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Exchequer Court of Canada

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JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

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

PUISNE JUDGES:
THE HONOURABLE J. C. A. CAMERON
(*Appointed September 4, 1946*)
THE HONOURABLE JOHN DOHERTY KEARNEY
(*Appointed November 1, 1951*)
THE HONOURABLE ALPHONSE FOURNIER
(*Appointed June 12, 1953*)
THE HONOURABLE JACQUES DUMOULIN
(*Appointed December 1, 1955*)
THE HONOURABLE ARTHUR LOUIS THURLOW
(*Appointed August 29, 1956*)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

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

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

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

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

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

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

His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.

The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.

The Honourable ESTEN KENNETH WILLIAMS, Manitoba Admiralty District—appointed February 26, 1952.

The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty District—appointed October 8, 1959.

SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

ALFRED S. MARRIOTT, Q.C., Ontario Admiralty District—appointed February 21, 1957.

DEPUTY JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Right Honourable JAMES L. ILSLEY, Nova Scotia Admiralty District—appointed November 3, 1958.

The Honourable THOMAS GRANTHAN NORRIS, British Columbia Admiralty District—appointed November 26, 1959.

ATTORNEY-GENERAL OF CANADA:
The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITOR GENERAL OF CANADA:
The Honourable LÉON BALCER, Q.C.

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The Honourable Fred H. Barlow, District Judge in Admiralty for the Ontario Admiralty District retired during the current year.

The Honourable Sir Albert Joseph Walsh, District Judge in Admiralty for the Newfoundland Admiralty District died during the current year.

CORRIGENDA

From pages 206 to 214 inclusive in the marginal notes "Sidney Smith, D.J.A." should read "A. I. Smith, D.J.A.".

In Minister of National Revenue v. Bower at page 100 in the second line of the headnote; at page 101 in the second holding; at page 104 fifth line from bottom and at page 106 second line from bottom s. 127 (1) (e) should read 139 (1) (e).

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN: 1958 Apr.14,15 Nov.4

THE STEAMSHIP *GIOVANNI AMENDOLA* ..... APPELLANT,

AND

POWELL RIVER COMPANY LIMITED, owner of the Towboat *Teeshoe* ..... RESPONDENT.

Shipping—Collision—Assessment of damages—Hire of substituted ship an element in assessing value of loss.

In an action arising from the loss of a tug boat the District Judge in Admiralty found that the loss was occasioned solely by the negligent operation of appellant's ship and awarded respondent the full amount claimed as the tug's value plus a further amount claimed for loss of user. On an appeal from the amount of damages awarded:

Held: That the Exchequer Court sitting in an admiralty appeal from the judgment of a trial judge will not interfere in the matter of quantum of damages unless it concludes that the award was clearly erroneous. *The S.S. Ethel Q. v. Beaudette* 17 Can. Ex.C.R. 505 at 506. Here the value of the tug was established by a preponderance of evidence and in allowing the extra cost occasioned by the hire of a substituted tug, which was an element in assessing the value of the loss of value to the owners, the rule in *Owners of Dredger Liesbosch v. Owners of Steamship Edison* [1933] A.C. 449, was properly applied.

APPEAL from a decision of the District Judge in Admiralty for the British Columbia Admiralty District.

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

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S.S. GIOVANNI AMENDOLA v. TOWBOAT TEESHOE OWNERS

J. R. Cunningham for appellant (defendant).

D. McK. Brown for respondent (plaintiff).

CAMERON J. now (November 4, 1958) delivered the following judgment:

This is an appeal from a judgment of Mr. Justice Sidney Smith, District Judge in Admiralty for the Admiralty District of British Columbia, dated March 19, 1958, whereby he affirmed the report of the Deputy Registrar for that district (dated January 10, 1958), awarding the respondent company the sum of $33,106 and interest. The respondent (plaintiff in the action) was the owner of the tugboat *Teeshoe* which was lost on December 4, 1954, and the learned Judge in Admiralty found that such loss was occasioned solely by the negligent operation of the appellant's ship; no appeal was taken from that finding. The sole question for determination on this appeal, therefore, is the amount of the damages awarded. In his report, the Deputy Registrar awarded the respondent the full amount of its claim, namely, $25,000 as the value of the tug and its gear (with interest at 5 per cent. thereon from December 4, 1954), and $8,106 for loss of user, together with interest from June 4, 1955, a date six months after the loss of the vessel.

The tug *Teeshoe* was built for the respondent in Vancouver in 1924; it was powered by a single Union Diesel engine also made in 1924, of 110 h.p. The tug was 48.5 feet long, 14.75 feet in beam and of 27.31 gross tons. It was used by its owner, the Powell River Co. Ltd., at Powell River and its vicinity for moving logs and scows, the company being engaged in the business of logging, towing and paper-making. Exhibit 11 is a photograph of the tug.

While the tug and its engine were thirty years old at the time of the loss, the Deputy Registrar found both on admissions made and on the evidence tendered before him that the tug was kept in first-class condition at all times and was in that condition when sunk.

I shall first consider the award of $25,000. It is common ground that in the case of a total loss such as occurred here, the owner, when acquitted of all negligence, is entitled to recover the full market value of the vessel and its gear.

The learned Registrar, on conflicting evidence, came to the conclusion that $25,000 was the fair market value. Having read the evidence and considered the argument by counsel for both the appellant and the respondent, I am of the opinion that his decision, affirmed as it was also by the learned District Judge in Admiralty, should not be disturbed. It is true that the evidence on this point was somewhat conflicting, but it is abundantly clear from the reasons given by the Registrar that he preferred the evidence of the witnesses for the respondent to that of the appellant, as of course, he was entitled to do.

In *The Harmonides*[1], Gorrell Barnes J. said:

> There is no doubt that in this class of case the best evidence is that of those who know the ship, and the next best evidence that of those who have experience of the market, but who do not know the vessel except from the shipping records.

A perusal of the evidence clearly establishes that a number of the respondent's witnesses had a personal knowledge of the tug, its condition and capacity. Captain Dolmage, for example, who had wide experience in buying, selling and operating tugs, knew the ship from the time it was built. Mr. G. W. O'Brien, a vice-president of the plaintiff company, Mr. C. S. Cosulich, a tugboat manager, and Mr. J. W. McDonald, General Manager of the Burrard Shipping and Engineering Works, all knew the ship well. On the other hand, of the two witnesses called by the defendant, Captain C. H. Hudson had never seen the *Teeshoe* and Captain C. R. Brewster, while he had been on board (he did not state how frequently), was familiar with the type of work she did only as an "onlooker".

The Registrar also accepted the evidence of the respondent's witnesses as to the market value of the vessel. I do not find it necessary to review this evidence at any great length. There was evidence that it might have had a maximum value of about $30,000, but the weight of the evidence supported the value found by the Registrar. He found confirmation of the various estimates in an offer of $25,000 made by the witness Captain Dolmage some time in the spring of 1954 after the tug had undergone repairs. Mr. McDonald, Vice-President of the plaintiff company, considered the offer a *bona fide* one but was not then

[1] [1903] P. 1 at 5.

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desirous of selling for a variety of reasons. It was strongly suggested in argument before me that that offer could not be considered as a genuine offer, particularly as Dolmage was then in contractual relationship with the respondent for other towing services and later became an officer of the latter company, and as his offer was rejected without any finality being reached as to the precise terms of the offer.

If there were no evidence of market value other than this offer, this argument would perhaps have more merit. But as I have already stated, there was a substantial body of evidence to establish the actual value in the market and I consider, as no doubt the Registrar did, that the offer so made afforded substantial corroboration of that relating to market value. It was made by one fully conversant with the vessel itself and with market conditions at the time. There is strong evidence that in 1955 the logging and paper companies were working to capacity and that tugs were in very active demand.

The duty of a judge hearing an Admiralty appeal in relation to facts found in the court below was stated by Audette J. in *The S.S. Ethel Q. v. Beaudette*[1] as follows:

> Sitting as a single judge in an Admiralty Appeal from the judgment of a trial judge, while I might be advised to differ with great respect in matters of law and practice, yet as regards pure questions of fact or the quantum of damages, I would not be disposed to interfere with the judgment below, unless I came to the conclusion that it was clearly erroneous.

Reference on this point may also be made to *The Inchmaree Steamship Co. Ltd. v. The Steamship Astrid*[2], and to *Landry v. Ray et al*[3], the headnote to which is as follows:

> On appeal from a judgment of a local Judge in Admiralty under s. 14 of *The Admiralty Act*, 1891, the Court will not interfere with a finding of fact by the local judge unless it is satisfied beyond a reasonable doubt that the evidence does not warrant such finding.

The decision below on this point having been founded on what I consider to be the preponderance of evidence, I am unable to find that it was in any way erroneous. The award as to that item will not be disturbed.

[1] (1915) 17 Ex.C.R. 505 at 506. [2] (1899) 6 Ex.C.R. 218.
[3] (1894) 4 Ex.C.R. 280.

There remains, however, the award of $8,106 for "loss of user". In his reasons for assessing the damage, the Registrar stated:

> The evidence is that the plaintiff endeavoured to find a suitable boat for purchase after the sinking of the *Teeshoe* but was unable to find such a vesel. It was then necessary in order to keep the pulp plant moving to charter a vessel for the time required to build a vessel. The time required to build a tugboat for service is given as six months. While the plaintiff was required to wait for a longer period than six months for the delivery of its new vessel, the plaintiff makes claim only for the cost of the vessel chartered to do the work of the *Teeshoe* for six months after deducting the cost of the operation of the *Teeshoe* for a similar period.

Mr. O'Brien stated that it was essential that the work of the company should continue without interruption; that the company was unable to find a vessel of like quality and condition available for purchase and that consequently a substitute tug was immediately hired, replacements being made from time to time. Finally, some three or four months after the loss of the *Teeshoe,* it was decided to have a tug built, this operation taking in all some nine or ten months to complete. The normal time for construction would have been approximately six months, but extra time was taken due to changes in the plans. He stated that the amount paid for the first six months of charterhire was $22,278, and after deducting therefrom the estimated cost of operating the *Teeshoe* for a like period of $16,764 (which amount is exclusive of overhead, supervision and depreciation) the amount claimed was $8,106. These figures as such are not challenged and may therefore be accepted as accurate. Neither is it contended that the normal period for construction of a tug is other than six months.

The principle to be followed in assessing damages in matters of this sort is found in Marsden's *Collisions at Sea,* 10th Ed., p. 105:

> The general rule was thus stated by Dr. Lushington in *The Clarence* [1850] 3 W. Rob. 283, 285: "The party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered." This appears to be the meaning of the phrase used in some of the cases that the sufferer is entitled to *restitutio in integrum.* There is, in general, no difference between the Amiralty and common law rules as to what damages are recoverable.

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The same principle is stated in Roscoe's *Measure of Damages in Maritime Collisions* 3rd Ed., at p. 5, as follows:

> In a series of judgments in the Admiralty Court, this principle has been called that of *restitutio in integrum*—"the right to a full and complete indemnity"—and this is therefore the measure or standard of damages which are recoverable by the owner of a ship which has been injured in the collision by a wrongful act on the part of another person.

Counsel for the appellant submits, however, that the judgments below erred in law in allowing in this case a claim for loss of user. It is said that the general principle is that stated by Dr. Lushington—that when the full value of the vessel lost has been awarded with interest, no claim could be set up for compensation beyond the value of that vessel (*The Columbus*[1]). The only exceptions to that general rule, it is said, are those cases in which the vessel was earning freight (or was under a profitable contract), or when the vessel is of such peculiar construction that it is impossible to replace her.

Many cases were cited by counsel for both parties, but on this point I find it necessary to refer to one only. I refer to the well-known decision in the House of Lords in *Owners of Dredger Liesbosch v. Owners of Steamship Edison*[2]. The facts and findings are summarized in the headnote as follows:

> While the dredger *Liesbosch* was lying moored alongside the breakwater at Patras Harbour in the Hellenic Republic the steamship *Edison* fouled the dredger's moorings and carried her out to sea, where she sank and was lost. The owners of the *Edison* admitted sole liability for the loss. In proceedings before the Admiralty Registrar and a Merchant between the owners of the *Liesbosch* and the owners of the *Edison* to assess the damages it appeared that the *Liesbosch* had been bought in 1927 for 4000£ by her owners, who had spent a further 2000£ in bringing her to Patras. They were a syndicate of civil engineers. Under a contract with the Patras Harbour Commissioners they were engaged in constructive work in the harbour, for which a dredger was necessary and for which they were using the *Liesbosch*.
>
> The contract provided for completion of the work within a specified time. Delay in completion involved payment of heavy penalties and, if prolonged, cancellation of the contract. The owners of the *Liesbosch* had staked their capital and credit on the successful result of the contract. The loss of the *Liesbosch* stopped the work and, being unable from want of funds to purchase any suitable dredger which was for sale, on May 4, 1929, they hired a dredger, the *Adria,* which was lying in harbour at

[1] (1849) 3 W. Rob. 158 at 164. [2] [1933] A.C. 449.

Carlo Forte, Sardinia, to take the place of the *Liesbosch*. The *Adria* was more expensive in working than the *Liesbosch*, and required the attendance of a tug and two hopper barges.

The *Liesbosch* was sunk on November 26, 1928. The *Adria* got to work on the harbour on June 17, 1929. On June 30, 1930, the Harbour Commissioners bought the *Adria* from her Italian owners for 9177£ and on September 5, 1930, they resold her to the owners of the *Liesbosch* for the same sum payable in instalments:

Held, that the measure of damages was the value of the *Liesbosch* to her owners as a profit-earning dredger at the time and place of her loss.

The factors to be considered in computing the capital sum representing the value to the owners are stated later herein.

In that case Lord Wright, in delivering judgment for the Court, pointed out that the simple but arbitrary rule enunciated by Dr. Lushington in the *Columbus* (*supra*) had not prevailed, at least as regards ships under profitable engagement. At p. 463 he stated that the dominant rule of law is the principle of *restitutio in integrum* and that subsidiary rules can only be justified if they give effect to that rule. On the same page he said:

> The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or the reverse.

Then at p. 464 he said:

> The assessment of the value of such a vessel at the time of loss, with her engagements, may seem to present an extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free of all engagements, either being laid up in port or being as seeking ship in ballast, though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damage will be simply the market value, on which will be calculated interest at and from the date of loss, to compensate for delay in paying for the loss. But the contrasted cases of a tramp under charter or a seeking tramp do not exhaust all the possible problems in which must be sought an answer to the question what is involved in the principle of *restitutio in integrum*. I have only here mentioned such cases as a step to considering the problem in the present case. Many, varied and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained.

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The question here under consideration is again different; the *Liesbosch* was not under charter nor intended to be chartered, but in fact was being employed by the owners in the normal course of their business as civil engineers, as an essential part of the plant they were using in performance of their contract at Patras. Just as in the other cases considered, so in this, what the Court has to ascertain is the real value to the owner as part of his working plant, ignoring remote considerations at the time of loss. If it had been possible without delay to replace a comparable dredger exactly as and where the *Liesbosch* was, at the market price, the appellants would have suffered no damage save the cost of doing so, that is in such an assumed case the market price, the position being analogous to that of the loss of goods for which there is a presently available market. But that is in this case a merely fanciful idea. Apart from any consideration of the appellants' lack of means, some substantial period was necessary to procure at Patras a substituted dredger; hence, I think, the appellants cannot be restored to their position before the accident unless they are compensated (if I may apply the words of Lord Herschell in *The Greta Holme* [1897] A.C. 596,605) "in respect of the delay and prejudice caused to them in carrying out the works entrusted to them." He adds: "It is true these damages cannot be measured by any scale." Lord Herschell was there dealing with damages in the case of a dredger which was out of use during repairs, but in the present case I do not think the Court are any the more entitled to refuse, on the ground that there is difficulty in calculation, to consider as an element in the value to the appellants of the dredger the delay and prejudice in which its loss involved them; nor is it enough to take the market value, that is, the purchase price (say, in Holland), even increased by the cost of transport, and add to that 5 per cent. interest as an arbitrary measure. It is true that the dredger was not named in the contract with the Patras Harbour authority, nor appropriated to it; but it was actually being used, and was intended to be used, by the appellants for the contract work.

Then at p. 466, after referring to *Clyde Navigation Trustees v. Bowring Steamship Co.*[1] as parallel to the *Liesbosch* case, Lord Wright noted that the Court had allowed compensation for loss of user in addition to the cost of procuring a comparable dredger and adapting it to their requirements and had rejected the contention that there was any definite rule fixing the compensation at the market value with interest from the date of the collision. Then at p. 467 he continued:

The late Mr. Registrar Roscoe, in his valuable work on "Measure of Damages in Maritime Collisions," cites at p. 42 of the 3rd Ed. the case of *The Pacaure,* (1912) Shipping Gazette, (Dec. 1912) a lightship which was sunk in collision; the owners, the Mersey Docks and Harbour Board, were allowed, in addition to the value of the sunken vessel, the cost of a substituted vessel for 366 days. I should prefer to state that such extra cost was an element in assessing the loss of value to the owners of the lightship, though it may be no different result would follow from the difference in statement.

[1] (1928) 32 Ll. L. Rep. 35.

In my judgment similar principles are applicable to the present case; . . . It might seem to follow that Scrutton L. J. is intending to give some compensation, beyond the actual cost of replacing the *Liesbosch,* for delay and prejudice in the contract work; if not, I do not see how he is giving the value of the dredger to the owners at Patras as a factor in their business as a going concern.

In conclusion he said at p. 468:

From these (the principles which he had stated) it follows that the value of the *Liesbosch* to the appellants, capitalized as at the date of the loss, must be assessed by taking into account: (1.) the market price of a comparable dredger in substitution; (2.) costs of adaptation, transport, insurance, etc., to Patras; (3.) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellants financial position. On the capitalized sum so assessed, interest will run from the date of the loss.

The principle so stated seems to me to be directly applicable to the instant case. The *Teeshoe* had been in constant use by its owners as a necessary and integral part of its day to day business. The owners had no available substitute tug and without a substitute a substantial and necessary part of its operations would have been stopped and loss occasioned. If operations were to be continued, another tug had to be secured immediately and at least one of the appellant's witnesses agreed that the action of the owners in hiring a tug at once was proper in the circumstances. The Registrar's finding on this point was stated as follows:

To put the Plaintiff in the same position as if the loss had not occurred would require, in addition to the value of the vessel lost, compensation for loss of user. This loss of user, in my opinion, is the difference between the cost of chartered vessels and the cost of the operation of the "Teeshoe" for the period required to build another vessel in six months, there being no vessels on the market at that time available for purchase.

It is clear, therefore, that the Registrar found that there were no tugs of a suitable type available for purchase and while there was conflicting evidence on this point also, there was evidence which the Registrar was entitled to accept that no such tug was available for purchase. It was therefore necessary for the owners to hire a tug for the period which it would normally take to construct a new tug and it is not denied that such a period is six months.

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In my opinion, it follows that the extra cost occasioned by the hire of a substituted tug—namely, $8,106—was "an element in assessing the loss of value to the owners" of the *Teeshoe*. There is no element of profit contained in that amount which, as I have said, represents only the difference between the charges actually paid by the owners for the use of the substituted tugs and what would have been the out-of-pocket cost of operation of the *Teeshoe* for six months.

I am therefore in substantial agreement with the results reached below. While there the sum awarded was made up of two items, the latter of which was designated as "loss of user", the result would have been the same had the award been one of $33,106 as representing the value of the *Teeshoe* to the owners at the time of the loss.

Accordingly, the appeal will be dismissed and the judgment of the learned District Judge in Admiralty affirmed, the whole with costs.

Judgment accordingly.

1957

Jan. 29,30,31, Feb. 1

1958

Sept. 5

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT,

AND

FRANKEL CORPORATION LIMITED RESPONDENT.

Revenue—Income tax—Profits—Sale of business—Specific sum for inventory included in the purchase price—Whether profit on inventory taxable—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 2(1)(3), 3, 4, 127(1)(e).

The respondent's business comprised the smelting of non-ferrous metals and dealing in non-ferrous scrap; the smelting of copper from scrap; the wrecking of buildings and the salvage and sale of the material therefrom; the fabrication and erection of structural steel. On January 2, 1952 it sold the non-ferrous metals part of its business comprising machinery and equipment, metals inventory, supplies, accounts receivable, prepaid items, good-will, patents, trade marks, etc. under an agreement that provided that out of the aggregate price paid for all the assets the purchase price of the metals inventory

should be the market price at the time of closing. Pursuant to the agreement the aggregate amount paid by the purchaser included some $822,611 for the inventory carried on respondent's books at the end of 1951 at a cost of some $744,515. In assessing the respondent for 1952 the Minister added to the income reported the difference between the two amounts, some $78,095, as "profit on inventory".

Held: That the Minister was right in adding this difference and in assessing accordingly.

2. That although the *Income Tax Act* taxes actual, and not potential profits, a realization of potential profit occurs when a taxpayer so deals with goods as to appropriate to himself whatever enhancement has resulted from a partially completed operation.

3. That the metals inventory was acquired for the purpose of gaining a profit in the non-ferrous metals business but when, to effect a sale of that business, it was diverted from its original purpose such diversion must be treated as a disposition of trading stock, the result of which for income tax purposes must be recorded as a receipt in the trading account for the period in which it occurred, namely 1952, and the amount to be so recorded must be the realizable value of the inventory at the time it was diverted and not its cost.

Sharkey v. Werner [1955] 3 All E.R. 493 applied, *Doughty v. Commissioner of Taxes* [1927] A.C. 327, distinguished.

APPEAL from a decision of the Income Tax Appeal Board.

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

W. R. Jackett, Q.C. and *J. D. C. Boland* for appellant.

H. C. Walker, Q.C. and *P. N. Thorsteinsson* for respondent.

THURLOW J. now (September 5, 1958) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a judgment of the Income Tax Appeal Board,[1] allowing an appeal by the respondent, Frankel Corporation Ltd., against an income tax assessment for the year 1952. In assessing the respondent's income for the year, the Minister, among other changes, added to the income reported by the respondent an amount of $78,095.68 described in the notice of assessment as "profit on sale of inventory," and it is the liability of the respondent for income tax on this amount which is in issue in the present appeal.

[1] 13 Tax A. B. C. 399; 55 D. T. C. 509.

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The amount in question arose in the following circumstances. The respondent was incorporated on October 30, 1950, and on the following day it took over the business assets and operations of Frankel Brothers Ltd. Thereafter the respondent carried on such operations in the same way as its predecessor had done until the events in question occurred. Frankel Brothers Ltd. had been operating since 1924 as a dealer in ferrous and non-ferrous scrap, and in the smelting and alloying of non-ferrous metals. The latter operation consisted of the recovering of certain non-ferrous metals from scrap material, alloying them with other non-ferrous metals to specifications required by the purchasers, and selling the products. The selling part of the non-ferrous metals operations was carried on under the name "National Metal Company" by Frankel Brothers Ltd. in its time and by the appellant in its turn, and both made use of a registered trade mark consisting of the letters "N. M. C." and also of the word "National" in connection with the products. These operations had been expanded in 1942 to include the smelting and alloying of copper recovered from scrap material. During the time this operation was carried on by the respondent, its activities as a dealer in non-ferrous scrap metal were incidental to the smelting operation, purchases of non-ferrous scrap metal being made only for the purposes of the smelting operation and sales of such scrap materials being made only when the respondent was oversupplied.

The ferrous scrap operation consisted of acquiring the scrap, sorting and preparing it by breaking the iron and shearing the steel for use in iron foundries and steel mills and selling it.

In 1926 Frankel Brothers Ltd. had begun carrying on wrecking and salvage operations which consisted of the wrecking and demolition of buildings and structures and the salvaging and sale of materials therefrom. The chief product of this operation was salvaged timber, but considerable quantities of ferrous scrap metal and minor quantities of non-ferrous scrap metal were recovered as well. When recovered, such ferrous scrap metal was transferred to the ferrous scrap metal operation and the non-ferrous scrap metal to the smelting operation.

In 1929 Frankel Brothers Ltd. had further expanded its activities to include a steel fabrication and erection operation consisting of the fabrication of steel for buildings in its plant and the erection of the steel on the site.

The respondent, on assuming these operations in October, 1950, also acquired the rights of Frankel Brothers Ltd. in the premises where the operations were carried on. These consisted of an area of land between Broadview and Lewis Avenues in Toronto devoted exclusively to the wrecking and salvage operation, and another area nearby at the corner of East Don Roadway and Eastern Avenue where the other three operations were carried on. The latter area was the larger of the two and was equipped with four crane runways and a number of buildings. It was also served by a railway line. Each of the remaining three operations had separate portions of this area where the machinery and equipment used in connection with them were located and the processing of the materials was carried out. In general, the portion used for the purposes of the non-ferrous smelting operation adjoined Eastern Avenue and was completely separated from that of the ferrous scrap metal operation by the area occupied by the steel fabrication operation which lay between the areas occupied by the other two operations and, by itself, held more than half of the whole area.

Not only were the areas and equipment of these operations separate, but the equipment of one was neither used nor usable in connection with any of the other operations. Goods or materials on the premises, for the purposes of these operations, were stored on the portion of the premises allotted to the particular operation and separate accounts of them were maintained, that of the non-ferrous metals being a complete list of each item with its weight and value. When scrap metal from the wrecking and salvaging operation was transferred to the ferrous or non-ferrous operation, the transfer was recorded by a voucher crediting the wrecking and salvaging operation and debiting the receiving operation with the market value of the scrap. Both the sources of material and the customers who bought the products of any of these operations were, in general, different from those of the other operations. The staffs who carried out the different operations were also separate

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and distinct from each other. Those employed in the non-ferrous smelting operation worked exclusively in that operation and consisted of some sixty-five persons, including a production supervisor, three salesmen, a purchasing agent, and laboratory and other workers.

The accounting practices followed by the respondent and its predecessor were not explained in detail, nor was detailed evidence given respecting the duties of clerical or accounting employees. In the annual statements, however, which accompanied the respondent's income tax returns, the profit and loss statement was broken down between what was headed "Metals Division", including both the ferrous and non-ferrous metal operations, and the "Structural Division", embracing the steel fabrication and the wrecking and salvage operations. A separate operating profit from each of these divisions was carried to the profit and loss statement, and overhead expenses, consisting of selling expenses, property expenses, and administrative expenses, were deducted generally to show the operating profit of the company for the year. To what extent these expenses were incurred separately for and charged to separate operations in the course of business does not appear, though there is evidence that the accounting for the structural steel operation and for the wrecking and salvage operation were separate from the others but that that for the ferrous scrap and non-ferrous metals operations was combined. Nor does it appear to what extent, if any, items such as directors' fees, municipal taxes on the property occupied, and other items of an apparently overall nature, were in fact incurred exclusively for or charged to any of the several operations. All four operations were, however, under the control of a single board of directors, each operation having one person in charge responsible to the board. There is also evidence that the respondent had a single union labour contract and insurance and pension plans covering employees of all the operations.

As a business field, the smelting and alloying of non-ferrous metals, such as copper, lead, zinc, tin and aluminum, is regarded by persons engaged in the trade as separate from that of iron and steel on the one hand and the precious metals such as gold, silver, and platinum on the other, the

type of plant and equipment, the sources of raw material, the processing and the uses of the product being quite different and distinct in each field.

In August, 1951, the respondent became aware that American Smelting and Refining Corporation, a large organization controlling some fourteen non-ferrous metals smelting and refining plants in the United States, as well as mining and other allied enterprises, was seeking a favourable opportunity to establish a non-ferrous metals smelting and refining business in Canada, and negotiations ensued which led to the sale in question in these proceedings. From the point of view of the respondent, two principal reasons prompted the course which it took. First, the respondent was controlled by members of the Frankel family, the younger members of which were more interested in the structural steel operation and in its expansion than in the other operations, and more space on the premises was required to accommodate such expansion. The second and more important reason was the prospect of another large competitor in the Canadian market. Ultimately, on December 19, 1951, an agreement was reached by which the respondent sold to Federated Metals Canada Ltd., a subsidiary of American Smelting and Refining Co., all the assets used in the non-ferrous metals operation other than the land and buildings, a number of overdue accounts, and a quantity of drosses representing about one per cent of the non-ferrous metals inventory. In the transaction the respondent leased the land and buildings to the purchaser for a four-year term and transferred to it, as well, the employees engaged in this operation. The assets transferred to the purchaser included laboratory equipment, inventories of raw, partly processed, and finished non-ferrous metals, supplies useful in the non-ferrous metals operation, accounts receivable, prepaid insurance and similar items, and

(*f*) Good-will, Patents, Trade Marks, etc. All the business, unfilled customers' orders, good-will, trade connections, patents, patent applications, inventions, licences, formulae, processes, trade names and trade marks of every nature and description owned or possessed by Frankel and pertaining to its non-ferrous metals business.

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On completion of the transaction on January 2, 1952, the respondent ceased operating in the smelting and refining of non-ferrous metals and as a dealer in non-ferrous scrap metal, and the purchaser assumed and carried on that operation on the same portion of the premises which had theretofore been used by the respondent for that purpose. The respondent continued as before with its other three operations, save that non-ferrous scrap metal recovered in the wrecking and salvage operation was thenceforth disposed of to the purchaser, pursuant to a term of the contract. No new or other operation in the smelting or refining of non-ferrous metals or the sale of non-ferrous scrap metal was set up or carried on by the respondent.

The contract, pursuant to which the sale was effected, was made between the respondent and American Smelting and Refining Co. and, after reciting the nature of the respondent's non-ferrous metals operations and the general nature of the agreement between the parties, proceeded as follows:

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and the mutual promises hereinafter exchanged, it is agreed as follows:

1. Frankel agrees to sell, transfer and convey to Federated the following assets of its non-ferrous metals business, namely:

(*a*) *Machinery and equipment.* . . .

(*b*) *Inventories of Raw Materials and Finished Metals.* All raw materials, such as scrap metals, drosses, skimmings and residues, and all new or finished metals on hand at the time of closing hereunder. The purchase price for scrap and other raw materials shall be the market price therefor at the time of closing, but should there be any dispute between the parties as to such market price, then Frankel shall offer such material for sale, privately or in any available market, and Asarco shall have the option of purchasing the same at a price equal to the best price bid therefor. Since Federated will take over Frankel's unfilled customers' orders at the time of closing and some of these may have been taken at prices below the current market at the time of closing, it is agreed that a sufficient allowance from said purchase price for raw materials will be made to Federated for the quantity of raw materials required to fill such customers' orders which are below market price so that said allowance will result in a market price for such raw materials that would normally prevail therefor when the finished product is sold at the price at which such orders were taken. The purchase price of ingot and other finished product shall be determined by adding the cost of manufacture to the current market price at the time of closing of the scrap or other raw materials that went into the manufacture thereof, provided such purchase price shall not exceed the current market price for the finished product less a fair allowance for the cost of storing,

selling and delivering the same. If any of such ingot or other finished product is required to fill customers' orders to be transferred to Federated and such orders are at prices below the current market prices at the time of closing, any necessary allowance will be made on the purchase price of the finished product to enable Federated to complete such customers' orders and make the normal profit which would accrue if such orders were at current market prices and made from currently priced raw material.

(*c*) *Supplies*. . . .

(*d*) *Accounts Receivable*. . . .

(*e*) *Prepaid Items*. . . .

(*f*) *Good-will, Patents, Trade Marks, etc*. . . .

* * *

2. The purchase price for all of the aforesaid property shall be:

(*i*) for the items specified in sub-paragraphs (*a*), (*b*), (*c*), (*d*) and (*e*) of paragraph 1 hereof, the aggregate of the sums specified therein which shall be payable in cash by Federated to Frankel at the time of closing, and

(*ii*) for the items set forth in sub-paragraph (*f*) of paragraph 1 hereof the amount of 150,000.00 which shall be payable in cash by Federated to Frankel at the time of closing, together with 49,000 shares without nominal or par value in the capital stock of Federated to be allotted and issued to Frankel or its nominee at the time of closing as fully paid and non-assessable and constituting 49% of the capital stock of Federated then authorized, issued and outstanding.

* * *

The contract also included a number of indemnity clauses, provisions for the sale of the 49,000 shares to Asarco within certain times, a provision that, in the meantime, certain members of the Frankel family should be members of the Board of Directors of Federated, a clause respecting the leasing of the premises to Federated, several clauses respecting the transfer of employees and the protection of the respondent in respect to their pension and insurance rights, and a clause respecting non-competition in the non-ferrous metals field by the officers and directors of the respondent.

As previously mentioned, the whole of the respondent's inventory of non-ferrous metals was purchased by Federated pursuant to the contract, with the exception of certain drosses which accounted for some one per cent of the whole. The aggregate amount paid by Federated pursuant to paragraph 2(i) above included $822,611.15 in respect of inventory calculated as set out in the above

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paragraph 1(b). The same inventory was being carried at the end of 1951 at a cost of $744,515.47, and it is the liability of the respondent to income tax on the difference between these figures which is in issue in this appeal.

In the profit and loss statement accompanying the respondent's income tax return for 1951, the closing inventory for the metals division was shown at $767,191.01, of which $744,515.47 represented inventory of non-ferrous metals which were thus treated as being on hand and as trading assets at the end of 1951. This statement formed part of the report of the respondent's auditors which was dated May 15, 1952. In the report it was stated that subsequent to the year end the respondent disposed of the non-ferrous metals division of the business to Federated Metals Canada Limited. In the profit and loss statement accompanying the respondent's 1952 income tax return, the opening inventory of the metals division was shown as follows:

Inventory December 31, 1951	$767,191.01
Less sold to Federated Metals Canada Limited	744,515.47
	$ 22,675.54

and only the difference was carried into the computation of gross profit for the year. The sum of $822,611.15 was not included as a receipt. The auditors' report stated that on January 2, 1952 the respondent disposed of the non-ferrous metals division of the business to Federated Metals Canada Limited. In each year the return was, of course, certified as correct on behalf of the respondent, and the sum reported as income was that appearing from the auditors' computation.

While I attach no importance to the use of the word "division" as characterizing the nature of the respondent's non-ferrous metal operations, these statements indicate that, despite the fact that the contract and notice to customers suggest that the transaction was to be closed in 1951, it was in fact closed, and the respondent treated it as having been closed in 1952, rather than in 1951.

By s. 2(1) of *The Income Tax Act* income tax is imposed upon the taxable income for the taxation year of all persons resident in Canada at any time in the year; and by s. 2(3) taxable income is defined as the taxpayer's income for the year minus certain deductions which are not in issue in this appeal. The income of a taxpayer for a taxation year is declared by s. 3 to be his income for the year from all sources, including income for the year from all businesses, and by s. 4 income for a taxation year from a business is defined, subject to the other provisions of Part I of the Act, as *the profit therefrom for the year.* Business is defined by s. 127(1)(*e*) as including a trade, manufacture or undertaking of any kind whatsoever and also as including an adventure or concern in the nature of trade. Since what is taxed under these provisions as income from a business is *the profit therefrom for the year,* the fundamental question that arises in the present situation is, what was the profit from the respondent's business for the year 1952?

In *Whimster & Co. v. The Commissioners of Inland Revenue*[1], Lord Clyde, in a passage which was cited with approval by the Privy Council in *Minister of National Revenue v. Anaconda American Brass Ltd.*[2], said at p. 823:

> In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business *during such year or accounting period* and the expenditure laid out to earn *those receipts.* In the second place, the account of profit and loss to be made up for the purpose of *ascertaining that difference* must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be.

In the present case no problem as to expenditures arises, and so the question is narrowed down at once to what were the receipts from the respondent's business for the year 1952. Now if the transaction by which the respondent sold the inventory and other assets of its non-ferrous metals operation was a transaction of the respondent's business, there could, I think, be no answer to this question but that the amount of $822,611.15 included in respect of

[1] [1925] 12 T. C. 813; [1926] Sess. Cas. 20.
[2] [1955] C. T. C. 314; 55 D. T. C. 1220; [1955] C. T. C. 311.

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inventory in the aggregate sum paid by the purchaser was a receipt from the respondent's business. But the question is broader than that of whether or not the sale to Federated was a transaction of the respondent's business, for even if that sale was not a transaction of the respondent's business it is still necessary to determine whether or not a receipt of the amount in question was realized from the respondent's business by or as the result of an event which, for income tax purposes, must be treated as the equivalent in point of law of a transaction of that business for, if so, the receipt of such amount must be accounted for in computing the profit from the business for the year in which such event occurred.

I turn, therefore, to consider the sale to Federated to determine first whether or not it was a transaction of the respondent's business. In essence, this problem seems to me to be that of applying to the situation the test propounded in *Californian Copper Syndicate v. Harris*[1] by the Lord Justice Clerk when he said:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, *where what is done is* not merely a realisation or change of investment, but *an act done in what is truly the carrying on, or carrying out, of a business.*
>
> * * *
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or *is it a gain made in an operation of business in carrying out a scheme for profit-making?*

In *Doughty v. Commissioner of Taxes*[2], the assets of a partnership, including stock in trade, were sold to a limited company formed to carry on the business, the consideration being a lump sum payable in shares of the company. This sum was greater than the value placed on the assets in the last balance sheet of the partnership, and adjustments had been made in the values shown on the

[1] (1904) 5 T. C. 159 at 165.
[2] [1927] A. C. 327; 96 L. J. P. C. 45; 136 L. T. 706.

balance sheet, including an increase in the value assigned to the stock in trade. This increase was assessed as profit of the partnership business and Doughty, one of the partners, appealed. The trial judge disallowed the assessment, but the Supreme Court restored it. Doughty then appealed to the Privy Council. In delivering the judgment of the Privy Council allowing the appeal, Lord Phillimore said at p. 331:

> The appellant puts his case in two ways. He says: (1.) that if the transaction is to be treated as a sale, there was no separate sale of the stock, and *no valuation of the stock* as an item forming part of the aggregate which was sold, and (2.) that there was no sale at all, but merely a readjustment of the business position of the two partners, and an application for their benefit of the law of New Zealand allowing the formation of private companies with limited liability.
>
> Income tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income tax.
>
> It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy farming business or a sheep rearing business, where the principal objects are the production of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, *a clearance or realization sale* of all the stock in connection with the sale and winding up of the business *gives no indication of the profit* (if any) *arising from income;* and the same might be said of a manufacturing business which was sold with the leaseholds and plant, even if there were added to the sale the piece goods in stock, and even if those piece goods formed a very substantial part of the aggregate sold.
>
> Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.
>
> But upon the evidence in this case, it would appear that no such separate sale was effected.

In *Hickman v. Federal Commissioner of Taxation*[1], a case referred to by Lord Phillimore in the *Doughty* case (*supra*), a grazier had sold his ranch with the cattle but not the horses thereon for a total sum made up of an

[1] (1922) 31 C. L. R. 232.

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amount for the ranch and £10,876 for the cattle, and it was sought to tax a portion of this sum as a profit "arising from" the vendor's business. Knox C. J. said at p. 238:

> In this case it is clear from the words of the contract of 1st January 1918 that it was an indivisible contract for the sale of the land and stock—substantially the whole of the assets of the business theretofore carried on by the appellant—and that the allocation of portion of the purchase-money to the live-stock and the balance to the land, presumably made for the convenience of the parties, does not convert the single contract into two—one for the sale of the land and the other for the sale of the live-stock for independent considerations. The single transaction must be treated as effecting a complete change of ownership of a continuing business and of the assets employed in carrying it on.
>
> The substantial question is whether any part of the purchase money payable on such a transaction is to be brought into account as a receipt in the assessment of the vendor to war-time profits tax in respect of the profits of the business sold.
>
> Mr. *Douglas* for the appellant admitted that he was liable to be assessed to this tax in respect of so much of the trading profits of the business made during the accounting period as was properly attributable to the six months during which he carried on the business; but contended that no portion of the sum of £10,876 could be treated as taxable profits, because the Act was directed to the taxation of trading profits and did not assume to tax the proceeds of realization of a business sold as a whole in one transaction. In my opinion this contention is correct.

Higgins J. said at p. 242:

> The proceeds of the sale of a business are not, in any part profits "arising from any business," within the meaning of sec. 7.

Starke J. said at p. 243:

> The taxpayer had carried on the business of a grazier on his property, buying, fattening, breeding and selling cattle. The sale from which the sum of £10,867 arose was not in the ordinary course of trade. It was not made for the purpose of realizing the profits of the business, but in order to end it so far as the taxpayer was concerned, and, in truth, to change the form in which his assets then existed into that of money. Such a transaction was not, as it appears to me, carrying on or carrying out his business. Consequently profits accruing from such a transaction do not arise from the business of the taxpayer within the meaning of the *War-time Profits Tax Assessment Act.*

Turning now to the facts in the present case, it may be noted that, while the respondent's non-ferrous metals operation was not separate in all respects from its other operations, it was, nevertheless, separate in many of its features, and as a whole it was readily separable from the others. The sources of the material and supplies used in the operation, the employee of the respondent who bought them, the machinery and equipment used in the operation,

and the employees who operated it, the portion of the premises where the operation was carried on, the customers who bought the products, and the employees of the defendant who sold them, the name under which the operation was carried on and the trade mark and trade name used on the products, as well as the supervision provided, were all almost entirely distinct from the other operations. Indeed, the whole process by which profit was earned seems to have been quite distinct from the others, save in respect of the acquisition of minor quantities of scrap material from the wrecking and salvage operation, the combination for some purposes of the accounting with that of the ferrous scrap operation and such general matters as control by the same board of directors, the arrangement of a single union contract for employees of the respondent, employees' pension and insurance plans, and the ultimate preparation of the profit and loss account for the operations of the company.

Next, the contract was, in my opinion, an indivisible one for the sale of the items mentioned in their entirety, rather than for the sale of the separate items by themselves. While the contract contained formulae for ascertaining the amount by which the aggregate sum to be paid by the purchaser would be increased according to the amount of inventory transferred to the purchaser in the transaction; and while the formula was, in the case of raw material, based on the prevailing price and, in the case of finished goods, on the lower of the cost of materials at prevailing rates plus the cost of manufacture, or market price, there was but one transaction in which, for the aggregate sums to be paid, the purchaser was to acquire not only the stock, equipment, good-will, business and other assets, but a right, as well, to a four-year term in the premises in addition to the benefit of the other covenants. Under this contract neither party could have held the other to any part of it while refusing on its part to carry out the whole and, despite the formulae above mentioned, I think it is impossible to say that the contract or the transaction shows that the sum calculated according to the formulae as forming part of the aggregate sum paid was paid or received for the inventory. The truth is that the whole consideration was paid and received for the

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assets and rights granted as a whole, and no part of the consideration was paid or received for inventory alone or for equipment alone or for any other single asset or right by itself. Now the assets sold included substantially the whole of the inventory of processed and unprocessed non-ferrous metals and partly processed metals as well. It also included the supplies provided for the processing of non-ferrous metals. Neither partly processed metals nor supplies had previously been sold in the course of the respondent's business. In the same transaction, substantially all of the tangible and intangible assets of the non-ferrous metals operation were also sold, including good-will, trade name and trade mark and—what is perhaps more significant—the unfilled customers' orders under terms which contemplated that they would be filled by the purchaser in the course of its own trading, and not on behalf of the respondent. The same contract provided for the transfer to the purchaser of the employees engaged in the operation and for the granting to the purchaser of a lease of the premises used in the operation. Finally, by or in conjunction with this transaction, the respondent put itself out of the non-ferrous metals trade. While none of these features would in itself be conclusive, in my opinion, taken together they distinguish this transaction from those of the respondent's business and classify this sale as one not in the business but outside and beyond the scope or course of that business. It follows, in my opinion, that no part of the receipts from this sale was a receipt from the respondent's business.

This, however, leaves undetermined the question whether or not the act of the respondent in diverting trading stock from the trade for the purpose of disposing of it in a transaction beyond the scope of the trade must itself be treated for income tax purposes as a disposition giving rise to a trading receipt equivalent to the realizable value of the stock so diverted.

In *Sharkey v. Wernher*[1] a horse forming part of the trading stock of a stud farm was taken by the owner for purposes not associated with the earning of income, and a question arose as to what amount, if any, should be

[1] [1955] 3 All E. R. 493; [1956] A. C. 58.

entered in the trading account of the farm to account for the horse so removed from the trade. It was held that, for income tax purposes, an amount must be entered as a receipt in the trading account of the stud farm to account for the horse and that the amount to be so entered was its realizable value at the time of such removal rather than the cost incurred in breeding it. At p. 504, Lord Radcliffe, with whom two other members of the House concurred, discussed the question as follows:

My Lords, with these considerations in mind, I must now say what I believe to be the right way to deal with the present case. When a horse is transferred from the stud farm to the owner's personal account, there is a disposition of trading stock. I do not say that the disposition is made by way of trade, for that is a play on words which may beg the question. At least three methods have been suggested for recording the result in the stud farm's trading accounts. There might be others. Your Lordships must choose between them.

First, there might be no entry of a receipt at all. This method has behind it the logic that nothing, in fact, is received in consideration of the transfer, and there is no general principle of taxation that assesses a person on the basis of business profits that he might have made, but has not chosen to make. Theoretically, a trader can destroy or let waste or give away his stock. I do not notice that he does so in practice, except in special situations that we need not consider. On the other hand, it was not argued before us by the respondent that this method would be the right one to apply; and a tax system which allows business losses to be set off against taxable income from other sources is, in my opinion, bound to reject such a method because of the absurd anomalies that it would produce as between one taxpayer and another. It would give the self-supplier a quite unfair tax advantage.

Secondly, the figure brought in as a receipt might be cost. That is what the respondent contends for. It is not altogether clear what is to be the basis of such an entry. No sale in the legal sense has taken place, nor has there been any actual receipt. The cost basis, therefore, treats the matter as though there had been some sort of deal between the taxpayer and himself but maintains that, in principle, he can only break even on such a deal. I do not understand why, if he can be supposed to deal at all, he must necessarily deal on such self-denying terms. But then the respondent argues that the cost figure entered as a receipt is to be understood as a mere cancellation of the cost incurred to date. The item of stock transferred to the owner's private account is shown by that very event to have been "withdrawn" from the trade, and the only practical course is to write out of the trader's accounts the whole of the cost bona fide, but mistakenly, entered in respect of it. I think this a very attractive argument, but its weakness is that it does not explain why such cancellation should take place. This is not put to us as a case in which, there being no market, cost is the best available estimate of value. The fact that an item of stock is disposed of not by way of sale does not means that it was any the less part of the trading stock at the moment of disposal. On the contrary, it was part of the stock of the venture at every moment up till then, and whatever was spent on it was

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rightly entered as a part of the costs and expenses of the trade. Its disposal does not alter that situation. The trade of which the receipts and expenses are in question is the whole activity of farming, and the disposal of the produce is only one, though a very important, incident of that activity. I think it a fallacy, therefore, to suppose that the method of disposal can give any warrant for treating costs hitherto properly charged to the trade as if, ex post facto, they never ought to have been charged at all. Yet, if a cancelling entry is not to be made, there must either be a figure entered as a receipt which, admittedly, does not represent any actual legal transaction or the costs incurred up to the date of disposal must remain on the books to create or contribute to a "loss" of income which common sense suggests to be a fiction.

In a situation where everything is to some extent fictitious, I think that we should prefer the third alternative of entering as a receipt a figure equivalent to the current realisable value of the stock item transferred. In other words, I think that *Watson Bros. v. Hornby,* [1942] 2 All E. R. 506, was rightly decided, and that its principle is applicable to all those cases in which the income tax system requires that part of a taxpayer's activities should be isolated and treated as a self-contained trade. The realisable value figure is neither more nor less "real" than the cost figure, and, in my opinion, it is to be preferred for two reasons. First, it gives a fairer measure of assessable trading profit as between one taxpayer and another, for it eliminates variations which are due to no other cause than any one taxpayer's decision as to what proportion of his total product he will supply to himself. A formula which achieves this makes for a more equitable distribution of the burden of tax, and is to be preferred on that account. Secondly, it seems to me better economics to credit the trading owner with the current realisable value of any stock which he has chosen to dispose of without commercial disposal than to credit him with an amount equivalent to the accumulated expenses in respect of that stock. In that sense, the trader's choice is itself the receipt, in that he appropriates value to himself or his donee direct instead of adopting the alternative method of a commercial sale and subsequent appropriation of the proceeds.

Viscount Simonds also said at p. 498:

But it appears to me that, when it has been admitted or determined that an article forms part of the stock-in-trade of the trader, and that, on his parting with it so that it no longer forms part of his stock-in-trade, some sum must appear in his trading account as having been received in respect of it, the only logical way to treat it is to regard it as having been disposed of by way of trade. If so, I see no reason for ascribing to it any other sum than that which he would normally have received for it in the due course of trade, that is to say, the market value. As I have already indicated, there seems to me to be no justification for the only alternative that has been suggested, namely, the cost of production. The unreality of this alternative would be plain to the taxpayer, if, as well might happen, a very large service fee had been paid so that the cost of production was high and the market value did not equal it.

In my opinion, the principle of this judgment is applicable under *The Income Tax Act* in the present situation. Counsel for the respondent sought to distinguish it on the

ground that *Sharkey v. Wernher* was a case where the trade was continuing, whereas the present situation is one in which the particular trading operation was brought to an end by the transaction in question. This, however, in my opinion, makes no difference, for in each case the problem seems to me to be the same, namely the manner in which trading stock which has been disposed of by the owner otherwise than in the ordinary course of trade is to be accounted for when, for income tax purposes, one is seeking an answer to the question: what were the receipts from the trade for the period in which the disposition occurred? The period in 1952 in which the respondent carried on its non-ferrous metals operation was short, consisting only of the period from the beginning of the year to the moment on January 2 when the sale was completed, and I think it is probable that in that period no ordinary transactions of the operation occurred and that the processing of metals was at a standstill. But the inventory of non-ferrous metals was still trading stock at the end of 1951. The metals comprised in it had been acquired in carrying on the business of buying, processing, and selling non-ferrous metals with the object of gaining profit thereby. Whatever the stage of their processing might be, the whole of these metals continued to be trading stock held for that original purpose until they lost that character at some time after the end of 1951. In my opinion, that time was January 2, 1952, when the sale to Federated was closed. Until then, the respondent's non-ferrous metals operation, as well as the scheme for making profit by it, were still in existence. There had been no discontinuance of the operation, nor had the respondent any intention of discontinuing it except upon the transfer becoming effective. Had the sale been cancelled at any time up to the moment when it was closed, I think the conclusion would have been inevitable that the respondent's operation had never been terminated. At that moment, in selling the non-ferrous metals inventory along with the other assets the respondent voluntarily diverted the inventory to a purpose other than that for which it had been acquired. In this situation, the judgment in *Sharkey v. Wernher,* in my opinion, is authority both that such diversion must be treated as a disposition of trading

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stock, the result of which for income tax purposes must be recorded as a receipt in the trading account for the period in which it occurred, that is, 1952, and that the amount to be so recorded must be the realizable value of the inventory so diverted at the time when it was diverted, rather than what it had cost the taxpayer to acquire it.

In the present case, selling the product was but one incident of the process by which profits were gained in the respondent's non-ferrous metals operation. The purchasing of raw materials and the processing of them were also incidents of the profit-earning operation, and the profits themselves were the result of the whole operation. In such an operation, at any particular moment when there are on hand raw, partly processed, and finished materials the value of which exceeds what they have cost, what may for convenience be called a potential profit has been earned, though it has not been realized because the goods have not been sold. If the operation proceeds and the goods are sold, that potential profit may be realized along with whatever increment may accrue from the selling as well. As I understand the law, *The Income Tax Act* taxes actual, that is to say, realized profits, not potential profits. If a potential profit is never realized, it never becomes subject to tax. But sale in the ordinary course of trade is not the only means by which potential profits which have been earned in a trade may be realized. Realization of a potential profit which has been earned in the trade may occur whenever the goods are so dealt with by the owner that he appropriates to himself whatever enhancement of value has resulted from the partially completed operation. He realizes that enhancement when he turns the property to his own private, as distinguished from his trade purposes, and he also realizes it when, as in this case, he diverts the property from the trade for the purpose of disposing of it in a transaction beyond the scope of the trade. In this view, the realizable value of the inventory so diverted from the trade must be brought into the computation of the profit of the operation as a receipt for the period in which the diversion occurred.

There is, in my opinion, nothing in the judgment in the *Doughty* case which conflicts with the application of the principle of the *Wernher* case in the present situation, for in the *Doughty* case it is apparent from the judgment that neither the transaction nor the other established facts afforded any indication that the realizable value of the stock transferred was in fact greater than the amount at which it was being carried on the books of the partnership. In the *Hickman* case the principle later applied in the *Wernher* case does not appear to have been raised or considered, nor was the realizable value of the cattle necessarily equal to the amount received from the purchaser in respect of them.

There remains the question: what was the realizable value of the inventory of non-ferrous metals so diverted? Counsel for the Minister submitted that the amount calculated in accordance with the contract and included in the aggregate sum paid by the purchaser is evidence of the realizable value. With respect to raw material, the contract provided that the amount to be included should be the market price of such raw material at the time of the transfer. In case of disagreement as to that price, the contract further provided a procedure whereby the best realizable price might be ascertained. In the case of finished goods, the amount was to be market price of raw material plus cost of manufacture but not exceeding the market price of the finished product less a fair allowance for the cost of storing, selling, and delivering the goods. Here, I think, the result of the formula was that the amount would not exceed realizable value but might conceivably be less. There was no special provision in the contract covering partly processed material. Nor was there evidence as to how much of the sum added in respect of inventory represented material in this state, though there is evidence that partly processed material was but a small proportion of the whole.

Having regard to the presumption in favour of the assessment and to the terms of the contract, and in the absence of evidence that the sum of $822,611.15 at which the inventory was valued in the aggregate amount paid by the purchaser was more than the realizable value of it, I

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think that the realizable value was at least equal to that amount. In my opinion, this amount should have been entered as a receipt in the respondent's trading account for the year 1952 and, had this been done, the respondent's income for 1952 would have been shown to be greater by $78,095.68 than the amount reported. It follows that the Minister was right in adding this difference and in assessing it accordingly.

The appeal will be allowed and the assessment of the sum in question restored. The appellant is entitled to his costs.

Judgment accordingly.

BETWEEN:

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Oct. 14

Oct. 28

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

ERNEST FRANK PFINDER AND EDITH EMELINE PFINDER .. } DEFENDANTS.

Practice—Information—Counterclaim joined to defence—Motion to strike out counterclaim—Fiat—Petition of Right Act, R.S.C. 1927, c. 158 (R.S.C. 1952, c. 210) s. 4, as enacted by 1951 (1 Sess.) c. 33, s. 1—Exchequer Court Act, R.S.C. 1952, c. 98, s. 36(1)—Exchequer Court r. 6(2).

Held: That by the repeal of s. 4 of the *Petition of Right Act,* R.S.C. 1927, c. 158 (now R.S.C. 1952, c. 98) by S. of C. 1951 (1 Sess.), c. 33, s. 1, and the enactment of a new s. 4, the necessity of obtaining a fiat as a condition precedent to proceeding against the Crown by petition of right was brought to an end. Under the new s. 4 an action may now be brought against the Crown by filing the original and two copies of the petition in the Exchequer Court of Canada.

2. That as a counterclaim is in effect a new suit in which the party named as defendant in the bill is plaintiff, and the party named as plaintiff under the bill is defendant, a fiat is no longer required to permit the filing of a counterclaim.

SEMBLE the enactment of the new s. 4 of the *Petition of Right Act* has rendered the reference to "fiat" contained in the *Exchequer Court Act,* R.S.C. 1952, c. 98, s. 36(1) and Exchequer Court r. 6(1), purposeless.

MOTION to strike out a counterclaim joined to a statement of defence filed in an action for damages brought in the Exchequer Court on the information of the Deputy Attorney General of Canada.

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T. E. Armstrong for the motion. No one appearing *contra.*

DUMOULIN J. now (October 28, 1958) delivered the following judgment:—

The plaintiff herein, Her Majesty the Queen, consequent to a collision between one of her motor vehicles and the defendants' automobile, in the City of Amherst, N.S., on January 15, 1958, filed an information for damages to her property in the sum of $838.75.

The statement of defence, coupled with several other grounds, urges a counterclaim to an extent of $2,047.52, as a result of personal injuries suffered by Mrs. Edith E. Pfinder, on that unfortunate occasion, and the cost of repairs to defendants' car.

It is moved, on plaintiff's behalf, that this counterclaim be struck out as derogatory to the *Exchequer Court Act,* c. 98, s. 36. (1), 1952 R.S.C., and to r. 6(2) of this Court.

It would seem that such an exception is probed for the first time since *An Act to amend the Petition of Right Act,* 1951 (1 Sess.), 15 Geo. VI, c. 33, was enacted in 1951, abrogating the former necessity of obtaining the Governor General's "fiat" as a condition antecedent to a claim at law against the Crown. I therefore believe an outline of the decision reached should be given, though this motion was unopposed.

Section 36 (1) of c. 98, 1952 R.S.C., cited as the *Exchequer Court Act,* reads thus:

> 36. (1) Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

And r. 6(2), *Exchequer Court Rules,* prescribes that:

> 2. Actions, suits or proceedings against the Crown are to be instituted by filing a Petition of Right, or in any case where there is a Reference of a claim against the Crown by the Head of any Department, by filing a Statement of Claim.

This latter rule was substituted for the old one on August 21, 1951.

Conformably to the abrogating measure of 1951, the Revised Statutes of 1952, c. 210, rewrote the *Petition of Right Act* in appropriate context wherein no mention is made of the lapsed "fiat". Having thus disposed of a Crown prerogative and endowed the subject with a substantive and

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untrammelled right of impleading the Sovereign, it could be expected some delay might elapse before expunging, from the relevant statutes or rules, all traces of the old law, henceforward of no avail.

A rather cogent corroboration of this opinion derives, I think, precisely from s. 36. (2) of the *Exchequer Court Act,* whose s-s. (1) was quoted to me, with different expectations, by plaintiff's counsel.

Subsection (2) states:

> (2) If any such claim [against the Crown] is so referred [by the head of a department] no *fiat* shall be given on any petition of right in respect thereof.

As indicated above, c. 98, the *Exchequer Court Act,* of which s. 36 is a part, was passed in 1952, one year after the 1951 statute (15 Geo. VI, c. 33) had rendered any mention of "fiat", in connection with the petition of right, an obsolete and purportless word.

For reasons even stronger, since r. 6 (2) is merely procedural, a similar conclusion attaches to a similar argument attempted by counsel.

Procedure necessarily abates whenever no substantive right remains to be implemented.

So far, I have not overstepped, I trust, the pale of legitimate inferential deductions welling out of the law laid down by Parliament.

Let us now approach the subject-matter itself, quite apart from ancillary considerations of procedure.

Previously to the statute of 1951, there could be but one conclusion, namely that the legal requirement of a fiat acted as a compelling condition to all litigation against the Crown, in both eventualities of petition of right or counterclaim, for motives completely similar: the King's paramount rank as Fount of all Justice, *"Princeps fons omnis justitiae"*. The Sovereign now agrees to be impleaded before His Courts in the ordinary manner. If then claim and counterclaim are considered absolutely alike, in their practical objects, the subsequent removal of any hindrance in the prosecution of a claim likewise affects counterclaims. The trite dictum that "two things equal to a third [the fiat] are coequal between themselves" still remains sound enough logic, and, with evident modifications, also helps to assimilate petition of right and counterclaim.

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Furthermore, counsel agrees that the law, obtaining since 1951, grants to every litigant a free access to a recourse against the Crown, but would except a counterclaim from such unimpeded "right of way". Why? Simply because s. 36 (1), (1952 R.S.C. c. 98), provides that: "Any claim against the Crown may be prosecuted by petition of right, . . ." and r. 6 (2) that: "Actions, suits or proceedings against the Crown are to be instituted by filing a Petition of Right, . . ." This was spoken to previously.

Now looking closer at the essence of a counterclaim we, at once, see that it is nothing but a "claim" emanating from the defendant.

In Black's Law Dictionary (fourth edition), v°: Counterclaim, we read:

> COUNTERCLAIM. A *claim* [italics are mine] presented by a defendant in opposition to or deduction from the claim of the plaintiff . . .

And some lines down, that:

> It is an *offensive* as well as a *defensive* plea . . .

And again:

> *It is in effect a new suit in which the party named as defendant under the bill is plaintiff and the party named as plaintiff under the bill is defendant . . .*

Exactly the situation foreseen by Parliament when it enacted c. 33 of the 1951 statutes.

Should it be objected, as a last retort, nor would I concede the point without some hesitation, that such a proceeding is a roundabout way of impleading the Crown, then, even so, whatever is directly permitted also is indirectly permissible.

For the reasons preceding, plaintiff's motion is dismissed without costs.

Judgment accordingly.

1958
Sept. 8, 9
Oct. 30

BETWEEN:

HOME PROVISIONERS (MANITOBA) LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Refrigerators sold on instalment plan subject to conditional sales contracts—Contracts assigned finance company to secure payment of unpaid balances—Reserve allowable on unpaid balance due more than two years after sale—The Income Tax Act, R.S.C. 1952, c. 148, s. 85B(1) as amended by S. of C. 1952-53, c. 40, s. 73.

The appellant company sold household deep-freeze refrigerators subject to conditional sales agreements which provided for a down payment of 10 per cent of the purchase price and the balance plus financing charges in 24 monthly instalments secured by purchaser's promissory note and his agreement title should not pass until all payments were completed. To finance its business the appellant assigned the conditional sales contracts to a finance company under an agreement whereby the latter advanced it 90 per cent of the unpaid purchase price forthwith and the balance on completion of payment by the purchaser, but reserved the right to withhold payment of the 10 per cent and credit it to a holdback account from which the appellant was entitled to receive from time to time the amount by which the balance in the account exceeded 10 per cent of the monies owing on the assigned contracts. In each case the appellant was required to guarantee payment by the purchaser.

In reporting its income for its 1954 fiscal year the appellant showed a gross revenue from sales of some $571,677 and a gross profit of some $248,375 from which it deducted some $99,677 as "deferred gross profit on instalment contracts." In its balance sheet it showed among its assets an item of some $23,926 as "Holdbacks on Lien Notes discounted with Finance Cos."

The Minister in assessing the appellant disallowed the whole of the deduction claimed but allowed a reserve of some $10,395 pursuant to s. 85B(1)(*d*) of *The Income Tax Act*. This figure was the proportion of $23,926—representing sums which the appellant had not received from the finance companies—which appellant's gross trading profit amounting to some $248,375 bore to gross revenue amounting to some $571,667.

In its appeal from the decision of the Income Tax Appeal Board[1] which affirmed the Minister's assessment, the appellant contended that the monies advanced by the finance company were loans for which it assigned the conditional sales contracts as security, that the amounts paid by purchasers continued its property, and that it was entitled to have the reserve to which it was entitled under s. 85B(1)(*d*), based on the total of such unpaid amounts. Alternatively, that if

the reserve was to be based on the $23,926 which appellant had not received from the finance company, the whole and not merely a portion of it, should be allowed as a reserve under s. 85B(1)(*d*).

Held: That the transactions with the finance company were not loans on the security of the conditional sales contracts but outright sales since the appellant had no right to repay the finance company and demand the return of the property assigned. *Re George Inglefield Limited,* [1933] 1 Ch. 1, followed.

2. That since the appellant was not the owner of the unpaid purchasers' accounts totalling some $344,665 it was not entitled to a reserve in respect of any portion of that amount.

3. That, assuming that the whole of $23,926 which the appellant had not received from either the purchaser or the finance company was profit from sales of refrigerators, on the evidence no basis was established for calculating the reserve in respect of such sum at any higher figure than that which had been allowed, and that it had not been established that the amount allowed was not a reasonable reserve in the circumstances.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at Winnipeg.

G. C. Hall for appellant.

A. E. Johnston, Q.C. and *L. J. Hallgrimson* for respondent.

THURLOW J. now (October 30, 1958) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board[1], dismissing the appellant's appeal against income tax assessments for the years 1953 and 1954. The matter in issue is the amount of the reserve which the appellant is entitled to deduct for the years in question under s. 85B(1)(*d*) of the *Income Tax Act,* R.S.C. 1952, c. 148, as enacted by Statutes of Canada 1952-53, c. 40, s. 73. This provision is as follows:

85B. (1) In computing the income of a taxpayer for a taxation year,

* * *

(*d*) where an amount has been included in computing the taxpayer's income from the business for the year or a previous year in respect of property sold in the course of the business and that amount is not receivable until a day

[1] (1958) 17 Tax A.B.C. 149; 12 D.T.C. 1183.

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(*i*) more than two years after the day on which the property was sold, and

(*ii*) after the end of the taxation year, there may be deducted a reasonable amount as a reserve in respect of that part of the amount so included in computing the income that can reasonably be regarded as a portion of the profit from the sale, . . .

The appellant was incorporated in January, 1953 and from February 13, 1953 to March 31, 1954, the period with which the appeal is concerned, it engaged in the business of buying and selling household deep-freeze refrigerators and also of supplying the purchasers of the refrigerators with frozen foods. Most of the refrigerators were sold on terms requiring a down payment of 10 per cent of the purchase price and payment of the balance with finance charges in 24 monthly instalments, commencing from 30 to 45 days after the date of purchase. In each case the purchaser also gave his promissory note for the unpaid portion of the purchase price and the finance charges and agreed that the title to the refrigerator should not pass to the purchaser until all the payments had been made.

In order to finance its business, the appellant assigned these conditional sale contracts to a finance company pursuant to arrangements whereby the finance company would pay the appellant 90 or 95 per cent (depending on the particular finance company) of the unpaid balance of the purchase price immediately and the remaining five or 10 per cent after completion by the purchaser of his payments, but subject to the right of the finance company to withhold payment to the appellant of the five or 10 per cent, as the case might be, even after it had been paid by the customer and to credit it to a holdback account from which the appellant would be entitled to receive from time to time only the amount by which the balance in the account exceeded 10 per cent of the monies owed by the purchasers on contracts assigned by the appellant to the finance company. When taking assignments of the contracts, the finance company in each case obtained the appellant's guarantee that the purchaser would make the payments required by his contract, and in addition at least one of the finance companies held personal guarantees from all the shareholders of the appellant, guaranteeing the payments to be made by the purchasers.

The appellant, in collaboration with the finance company, maintained a close watch on the payments to be made by purchasers when such payments were overdue and employed a full-time collector, whose duties included the collection of such payments. Under the terms of the contracts, the payments were to be made at the office of the finance company, and until they fell into default the collector had no responsibility to collect them, but he would accept payments not in default when offered, and some purchasers also made payments which were not in default at the appellant's office. The appellant accounted to the finance company and paid over to it all such payments accepted by the collector or made at the appellant's office. If a purchaser fell seriously into default, the appellant would arrange for return of the refrigerator and repay the finance company the amount outstanding on the purchaser's contract. Occasionally, a purchaser would object to the assignment of his contract to the finance company and, if it had been assigned, the finance company would return it to the appellant on request and on repayment of the monies which had been paid to the appellant by the finance company in respect to it.

When recording these transactions in its books, the appellant customarily charged the purchaser with the price of the refrigerator and credited against this charge the 10 per cent down payment. When the initial proceeds of the assignment were received from the finance company, a further credit of the amount was entered in the purchaser's account, and at that time the appellant would also enter in the same account a credit of the balance and charge a corresponding debit to the finance company. In consequence, the purchaser's account would then show no debit balance in respect of the price of the refrigerator and no further entries would be made in respect thereto, even if it subsequently became necessary to repay the finance company and take back the refrigerator.

Apart from the assignment itself, which in each case was endorsed on the contract, there was no formal written agreement relating to the arrangements on which the contracts were assigned to the finance company. In giving

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evidence on the trial of the appeal, Mr. Keith Jensen, who was the president and chief shareholder of the appellant, referred to and characterized these transactions as loans. On the other hand, in a letter dated November 25, 1955, written by the appellant's auditors to the Director of Income Tax at Winnipeg, the auditors referred to and enclosed a copy of a memorandum from the Toronto office of the finance company to its branch offices, which indicates that that particular finance company regarded the transactions as purchases of the contracts, and Mr. Jensen in his evidence referred to this memorandum as setting out the arrangement between the appellant and the finance company. The arrangement referred to was between the appellant and Traders Finance Corporation Ltd., to whom from April, 1953 onward all the appellant's contracts were assigned. The form of assignment used in transactions with Traders Finance Corporation Ltd. was as follows:

FOR VALUE RECEIVED undersigned hereby sells, assigns and transfers to Traders Finance Corporation Limited herein called "Traders" all undersigned's right, title and interest in and to the within contract and the property therein described. Undersigned warrants that the cash payment specified in the within contract was actually received by undersigned in cash and that no part of the said cash payment was loaned to the Purchaser by undersigned. Undersigned guarantees full performance of all covenants and agreements of the Purchaser named in the within contract and note and in the event of repossession and resale agrees that undersigned shall be jointly and severally liable with the Purchaser for any deficiency between the net amount actually received upon such resale and the amount secured by the said contract hereby assigned. Undersigned agrees that all guarantees are continuing guarantees and that Traders may grant extensions of time for payment of the moneys secured by the said contract and note and may give and accept any renewals thereof and may make any changes with respect to times for payment and the amount of the payments therein provided without notice to the undersigned, and without discharging or affecting the liability of the undersigned. Undersigned certifies that a true copy of the within contract was duly registered in the proper registration office.

EXECUTED by the undersigned on the ..... day of ....., 19 .....

No evidence was offered as to the form used in assigning contracts to the two other finance companies to whom contracts were transferred prior to April, 1953, nor does the evidence indicate that the nature of the appellant's transactions with them differed from its transactions with Traders.

In reporting its income for the period from February 13, 1953, when it commenced doing business, to March 31, 1954, the end of its fiscal period, the appellant included a statement of trading operations showing gross revenue from refrigerator sales during the 13½ months' period totalling $571,677.28. The same statement showed a gross profit on refrigerator sales of $248,375.72, from which a sum of $99,587.92 was deducted as "deferred gross profit on instalment contracts." The latter amount, as explained by the auditor, Mr. Frank Lyle Green, was calculated by ascertaining the gross profit on each refrigerator sale and attributing one twenty-fourth of it to each of the 24 months over which the payments were to be made. The $99,587.92 was the sum of the portions of the gross profit on the sales so attributed to the months which each contract had yet to run. Thus, if the gross profit on a sale was $240 and at March 31, 1954 the contract had ten months to run, the amount of profit attributed to the unexpired period of the contract would be 10/24 of $240 or $100. In the balance sheet as at March 31, 1954, which also accompanied the returns, the appellant showed among its assets an item of $23,926.65 as "Holdbacks on Lien Notes Discounted with Finance Companies," and on the liabilities side a contingent liability to finance companies of $344,665.78. The latter figure was not added into the total liabilities on which the balance was struck nor, save for the $23,926.65, was the amount owed by customers on conditional sale contracts assigned to finance companies included in any corresponding item shown on the assets side either as accounts receivable from purchasers or otherwise.

The Minister, in assessing the appellant, disallowed the whole of the sum of $99,587.92 claimed as above mentioned but subsequently, after receiving notice of objection, allowed a reserve of $10,395.56 pursuant to s. 85B(1)(*d*). This figure was the proportion of $23,926.65—representing sums which the appellant had not received from the finance companies—which the appellant's gross trading profit on refrigerators, amounting to $248,375.72, bore to the gross revenue from refrigerator sales, amounting to $571,667.28. The effect of this was to treat each dollar of the revenue

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from refrigerator sales as 43.4476 per cent profit and to allow the appellant a reserve under s. 85B(1)(*d*) equal to that portion of the $23,926.65.

On the appeal to this Court, the appellant advanced two main contentions. The first was that the transactions in which the appellant assigned the conditional sale contracts to the finance companies were, in fact, loans, that in consequence the amounts to be paid by the purchasers pursuant to the contracts continued to belong to the appellant and that the appellant was, accordingly, entitled to have the reserve to which it was entitled under ss. (1)(*d*) of s. 85B, based on the total of such unpaid amounts. The second contention was that, if the reserve was to be based on the $23,926.65 which the appellant had not received from the finance companies, the whole of such amount, and not merely a portion of it, should have been allowed as the reserve under s. 85B(1)(*d*).

Turning to the first of these contentions, it may be noted that, even if the transactions with the finance company were in fact loans, the sum of $99,587.92, as claimed as a reserve by the appellant, does not appear to be related or confined either to the whole or to a part of what may reasonably be regarded as the profit portion of *amounts* which were *not receivable until a day more than two years after the day on which the property was sold.* On the contrary, the sum is calculated as the equivalent of the whole of the profit portion of all unaccrued payments, regardless of how long after the day of sale they would become due. Most of them must necessarily have been payments that would accrue due in less than two years from the date of sale. Nor does it seem probable on a rough calculation that the total of all unaccrued instalments which would accrue more than two years after the date of sale could reach even approximately the figure of $99,587.92, for it must be borne in mind that it was in no case more than the last two instalments on the contract which would accrue due more than two years after the date of sale. I am accordingly of the opinion that the figure of $99,587.92, claimed by the appellant, cannot be taken in any event as the amount of reserve to which the appellant may be entitled under s. 85B(1)(*d*).

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But on this contention I am also of the opinion that the transactions with the finance company were not loans on the security of the conditional sale contracts but were outright sales to the finance company of the appellant's rights under them.

In discussing this distinction, Romer L. J. in *Re George Inglefield Limited*[1] said at p. 27:

> The only question that we have to determine is whether, looking at the matter as one of substance, and not of form, the discount company has financed the dealers in this case by means of a transaction of mortgage and charge, or by means of a transaction of sale; because, of course, financing can be done in either the one way or the other, and to point out that it is a transaction of financing throws no light upon the question that we have to determine.
>
> It appears to me that the matter admits of a very short answer, if one bears in mind the essential differences that exist between a transaction of sale and a transaction of mortgage or charge. In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them. The second essential difference is that if the mortgagee realizes the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the mortgagor he has to account to the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase, and realizes a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mortgagee realizes the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he would not be entitled to recover the balance from the vendor.
>
> In this case the subject-matter of the mortgage or charge, or of the sale and purchase, whichever it be, is certain furniture subject to, and with the benefit of, the hiring agreements. If one considers the documents, which I do not intend to go through again, in relation to the three matters that I have mentioned, it will be found that in every one of those three respects the documents bear the attributes of a sale and purchase, and not the attributes of a mortgage or charge.

In the present case, it may first be noted that the form of assignment used included the word "sold". This I regard as some evidence that the transaction was in fact a sale

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though I think it was open to the appellant to show, if it could, that the nature of the transaction was not that of a sale notwithstanding the use of the word "sold". To this may be added the fact that the entries by which the appellant recorded the transaction in the customer's account also suggest that the transaction was a sale for the entries appear to me to indicate a disposal of the account rather than a loan on the security of it. If the transactions were loans there would ordinarily be no reason to credit the customer at that stage either with the immediate proceeds or with the sum held back. Against this may be set the evidence of Mr. Jensen, who described the transactions as loans or borrowings, but I doubt that Mr. Jensen, when making the arrangements, ever paused to consider whether the transactions would be loans or sales and, as previously mentioned, he regarded the memorandum from the Toronto office of the finance company to its branch offices as stating the terms of the arrangement which had been made, and this document leaves no doubt that the finance company regarded them as purchases. It was argued that the fact that the finance company would return a contract, when requested and repaid, indicates that the appellant had a right to redeem the contracts, but in my view this fact is consistent with other explanations as to why the finance company would return a contract and in the absence of evidence of a term of the arrangement giving the appellant a right of redemption I do not regard it as indicative of such a right. If, indeed, the appellant had such a right, it would have been in a position to render the arrangements for holdbacks entirely ineffective by redeeming each contract as the time for completion of the payments approached. Moreover, in my view, the attention and service which the appellant and its collector gave to the collection of the payments are attributable to the appellant's desire to protect itself from loss on its guarantees, rather than indicative of ownership by the appellant of the accounts. I find nothing in the terms set out either in the assignment or the memorandum giving the appellant any right of redemption of the kind referred to by Romer L. J. in the passage above quoted. No doubt, certain equities in respect of the property assigned would arise in favour of the appellant upon the

appellant honouring its guarantee when called upon to do so, but in my opinion such equities are quite distinct from a right at any time to call for a return of property subject to a mortgage or charge upon payment of a loan. In my opinion, the appellant had no such right to repay the finance company and demand a return of the property assigned except upon being called upon to honour its guarantee. Accordingly, I find that the transactions were sales rather than loans.

It follows from this finding that, since the appellant was not the owner of the unpaid purchasers' accounts totalling $344,665.78, it is not entitled to a reserve under s. 85B(1)(*d*) in respect of any portion of that amount.

The appellant's second or alternative submission relates to the $23,926.65 held back by the finance company. This amount was included by the appellant in its income, but it had not been received and, under the terms of the arrangement with the finance company, it would not become receivable until some indefinite period after the several purchasers had completed the payments required by their contracts. This, in each case, would be at least two years after the making of the sale to the purchaser, and I think in the circumstances described it may also be taken that in each case the time when the sum would become receivable from the finance company would be at least two years after the date of the assignment.

Now under s. 85B(1)(*d*) what may be allowed as a reserve is not necessarily the whole of the amount which is receivable more than two years after the date of sale, for it may not be reasonable to regard all of the amount as profit from the sale; nor is the reserve to be allowed necessarily equal to the whole of the portion of the amount that can reasonably be regarded as profit from the sale. The reserve that may be deducted under s. 85B(1)(*d*) is *a reasonable amount in respect of that part of the amount so included in computing the income that can reasonably be regarded as a portion of the profit from the sale.*

The appellant submits that the whole of the $23,926.65 can reasonably be regarded as a portion of the profit from the sales to the purchasers of refrigerators and that the whole of this amount should be allowed as a reserve.

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In my opinion, it is open to question whether a reserve in respect of any portion of the $23,926.65 is strictly allowable under s. 85B(1)(*d*) since, in the view I have taken of the facts, the amount is payable by the finance company in each case as part of the consideration for the sale to it of the contract, rather than from the sale of the refrigerator, and there is no suggestion that any profit whatever accrued to the appellant from the sales of the contracts, the price at which they were assigned being merely equal to the unpaid portion of the selling price of the refrigerator. However, I do not think it is necessary to resolve this question for, even assuming that the reserve is in the present situation allowable in respect of the profit portion of the $23,926.65 on the basis of its being receivable in respect of the refrigerators and also assuming, as the appellant submits, that the whole of the $23,926.65 can reasonably be regarded and should be regarded as a portion of the profit from the refrigerator sales, there still remains the question: what is *a reasonable amount as a reserve in respect of that portion of the profit from* such sales? The Minister has allowed $10,395.56, and it was for the appellant to show, if it could, that the amount allowed should have been higher. There is evidence that the sums making up the $23,926.65 were not payable until a day more than two years after the sale. In addition, having regard to the guarantee arrangements, it is clear that all sums paid by the purchaser would be applied first in discharge of the other sums payable under the contract and nothing would be credited to the deferred account or paid to the appellant until all other sums payable by the purchaser under the contract had been paid. In effect, $344,665.78 had to be collected from the purchasers before the appellant would even become entitled to credit in the holdback acount for the $23,926.65. This feature of the situation suggests the need of a reserve in respect of the amounts making up the $23,926.65 but, on the other hand, the amounts payable by the purchasers were all secured on the refrigerators and presumably, as time went by and payments were made, the prospects of the amounts in question being paid by or recovered from the purchasers might be expected to improve rather than to deteriorate. In the meantime, the chances of recovery of these amounts were further protected

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by provisions of the contract, making all payments immediately due in the event of default or breach by the purchaser or in the event of the finance company deeming itself insecure. The evidence does not show what proportion of the amounts making up the $23,926.65 was likely, in the experience of the appellant or its officers or of the finance company, to become irrecoverable or what amount of effort or expense might reasonably be expected to be required in later years in order to recover them. Nor is there evidence of the value on March 31, 1953 of the individual amounts making up the $23,926.65, or of the value on that date of the whole sum as an asset of the appellant, from which, in view of the fact that the whole amount has been included in revenue, an inference might be drawn as to what amount would be a reasonable reserve. In this situation, one might be tempted to speculate that the whole amount of the $23,926.65 would not be too much to allow as a reserve, but on the evidence as it stands I am of the opinion that no basis has been established for calculating the reserve at any higher figure than that which has been allowed, and that it has not been established that the amount allowed was not a reasonable reserve in the circumstances.

The appeal accordingly fails, and it will be dismissed with costs.

Judgment accordingly.

BETWEEN:

1958

Jun. 16 & 17

Dec. 5

HERMAN LUKS ..... APPELLANT;

AND

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

Revenue—Income tax—Deductions—Expense of "travelling in the course of his employment"—"Supplies"—"Consumed in the performance of the duties of employment"—The Income Tax Act, R.S.C. 1952, c. 148, ss. 5, 11(9),(10)(c), (11).

The appellant, an electrician, in his 1954 income tax return deducted from the wages of his employment expenses incurred in travelling and carrying his tools in his motor car to and from his home and place of employment, including operating, maintenance and capital

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cost allowance with respect to the car. He also deducted the cost of replacing tools he was required to provide for use in his work. The deductions were disallowed by the Minister and the assessment in that regard affirmed by the Income Tax Appeal Board. Upon appeal to this Court

Held: That neither the appellant's travelling nor the carrying of his tools was "travelling in the course of his employment" within the meaning of s. 11(9) of *The Income Tax Act* and the claim for deduction for travelling expenses was properly disallowed. *Ricketts v. Colquhoun* [1926] A.C.1; *Mahaffy v. Minister of National Revenue* [1946] S.C.R. 450, followed.

2. That the articles which the appellant under his contract was required to provide were all tools falling within the general category of equipment and none of them could properly be regarded as "supplies" within the meaning of that term as used in s. 11(10)(*c*) of the Act, and even assuming that they could be so regarded, the claim for deduction was defeated by appellant's failure to show that the tools were consumed in performing the duties of employment.

APPEAL from a decision of the Income Tax Appeal Board.

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

John B. Tinker for appellant.

W. R. Latimer for respondent.

THURLOW J. now (December 5, 1958) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board,[1] dated June 25, 1956, allowing in part the appellant's appeal against an income tax re-assessment for the year 1954. The matter in issue is the right of the appellant, in computing his income for income tax purposes, to deduct from the wages of his employment certain expenses incurred by him in travelling and carrying his tools from his home to his place of employment and back each day and the cost of replacing tools which he was required to provide for use in his work.

The appellant is an electrician and throughout the year in question he resided in the Township of North York. From January 1, 1954 to the end of June, 1954 he was employed by Eastern Electrical Construction Ltd. of Oshawa, for whom he worked on premises of General Motors at Oshawa in connection with the construction of a new building. For this work the appellant was paid at

[1] 56 D.T.C. 345; 15 Tax A.B.C. 264.

an hourly rate for the time he was engaged on the work and from January 1, 1954 to March 11, 1954 he was also paid a travelling allowance of $14 per week. Under the terms of a union contract governing the employment, the appellant was required to provide certain tools for use in his work. The list of tools so required was a lengthy one, and it is obvious that they would make a load that could not be conveniently carried without a vehicle of some sort. The appellant might have left them on the premises where he worked, but he would have done so at his own risk of loss, and no place to store them was provided. What he did was to carry them in his car which he used each day in travelling from his home to the place where he worked, a distance of 47 miles, and return. In June, 1954 he terminated this employment and secured employment on the same terms with Leslie Electric Co., an electrical contractor of Toronto. For this contractor the appellant worked on alterations to a building at Sunnyside, some 9½ miles from his home. This employment lasted until the end of August. From September 2 to December 8, 1954, the apellant was employed on the same terms by Standard Electric Co. of Toronto, for whom he worked on the construction of a new building in Toronto, eight miles from his home. In each of these jobs, the appellant was paid at an hourly rate for the time during which he was engaged on the work, not including any of the time spent in travelling to or from his work. He received no travelling allowance from any of the employers except as previously mentioned.

In computing his income in his income tax return for 1954, the appellant deducted from the wages received in these employments $1,239.06 as travelling expenses incurred in travelling as above mentioned. The $1,239.06 was made up of $373.06 for gasoline, oil, repairs, and sundry automobile expenses, and $866 for capital cost allowance in respect of the automobile. He also deducted $44.34 for the expense of replacing worn-out or broken tools. The Minister, in assessing the appellant's income, disallowed as deductions both the claim in respect of the travelling expenses and the claim in respect of the expense of replacing tools. The appellant thereupon appealed to the Income Tax Appeal Board, where the disallowance of these deductions was upheld.

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On his appeal to this Court, the appellant contended that because, under each of the contracts of employment, tools were "to be supplied" by the employee, the carrying of them to and from the place where he was employed was part of the duties of his employment and that he was entitled to deduct the travelling expenses and capital cost allowances so claimed under s-ss. (9) and (11) of s. 11 of the *Income Tax Act*, R.S.C. 1952, c. 148, and further that he was entitled under s. 11(10)(*c*) to deduct the cost of replacing tools as an expense for supplies that were consumed directly in the performance of the duties of his employment.

For the purposes of the *Income Tax Act*, income from an office or employment is defined by s. 5 as the salary, wages and other remuneration, including gratuities, received by the taxpayer (plus certain additions not material in this case and with certain exceptions also not material in this case) minus the deductions permitted by certain provisions which include s-ss. (9), (10)(*c*), and (11) of s. 11. Subsections (9) and (11) of s. 11 provide as follows:

(9) Where an officer or employee, in a taxation year,

(*a*) was ordinarily required to carry on the duties of his employment away from his employer's place of business or in different places,

(*b*) under the contract of employment was required to pay the travelling expenses incurred by him in the performance of the duties of his office or employment, and

(*c*) was not in receipt of an allowance for travelling expenses that was, by virtue of subparagraph (*b*) of section 5, not included in computing his income and did not claim any deduction for the year under subsection (5), (6) or (7),

there may be deducted, in computing his income from the office or employment for the year, notwithstanding paragraph (*a*) and (*h*) of subsection (1) of section 12, *amounts expended by him in the year for travelling in the course of his employment.*

(11) Where a deduction may be made under subsection (6) or (9) in computing a taxpayer's income from an office or employment for a taxation year, notwithstanding paragraph (*b*) of subsection (1) of section 12, there may be deducted, in computing his income from the office or employment for the year, such part, if any, of the capital cost to the taxpayer of an automobile used in the performance of the duties of his office or employment as is allowed by regulation.

It will be observed that under ss. (9), when the preliminary conditions for the application of the subsection are met what may be deducted is "amounts expended by the taxpayer in the year for *travelling in the course of his*

employment". This raises the question whether any of the travelling expenses claimed by the appellant were "for *travelling in the course of his employment*".

In *Ricketts v. Colquhoun*[1] the House of Lords considered the case of a London barrister who held the office of Recorder of Portsmouth and who had sought to deduct from the emoluments of that office his expenses of travelling several times each year from London to Portsmouth for the purpose of carrying out his duties as Recorder. He also sought to deduct the cost of transporting his robes of office as Recorder, which he required for the performance of the duties of that office. The section of the statute provided as follows:

> If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

With respect to the travelling expenses and the cost of conveying the robes, Viscount Cave said at p. 4:

> As regards the appellant's travelling expenses to and from Portsmouth, with which may be linked the small payment for the carriage to the Court of the tin box containing his robes and wig, the material words of the rule are those which provide that, if the holder of an office is "necessarily obliged to incur . . . the expenses of travelling in the performance of the duties of the office" the expenses so "necessarily incurred" may be deducted from the emoluments to be assessed. The question is whether the travelling expenses in question fall within that description. Having given the best consideration that I can to the question, I agree with the Commissioners and with the Courts below in holding that they do not. In order that they may be deductible under this rule from an assessment under Sch. E, they must be expenses which the holder of an office is necessarily obliged to incur—that is to say, obliged by the very fact that he holds the office and has to perform its duties—and they must be incurred in—that is, in the course of—the performance of those duties.
>
> The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them.

[1] [1926] A.C. 1.

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In *Mahaffy v. Minister of National Revenue*[1] the Supreme Court of Canada dealt with a claim for travelling expenses incurred by a member of a legislative assembly in travelling from his home to the provincial capital and back on week-ends during the legislative session. Rand J. said at p. 455:

> The question is whether the items deducted are travelling expenses "in the pursuit of a trade or business"; or "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income." and in my opinion they are neither. Whether or not attending a session of a Legislative Assembly can be deemed "business" which I think extremely doubtful, certainly making the extra trips and lodging in a hotel in Edmonton cannot be looked upon as "in the pursuit" of it. That expression had been judicially interpreted to mean "in the process of earning" the income: *Minister of National Revenue v. Dominion Natural Gas Co.*, [1941] S.C.R. 19. The sessional allowance is specifically for attendance by members at the legislative proceedings: it has no relation to any time or place or activity outside of that. The "pursuit" of a business contemplates only the time and place which embrace the range of those activities for which the allowance is made: the "process of earning" consists of engaging in those activities. To treat the travelling expenses here as within that range would enable employees generally who must, in a practical sense, take a street car or bus or train to reach their work to claim these daily expenses as deductions. Employees are paid for what they do while "at work"; and the legislators receive the allowance for their participation in the sessional deliberations: up to those boundaries, each class is on its own. For the same reason it cannot seriously be urged that the expenses are "wholly, exclusively and necessarily" laid out for the purpose of earning the allowance: they are for acts or requirements of the member as an individual and not as a participant in the remunerated field.

In the present case, travelling between the appellant's home and the several places where he was employed was not part of the duties of his employment, nor was it any part of the duties of his employment to take his tools from the place of employment to his home each day, nor to carry them each day from his home to the place of employment. This may well have been the practical thing for him to do in the circumstances, but the fact that it was a practical thing to do does not make it part of the duties of his employment. Both travelling from his home to the place of employment and carrying his tools from his home to the place of employment were things done before entering upon such duties, and both travelling home and carrying his tools home at the close of the day were things done after the duties of the employment for the day had been

[1] [1946] S.C.R. 450.

performed. The journeys were not made for the employer's benefit, nor were they made on the employer's behalf or at his direction, nor had the employer any control over the appellant when he was making them. The utmost that can be said of them is that they were made in consequence of the appellant's employment. That is not sufficient for the present purpose. In my opinion, neither the appellant's travelling nor the carrying of his tools was "travelling in the course of his employment" within the meaning of s. 11(9). It follows that the claim for the deduction of $1,239.06 for travelling expenses cannot be sustained and that it was properly disallowed.

The claim to deduct the $44.34 expended by the appellant in replacing tools is made under s. 11, s-s. (10)(*c*), by which it is provided as follows:

> (10) Notwithstanding paragraphs (*a*) and (*h*) of subsection (1) of section 12, the following amounts may, if paid by a taxpayer in a taxation year, be deducted in computing his income from an office or employment for the year
>
> * * *
>
> (*c*) the cost of *supplies that were consumed directly in the performance of the duties of his* office or *employment* and that the officer or employee was required by the contract of employment to supply and pay for,
>
> * * *
>
> to the extent that he has not been reimbursed, and is not entitled to be reimbursed in respect thereof.

The deductions permitted by this subsection are strictly limited to such amounts as meet all of the several requirements of the subsection. In order to qualify, they must first be amounts paid by the taxpayer in the year. They must be amounts for the cost of supplies. The supplies must have been consumed directly in the performance of the duties of the taxpayer's employment and they must have been supplies that the taxpayer was required by the contract to supply and pay for. Even when all these qualifications have been met, the amount is deductible only to the extent that the taxpayer has not been reimbursed and is not entitled to be reimbursed therefor.

In the present case, no question is raised as to the $44.34 having in fact been paid by the appellant in 1954, nor of his having been required by his several contracts of employment to provide certain tools at his own expense, nor of

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his having been reimbursed, nor of his being entitled to reimbursement in respect of any of the $44.34 so paid. But issue is raised as to the extent to which the $44.34 was for *supplies that were consumed* directly in the performance of the duties of the appellant's employment.

"Supplies" is a term the connotation of which may vary rather widely, according to the context in which it is used. In s. 11(10)(*c*) it is used in a context which is concerned with things which are consumed in the performance of the duties of employment. Many things may be consumed in the sense that they may be worn out or used up in the performance of duties of employment. The employer's plant or machinery may be worn out. The employee's clothing may be worn out. His tools may be worn out. And materials that go into the work, by whomsoever they may be provided, may be used up. "Supplies" is a word of narrower meaning than "things", and in this context does not embrace all things that may be consumed in performing the duties of employment, either in the sense of being worn out or used up. The line which separates what is included in it from what is not included may be difficult to define precisely but, in general, I think its natural meaning in this context is limited to materials that are used up in the performance of the duties of the employment. It obviously includes such items as gasoline for a blow torch but, in my opinion, it does not include the blow torch itself. The latter, as well as tools in general, falls within the category of equipment.

The distinction between supplies and equipment was considered in *The D'Vora*[1], where the problem was whether or not the supplying of fuel oil to a ship fell within the meaning of the expression "building, equipping or repairing a ship". Willmer J. said at p. 1127:

> Clearly, the supplying of fuel oil could hardly come within the words "building" or "repairing". The argument, however, is that it comes within the word "equipping". To my mind, there is, prima facie at least, a wealth of difference between the meaning of the word "equipping" and the meaning of the word "supplying". At my suggestion reference has been made to the OXFORD DICTIONARY, but I confess that a perusal of that work has not thrown any great light on the problem which I have to determine. It is to be observed, however, that when I look through the synonyms given for "supply" in the OXFORD DICTIONARY the one word

[1] [1952] 2 All E.R. 1127.

which I do not meet is "equip". In my judgment, the important difference between "equip" and "supply" is that "supply" is a word which is appropriate for use in connection with consumable stores, such as fuel oil, whereas "equip" connotes something of a more permanent nature. I can well understand that anchors, cables, hawsers, sails, ropes, and such things, may be said to be part of a ship's equipment, although they may have to be renewed from time to time, but such things as fuel oil, coal, boiler water, and food appear to me to be in quite a different category.

The problem before Willmer J. was not the same as that in the present case, for he was considering whether providing fuel oil, which could readily be regarded as supplying the ship, could also be regarded as equipping it, while what has here to be determined is whether tools, which are readily classed as equipment, can also be classed as supplies. But the passage quoted indicates that, in general, the two categories are quite distinct from each other.

The tools which the $44.34 was spent to replace included a blow torch, screw drivers, pliers, and a chalk line, all of which were items which the appellant was bound by the contract to provide, and on the evidence it may also have included some small items which the employer was bound by the contract to provide. There was evidence that a blow torch can be expected to last more than a year, that screw drivers and pliers are of uncertain duration, sometimes requiring replacement in the course of a year and sometimes more often, and that a chalk line is a type of thing that is used up completely in the course of a year. There was no evidence, however, as to when any of these items, or for that matter any other tools which the appellant was required by the contract to provide and which were included in the $44.34, in fact ceased to be useful.

In this situation, the appellant's claim to deduct the $44.34 fails on two grounds.

The first is that, regardless of how long they may last while in use or how often it may be necessary to replace them, the articles mentioned as having been included in the $44.34, as well as the other articles which, under the contract, the appellant was required to provide were all tools falling within the general category of equipment, and in my opinion none of them can properly be regarded as "supplies" within the meaning of that term as used in s. 11(10)(*c*).

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Secondly, even assuming that the tools purchased with the $44.34 were supplies of the kind contemplated by s. 11(10)(*c*) it has not been established that they were consumed or worn out in the performance of the duties of any of the three employments in which the appellant was engaged in 1954. Nor was it established that they were consumed or worn out by the end of 1954. For aught that appears, they may not yet be worn out or consumed.

The language of s. 11(10)(*c*) is definite in limiting the deduction to the cost of supplies "*that were consumed*" in performing the duties of the employment. In the French text, it is perhaps even more definite, for the expression there used is "qui ont été consommées". In order to succeed in obtaining the deduction, the taxpayer must show that the amount sought to be deducted meets the requirement. It is not difficult to see how readily it can be met when supplies such as gasoline for a blow torch are involved, for if a record is kept the taxpayer will know how much of the commodity was consumed in the year, but difficulty will inevitably be experienced in attempting to apply this limitation in the case of tools, and this confirms me in the opinion already expressed that tools are not supplies at all within the meaning of the subsection. For the present purpose, however, it is sufficient to say that the claim for the deduction is defeated by the failure to show that the tools purchased with the $44.34 were consumed in performing the duties of the employment.

The appeal fails as to both of the deductions claimed, and it will be dismissed with costs.

Judgment accordingly.

1958

Nov. 26

Dec. 12

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

GLADYS (GERALDINE) EVANS .....RESPONDENT.

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a)(b)—"An outlay . . . on account of capital" or "an outlay . . . for the purpose of gaining income"—Legal expenses incurred to secure an existing right to income from an estate an outlay on account of capital and non-deductible from income—Appeal allowed.

Respondent was bequeathed an income for life by the will of her first husband through the exercise of a power of appointment conferred upon him by the will of his father. After the death of her first husband respondent remarried. Her right to continue to receive the income was contested and the trustees of the father's estate applied to the Supreme Court of Ontario for advice and direction on the question of whether or not respondent was entitled to the income bequeathed to her by the exercise of the power of appointment. The matter was finally decided by the Court of last resort in Canada in favour of respondent who was represented by counsel throughout all proceedings. In computing her income tax return for the taxation year 1955 respondent deducted the amount of money she had paid her lawyers in that year for such legal services. That amount was added to her declared income by the Minister of National Revenue and an appeal by respondent to the Income Tax Appeal Board was allowed. From that decision the Minister appealed to this Court.

Held: That the outlay made by respondent and under consideration in this appeal was one made for the purpose of protecting an existing asset from extinction, it was not an expenditure of a recurring nature as the litigation settled for all time the respondent's right to a share in the income.

2. That the outlay was on account of capital and non-deductible by virtue of the provisions of s. 12(1)(b) of the *Income Tax Act*.

APPEAL from a decision of the Income Tax Appeal Board.

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

Donald Guthrie, Q.C. and *D. Andison* for appellant.

Terence Sheard, Q.C. for respondent.

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

CAMERON J. now (December 12, 1958) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board[1] dated March 31, 1958, allowing the appeal of the respondent from a reassessment made upon her for the taxation year 1955 and dated January 10, 1957. In computing her income tax return the respondent deducted the sum of $11,974.93, an amount which she had paid to her lawyers in that year for legal services. In assessing the respondent, that amount was added to her declared income. Mr. Fisher of the Income Tax Appeal Board,

[1] 19 Tax A.B.C. 176.

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being of the opinion that the expenditure was one made for the purpose of gaining income from property and thus within the exception found in s. 12(1)(*a*) of *The Income Tax Act* and not within the prohibiting provisions of s. 12(1)(*b*), allowed her appeal.

The facts are not in dispute. No oral evidence was tendered at the hearing of this appeal, the parties relying on the pleadings and the documentary material before the Income Tax Appeal Board.

The expenditure in question was made under the following circumstances. The respondent's former husband was John Alexander Russell, a son of the late Thomas Alexander Russell, a wealthy manufacturer and executive who died testate on December 29, 1940. By his father's last Will and Testament and Codicils thereto, the said son John Alexander Russell became entitled to one-third of the residue, one-half of which was payable at the "period of division", namely the date of his mother's death, and the remaining one-half thereof five years from the "period of division", with certain rights of income therefrom in the meantime. The Will further gave John Alexander Russell certain powers of appointment to his issue if he died before receiving the corpus of his share. His father's Will also provided:

> Provided if he leaves a widow him surviving, he may leave the income from the whole or any part of such share to his widow during any part of the remainder of her lifetime.

John Alexander Russell died on August 8, 1950, prior to the death of Mrs. T. A. Russell who died on September 20, 1953. He left no issue him surviving. By his Will the income from his estate with certain powers of encroachment on capital was left to his widow, the respondent herein. Further by his Will, he referred to his estate as including any property over which he had any power of appointment and including all benefits derived or accruing to him under the Will of his late father.

Following the death of the widow of Thomas Alexander Russell and the re-marriage of the respondent, the trustees of the father's estate were concerned as to the right of respondent to receive further income from that estate, and, acting upon the advice of their solicitors, a motion was

launched before the Supreme Court of Ontario under the provisions of Rule 600 of the Rules of Practice and Procedure, for the advice and direction of the Court on the following questions:

(1) What is the extent of the power of appointment given by the donor, the late Thomas Alexander Russell by the said Will to the late John Alexander Russell in respect of the disposition of income on the share of the said John Alexander Russell? and

(2) Has the said John Alexander Russell as donee of the power properly appointed and executed the same under the terms of his Will?

The motion was heard by Mr. Justice LeBel who held as follows:

(2) This Court doth declare that the power of appointment given to John Alexander Russell of the income from his share of the estate of Thomas Alexander Russell, deceased, under para. 9(e) of the last Will and Testament of Thomas Alexander Russell was validly exercised by the last Will and Testament of the said John Alexander Russell AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

Upon appeals to the Appellate Division of the Supreme Court of Ontario and to the Supreme Court of Canada that decision was upheld.

The party and party costs of the respondent in that litigation were paid out of the estate of Thomas Alexander Russell. In addition, however, the respondent was called upon to pay and did pay her solicitors the sum of $11,974.93 as solicitor-and-client costs. It is the deductibility of that amount that is now questioned.

Before turning to a consideration of the applicable law, it will be convenient to summarize briefly the basic facts, none of which are in dispute. The respondent's right to a portion of the income from the residue of her father-in-law's estate came into existence at the time of her husband's death although like her husband she was not entitled to any benefit from that right until the "period of division", namely upon the death of Mrs. T. A. Russell. Her right did not come into being as a result of the litigation to which I have referred, the Court's decision merely affirming such right. Similarly, her right did not arise from the expenditure of the amount in question; such expenditures were incurred in defending an already existing right, one of her husband's family having disputed her right to benefit in any way from the income of her father-in-law's estate.

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The question is to be determined by a consideration of these facts and of the provisions of paras. (*a*) and (*b*) of s-s. (1) of s. 12 of *The Income Tax Act*, R.S.C. 1952, c. 148 which read as follows:

12. (1) In computing income, no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this part.

Mr. Sheard, counsel for the respondent, on whom the burden lies, submits that the outlay in question falls within the exception in para. (*a*) as one having been made for the purpose of gaining or producing income from property; that it was not a payment on account of capital and therefore is not excluded from deduction by reason of para. (*b*).

Mr. Guthrie, counsel for the Minister, takes the contrary view and submits that the expenditure was a payment on account of capital and is therefore non-deductible. Alternatively, he says that it is not an outlay for the purpose of gaining income from property and consequently is barred by the terms of para. (*a*).

Counsel agreed, and I think rightly so, that if the expenditure were barred by the provisions of para. (*b*) that would end the matter and para. (*a*) need not be considered. (See *Thompson Construction (Chemong) Ltd. v. M. N. R.*[1]).

In my view, the only part of para. (*b*) that would have any application to this case is the phrase "a payment on account of capital", and the question narrows down to this: "Were these legal expenses a payment on account of capital?"

The term "capital" is, of course, not defined in *The Income Tax Act*. Lord Atkinson in *Scottish North American Trust v. Farmer*[2] said that "Capital when used in these statutes, unless the context does not otherwise require, should be construed in its ordinary sense and meaning".

[1] [1957] Ex. C.R. 96 at 101. [2] 5 T.C. 693 at 706.

The answer to the question which I have posed depends upon the nature and quality of the right which the respondent had and in the defence of which the outlay was made. If it was a capital asset I am bound, I think, by the decision of the Supreme Court of Canada in *Dominion Natural Gas Co. Ltd. v. M. N. R.*[3], to find that such outlay was one on account of capital and therefore non-deductible. Further reference to that case will be made later.

Upon first consideration and since Mrs. Evans received only income from her right, the expenditures might seem to have been made not on account of capital but on account of income. That would, I think, have been the case had she in any year found it necessary to lay out money for legal expenses to enforce payment of the quarterly or annual income when the right to receive it was not in question but the trustees had failed to pay it over. Such a case would have been similar to one in which a landlord was required to pay legal expenses in collecting his rent. That, however, was not the case here. What was in dispute was not the *amount* of income to which she was entitled but whether or not she was entitled to anything. It was her right to income which was disputed on the ground that her father-in-law's Will did not confer on her husband the power to appoint the income to her in the circumstances; and even if it had done so the power was not validly exercised. In my opinion, what the respondent had was a life estate or a life interest in the income from a portion of the residue of her father-in-law's estate. That right must be distinguished from the income which flowed therefrom to her as a result of her ownership of the right. While it was an intangible right, I think it would normally be considered a proprietary right—something which the respondent possessed to the exclusion of all others and quite apart from the fact that by the provisions of s. 139(1)(*ag*) the word "property" includes "a right of any kind whatsoever". That right was something capable of evaluation as, for example, by the succession duty officers or by actuaries. It could be sold or pledged. Had that right been purchased, for example, by an investment corporation, the right in its

[3] [1941] S.C.R. 19.

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hands would, I think, have been considered as a capital asset. In my view, it was a capital asset and the source of her income.

Mr. Sheard, counsel for the respondent, contends, however, that even if Mrs. Evans' right is a capital asset, the outlay in question, on the authorities which he cited, should not be found to be one on account of capital. His main point is that the expenditure did not bring into existence or in any way affect the capital asset which was something she had from the moment of her husband's death. It was, he said, an outlay made to preserve something which Mrs. Evans already had and that is undoubtedly so.

The English and Canadian authorities are not in agreement as to the manner in which such outlay should be treated for the purpose of income tax. Mr. Sheard relies mainly on the case of *Southern v. Borax Consolidated Ltd.*[1]. There the taxpayer incurred legal expenses in defending the title to real estate in California owned by one of its subsidiaries but which for income tax purposes was considered to be carrying on the business of the taxpayer. The General Commissioners held that the sum in question was wholly and exclusively laid out for the purpose of the trade. On appeal Lawrence J. held that the decision of the Commissioners was right. He said in part at p. 116:

> In my opinion the principle which is to be deduced from the cases is that when a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but that if no alteration is made of a fixed capital asset by the plaintiff, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the Company.

And at p. 120 he added:

> It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact that it was maintaining the title and not the value of the company's business does not, in my opinion, make it any different.

[1] [1941] 1 K.B. 111.

In the *Borax* case Lawrence J. quoted with approval the statement of Sargant L. J. in *B. W. Noble's* case[1]:

> The object (of the expenditure) was that of preserving the status and the reputation of the Company which the directors felt might be imperilled . . . To avoid that and to preserve the status and dividend earning power of the Company seems to me to be a purpose which is well within the ordinary purposes of the trade . . . of this Company.

Counsel for the respondent also referred to *Morgan v. Tate and Lyle Ltd.*[2]. There the taxpayer had expended large sums of money in a campaign opposing the nationalization of its sugar business. It was held that the sums were deductible as monies spent to preserve the very existence of the company's trade.

Under the Canadian taxing Acts the decisions, with one exception, have been to the contrary. The leading case on this point is that of the Supreme Court of Canada in *Dominion Natural Gas Co. Ltd. v. M. N. R.*[3]. There the taxpayer had expended a large sum of money in successfully defending its right—a franchise from the city of Hamilton to distribute gas. The right of the company to earn income from the franchise was attacked but the expenses were disallowed as being "an outlay on account of capital".

Again in *Siscoe Gold Mines v. M. N. R.*[4], the taxpayer incurred legal expenses in defending its title to certain mining properties. In his judgment the learned President of this Court declined to follow the decision in the *Borax* case and stated at p. 265:

> In my view it is established that legal expenses incurred by a taxpayer in maintaining the title to his property or protecting his income when earned, or in connection with the financing of his business, are not directly related to the earning of his income and are not allowed as deductions in computing the gain or profit to be assessed.

In reaching that conclusion the President followed the principles laid down in the *Dominion Natural Gas* case.

One Canadian case, however, was decided in favour of the taxpayer. I refer to the case of *Hudson's Bay Co. v. M. N. R.*[5]. There the Hudson's Bay Co. incurred legal and other expenses in an action brought by it in the United States against a company—the Hudson's Bay Fur Co.

[1] [1927] 1 K.B. 719.
[2] [1955] A.C. 21.
[3] [1941] S.C.R. 19.
[4] [1945] Ex. C.R. 257.
[5] [1947] Ex. C.R. 130.

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Inc.—for damages and an injunction to restrain it from carrying on business in that or any similar name. The outlay was therefore one incurred for the purpose of protecting its trade name—an asset of great value. It was held that the expenses were deductible. So far as I am aware, that decision has not been followed in any other case.

In the case of *Kellogg Co. of Canada Ltd. v. M. N. R.*[1], the taxpayer had paid certain legal fees in an action brought against it for damages because of its user of a registered trade mark of a competitor. The late President of this Court distinguished that case from the *Dominion Natural Gas* case by pointing out that there the expenses were not incurred "in the process of earning the income" but rather for the preservation of "an asset or advantage".

In the *Kellogg* case, however, he was of the opinion that the taxpayer had incurred a business difficulty which it had to get rid of if possible in order to continue the sales of its products as it had in the past. The decision was upheld in the Supreme Court of Canada[2], but on other grounds, Duff C. J. C. stating:

> The right upon which the respondent relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them.

While that decision is not directly in point, it suggests strongly that had the expenditure been made in defending a property right its deduction would have been disallowed as being an outlay on account of capital.

While the decisions in the *Dominion Natural Gas* and the *Siscoe Gold Mines* cases were referable to the provisions of s. 6 of *The Income War Tax Act,* I am of the opinion that they are equally applicable to the section of *The Income Tax Act* now under consideration so far as the facts of this case are concerned.

Being of the opinion as stated above, that the right which Mrs. Evans had was a capital asset and considering that the principles laid down in the *Dominion Natural Gas* case are binding upon me, I have come to the conclusion that the outlay here in question was one made for the

[1] [1942] Ex. C.R. 33. [2] [1943] S.C.R. 58.

purpose of protecting an existing asset from extinction. The expenditure was not of a recurring nature as the litigation settled for all time the respondent's right to a share in the income. Consequently, it was an outlay on account of capital and is barred from deduction by the provisions of s. 12(1)(*b*) of the Act.

In view of this finding, it becomes unnecessary to consider whether or not the payment falls within para. (*a*) of that subsection.

In the result, the appeal of the Minister will be allowed, the decision of the Income Tax Appeal Board set aside and the re-assessment made upon the respondent affirmed, the whole with costs.

Judgment accordingly.

1958
Nov. 24
Dec. 12

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF,

AND

DANTE ALBERT SARACINI and ALBERT SARACINI carrying on business under the style and name of SARACINI CONSTRUCTION COMPANY ..... DEFENDANTS.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, s. 30(1) and s. 31(1)(d)—Goods manufactured for use by defendants solely and not for sale to others attract sales tax.

Defendants carry on the business of building and selling houses. In the course of this business they produced or manufactured kitchen cabinets for the purpose of installing them in the houses then being constructed by them and which were later sold. The cabinets were not manufactured for sale to other buyers. They were constructed in a warehouse apart from and some distance from the site of the house construction because it was found more satisfactory to do so and install them in the houses as a separate unit rather than build them into and as a permanent part of the house being erected. The cabinets were made according to the precise specifications and measurements required by each house.

The Crown contends that such manufacture falls within the provisions of s. 31(1)(d) of the *Excise Tax Act*, R.S.C. 1952, c. 100 and brings this action to recover from defendants the amount of tax so imposed together with penalties.

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Held: That the kitchen cabinets were manufactured by the defendants at their warehouse where they were substantially completed, all that remained to be done was to install and repaint them after certain adjustments as to size were made. As such they attracted sales tax by virtue of the provisions of the *Excise Tax Act*, R.S.C. 1952, c. 100, s. 30(1) and also of the *Old Age Security Act*, R.S.C. 1952, c. 200, s. 10(1) and defendants do not escape tax because they were manufactured solely for their own use. *The King v. Dominion Bridge Co. Ltd.* [1940] S.C.R. 487, followed.

INFORMATION by the Crown to recover sales tax and penalties from defendants.

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

R. W. McKimm for plaintiff.

J. L. Lewtas for defendants.

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

CAMERON J. now (December 12, 1958) delivered the following judgment:

By this Information the Crown seeks to recover from the defendants the sum of $1,052.48, together with certain penalties. The defendants carry on a construction business at Toronto under the firm name of Saracini Construction Co., the greater part of its operations being that of building and selling houses.

The Information alleges that from January 1, 1956, to October 31, 1956, the defendants in the course of their business produced or manufactured at 9 Advance Road, Toronto, 188 kitchen cabinets, each consisting of a floor unit and a wall unit, for use by them in houses which they had constructed or were in the course of constructing. This fact is admitted.

The Information further alleges that by reason of such production or manufacture, the defendants became liable for consumption or sales tax under the provisions of the *Excise Tax Act*, R.S.C. 1952, c. 100 as amended, and for the tax prescribed by s. 10(1) of the *Old Age Security Act*, R.S.C. 1952, c. 200. The kitchen cabinets were manufactured by the defendants, not for sale as kitchen cabinets, but for the purpose of installing them in the houses then being constructed by them and which were later sold.

Pursuant to the provisions of s. 31(1) of the *Excise Tax Act,* the Minister of National Revenue on August 8, 1957, by Exhibit 1 determined that the value for tax of each kitchen unit was $55.77, and that determination of the value is not questioned. The amount claimed is made up of $1,048.48, representing the consumption or sales tax (including the tax imposed by the *Old Age Security Act*), and payment of license fees of $4 pursuant to s. 34(1) of the *Excise Tax Act.* Again, these amounts as such, are not in dispute, the only question being as to the defendant's liability to pay them.

The facts are simple and uncontradicted. For some years prior to the period in question, the defendants in constructing their houses were accustomed to having their own carpenters (or the firms to which they had sublet the carpentry work) build the kitchen cabinets piece by piece in the proper place in the kitchen of the house under construction, where it remained permanently. Constructed *in situ,* and in that fashion, the cabinet was built as part of the individual house and admittedly never was "goods" as that word is used in the *Excise Tax Act.*

It was found, however, that when so installed during the course of house construction, the results were not quite satisfactory. The walls on which the cabinet was attached were green walls and later, when the house was in use and the materials had dried, the installation was found to be unsatisfactory. Accordingly, it was decided to carry on the major part of the construction at 9 Advance Road—a fairly large building generally used for the storage of equipment, but part of which in the building season would be available for such work. The building was then owned by the defendants and may be seen in the photographs Exhibits 2 and 3. It was situated about three miles from the area where the defendants were engaged in building houses—a housing development of about 125 residences. It was found that better results were obtained both as to quantity and quality by producing the cabinets in this fashion. As I recall the evidence, not all the required cabinets were made at the warehouse, some still being made as before, and piece by piece in the house under construction.

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Under the new method, the defendants' carpenter would go to the several houses under construction and take careful measurements of the spaces into which each cabinet was to be installed. Then at the warehouse, where there was a staff of about six or eight carpenters doing this type of work, the cabinets would be made according to the precise specifications which had been ascertained. In general, the width of each was the same, but the height and depth varied according to the space available.

It is unnecessary to describe the cabinet in great detail. It consisted of two parts, the floor unit and an upper wall unit. Lumber was used except for those parts which were not exposed, these parts being masonite. The materials and tools were the same as those which had been used when the cabinet was constructed *in situ*. The units were practically completed at the warehouse. The sliding doors, shelves and drawers were also made at the warehouse and taken separately to the house where the cabinet was to be installed. Prior to removal to the house, the cabinet and its parts received one coat of paint.

The evidence is that when taken to the house for installation, the following steps were taken. The cabinets were placed in the proper location, any necessary trimming being done to ensure a correct fit. Moldings were installed between the cabinets and the ceilings and walls to close up any gaps, then the whole was repainted and drawers and doors would be placed in position. A laminated counter-top prepared separately at the warehouse was also installed on the top of the base unit, at the site.

The cabinets as such were not, of course, manufactured for sale, but for use by the defendants in the construction of their houses. For the plaintiff it is submitted that such manufacture falls within the provisions of s. 31(1)(*d*) of the *Excise Tax Act*. I think it advisable to quote not only that subsection, but also the general section, namely, s. 30.

30. (1) There shall be imposed, levied and collected a consumption or sales tax of 8 per cent on the sale price of all goods

(*a*) produced or manfactured in Canada.

31. (1) Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

(*d*) such goods are for use by the manufacturer or producer and not for sale;

The Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

For the defendants it is submitted that there is no material difference between the construction of the cabinets *in situ* as originally done and the construction carried on at the warehouse; that each cabinet was made essentially to fit a particular house and was substantially incomplete until installed; that in each case the cabinets were intended to be and did become a part of the house and were consequently never "goods" within the meaning of the Act.

Now in order to attract this tax it is clear that the goods need not be sold. If they are "goods" and consumed or used by the manufacturer, they are liable to the tax, unless especially exempted. Reference may be made to the case of *Bank of Nova Scotia v. The King*,[1] a case decided mainly under a section of *The Special War Revenue Act* which is similar to s. 31(1)(*d*) of the *Excise Tax Act*.

Counsel for the plaintiff relied on the case of *The King v. Fraser Companies, Ltd.*[2] a case also decided on the provisions of s. 87(*d*) of *The Special War Revenue Act*. The headnote reads in part:

Respondent was a manufacturer of lumber for sale, and consumed a portion in construction and building operations, carried on over a period of years, the lumber so consumed having been taken from stock in its yards, produced and manufactured in the ordinary course of its business of manufacturing for sale, and not produced or manufactured especially for the purpose for which it was used.

Held (Cannon J. dissenting): Respondent was liable, under the *Special War Revenue Act*, R.S.C., 1927, c. 179, ss. 86, 87, for sales tax on the lumber so consumed. The intention of the Act was to levy the tax on the sale price of all goods produced or manufactured in Canada, whether they be sold by the manufacturer or consumed by himself for his own purposes. Respondent could not avoid liability by invoking the wording of s. 87(*d*) of the Act.

In that case Smith J., in delivering the judgment for the majority of the Court, said at p. 493:

The view taken in the court below would result in the introduction of an exception to the general rule that all goods produced or manufactured are to pay a tax, and would amount to a discrimination in favour of a particular consumer. As an example, it is not unusual for a manufacturer engaged in the production and manufacture of lumber for sale to engage at the same time in the business of a building contractor. He manufactures his lumber for sale, and, as a general rule,

[1] [1930] S.C.R. 174.
[2] [1931] S.C.R. 490.

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would not manufacture any specific lumber for use in connection with his building contracts, but would simply take lumber for these purposes from the general stock manufactured for sale, and might thus, under the view taken in the court below, escape taxation on all lumber thus diverted from the general stock manufactured for sale.

I am of opinion that, construing the provisions of the Act as a whole, the respondent is liable for taxes on the lumber consumed by him, as claimed.

That case is important as expressing the view that the general rule is that all goods produced or manufactured are to pay the tax, but that rule is now modified by the excepting provisions of s. 32 of the *Excise Tax Act* and the schedules thereto. The *Fraser* case, however, is to some extent distinguishable on its facts from the instant case in that there the taxpayer manufactured all its stock of lumber for sale and merely diverted a portion thereof (not specially manufactured for its building operation) for the purpose of constructing houses. That was not the case here as the defendants manufactured nothing for sale. The *Fraser* case was referred to and on this point followed in *The King v. Dominion Bridge Co. Ltd.*,[1] a case also decided under the provisions of s. 87(*d*) of *The Special War Revenue Act*. The facts are disclosed in the headnote which reads:

By certain contracts entered into between the suppliant and His Majesty the King, represented by the Minister of Public Works for the province of Quebec, the suppliant undertook to erect the structural steel superstructure of three bridges in that province, in consideration of the sums set out in each contract. The suppliant erected the three bridges and was paid according to the contracts. In respect of the materials incorporated in the bridges, suppliant was assessed for sales tax, alleged due under the terms of the Special War Revenue Act, R.S.C., 1927, c. 17 and amendments. It paid under protest a proportion of the amounts so assessed to the Commissioner of Excise. The suppliant then claimed by way of a petition of right before the Exchequer Court of Canada a return of the moneys so paid on the grounds that no tax was payable by it in respect of the materials supplied in virtue of the contracts or, alternatively, that, if the materials were taxable, suppliant was entitled to a refund by reason of the fact that the materials were sold, if sold at all, to His Majesty the King in the right of the province of Quebec.

Held, that the above transaction between the suppliant and the Crown in the right of the province of Quebec must, by force of section 87(*d*) of the Special War Revenue Act, be deemed to be a sale and that the suppliant was rightly chargeable accordingly for a sales tax.

(The King v. Fraser Companies, [1931] S.C.R. 490 applied):

[1] [1940] S.C.R. 487:

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The Chief Justice of Canada, in delivering the judgment of the Court, after referring to that part of the judgment of Smith J. in the *Fraser* Case which I have cited, said at p. 489:

> This passage in the reasons of my brother Smith was not part of the ratio decidendi but it was the considered opinion of the four judges who constituted the majority of the Court. They said that, if a building contractor is also a manufacturer of building material, lumber or brick for example, and uses, for the purpose of executing a building contract, brick or lumber produced by himself, that is a case within section 87(*d*) and the transaction is, by force of that section, deemed to be a sale and he is chargeable accordingly. In the present case the members of the bridge produced were produced specially for the purposes of the contract.
>
> I have fully considered the able argument addressed to us by Mr. Forsyth and my conclusion is that, when sections 86 and 87 are read together, this transaction falls within the category of cases described by section 87(*d*), and that the view expressed by my brother Smith in Fraser's case is the view which ought to govern us in the disposition of this appeal. I think, in this respect, the practice of the Department is right.

After careful consideration of that case, I am unable to distinguish it from the one now before me. There as here the bridge company was engaged in building contracts, in building bridges which became immoveables when completed, as were the houses constructed by the defendants. There the members of the bridge produced were produced specially for the purposes of the contract and I think would normally be quite unsuitable for any other purpose, certainly not without adjustment. That is the precise situation here. The decision in that case must have been based on a finding that the component parts of the bridge were in fact "goods" within the meaning of the Act.

In the present case it is admitted in the pleadings that the defendants manufactured or produced kitchen cabinet units at 9 Advance Road for use in houses which they had or were constructing. While that may be construed as an admission that they manufactured "goods" (which goods are not exempted from tax by any of the provisions of the Act), I prefer to rest my finding on the evidence adduced. That evidence makes it abundantly clear that the units were manufactured by the defendants at their warehouse, that they were substantially completed there and would

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no doubt be properly called "kitchen cabinets" at that stage. All that remained to be done was to suitably install and repaint them after completing the necessary small adjustments as to size.

My conclusion, therefore, must be that the plaintiff is entitled to succeed. I should add here that no question is raised as to the good faith of the defendants, this case being to some extent a test case.

Accordingly, there will be judgment for the plaintiff for $1,052.48, together with such penalties for non-payment as are provided for in ss. (4) of s. 48 of the *Excise Tax Act*. The plaintiff is also entitled to costs after taxation.

Judgment accordingly.

BETWEEN:

BEDFORD OVERSEAS FREIGHTERS LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act 1948, S. of C. 1948 c. 52, s. 12(1)(a)—"An outlay or expense made for the purpose of gaining or producing income from a property or a business of the taxpayer"—Money paid to obtain cancellation of a charter party to escape the incurrence of losses by a company engaged solely in business of chartering ships for hire held properly deductible from income—Appeal allowed.

Appellant is an incorporated company whose only business is that of chartering ships for hire. One vessel owned by it, namely, the *Bedford Prince* was chartered to Alpina Steamship Co. Inc. for a minimum period of ten months and a maximum period of twelve months from the date of delivery about August 16, 1951, at Tel Aviv, Israel. After loading in Turkish ports the *Bedford Prince* set out for Baltimore, Maryland. Due to the necessity of urgent major repairs to the ship causing delay with loss of use and damages for loss of freight and other matters, the appellant arranged with

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the Alpina Company for annulment of the charter party on certain conditions and in 1952 paid to Alpina Company the sum of $130,203.44 as covenanted in the agreement of annulment. This sum was treated by appellant as an operating expenditure chargeable against revenue and was claimed as such by appellant in computing its income tax for 1952. This claim was disallowed by the Minister of National Revenue and an appeal from such disallowance to the Income Tax Appeal Board was dismissed. Appellant now appeals to this Court.

Held: That the sum paid by appellant for cancellation of the charter party was one made "for the purpose of gaining or producing income from the property or a business of the taxpayer" within s. 12(1)(*a*) of the *Income Tax Act*.

2. That a forfeit payment of such nature is a normal risk integrated with appellant's regular marine operations.

3. That the amount paid by appellant to Alpina Steamship Co. is properly deductible from appellant's income tax for 1952 and the appeal is allowed.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Halifax.

H. B. Rhude for appellant.

A. G. Cooper, Q.C., and *W. R. Latimer* for respondent.

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

DUMOULIN J. now (December 22, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1] dismissing appellant's appeal against the income tax assessment for the year 1952.

Those facts, from which the instant litigation arose, are accurately set out in a well prepared memorandum, including also the complete text of the argument submitted to the Court by appellant's counsel. I may, therefore, closely adhere to that recital insofar, of course, as it does not overstep the line of uncontested points.

[1] 17 Tax A.B.C. 452.

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Bedford Overseas Freighters Limited (hereinafter called the "Bedford Company") obtained corporate powers under the laws of Nova Scotia in 1950. Its objects, duly stated in the Memorandum of Association (ex. 1), comprise those of owning and chartering ships for hire. With this end in view, the Bedford Company, shortly after its formation, acquired three cargo vessels, of which, the *Bedford Prince*, constitutes the subject-matter of this case. These ships, as alleged, "were owned solely for the purpose of being chartered to others and all revenues which the Bedford Company has ever received have been in the form of charter hire".

From 1950 to 1955 inclusive, Bedford Company "entered into fifty-six separate charters in respect of these vessels", and it is accurate to hold that chartering ships for hire was the only business carried on by the Company.

"On April 18th, 1951, the Bedford Company chartered the *Bedford Prince* to Alpina Steamship Co. Inc. for a minimum period of ten months and a maximum period of twelve months from the date of delivery", which eventually occurred at Tel Aviv, Israel, about August 16, 1951 (ex. 4). More accurately this contract was implemented through Petmar Agencies Inc., as agents for the appellant.

This ship, after loading in Turkish ports, weighed anchor for Baltimore, Md. From then on, some quite untoward happenings set in. The boilers operated inefficiently, making a refuelling stop at Bizerta, Tunisia, imperative, and this predicament worsened to such an extent that "at one point the engines did not develop sufficient power to give the vessel steerage-way".

Beyond Gibraltar, the *Bedford Prince* had to put into Horta for temporary repairs, which failed to remedy the crippling disability. It then became apparent that extensive reconditioning was required, pending which the vessel simply could not continue in service. It is also mentioned, and quite plausible, that continual complaints about the ship's unseaworthiness were received from her charterers, Alpina Steamship Company.

Since major and protracted repairs had become unescapable, the owners saw only one way out of what otherwise would prove to be a most costly complication (claims for loss of use of the ship; damages for loss of freight; off-hire, etc.) and that consisted in obtaining a cancellation of the charter-party.

Negotiations to this effect were initiated, culminating in the agreement of November 23, 1951, (ex. 7), whereby the Bedford Company and Alpina Steamship Co. Inc. annulled the charter-party on the following conditions, reproduced from page 4 of appellant's précis:

(*a*) That the Charter Party be terminated and the ship redelivered to the Bedford Company when its cargo was discharged at Baltimore instead of at the normal termination of the Charter Party; and

(*b*) That the Bedford Company pay to Alpina Steamship Co. Inc. the sum of $130,000.00 (United States currency) on redelivery of the ship to it in Baltimore.

The pertinent indenture, exhibit 7, also provided for the contingency of total loss before redelivery to owners, one of the two contracting parties being Petmar Agencies, Inc. "as Agents for Owners".

Redelivery of the *Bedford Prince* took place on or about February 16, 1952, and the Bedford Company duly paid the covenanted sum to Alpina Steamship Co. Inc. by a cheque (ex. 10) for $130,203.44, Canadian currency. Thence originates the difficulty. Figuring its income for the taxation year 1952, appellant treated this payment of $130,203.44 as an operating expenditure chargeable against revenue. This assumption met with departmental disallowance, on the grounds that such an outlay was not incurred for the purpose of gaining or producing income, within the purview of s. 12 of the Act, para. (a), ss. (1), but constituted a capital expense within the meaning of para. (*b*), ss. (1) of said s. 12.

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Among several reasons in support of its appeal, the Bedford Company submits that (*vide* Notice of Appeal, p. 6) this payment

> 27 . . .
>
> (*a*) was made in the ordinary course of business of the Appellant;
>
> (*b*) is properly deductible from income by the ordinary principle of commercial trading and accepted business and accounting practice;
>
> (*c*) was an outlay or expense made or incurred by the Appellant for the purpose of gaining or producing income from its business;
>
> * * *
>
> 28 . . . was made to effect a saving to the Appellant's working expense, to avoid "off-hire" claims and to earn income.

In para. 20, it is mentioned that from May 31, 1952, until August of that year, ". . . the Vessel carried out a number of profitable voyage charters". This fact, maturing many months after the cancellation could have no direct bearing on it and, I presume, serves as a little "extra trimming".

The issue, as joined, hinges on whether this indemnity of $130,203.44 (Canadian) was, or was not, really incidental to appellant's regular line of business.

An approach to this problem is concisely formulated in re: *The Royal Trust Co. v. The Minister of National Revenue*[1], wherein Thorson P. applying anew those dicta set out in *Imperial Oil Limited v. The Minister of National Revenue*[2], wrote that:

> . . . it may be stated categorically that in a case under *The Income Tax Act* the first matter to be determined in deciding whether an outlay or expense is outside the prohibition of section 12(1)(*a*) of the Act is whether it was made or incurred by the taxpayer in accordance with the ordinary principles of commercial trading or well accepted principles of business practice. If it was not, that is the end of the matter. But if it was, then the outlay or expense is properly deductible unless it falls outside the expressed exception of section 12(1)(*a*) and, therefore, within its prohibition.

[1] (1957) 11 D.T.C. 1055 at 1060. [2] [1947] Ex. C.R. 527 at 531.

The pronouncement above is moreover quite in line with those of Lord Halsbury L. C. and Earl Loreburn, of several decades past. In *Gresham Life Assurance Society v. Styles*[1] the then Lord Chancellor spoke thus:

> Profits and gains must be ascertained on ordinary principles of commercial trading.

And in *Usher's Wiltshire Brewery, Limited v. Bruce*[2], Earl Loreburn approved the statement that:

> profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it.

Evidence on this score was adduced by Messrs. George M. Murray, a Chartered Accountant, connected with the Halifax firm of Nightingale, Hayman & Co., and James R. McGrath, a shipbroker from Richwood, New Jersey.

Appellant's fiscal year ends on August 31; Mr. Murray audited the Company's books for 1952. Informed by his clients, Bedford Freighters Ltd., that a forfeit of $130,203.44 (Canadian) had been paid to excuse the S. S. *Bedford Prince* from its charter-party, due to her defective condition and with the expectation, after repairs, of entering upon still more remunerative business, Murray mentally deducted this outlay from the Company's Profit and Loss Statement, p. 5 of ex. 13, where the extension appears as $134,909.94, the increased total of no bearing on the issue.

James R. McGrath describes his calling, shipbroker, as a brokerage agent engaged in procuring cargoes or charter-parties for ship-owners, acting as intermediary between lessors and prospective charterers or lessees. Since 1948, he belongs to a partnership known as Meridian Marine Company. "On an average," testifies McGrath, "my company concludes about one hundred charter parties per year, with a cancellation percentage of approximately two per centum".

This witness mentions four recent cancellations of charter-parties, of which the latest concerned the SS. *Delphi,* subsituted to S.S. *Roxiana.* He points out that should a ship prove unseaworthy or otherwise unfit for some stipulated voyage and conditions, "such as becoming too slow or consuming excessive quantities of fuel, then her charterers would doubtless apply for commensurate relief, possibly extending to formal cancellation".

[1] [1892] A.C. 309 at 316. [2] [1915] A.C. 433 at 444.

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Accordingly, Mr. McGrath views this actual annulment of the charter-party in the light of "a proper and admissible business practice".

It should be added that inferentially I could not see my way clear to any other interpretation. Even one untrained to the complexities of scientific bookkeeping knows that any profit, accruing from a property lease, constitutes an operating gain automatically written into the revenue column. Correlatively all losses from the same source are chargeable against income. Credits and debits of like origin correspondingly offset each other in parallel entries.

I therefore hold this amount was correctly deducted from revenue, a subtraction in no wise inconsistent with ordinary principles of commercial trading and well accepted rules of accounting practice.

Section 12(1)(a) of the 1948, *Income Tax Act* (S.C. c. 52) reads thus:

> 12. (1) In computing income, no deduction shall be made in respect of
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

The taxing enactment being such, we must now seek to ascertain whether or not this compensatory "outlay or expense . . . was incurred by the taxpayer" for those purposes foreseen by statute as constituting a "saving" exception. Respondent's counsel relied on a cross-examination of witnesses, that failed to disprove any material disclosure, and upon his construction of the law, about which, henceforth, I need be solely concerned. Before so doing, however, I would briefly restate the matter in closer connexity to its second stage, namely as an outlay made within the statutory exception.

Confronted with the financially unfathomable predicament of footing damage claims, consequent upon the lease of an unseaworthy vessel, Bedford Overseas Freighters Limited preferred, and one might think advisedly so, to cancel it through payment—or loss—of a large sum, $130,203.44. Had the charter-party run out its normal course, no doubt subsists that all net receipts therefrom would be profits taxable as such. But instead of profits a heavy expenditure ensued, in order to curtail more dire

results. Then an even measure of appreciation must obtain: since gains are fit subject-matter for taxation, losses also should be deductible from a taxpayer's yearly income. Such is, I believe, the view-point of the law. References to a few authoritative decisions will focus the issue in a clearer light.

Port Elizabeth Electric Tramway Ltd., a South African company, had to pay compensation to the widow of a motorman accidentally killed. The company likewise incurred litigation costs which it sought to deduct. On appeal, from the Commissioner's adverse finding, to the Cape Provincial Division of the Supreme Court[1], Watermeyer A. J. P. partly reversing the decision, said, at p. 16:

> Income is produced by the performance of a series of acts, and attendant upon them are expenses. Such expenses are deductible expenses, provided they are so closely linked to such acts as to be regarded as part of the cost of performing them.

And at p. 17:

> All expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are *bona fide* incurred for the more efficient performance of such operation provided they are so closely connected with it that they may be regarded as part of the cost of performing it.

Closer still to our purpose is the exhaustive review in re: *Imperial Oil Limited v. Minister of National Revenue*[2]. In that case, the Court allowed appellant a deduction of $526,995.35, amount paid by it in settlement of damages arising out of a collision at sea between one of its oil tankers, the motorship *Reginalite*, and the steamship *Craster Hall*, owned by United States Steel Products Company.

Thorson P. held that:

> if a particular disbursement or expense is not within the express terms of the excluding provisions of section 6(*a*), its deduction ought to be allowed if such deduction would otherwise be in accordance with the ordinary principles of commercial trading or well accepted principles of business and accounting practice.

For all practical ends of this litigation, should any notional distinction differentiate a collision at sea from a disability at sea?

[1] [1935] 8 S.A. Tax Cases 13. [2] [1947] Ex. C.R. 527.

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The fortuitous occurrence of a deficit instead of a profit leaves the legal climate unaltered; to this effect, I will again quote two excerpts from the President's speech in the lawsuit just mentioned, at pp. 543 and 545.

Page 543:

> . . . while the section [6(*a*)] by implication prescribes that the expenditure should be made for the purpose of earning the income it is not a condition of its deductibility that it should actually earn any income. The view that an item of expenditure is not deductible unless it can be shown that it earned some income is quite erroneous. It is never necessary to show a causal connection between an expenditure and a receipt. An item of expenditure may properly be deductible even if it is not productive of any income at all and even if it results in a loss: *Commissioners of Inland Revenue v. The Falkirk Iron Co. Ltd.* ([1933] 17 T.C. 625).

And at *p. 545:*

> These are the disbursements or expenses referred to in section 6(*a*) [-(section 12(1)(*a*) of 1948 S.C. c. 52),-] namely, those that are laid out or expended as part of the operations, transactions or services by which the taxpayer earned the income. They are properly, therefore, described as disbursements or expenses laid out or expended as part of the process of earning the income. This means that the deductibility of a particular item of expenditure is not to be determined by isolating it. It must be looked at in the light of its connection with the operation, transaction or service in respect of which it was made so that it may be decided whether it was made not only in the course of earning the income but as part of the process of doing so.

A renewed application of this line of thought was made in *The Royal Trust Company v. Minister of National Revenue*[1] whereby the appellant firm successfully claimed as a deductible expense its practice of paying social club dues and initiation fees for executives and senior personnel.

At the argument, I gathered the impression that respondent's counsel had some doubts on the score of reconciling the transaction at bar with the prohibitory language of s. 12(1)(*a*). His submissions in the matter, albeit not lacking in originality, struck me as rather odd withal. They appear *in extenso* on pp. 3 and 4 of a memorandum on behalf of respondent and apply in two other cognate cases, hence the plural form. In brief, it is contended that:

> (*c*) the ships formed part of the fixed capital of the Appellants;
>
> (*d*) . . . the fixed capital of the Appellants as represented by the ships was encumbered by these Charter-parties;
>
> * * *

[1] (1957) 11 D.T.C. 1055.

(*f*) the Appellants *voluntarily* chose to bring the charterparties to an end before the expiration of their terms.

* * *

7. The effect of doing so was that the Appellants acquired or reacquired their fixed assets, namely, the ships.

8. It is clear that money laid out to acquire fixed assets is a capital outlay. For example, money paid in the first instance to acquire ships, or a building, or any other fixed asset, is without question a capital outlay. . . .

A conclusion follows which would be unassailable, if only the premises had painted a different picture. I quote:

It is submitted that money paid to reacquire fixed assets *or* to regain assets parted with can be in no different category. The ships were fixed assets when they were first acquired; they retained their character of fixed assets; in effect, an interest in them was sold by the charterparties . . . when that interest is reacquired the money spent in the reacquisition is a capital outlay.

So circuitous a reasoning seems to lead up a blind alley; at all events it fails to smooth an apparently hoped-for access to the haven of ss. (1)(*b*) of s. 12, which I need not reproduce.

Suffice it to point out, if needs must, that Bedford Overseas Freighters Limited, upon leasing the *Bedford Prince* to Alpina Steamship Co., never parted with their ownership but merely with the temporary management and use of this steamer. How then could appellants reacquire an asset which at all material times remained their undoubted property and, moreover, who would then be deeding an acquisition title to whom?

The Court can find no distinguishing factor between this case and those copiously referred to *supra*.

A practically unescapable cancellation of the charterparty necessitated by the urgency of major repairs was obtained and paid for, at a price of $130,203.44, within the ambit of the permissive clause in s. 12(1)(*a*), namely "for the purpose of gaining or producing income from property or a business of the taxpayer."

A forfeit payment of this nature is a normal risk integrated with appellants' regular marine operations.

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For the reasons given, the amount of $130,203.44 (Canadian currency) is properly deductible from appellant's income for 1952. This sum was incorrectly added to the assessment which should be amended accordingly. The appeal must, therefore, be allowed with costs.

Judgment accordingly.

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BETWEEN:

HALIFAX OVERSEAS FREIGHTERS, LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act 1948, S. of C. 1948, c. 52, s. 12(1)(a)—"An outlay or expense ... made ... for the purpose of gaining or producing income from property or a business of the taxpayer"—Money paid to obtain cancellation of charter-parties in order to enter into new lucrative ones is properly deductible from income—Appeal allowed.

Appellant, engaged in the business of chartering ships for hire, entered into agreements with charterers covering some of its ships. By paying to the charterers a certain sum of money appellant procured cancellation of the charter-parties in order that appellant might enter into new charter-parties with other charterers at greatly enhanced prices per ton with consequent greater profits to appellant. Appellant deducted the sum paid to the original charterers from its income for 1952. This deduction was disallowed by the Minister of National Revenue and an appeal from that decision to the Income Tax Appeal Board was dismissed. Appellant now appeals to this Court.

Held: That the sum paid for cancellation of the charter-parties was "for the purpose of gaining or producing income from the property or a business of the taxpayer" within s. 12(1)(*a*) of the *Income Tax Act*.

2. That appellant in taking advantage of the possibility of buying its way to greater profits acted within the scope of ordinary business activities and the amount paid by it to obtain cancellation of the charter-parties is properly deductible from its income for 1952.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Halifax.

H. B. Rhude for appellant.

A. G. Cooper, Q.C. and *W. R. Latimer* for respondent.

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

DUMOULIN J. now (December 22, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1] dismissing an appeal against the income tax assesment of appellant for taxation year 1952.

Before proceeding further, I might point out a close similarity between this and two other cases, namely those of *Falaise Steamship Co. Ltd.* (*post* page 86), and *Bedford Overseas Freighters Ltd.* (*ante* page 71), the latter factually distinguishable from this instant one insofar as the outlay incurred reduced or stemmed a loss instead of enhancing profits.

The relevant data may be summarized as hereunder.

Halifax Overseas Freighters Limited, whose President is also that of Falaise Steamship Co. and of Bedford Freighters Ltd., obtained corporate existence in 1947, under the provincial laws of Nova Scotia, with Head Office at Halifax.

Among several objects enumerated in its Memorandum of Association (ex. 1), the company is empowered to pursue those of owning and chartering ships for hire (p. 1, para. 2(*a*)).

In or about 1950, the Halifax company acquired ten cargo vessels, three of which respectively received the new appellations of *Sycamore Hill, Pine Hill* and *Maple Hill.*

These three ships, and the seven others, were put to one single use, being chartered to various maritime firms during the years 1950 to 1956 inclusive.

It is not seriously contested that charter hire, particularly, of course, during 1952, constituted appellant's sole source of revenue (cf. Reply to Notice of Appeal, para. 2); nor does any doubt subsist regarding its ownership of the vessels during all material time as, for instance, a perusal of exhibit 5 will show (ex. 5: an agreement instituting

[1] 17 Tax A.B.C. 422.

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The Counties Ship Management Co. Ltd., of London, England, managers of the vessels; especially clause 2 and clauses 5 to 8 inclusive).

On May 9, 1951, Counties Ship Management Company, pursuant to its agency undertaking, and Chartering and General Agency Inc. "entered into a Time Charter by which the appellant [as principal] agreed to let and General Agency agreed to hire the 'SYCAMORE HILL' for a period of twelve months at a charter hire of Four Dollars and Twenty Five Cents ($4.25) United States Funds per Dead Weight Ton per month" (cf. Notice of Appeal, para. 5, and ex. 7). Identical arrangements were concluded concerning the S.S. *Pine Hill* (ex. 8) and S.S. *Maple Hill* (ex. 9). Paragraph 9 of the Notice of Appeal mentions that this sum of $4.25, U.S. funds, for 1952, "equalled approximately Thirty Shillings (30/-d) Sterling".

Furthermore, s. 10 particularly emphasizes:

> *THAT* following the execution of the Charter Parties the freight market rose to such a degree that, had the vessels not been already chartered, the Appellant could have entered into charters in respect of each of the Vessels which would have provided for a much greater charter hire per Dead Weight Ton than was provided for in the Charter Parties.

As yet the three ships had not been delivered to their charterers, a factor which facilitated an attempt on the Halifax company's part to avail itself of this sudden upsurge in rates.

Negotiations to this effect turned out successfully; on January 1, 1952, the charterers released the ship-owners from those several charter-parties then in force, against a forfeit indemnity of $40,000 in respect of each contract (U.S. currency), a total of $120,750.03, when computed in Canadian Funds (cf. exhibits 7, 8, 9, cancellation agreement inscribed diagonally across the indenture, and also exhibits 10, 12, 13). On January 19, 1952, the foregoing obligations were duly implemented through payment of $120,750.03, Canadian money, to the erstwhile lessees (exhibits 10, 12, 13).

From now on, the recital of facts remaining reaches the evidential stage, but before reverting to it, I will outline the moot question under consideration, as read in para. 16 of the Notice of Appeal:

> 16. . . . in calculating its income for the taxation year 1952 the Appellant deducted from its gross revenues the said payment to General Agency of $120,750.03.

Such a view of the transaction met with successive disallowances from the Minister and the Income Tax Appeal Board.

Before this Court, the respondent counters that the amount of $120,750.03, "was not an outlay or expense made or incurred . . . for the purpose of gaining or producing income . . . (para. 11);" or "In the alternative . . . the said amount of $120,750.03, if paid, was an outlay of capital or a payment on account of capital (para. 12)."

Mr. Harry Isaac Mathers, the first of three witnesses called by appellant, is, as mentioned above, President of Halifax Overseas Ltd. Mr. Mathers succinctly enumerates his firm's maritime interests and shipping ventures, stressing its constant practice of resorting to the co-operation of specialized managers or shipbrokers in England. He files, with requisite comments, a number of documentary exhibits, explains the triple cancellation of former charter-parties, dated January 1, 1952, and the attending payments.

This witness goes on to say that from January 1, 1952, simultaneously with the sundering of contractual ties, several other time charters were concluded along the lines hereafter:

(*a*) The Sycamore Hill (or alternatively S.S. Poplar Hill) was chartered onto Alfred Holt and Co. for a price of fifty-seven shillings and six pence (57/6d) per Dead Weight Ton a month (exhibits 14, 15), instead of thirty shillings (30/-d) as formerly.

Mr. Mathers, figuring in terms of national currency, compares this latter rental, equivalent to $80,000 a month, with the preceding one of $42,000; a $38,000 monthly rise in receipts.

(*b*) A subsequent or third charter party, dated February 22, 1952, covering S.S. Sycamore Hill (ex. 15), at a practically doubled price.

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(c) The Pine Hill, on February 21, was let to Polish Ocean Lines, for a nine months' period, at a monthly hire of forty shillings (40/-d) (ex. 16).

In dollar terms, specifies the witness, this means $60,000 a month compared with $45,000, an additional gross profit of $135,000, spread over nine months.

(d) The chartering of S.S. Maple Hill, January 17, 1952, to undertake one voyage from some European port to Hong Kong at fifty-seven shillings and six pence (57/6d) monthly per ton, or $80,000 per month as against $45,000 previously (ex. 17).

This trip lasted from January 30 until April 18, 1952.

(e) Another Time Charter listing S.S. Maple Hill with the Far East Enterprising Company, as per February 25, 1952, which endured from April 22 until the 12th day of July, same year, at rates approximately doubled (ex. 18).

Mr. Mathers necessarily concludes these repeated dealings on the charter-party market brought about some very beneficial results.

James R. McGrath's evidence in the preceding matter of *Bedford Overseas Freighters v. Minister of National Revenue* (*supra*) was allowed by both parties to serve as an integral part of this and the *Falaise Steamship* case. In brief, this shipbroker from Richwood, N.J., had testified his firm, the Meridian Marine Company, handled no less than a hundred charter-parties each year, "with a cancellation percentage of two per centum"; a relief sought when a ship under charter suffered a disability or otherwise became unseaworthy. And whenever such a complication of costly consequence arose, as in *Bedford Freighters*, Mr. McGrath considered the annulment of a charter-party to be "a proper and admissible business practice". Possibly, it is a fair inference to hold he would have spoken to the same effect should the purport of a cancellation be an enhancement of profits and not an avoidance of loss.

Mr. George M. Murray, a chartered accountant, associated with the Halifax partnership of Nightingale, Hyman & Co., was the next and last witness heard, since respondent adduced no oral evidence.

Mr. Murray's brief examination in chief was a repetition of his previous testimony in *Bedford Overseas Freighters*, with the only exception that Halifax Freighters

ends its fiscal year on April 30. But, on cross-examination, he owned that no itemized mention of the annulment indemnities appeared in the company's Financial Statements for 1952, exhibit 19.

A deduction of $40,000 for each of those three vessels: *Sycamore Hill, Maple Hill* and *Pine Hill,* according to this witness, was calculated *"in abstracto"* before the figures shown opposite the respective ships, on p. 5 of exhibit 19, were arrived at in the Profit and Loss account.

With some degree of surprise the Court inquired whether this method might not be an over-simplification, eventually leading up to the production of a top and back cover enclosing a sheaf of blank sheets.

At all events, there is of record an admission that no discernible trace of the cancellation forfeits is to be found in the appellant's financial statement for 1952 (ex. 19).

Notwithstanding this too discreet whim of accountancy, the Court is satisfied that appellant preponderantly proved its main submissions of facts.

As for the legal aspect, it is entirely dependent upon an admissible connexity between the global indemnities of $120,750.03 and the company's regular scope of operating expenses. In statutory parlance, (s. 12(1)(*a*) of The 1948 *Income Tax Act*) was this cumulative outlay ". . . made for incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer?"

The mutual interplay of verbal and literal evidence points at practically a twofold increase of monthly receipts, consequent upon the speculative dealings engaged in. And these profitable transactions were achieved by means of normally exploiting the company's working assets. The requisite, though not correlative, characteristics of revenue income, accruing from some initial expense made with the object allowed by law, occur here conformably to statutory requirements.

One more word. Let us forget, momentarily, about the cancellation indemnities, and suppose the several time charters had just succeeded one another. Surely none would deny the income status of the ensuing receipts or operating quality of related expenditures.

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Then, if this assumption be correct, the mere occurrance of disbursements, required to ensure repeated profit-takings, could hardly fall, as argued by respondent, under the caption of ". . . an outlay of capital or a payment on account of capital". A possibility of buying its way to greater profits fortuitously loomed up. By availing itself of this alluring prospect, the appellant company did not overstep the limits of ordinary business activities.

Now, the points of law raised and the rather copious jurisprudence cited in the allied case of *Bedford Overseas Freighters Limited v. Minister of National Revenue* (*supra*) also apply, and should be considered as parts of these notes.

For the reasons above, the amount of $120,750.03 (Canadian) is properly deductible from appellant's income for taxation year 1952. This sum was incorrectly added to the assessment above which should be amended accordingly. Therefore, the appeal is allowed with costs.

Judgment accordingly

1958

Jun. 7

Dec. 22

BETWEEN:

FALAISE STEAMSHIP COMPANY LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act 1948, S. of C. 1948, c. 52, s. 12(1)(a)—"An outlay or expense . . . made . . . for the purpose of gaining or producing income from property or a business of the taxpayer"—Money paid to obtain cancellation of a charter-party in order to enter into a more lucrative one and money paid as commission to an agent for procuring business held deductible from income—Appeal allowed and cross-appeal dismissed.

Appellant, engaged in the business of chartering ships for hire, entered into a charter-party for a term charter of one of its ships and after some months of the term had elapsed paid to the charterer a sum of money to obtain cancellation of the agreement in order that it might enter into better paying charter-parties. Appellant deducted

this sum from its income for 1952 and also deducted a further sum paid as commission on all freights to a service agency for ferreting out prospective charterers. Both of these deductions were disallowed by the Minister of National Revenue and on appeal to the Income Tax Appeal Board the appeal from refusal to allow as a deduction the amount paid to the charterer was dismissed while that from the refusal to allow the amount paid for commission was allowed. The appellant and the Minister appealed to this Court.

Held: That both amounts paid by appellant were expenses made "for the purpose of gaining or producing income from the property or a business of the taxpayer" within s. 12(1)(*a*) of the *Income Tax Act*.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Halifax.

H. B. Rhude for appellant.

A. G. Cooper, Q.C. and *W. R. Latimer* for respondent.

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

DUMOULIN J. now (December 22, 1958) delivered the following judgment:

This is an appeal from that part of a decision of the Income Tax Appeal Board[1], dated August 16, 1957, in respect of the income tax assessment for 1952 of Falaise Steamship Company Limited, relating to the payment by appellant of $40,037.50 to Seawell Steamship Corporation.

Respondent, on the other hand, files a cross-demand against the Board's approval of appellant's claim to deduct from receipts $11,095.19, being commissions on gross freights paid by Falaise Steamship Co. to Intramar S.A. of Berne, Switzerland, in 1952.

The company above was incorporated in 1948, under the provincial regulations of Nova Scotia, with its Head Office at Halifax.

It is a navigation enterprise owning several sea-going vessels, one of which is the S.S. *Woldingham Hill*. The main and possibly sole source of revenue consists in charter hire derived from leasing its ships. Pursuant to what appears a customary practice, the company, for expedi-

[1] 17 Tax A.B.C. 449.

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ency's sake, entrusted the management of its fleet to a firm of London marine agents, known as Counties Ship Management Co. Ltd. (ex. 4).

Since all material facts herein are along lines similar to those in the twin case of *Halifax Overseas Freighters Limited* (*ante* page 80), anything but a summary would prove tediously repetitious.

The Notice of Appeal relates that on April 10, 1951, the Counties Company, as agent for its principal, chartered the *Woldingham Hill* to Seawall Steamship Corporation for a period of eighteen months from the date of delivery, the 2nd day of August, at a hire rate of $4.25, United States funds, per dead weight ton per month; an amount equivalent to thirty shillings (30/-d) sterling (ex. 5).

Shortly after subscribing to this undertaking, appellant's British representatives, in consequence of a marked rise in charter hire prices, foresaw a possibility of ventures far more profitable.

With this end in mind, the Counties Company, on appellant's behalf, persuaded Seawall Corporation to renounce their contract as from January, 1952, in consideration of a $40,000 indemnity, equal to $40,037.50, Canadian currency. When given up, this erstwhile lease had already run during five of the eighteen allotted months. Exhibits 6 and 7 establish payment of the agreed compensation on January 29, 1952.

In calculating its income for the taxation year 1952, Falaise Steamship Company alleges it deducted from gross revenues this amount of $40,037.50 (cf. Notice of Appeal, para. 14), and also a further sum of $11,095.19, a one per centum (1%) commission paid on all freights to the Swiss agency, Intramar S.A. (Société Anonyme), for ferreting out prospective charterers (exhibits 11, 12, 13).

Of these two claims, the former ($40,037.50) was waved aside by the Minister and the Appeal Board who, nonetheless, reversed the ministerial disallowance of the latter deduction ($11,095.19) for no other given motive than it ". . . was on all fours" with appeal *No. 319 v. M. N. R.*[1]

[1] 14 Tax A.B.C. 342.

Quaere whether the correct approach to the problem should be restricted to superficial traits and not be extended to underlying principles?

Appellant alone called witnesses, the same as in both other joint cases: *Beford Overseas Freighters Ltd.* (*ante* page 79) and *Halifax Overseas Freighters Ltd.* (*supra*).

Mr. Harry Isaac Mathers, of Halifax, the Company's presiding officer, outlines his firm's business enterprises and files, with appropriate comments, several documentary exhibits in support of facts set out in the Notice of Appeal. He next produced exhibit 8, a time charter, dated January 3, 1952, evidencing the lease of S.S. *Woldingham Hill* to Cement Importers of New Zealand, for a ten to thirteen months' period, the charter hire fixed at forty-five shillings (45/-d) a month per dead weight ton. This contract ran out its entire span ensuring monthly gross returns of $65,000 in lieu of $45,000 as previously.

A comparative calculation of both these charter terms establishes a monetary benefit of $25,000 (exclusive of 1% commission to Intramar) and, possibly an advantage of greater significance, a duration shortened by no less than three months.

Mr. Mathers also describes the agreement concluded with Intramar, tendering to that effect exhibits 11, 12, 13, 14. He vouches for the due performance of all payments stipulated.

In re Bedford Overseas Freighters Ltd. (*supra*) the parties agreed that evidence then adduced by Mr. James R. McGrath, a shipbroker associated with Meridian Marine Company of Richwood, N. J., would serve in all three cases. I therefore refer to the recital and analysis of his testimony appearing on pp. 75 to 76 of my notes in *Bedford Freighters* and p. 84 of *Halifax Freighters.*

A similar reference applies to the third and final witness heard, Mr. George M. Murray, chartered accountant, partner in a well known Halifax office. Anything pertaining to Mr. Murray's evidence may be read at pp. 6 to 7 in the *Halifax Freighters* notes or 6 of *Bedford Freighters.* The only addition relates to the Intramar

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commission inscribed, albeit then unpaid, at p. 5 of the financial statement, exhibit 13, under the heading of General Administration and Overhead Expenses.

Here again the litigation hinges upon the applicability of the exception permissively afforded in s. 12(1)(*a*) of *The Income Tax Act*, 1948.

In respondent's view, extending also to the cross-appeal, the moneys paid out, i.e. indemnity and commissions were not expended ". . . for the purpose of gaining or producing income . . ." (para. 11) or, in the alternative constituted "an outlay of capital or a payment on account of capital", (para. 12).

The pertinent legal solution entirely depends upon an admissible connexity between the compensation for annulment, the commission to Intramar; and this company's regular operating expenses.

Verbal and literal evidence reveal a decided revenue improvement and an economy of time resulting from this initiative. It seems hard to contend that such profitable returns became possible through means other than a normal use of appellant's working assets. The requisite, though not correlative, characteristics of a revenue income, accruing from an outlay made for the purpose allowed by law, are coupled in the instant case conformably to statutory requirements.

Section 4 of the Act clearly assimilates "income for a taxation year from a business or property . . ." to the profit therefrom, which of necessity implies a previous subtraction of all producing costs. Profits in this instance are both undisputed and assessed, why then should they be divorced from expenses normally and unavoidably attendant upon their realization?

A possibility of buying its way to greater profits suddenly loomed up. By availing itself of this chance, Falaise Steamship Company did not go beyond the limits of regular business ventures.

The points of law examined and the jurisprudence quoted in the matter of *Bedford Overseas Freighters Limited v. Minister of National Revenue* (*supra*) also apply as integral parts of these notes.

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For the reasons above, the sum of $40,037.50 (Canadian) is properly deductible from appellant's income for taxation year 1952. This amount was incorrectly added to the assessment above which should be amended accordingly. Therefore, the appeal is allowed with costs.

Respondent's cross-appeal, for parity of motives should be dismissed, with costs in favour of appellant.

Judgment accordingly.

BETWEEN:

1958

Nov. 28

1959

Jan. 14

FEDERAL FARMS LIMITED .....APPELLANTS;

AND

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

Revenue—Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3 and 4—"Income . . . includes income from all (a) businesses . . ."—Money received in nature of a voluntary gift and not a business operation—Money received from a public relief fund to alleviate loss sustained through a hurricane is not income—Appeal allowed.

Appellant carries on business as a grower, packer and shipper of vegetables. In 1954 at the harvesting season a storm and hurricane destroyed and rendered valueless large quantities of vegetables in the ground and also damaged extensively its farm and field and main ditches. A company was incorporated by certain persons for the purpose of receiving voluntary contributions and distributing the same to sufferers from the hurricane in order to alleviate the losses sustained by them. The funds available were not adequate to meet the full costs of all vegetables lost and "Unit Prices" were established for each vegetable, such being somewhat lower than the total cost of production of the vegetables. The appellant received from the corporation the sum of $40,144.08 for crop losses at the fixed unit prices and also a certain percentage of the value of containers and supplies lost. This money was spent by appellant in rehabilitating the farm, clearing up the debris, repairing equipment, in payment of accounts and for new supplies and seed purchased, and in getting the farm back into production for the following year. This sum was added to appellant's taxable income for the year 1955 and appellant appeals from such assessment for income tax.

Held: That the money received by appellant was in the nature of a voluntary gift and not in any sense a business operation and did not arise out of the taxpayer's business, and the fact that the amount

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of payment was related to and to some extent measured by the amount of loss cannot affect the nature or the quality of the payment.

2. That the amount in question is not income or a revenue receipt which must be brought into account in computing income.

APPEAL under the *Income Tax Act.*

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

W. D. Goodman for appellant.

J. D. C. Boland and *W. R. Latimer* for respondent.

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

CAMERON J. now (January 14, 1959) delivered the following judgment:

This is an appeal from a re-assessment made upon the appellant for the taxation year 1955 and dated June 27, 1957. In its return for that year the appellant showed a net loss of $20,061.04, but in the re-assessment the respondent added to the declared income *inter alia* the sum of $40,144.08 received by it on or about January 28, 1955, from the Ontario Hurricane Relief Fund (hereinafter to be referred to as The Relief Fund) under the following circumstances.

The appellant carries on business on a large farm in the Holland Marsh near Bradford, Ontario, as a grower, packer and shipper of vegetables. On or about the 15th and 16th of October, 1954, during the flood resulting from the storm known as Hurricane Hazel, the appellant's farm was flooded to a very considerable depth. The appellant was then engaged in harvesting its vegetable crops, but due to the flood very substantial quantities of the vegetables in the ground were utterly destroyed and were of no value. In addition, the farm and the field and main ditches thereon were heavily damaged by erosion.

As is well known, Hurricane Hazel and the flooding which followed caused widespread damage, not only in Holland Marsh, but elsewhere. In order to alleviate the distress and to render assistance, four well-known and

public spirited gentlemen, including the Mayor of Metropolitan Toronto, secured Letters Patent from the province of Ontario by which the Ontario Hurricane Relief Fund was incorporated for the following objects:

(*a*) To provide assistance and relief for persons in Ontario who suffered as a result of the storms and accompanying floods which occurred in Ontario on or about the fifteenth day of October, A.D. 1954, and the sixteenth day of October, A.D. 1954;

(*b*) To accept donations from any person or persons in the Province of Ontario or elsewhere and to raise money by any other means; and

(*c*) To invest and deal with the moneys of the Corporation not immediately required for the objects of the Corporation in such manner as may be determined by the board of directors;

The Letters Patent expressly stated that "The Corporation shall be carried on without the purpose of gain for its members and any profits or other accretions to the Corporation shall be used in promoting its objects".

As shown by the final report (Exhibit 2), the Relief Fund received in excess of $5,000,000 from donations, the estimated number of such donors being 250,000. Substantial amounts came from corporations, charitable foundations, churches, clubs, unions, employee groups and individuals. Its relief responsibilities to the community were defined as (1) To provide emergency assistance to hurricane flood victims; (2) To care for the dependents of some seventy-seven people who lost their lives; (3) To provide compensation for losses of household contents, clothing and other property not otherwise recoverable.

A special division was set up for the Holland Marsh area known as the Holland Marsh Division of the Ontario Hurricane Relief Fund. The flood affected some 7,000 acres in Holland Marsh and all farmers who applied for assistance from the Relief Fund received payments.

Mr. Hilliard, director of the Extension Branch of the Department of Agriculture, was the co-ordinator of all relief services and assisted in the work relating to the Holland Marsh area. He stated that in settling the claims for crop loss in that area, the Division took into account: (1) The portion of the general fund allotted to the Holland Marsh area; (2) The total production of crops; and (3) In order to arrive at the basis of payment, the cost of production for each unit produced—namely, the type of

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vegetable grown. In the result, it was found that the amount on hand for such crop losses was inadequate to meet the full costs of all vegetables lost and consequently "Unit Prices" were established for each vegetable, such being in all cases somewhat lower than the total cost of production of the vegetables.

Farmers who had suffered crop losses were required to furnish the division with declarations proving their crop losses. Exhibit 4 is that completed on behalf of the appellant. Its total claim for crop losses aggregated $76,510, but as stated in the claim this item included harvesting costs and storage which, of course, would be excluded. In the result, as shown by the Settlement Statement which accompanied the cheque, the appellant received $38,870 for crop losses at the fixed unit prices, and $1,274.08, being 70 per cent. of the value of the containers and supplies lost—a total of $40,144.08.

The evidence of Mr. Henderson, general superintendent of the appellant, shows that the money so received was spent in rehabilitating the farm, clearing up the debris, repairing equipment, in payment of accounts and for new supplies and seed purchased—and in general for getting the farm back into production for the following year. It is also established that for income tax purposes all of the expenses incurred in the seeding and cultivation of the crops destroyed were allowed as deductible operating expenses, as well as all the expenses occasioned by the flooding and in connection with which the amount in question was spent. The appellant carried no insurance for flood losses and received nothing from any other source in respect of the loss sustained.

The question to be decided is whether this sum was income within the provisions of ss. 3 and 4 of *The Income Tax Act*, R.S.C. 1952, c. 148, which were as follows:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

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

The appellant's reasons are summarized in Part B of the Notice of Appeal as follows:

> The Appellant claims that the said sum of $40,144.08 does not constitute income within the meaning of *The Income Tax Act*, that it was a receipt in the nature of a gift, casual gain or windfall, not derived from the operation of the Appellant's business, that it constituted compensation for damage to the Appellant's land and that the payments, having been made for a special purpose, in the public interest, that of assistance and relief to persons who suffered from the hurricane, were not of income nature.

Counsel for the Minister, on the other hand, submits that the amount received was income from the appellant's business. He takes the position that the amount received took the place of the growing crops which were the stock-in-trade of the appellant and that consequently it was a revenue receipt and one received in the course of the appellant's business.

A good many cases were cited to me by both parties. I think the position taken by the respondent may be stated by citing a passage of the judgment of the Master of the Rolls in *London Investment Co. v. Inland Revenue Commissioners*[1]. After referring to the well-known cases of *J. Gliksten & Son, Ltd. v. Green*[2] and *Newcastle Breweries Ltd. v. Inland Revenue Commissioners*[3], Lord Evershed said at p. 282:

> It seems to me that these two cases support the view which has been fundamental to the Crown's argument, that, where a trader is dealing in any kind of commodity and where for any reason part of that commodity, his stock-in-trade, disappears or is compulsorily taken or is lost, and is replaced by a sum of cash by way of price or compensation, then prima facie that sum of cash must be taken into the account of profits or gains arising to the trader from his trade.

In that case, the Court of Appeal allowed the appeal of the Crown and their decision was upheld in the House of Lords[4], where the facts are summarized in the headnote as follows:

> The taxpayers, a property dealing company who had paid the compulsory war damage contributions during the war, received value payments under the War Damage Act, 1943, in respect of some of their properties which had been damaged by enemy action. They had disposed of some of the properties but retained others as part of their stock-in-trade, and were either having them rebuilt or would have them rebuilt. Under the War Damage Act, 1943, s. 66(1), contributions made

[1] [1957] 1 All E.R. 277.
[2] [1929] A.C. 381.
[3] 12 T.C. 927.
[4] [1958] 2 All E.R. 230.

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and indemnities given under Part I of the Act were to be treated for all purposes as outgoings of a capital nature, and by s. 113, as superseded by the War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28, expenditure on making good war damage was not deductible in computing profits for income tax purposes. On the question whether the value payments should be included in the receipts of the taxpayer's trade for the purposes of their assessments to income tax under Case I of Sch. D, and to the profits tax,

Held: the value payments were part of the taxpayers' trading receipts for taxation purposes, since they were money into which their stock-in-trade had been converted.

There the main judgment was delivered by Viscount Simonds (Lord Morton, Lord Tucker and Lord Somervell concurring) and at p. 232 he said:

> My Lords, I have no doubt that the Commissioners were right in saying that the payments were *prima facie* trading receipts. It was the business of the taxpayers to dispose of their stock-in-trade and to receive a cash equivalent or other compensation in return and, for the purpose of income tax law, such cases as *J. Gliksten & Son, Ltd. v. Green* ((1929) 14 Tax Cas. 364) and *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* ((1927) 12 Tax Cas. 927) show that it is irrelevant whether the disposition is by sale, voluntary or compulsory, or by an involuntary loss attended by subsequent compensation. The taxpayers had one asset, lost it, and acquired another. I think that it is incontrovertible that the asset they acquired was acquired in the course of their business, and not the less so because the war damage scheme was universal and compulsory and applied equally to all property owners, whether or not they carried on the business of dealers in property. I do not deal at greater length with this part of the case because I am in complete agreement with the judgment of the Court of Appeal.

It is well settled that the whole of the amount received in respect of insurance policies on stock destroyed is a trade receipt and that compensation received for stock-in-trade which has been expropriated is also a trade receipt. Such cases now present no difficulty, the reported cases having decided that the compensation received was received in the course of or arising out of the trade, although the disposition of the stock was involuntary.

In the *London Investment Company* case (*supra*), it will be noted particularly that the taxpayer had made contributions under *The War Damage Act* and consequently, as a result of such contributions—which seem to have been something in the nature of insurance premiums—it was entitled to receive the value payments when loss of inventory was sustained by enemy action.

In the present case, I can find no analogy between the monies received from the Relief Fund and the monies received from insurance policies on stock-in-trade which has been destroyed by fire. Here the Relief Fund received nothing whatever from the appellant by way of contribution, insurance premiums, services, salvage or otherwise. The appellant had no legal right at any time to demand payment of any amount from the Relief Fund and clearly, at the time of its loss, had no expectation of getting anything. There was no contract of any sort between the donor and the donee, and the trustees of the Relief Fund, had they so desired, need not have paid the appellant anything. I can find nothing in the circumstances outlined which would indicate that the giving and receiving of the amount was in any sense a business operation or arose out of the taxpayer's business.

In truth, the monies received were in the nature of a voluntary personal gift and nothing more. Counsel for the respondent stressed the fact that the amount of the payment was related to and to some extent measured by the amount of the loss. That fact alone, however, cannot affect the nature or quality of the payment. In *Glenboig Union Fireclay Co. Ltd. v. Commissioners of Inland Revenue*[1]—a decision of the House of Lords—it was stated:

> It is unsound to consider the fact that the measure, adopted for the purpose of seeing what the total amount should be, was based on considering what are the profits that would have been earned. That, no doubt, is a perfectly exact and accurate way of determining the compensation, for it is now well settled that the compensation payable in such circumstances is the full value of the minerals to be left unworked, less the cost of working, and that is, of course, the profit that would be obtained were they in fact worked. But there is no relation between the measure that is used for the purpose of calculating a particular result, and the quality of the figure that is arrived at by means of the application of that test.

There are, of course, many cases in which a voluntary payment has been found to be an income receipt—(*Goldman v. M. N. R.*[2]; *Ryall v. Hoare*[3]; *Cowan v. Seymour*[4]; *Australia (Commonwealth) Commissioner of Inland Revenue v. Squatting Investment Co. Ltd.*[5]. In such cases, it was held that the payments, while voluntary, were for

[1] 12 T.C. 462 at 463.
[2] [1953] C.T.C. 95.
[3] 8 T.C. 521.
[4] [1920] 1 K.B. 500.
[5] [1954] 1 All E.R. 349 (P.C.)

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services rendered or arose out of or because of employment, or in respect of trading transactions. Nothing of that sort is to be found here, the payment having been an entirely gratuitous one.

The gift here in question, it seems to me, is of an entirely personal nature, wholly unrelated to the business activities of the appellant. The fact that the recipient is incorporated and that the gift was a large one does not affect the true nature of the payment, which, in my view, is precisely of the same kind as if the amount had been received by a neighbour of the appellant who had suffered flood damage but who was an individual and received less than did the appellant.

There are very few reported cases in which consideration has been given to the nature of a spontaneous gift received from the members of the public, except those in which the gift may have been thought to be related to services rendered by the respondent. Counsel for the Minister adopted the opinion of Mr. Monet, the late and much respected chairman of the Income Tax Appeal Board, in *Gagnon v. M. N. R.*[1]. There the facts were much the same as in the instant case except that there the taxpayer, a druggist whose stock-in-trade had been destroyed by a fire, received a substantial amount of money which had been raised by public subscription and which was paid to him by a relief committee. There it was held that as the amount received was analogous to monies received from a fire insurance company, such receipt "must be put in the place of the goods". For the reasons which I have stated, I am unable to agree with that view of the matter since I can find no analogy between payments received *ex contractu* and arising in the course of a business, and the voluntary gift here in question.

The nature of spontaneous gifts from the public was referred to in *Seymour v. Reed*[2]. In that case, the appellant was a professional cricketer and the committee of the club which employed him, in the exercise of their discretion, granted him a benefit match. The proceeds of the match, together with certain public subscriptions, were invested by the trustees and the income was paid to the taxpayer

[1] 8 Tax A.B.C. 417. [2] [1927] A.C. 554.

in accordance with the rules of the club. Later, the investments were realized and the proceeds were paid to the taxpayer who, with the consent of the trustees, applied them in purchasing a farm.

At the trial, Rowlatt J. applied the test—"Is it in the nature of a personal gift, or is it remuneration?"—and held that the proceeds were not taxable. The Court of Appeal reversed that judgment which, however, was restored by the House of Lords. In approving the test mentioned, Viscount Cave L. C. said at p. 559:

> A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement . . . Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities. It is usually associated, as in this case, with a public subscription; and, *just as those subscriptions, which are the spontaneous gift of members of the public, are plainly not income or taxable as such,* so the gate moneys taken at the benefit match, which may be regarded as the contribution of the club to the subscription list, are (I think) in the same category. If the benefit had taken place after Seymour's retirement, no one would have sought to tax the proceeds as income; and the circumstance that it was given before but in contemplation of retirement does not alter its quality. The whole sum—gate money and subscriptions alike—is a testimonial and not a perquisite. In the end—that is to say, when all the facts have been considered—it is not remuneration for services, but a personal gift.

Finally, it is submitted on behalf of the respondent that this gift is similar to government subsidies granted for the purpose of assisting in the conduct of the respondent's operation (See *Higgs v. Wrightson*[1] in which a grant or subsidy was made to cover part of the cost of ploughing up land in wartime). It seems to me, however that there is little if any similarity between governmental subsidies and the gift here made. In the former, subsidies are normally paid because it is considered in the public interest that assistance should be rendered to the qualified recipients who in turn would render some service of benefit to the public, such as ploughing up land, or the operation of a drydock. The grant of the subsidy is closely related to the business operation of the recipient who in turn provides a benefit, either for the government or the public at large. Here, no such considerations apply.

[1] [1944] 1 All E.R. 488.

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In this case, as I have suggested above, the payment was in no proper sense "compensation" or "income"; it was unlikely to ever occur again and did not result directly or indirectly from any business operation. It came about because of the losses suffered by the appellant in common with all others who had sustained flood losses and by reason of the sympathy engendered in the public mind for the difficulties in which such owners found themselves and which brought about a generous outpouring of funds for their relief. It could scarcely be contended that any of the tens of thousands of contributors to the fund had a thought that they, by their subscriptions, were entering into any business transaction with the flood sufferers or that any part of the sums so subscribed would be gathered in as "income" by the respondent. What they undoubtedly wanted to do—and all that they wanted—was to provide immediate relief to the needy and to assist the flood victims in getting back on their feet.

For these reasons, I have come to the conclusion that the amount in question was not "income" or a revenue receipt which must be brought into account.

Accordingly, the appeal will be allowed with costs, the re-assessment of June 27, 1957 set aside, and the matter referred back to the Minister for the purpose of re-assessing the appellant in accordance with my findings.

Judgment accordingly.

1958

Mar. 21

1959

Jan. 20

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

GEORGE LINDSAY BOWER ..... RESPONDENT.

Revenue—Income—Income tax—Income Tax Act R. S. C. 1952, c. 148, ss. 3 and 4 and 127(1)(e)—"Business"—Profits from houses built speculatively and sold at a profit are income in seller's hands—Appeal from decision of Income Tax Appeal Board allowed.

Respondent has for many years been engaged in a large way and on his own account in business as an excavating contractor and in heavy hauling. He purchased houses and also lots on which he said that houses were erected for the purpose of providing housing accommodation for his employees by way of renting to them and that at the time of acquisition of the lots he had no intention of selling any of them. He entered into an arrangement with one Jameson, a builder, for the construction of houses on the lots and any profit from the sale of which was divided between them. None of the houses sold were either rented or sold to any employee of respondent and in assessing respondent's income tax the Minister added the profits realised by him on these sales to his declared income for the years 1952 and 1953. An appeal from such assessment to the Income Tax Appeal Board was allowed and from that decision the Minister now appeals to this Court.

The Court found that even if respondent intended doing something to secure residences for his employees at the time he bought the lots in question he had completely abandoned that intention at the time he decided to build the houses on them.

Held: That when the respondent entered into the building arrangement with Jameson they joined forces in a business scheme to construct and sell houses at a profit and with no real intention of retaining them as an investment.

2. That respondent in doing what he did was engaged in the business of constructing and selling houses in the same manner as a speculative building contractor would do and was therefore in business at least to the extent defined as "business" in s. 127(1)(*e*) of the *Income Tax Act*.

3. That the profits from the sale of the houses are taxable income in respondent's hands.

APPEAL from a decision of the Income Tax Appeal Board.

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

M. A. MacPherson, Q.C. and *Allan Irving* for appellant.

E. W. Gerrand, Q.C. for respondent.

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

CAMERON J. now (January 20, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated September 14, 1956[1] allowing the respondent's appeal from assessments made upon him for the years 1952 and 1953. In each of these years the respondent sold certain houses at a profit, and being of the

[1] 15 Tax A.B.C. 411.

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opinion that such profits were not of an income nature, omitted them from his taxable income. In re-assessing the appellant on March 7, 1955 the Minister added to his declared income the sums of $2,757.10 and $1,759.33 respectively for the years 1952 and 1953. There is no dispute as to the amounts involved, the sole question being whether, in the circumstances, such profits form part of the respondent's taxable income.

In the main, the facts are not in dispute. The respondent, who resides in Regina, has for many years been engaged in a large way on his own account in business as an excavating contractor and in heavy hauling. At the end of the Second World War his business expanded rapidly due to the increased demand for housing. He invested heavily in new machinery and added to the number of his employees who, in the years in question, numbered from ten to twenty. He found some difficulty in retaining his skilled employees who were unable to secure or retain suitable residences and accordingly he says he decided to do something to remedy that situation. He had in mind the purchase of lots on which he would erect houses of a suitable type and then rent them to his employees. It may be noted here, so as to avoid repetition later on, that the respondent stated that the properties which he acquired from 1946 to the end of 1951 and whether they were houses, or lots on which he later built houses, were all acquired with the intention of renting them to his employees. At the time of acquisition he says he had no intention of selling any of them.

Now it is a fact that to some extent that purpose was carried out. In 1951, for $1,000 he purchased a small residence at 195 Athol Street and rented it to an employee who is still his tenant. In the same year, he purchased another lot at 1901 Garnet Street and, after moving a residence thereon, rented it to another employee; its total cost was about $6,000. Again, in 1951 he bought another home at 1911 Montague Street for about $6,000 and rented it to an employee Bloos, who is still his tenant. It will be noted particularly that none of the residences which were rented to his employees were constructed by the respondent. They are still his property and have no direct bearing on the question now before me. I have referred to them because

of the respondent's contention that they assist in establishing his intention in regard to the houses which he constructed and sold.

I turn now to the evidence regarding the three houses which were sold at a profit in 1952 and 1953, namely, 3425 McCallum Avenue, 4424 Dewdney Avenue, and 4420 Dewdney Avenue. In 1949 or 1950, the respondent purchased two lots on McCallum Avenue and in 1951 two lots on Dewdney Avenue. He was not himself a builder and therefore entered into an arrangement with a friend, Mr. A. P. Jameson—a very experienced building contractor—by which they would jointly construct houses thereon, the profits to be divided between them in a manner which I need not explore. This arrangement with Jameson was carried out in all four houses to which I will refer.

On one of the lots on McCallum Avenue there existed a foundation for a house at the time of acquisition. In 1951 the respondent arranged to have a residence constructed thereon by Jameson. In the same year it was sold, upon completion, to one Schmidt, a friend of the respondent and a relative of Jameson. The respondent made a profit thereon but in his 1951 income tax return reported it as a "capital gain". That return is not before me but I record the transaction as I shall have to refer to it later in connection with the sale of 4420 Dewdney Avenue.

Prior to the construction of the houses at 3425 McCallum Avenue and 4424 Dewdney Avenue in 1952, the respondent was well aware that they would not be suitable to rent to his employees. The area seems to have improved considerably and the probable cost of construction and the extra taxes due to street paving and the like would result in a rental beyond the ability of his employees to pay. Nevertheless, he proceeded with the construction of the houses. In reference to 3425 McCallum Avenue, he stated:

> Well, I still have this lot over on McCallum Avenue which has now become a liability. I knew it was of no value to build for employees at that particular time, so I told Mr. Jameson, I said: "You better go ahead and build a house over there". So Mr. Jameson went ahead and built a house. He sold it to a Dr. Good at a profit to me of $1,100.90.

The respondent admits that that statement was applicable also to 4424 Dewdney Avenue.

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3425 McCallum Avenue, constructed at a cost of over $11,000, was sold immediately upon completion in 1952, both Jameson and the respondent realizing a profit of $1,100.90. No effort was made to rent it to an employee or to anyone else and quite obviously it was built speculatively with the intention of selling it if possible at a profit.

The same conclusion must be reached in regard to the house built at 4424 Dewdney in 1952 and sold in the same year. It was never rented to an employee or anyone else and was sold for $13,000 within one month of its completion, the respondent realizing a total agreed profit on the operation of $1,656.20 after alloting a portion of the profit to Jameson.

It is the sum of these profits, totalling $2,757.10, made upon the sale of 3425 McCallum Avenue and 4424 Dewdney Avenue that the Minister, in assessing the respondent for 1952, added to his declared income.

In 1953, under similar arrangements with Jameson, another residence, 4420 Dewdney Avenue, was constructed at a cost of $12,481.34. On the settlement with Jameson, it is agreed that the respondent realized a profit of $759.33. No effort was made to rent the property and after two or three months it was sold, the respondent realizing a further profit of $1,000—a total of $1,759.33.

The following sections of *The Income Tax Act* were applicable to each of the years 1952 and 1953.

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

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

127. (1) In this Act,

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

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Although the Minister is the appellant in this case, the onus of proving the assessment to be erroneous is on the respondent (*Minister of National Revenue v. Simpsons Ltd.*[1]).

Counsel for the respondent submits that on the evidence it should be found that the latter never had the intention to construct houses for sale; that his sole purpose was to invest his money in houses which he would construct and which he would then rent to his employees; that that purpose was frustrated by the increased building costs and taxes which rendered such houses unsuitable for his employees, and that in building the houses and later selling them, he was merely endeavouring to salvage his investment in the lots, and complying with an agrement with the city of Regina made at the time of the purchase of the lots that he would construct houses thereon.

Now the evidence as to the respondent's original intention is very sketchy and uncertain. Apart from his own statement, I find no substantial evidence to support it. If he ever intended to rent to his employees the houses which he constructed, he did not communicate that fact to them. Both Bloos and Kerr were called as witnesses on his behalf and each denied that the respondent had ever discussed with them the possibility of renting any of the houses which were sold. Kerr stated that his only conversation was in reference to 1911 Montague Street, that he was not interested in any way and that no mention was made of renting or buying it. Bloos stated that his only discussion was in regard to that property which he rented and still occupies.

There is good reason, also, to doubt the respondent's evidence in regard to the construction of 4420 Dewdney Avenue. His evidence is that he built it in 1953 for one of his key employees Sogz, and that he was the only employee who could afford to pay the rent for a house of that type. He states that Sogz became ill in September 1953 about the time the house was completed, and left his employ. Consequently, he held the property only a few months and then sold it. Sogz was not a witness at the trial and therefore there is little evidence to support the

[1] [1953] Ex. C.R. 93.

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statement of the respondent. It is informative, however, to examine the respondent's statement as to why he built this house for Sogz. He says that in 1951 when he built the first house on McCallum Avenue, he intended it for Sogz, that *after it was completed* he decided to sell it to Schmidt and for that purpose secured Sogz' consent and then agreed to build another house for him later. In 1953, therefore, he says he planned to rent 4420 Dewdney to Sogz. Grave doubt is thrown on this evidence of the respondent by that of the witness Jameson. He states that the property sold to Schmidt in 1951 was built by him *for Schmidt* and not for Sogz. He was in an excellent position to know the facts as he was the builder and related by marriage to Schmidt. The respondent himself admitted that there was no definite arrangement with Sogz in regard to that house. He said:

> We had discussed it but we had never finalized anything because we were too busy to go into details. I did not know what the cost would be.

In the light of all the circumstances, I have reached the conclusion that even if the respondent had a vague intention of doing something to secure residences for his employees at the time he purchased the lots at McCallum Avenue and Dewdney Avenue, he had completely abandoned that intention at the time he decided to build the houses thereon. There was then a great demand for houses in Regina and the evidence clearly establishes that a ready profit could be realized on the construction and sale of houses. I am satisfied that when the respondent entered into the building arrangements with Jameson, they joined forces in a business scheme to construct and sell houses at a profit and with no real intention of retaining them as an investment. In fact, none were rented and each was sold within a very short time after construction.

In my opinion, therefore, the respondent, in doing what he did, was engaged in the business of constructing and selling houses in the same manner as a speculative building contractor would do. He was therefore in business at least to the extent mentioned in the definition of "business" as found in s. 127(1)(*e*) cited above. The profits therefrom are therefore taxable income in his hands.

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For these reasons, the appeal of the Minister will be allowed, the decision of the Income Tax Appeal Board set aside, and the re-assessments made upon the respondent for the years 1952 and 1953 affirmed. The Minister is also entitled to his costs after taxation.

Judgment accordingly.

1958

Dec. 11

1959

Jan. 13

BETWEEN:

GARCY COMPANY OF CANADA LIMITED PLAINTIFF;

AND

ROSEMOUNT INDUSTRIES LIMITED ..DEFENDANT.

Practice—Application for injunction restraining use of industrial design—Design of recent registration and validity in issue—Injunction refused.

Held: That an interlocutory injunction to restrain the use of an industrial design will not be granted where the registration of the design is recent and its validity is challenged.

MOTION for an interlocutory injunction restraining defendant from using an industrial design.

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

A. B. R. Lawrence, Q.C. for the motion.

H. Gérin-Lajoie, Q.C. contra.

FOURNIER J.:—This is an application by the plaintiff for an interlocutory injunction restraining the defendant, its agents and employees from manufacturing, selling or distributing the ROSEMOUNT CLASSIC DE LUXE lighting fixture or other lighting fixtures in infringement of the plaintiff's registered industrial designs numbers 156/22009, 156/22010 and 156/22011.

On September 2, 1958, the above industrial designs were registered by the GARDEN CITY PLATING & MANUFACTURING CO., of the City of Chicago, State of Illinois, U.S.A., in the Register of Industrial Designs in accordance with the *Industrial Design and Union Label*

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GARCY CO. OF CANADA LTD. v. ROSEMOUNT INDUSTRIES LTD.

Fournier J.

Act, R.S.C. 1952, c. 150. On October 23, 1958, a certificate of assignment of the above registered industrial designs, bearing No. 2625, was issued to the plaintiff by the Commissioner of Patents. On October 29, 1958, a statement of claim was filed in this Court by the plaintiff and served on the defendant on November 12, 1958. A notice of the present application for an interim injunction was filed on November 10, 1958. The statement of defence and the particulars of objection were filed on December 8, 1958.

The plaintiff, a manufacturer of lighting fixtures, alleges to be the assignee of the registered industrial designs in dispute. It has been manufacturing and selling lighting fixtures according to these designs under the name of GARCY ULTRA-LUX. It states that the defendant, its servants and agents have been manufacturing and selling and are manufacturing and selling a lighting fixture in infringement of one or all of the plaintiff's designs under the name of ROSEMOUNT CLASSIC DE LUXE and that these fixtures are an exact copy of the above designs and an infringement of its rights in the said industrial designs.

The defendant in its defence admits that it has been manufacturing and selling and is manufacturing and selling fluorescent lighting fixtures, but denies the plaintiff's allegation wherein it is stated that these lighting fixtures are an exact copy of the plaintiff's fixtures. It further says that the registrations of the industrial designs in question are illegal, invalid, null and of no effect for the reasons given in its particulars of objections. These objections are that the designs lack originality, novelty and subject matter. They are identical to designs which have been in use for a great many years in the manufacture and sale of fluorescent lighting fixtures and are not designs that can be the object of registration as industrial designs. The registrations were not made in accordance with the provisions of the Act and the articles to which the designs have been applied are not properly marked according to the

statute. It also alleges that the plaintiff is not the registered proprietor of the designs. The facts stated in the defence and the particulars of objections are supported by the affidavit of the president of the defendant corporation which was filed on December 8, 1958.

Most of the facts in this case are in dispute. I summarize. The defendant denies having imitated or copied the designs in question, though it admits having manufactured and sold fluorescent lighting fixtures under the name of ROSEMOUNT CLASSIC DE LUXE. It contends that the registered industrial designs are invalid for the following reasons: "lack of originality, novelty and subject matter; illegal delay between registration and publication of the designs; absence of proper marks on the articles to which the designs have been applied." The facts disclosed by the pleadings, procedures and exhibits filed herein are supported by sworn statements.

On this evidence and the provisions of the statute, as well as the decisions in similar matters, the Court must base its own decision as to whether it is just and convenient to grant or refuse the present application.

At the outset of my remarks, I have intentionally enumerated the proceedings in this case as closely as possible in their chronological order. Suffice it to say that the registrations of the industrial designs bear the date of September 2, 1958; the assignment to the plaintiff, October 23, 1958; the statement of claim, October 29, 1958; the present application for an interim injunction, November 10, 1958. It is quite evident that the registrations of the industrial designs are of a very recent date.

The rule as to the granting of interlocutory injunction in patent and design cases is clearly set out in the case of *Smith v. Grigg Ltd.*[1]. I quote:

Held, by the Court of Appeal, that the recognised rule as to the grant of interlocutory injunction in the case of a patent, namely, that where the patent is a recent one and has not been established and there is a dispute as to validity the Court will not as a rule interfere by granting an interlocutory injunction, applies also to registered designs;

[1] [1924] 41 R.P.C. 149.

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GARCY CO. OF CANADA LTD. v. ROSEMOUNT INDUSTRIES LTD.

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that in this case a serious question had been raised as to the validity of the registration of the Design, and that the case was not one in which an interlocutory injunction should be granted and that the question of a breach of contract was not before the Court. The appeal was allowed and the injunction was discharged, the Defendant undertaking to keep an account of articles sold to which the Design was applied.

This rule is applicable not only in patent cases but is followed in industrial design cases.

It seems to me that counsel for the plaintiff argued his application as if the registered design was not of recent origin but of long standing. If it had been registered for a substantial time, and acknowledged, there is no doubt that there would be a *primâ facie* presumption in favour of its validity, but it is not the case.

In 1929, Romer J. of The High Court of Justice, Chancery Division, dealt with the above question in the case of *Marshall and The Lace Web Spring Co. Ltd v. The Crown Bedding Co. Ltd.*[1]. I quote:

> . . . So far as I know, however, the only difference between a motion where the patent is old and a motion where the patent is new is this: in the latter case it is sufficient for the defendant's Counsel, if the plaintiff is rash enough to move for an interlocutory injunction, to state at the bar that he proposes to dispute the validity of the patent, and that the question of the validity of the patent will have to be decided at the trial. Where the patent is not of recent origin—apparently in cases where it is of more than six years of age—the Court has been in the habit of entertaining motions for interlocutory injunctions because in such a case there is a *prima facie* presumption in favour of the validity of the patent, and in such a case as that it is not sufficient for the defendant to state at the bar that he proposes to dispute the validity of the patent; . . .

Fox in his work *The Canadian Law of Trade Marks and Industrial Designs* (1940), p. 493, under the heading "Interlocutory Injunction", states:

> The recognized rule governing the grant of an interlocutory injunction in patent cases, where validity is disputed, applies also to design cases. This rule is to the effect that, where the patent is a recent one and has not been established, and there is dispute as to its validity, the court will not, as a rule, interfere by granting an interlocutory injunction.

[1] (1929) 46 R.P.C. 267, 269.

Counsel for the applicant in support of the application cited the case of *Knowles v. Bennett*[1] in which the Court on an application for an interim injunction involving infringement of a design was more sympathetic to the owner of the design than to the imitator. It also found that the Register presents certain *primâ facie* evidence required by a plaintiff and referred to a section of the English Act similar to Section 7 (3) of our Act, which reads:

> 7. (3) The said certificate, in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act.

The important phrase in the section is: "in the absence of proof to the contrary". Where there is absence of proof the certificate is sufficient evidence of the design, but where there is some proof to the contrary the evidence is lacking. In the present case, in my opinion, the sworn statement of the president of the defendant corporation as to the veracity of the facts alleged in the defendant's defence and particulars of objections cannot summarily be set aside. It may not be irrefutable evidence, but sufficient for the Court to conclude that in all fairness to the parties, considering the provisions of the statute, the facts before the Court and the rule as to interlocutory injunction in recent registration of a design, the issuance of any injunction should be granted or denied at the trial on the merit of the case.

As was stated by counsel for the plaintiff, the considerations upon which applications for an interim injunction should be granted or refused relate to what is "just and convenient" whether or not the plaintiff appears to have a "*primâ facie*" case, preservation of the "*status quo*" and the "balance of convenience".

[1] (1895) 12 R.P.C. 137.

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GARCY CO. OF CANADA LTD. v. ROSEMOUNT INDUSTRIES LTD.

Fournier J.

The refusal of the application, in my opinion, will in no way inconvenience the plaintiff. If what appears on the file is in accordance with the facts, the plaintiff's secretary-treasurer on October 30, 1958, seven days after the registration of the assignment of the registered designs, was advised that a certain party proposed to purchase the ROSEMOUNT CLASSIC DE LUXE lighting fixtures, though the architects' specifications required the plaintiff's fixtures. This would, in my mind, indicate that both parties were manufacturing lighting fixtures and offering them on sale before the registration of the designs in question or the assignment thereof to the plaintiff. I do not know if the sale of the said fixtures was completed before or after the service of the plaintiff's statement of claim on the defendant. But at all events, in its statement of claim the plaintiff prays for the issuance of an order for an accounting of the profits realized by the defendant on the sale of the fixtures to which the registered designs were applied. Were the plaintiff to succeed with its action in infringement of the designs, there is no doubt that the Court would order an accounting of the profits made by the defendant pending litigation.

This is a case where the Court can find no factual or legal ground to justify the granting or an interlocutory injunction and to ignore the rule applicable when registered industrial designs are of a recent date. I believe that in this instance an order to restrain should not be granted before the validity of the registered designs, after litigation, has been established by a judgment at law.

Therefore, the judgment of the Court is that the application for an interlocutory injunction until the trial or the disposition of the action is refused with costs in the cause.

Judgment accordingly.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1958
Nov. 27
1959
Jan. 23

AND

FARB INVESTMENTS LIMITED .....RESPONDENT.

Revenue—Income—Income tax—Payment to lessor to accept surrender of lease—Income or capital receipt—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The respondent company in March 1954 leased its property to F who operated thereon two businesses, one a service station, the other a car wash. The lease was for five years at a monthly rental of $1,200. and payment of all taxes, as well as insurance premiums on the buildings on the lot. Subsequently an agreement was entered into by the respondent, F and Imperial Oil Ltd. whereby F surrendered his lease to the respondent who thereupon leased the service station to the oil company for a five-year term at an annual rental of $6,000. and the latter thereupon sublet the property to F for the full term less one day at the same rental, the respondent consenting. Pursuant to the agreement, and upon the surrender of the lease by F to the respondent and its acceptance thereof, the oil company paid the respondent $17,000. "as a consideration for such acceptance of surrender". At the same time a new lease for a five-year term was granted by the respondent to F of that part of the property on which he had carried on his car wash business, at a monthly rental of $700. and payment of taxes and insurance premiums thereon.

In re-assessing the respondent for its 1956 taxation year the Minister added $17,000. to its declared income, describing that item as "surrender of lease". The respondent's appeal from the assessment was allowed by the Income Tax Appeal Board and the Minister appealed from its decision.

Held: That by the terms of the lease from the respondent to the oil company, the respondent which had previously not been liable for payment of taxes and insurance premiums on the service station, became obligated to pay them. It could not be assumed that the respondent would voluntarily and without consideration forego the indemnification it previously had in regard thereto, and, in the absence of any explanation, it must be inferred that the $17,000. payment was to take the place of the right surrendered by the respondent. That being so, it was merely receiving in advance taxes and insurance premiums for a period of five years, in effect an additional payment of rent beyond the stipulated annual sum of $6,000., and the sum so received must be brought into account in computing the respondent's taxable income.

APPEAL from a decision of the Income Tax Appeal Board.[1]

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

[1] (1958) 18 Tax A.B.C. 349; 58 D.T.C. 91.

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MINISTER OF NATIONAL REVENUE v. FARB INVESTMENTS LTD.

J. D. C. Boland and *W. R. Latimer* for appellant.

W. D. Goodman for respondent.

CAMERON J. now (January 23, 1959) delivered the following judgment:

In this case, the Minister of National Revenue appeals from a decision of the Income Tax Appeal Board[1] dated January 7, 1958, which decision allowed the respondent's appeal from a re-assessment made upon it for its taxation year ending February 29, 1956 and dated December 20, 1956. In re-assessing the respondent, the Minister added $17,000 to its declared income, describing that item as "surrender of lease". There is no dispute as to the facts, the sole question being whether that sum, which was admittedly received, is or is not taxable income within the meaning of *The Income Tax Act.*

The respondent was incorporated as a private company on December 11, 1953 under the provisions of *The Companies Act* of Ontario. Its provisional directors were Shirley Farb (the wife of Saul Farb) and their three sons Jerome, Stewart and Donald Farb. On February 25, 1954, a certain property located at the corner of King St. West and John St. in the city of Toronto, and owned by the said three Farb brothers, was conveyed to the respondent company subject to an existing lease for five years, dated December 1, 1953, the lessee being Saul Farb, father of the lessors. The lessee operated thereon two businesses, one of which was that of a service station and the other that of a car wash. The evidence indicates that at some earlier date the property had been owned by Saul Farb, who had conveyed it to his three sons. On March 1, 1954, the respondent accepted a surrender of the old lease and granted a new five-year lease to Saul Farb at a monthly rental of $1,200 for the entire property.

Shortly before November 1, 1954, Imperial Oil Co. Ltd. approached the directors of the respondent company with the view of getting a lease on a portion of the property, namely, that on which Saul Farb operated a service station. Apparently, Imperial Oil did not desire to operate the service station but merely to control it in such a way as to

[1] (1958) 18 Tax A.B.C. 349; 58 D.T.C. 91.

ensure that its products would there be sold. It was prepared, if granted a lease, to immediately sublet it to Saul Farb and to pay $17,000 to the respondent if the lease to it could be arranged on the terms proposed.

In the result, after securing the approval of Saul Farb, an agreement was entered into on October 28, 1954 (Exhibit 1) between the respondent company, Saul Farb and Imperial Oil Ltd. Thereby, Saul Farb agreed to surrender his existing lease which the respondent agreed to accept. Upon such surrender, the respondent agreed to lease the service station to Imperial Oil Ltd. for a term of five years from November 1, 1954 at an annual rental of $6,000. Imperial Oil agreed, upon receiving such a lease, to immediately sublet the same property for the full term (less one day) to Saul Farb at the same rental, namely, $6,000 per annum, the respondent agreeing to such sublease. It was further provided by clause 2(*a*) of the said agreement as follows:

> 2.(a) If and when the said Farb surrenders the aforesaid existing lease to the said company, the said company will accept such surrender upon receiving from the said Imperial (which, contemporaneously with such acceptance will pay the said company) the sum of seventeen thousand dollars ($17,000) as a consideration for such acceptance of such surrender.

The terms of this agreement were duly carried into effect on November 1, 1954. Saul Farb surrendered the unexpired term of the old lease (Exhibit 2); the respondent granted a new lease of the service station to Imperial Oil Ltd. (Exhibit 3) which immediately sublet it to Saul Farb (Exhibit 4). A new lease for a five-year term was granted by the respondent to Saul Farb over that portion of the property in which he had carried on his car wash business, at a monthly rental of $700. Then, pursuant to the agreement of October 28, 1954, Imperial Oil Ltd. paid the respondent $17,000 in its 1956 taxation year.

The respondent owns no property other than that mentioned and carries on no business other than that connected with such ownership.

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The question as to the taxability of the said receipt of $17,000 is to be determined by a consideration of these facts and the relative provisions of *The Income Tax Act*, which then were:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

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

* * *

139.(1) In this Act,

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

Counsel for the respondent submits that this receipt was not on revenue account but was a receipt of capital. It was, he says, a bonus or premium paid for granting the lease. On behalf of the Minister, it is submitted that the receipt was income from the respondent's business or its property. Although the Minister is the appellant in this case, the onus of proving the assessment to be erroneous is on the respondent (*Minister of National Revenue v. Simpsons, Ltd.*[1]).

In support of his contention that the payment of $17,000 was a bonus or premium, counsel for the respondent pointed out that there was no difference in the rentals received prior to and after November 1, 1954. It was suggested, therefore, that the payment could not be in the nature of rent or of income from the business since it could be assumed that the full rental value was that paid by Saul Farb prior to November 1, 1954. There is no evidence as to the manner in which the sum of $17,000 was computed. The only oral evidence at the trial was that of Donald Farb, a director and secretary of the respondent since its incorporation. He said that there was very little discussion about the matter, that the only offer made by Imperial Oil was for that specific sum and that after all the directors had given it consideration, it was accepted.

[1] [1953] Ex.C.R. 93.

In endeavouring to find out the real nature of the payment and while examining the documentary evidence filed, certain facts have come to light which were not mentioned in the evidence of Donald Farb—facts which I think he must have known and should have disclosed. As I listened to the evidence at the trial, I was given the clear impression—although perhaps it was not so stated in express terms—that there was no essential difference so far as the respondent was concerned between that which Saul Farb, the prior tenant, was required to do and pay, and that which under the new arrangements, Imperial Oil and Saul Farb were required to do and pay for the property. True it is that the cash rentals received were the same, but there is a very substantial difference in regard to certain other matters.

By the terms of the lease made by the respondent to Saul Farb on March 1, 1954 (Exhibit 2), the lessee was required to pay a monthly rental of $1,200 for the whole of the property, and, in addition

> (*b*) the full amount of all taxes, local improvement rates and building insurance premiums charged against the said lessor in respect of the said demised premises or the buildings standing thereon.

By the terms of the lease from the respondent to Imperial Oil dated November 1, 1954, however, the oil company was required only to pay the agreed cash rental of $6,000 per year and was not required to pay either the taxes on the service station or the building insurance premiums, which taxes and premiums consequently fell to be paid for the full term of five years by the respondent. In the sublease from Imperial Oil and Saul Farb, the latter was again not required to pay such taxes or insurance premiums. However, by the terms of the new lease from the respondent to Saul Farb, on the car wash portion of the property, the lessee was required to pay such taxes and insurance premiums.

As a result of such changes, the respondent, which had previously not been liable for payment of taxes and building insurance premiums on the service station, was now obligated to pay them. There is no evidence before me as to what these would amount to over a period of five years, but there can be no question that they would be

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very substantial. The minute book of the respondent shows that the whole of the property was sold to the respondent in February, 1954 for a consideration of approximately $135,000. The agreed rental of the service station situated on a corner would also indicate that the taxes and insurance premiums would be very large.

Now it cannot be assumed that the respondent would voluntarily and without consideration forego the indemnification which it had previously had in regard to taxes and insurance premiums on the service station. I think there is a clear inference from the terms of the documents that the payment of $17,000 was closely related to the surrender of that right, more particularly as no evidence was given in explanation of why that right was surrendered. It may be true that the payment was made in order to prevail upon the respondent "to accept a surrender of the said existing lease, so as to enable the said lessee to apply for and obtain a lease" (as stated in the preamble of the lease to Imperial Oil), but if so, it was made in order to secure the particular lease that the parties had agreed upon, namely, one in which the tenant was not obligated to pay taxes and building insurance premiums. It is inconceivable that the respondent, in settling the terms of the new lease with Imperial Oil, would not take into consideration the terms of the outstanding lease to Saul Farb which still had over four years to run, or would fail to seek compensation in some manner for the loss of revenue that it would sustain if it did not require Imperial Oil to pay the taxes and insurance premiums. In the absence of any explanation, I must infer that the agreed amount of cash to be paid, namely, $17,000, either in whole or in some unascertained part, took the place of the right which was surrendered by the respondent. That being so, it was merely receiving in advance the amount of taxes and insurance premiums for a period of five years.

In view of that conclusion, it follows, I think, that the sum so received was nothing more than an additional payment of rent beyond the stipulated annual sum of $6,000 and must be brought into account in computing the respondent's taxable income. Even if it be the fact that the total amount of taxes and insurance premiums for a

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period of five years were less than $17,000, I would be obliged in the circumstances to find that the respondent had failed to satisfy me that there was error in fact or in law in the assessment, since no evidence was given on that particular matter.

I may add, however, that quite apart from the above considerations, I would have been inclined to the view that the sum received was not a capital receipt. The question to be decided is not whether in some senses or in some contexts such payment might be called a "capital payment", but whether within the terms of ss. 3 and 4 of *The Income Tax Act*, it is the profit arising from the business or property of the respondent. It is not necessary to reach any final conclusion on the mater, but I would point out that the cancellation of the old lease and the giving of a new lease to Imperial Oil in no sense affected the profit-making apparatus of the respondent and its capital structure remained precisely the same as it had previously been.

For these reasons, the appeal of the Minister will be allowed, the decision of the Income Tax Appeal Board set aside, and the re-assessment made upon the respondent affirmed. The appellant is entitled to his costs after taxation.

Judgment accordingly.

BETWEEN:

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Feb. 3 & 4

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Feb. 13

ALMA CATHERINE BURNS and RICHARD JOHN BURNS, Executors of the Estate of MICHAEL JOHN BURNS, deceased ..... APPELLANTS;

AND

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

Revenue—Succession Duty—Valuation of interest in estate—Where no rule, method and standard of mortality etc. prescribed by Minister, fair market value applicable—Dominion Succession Duty Act, S. of C. 1940-41, c. 14 ss. (2)(a)(e)(m), 5(1), 34, 58(2)(c) as amended, Regulation 20, Tables I, II, III and IV.

At the time of his death on June 23, 1953, Michael John Burns was entitled to a 15.9455 interest in the capital of the estate of the late the Honourable Patrick Burns, who died in 1937, but such interest

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would not become distributable under the terms of the latter's will until the death of a person who when John Michael Burns died had a life expectancy of twenty-five years. In valuing such interest for the purposes of the *Dominion Succession Duty Act* the Minister applied Regulation 20 entitled "Valuation of annuities etc., Section 34" and the tables approved for the purposes of that section and thereby assessed the value at some $180,647. On an appeal from the Minister's assessment to this Court

Held: That Regulation 20 and the tables referred to therein having been made at a time when s. 34 did not empower the Minister to prescribe rules, methods or tables etc. for the valuation of such an interest, neither Regulation 20 nor the tables were applicable in valuing the interest in question. *Smith and Rudd v. Minister of National Revenue* [1950] S.C.R. 602, referred to.

2. That while s. 34 as re-enacted by S. of C. 1952, c. 24, s. 8, may empower the Minister to prescribe a rule, method and standard of mortality etc. for the valuation of such interest, no such rule, method or standard etc., had been made at the time of the death of John Michael Burns and accordingly the interest in question fell to be valued for the purposes of the Act at its fair market value to be ascertained by any relevant evidence of such value.

3. That on such evidence the fair market value did not exceed $486,035 and the appeal should therefore be allowed and the assessment referred back to the Minister to be revised accordingly.

APPEAL under the *Dominion Succession Duty Act.*

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

K. E. Eaton and *R. H. McKercher* for appellants.

G. H. Milvain, Q.C. and *F. J. Cross* for respondent.

THURLOW J. now (February 13, 1959) delivered the following judgment:

This is an appeal by the executors under the will of Michael John Burns, deceased, from an assessment of succession duties made by the Minister of National Revenue on or about October 27, 1955 and confirmed by him with a minor alteration on August 2, 1956 in respect of successions to property under the will of the said deceased. The deceased died on June 23, 1953, leaving among other assets a 15.9455 per cent interest in the capital of the estate of the late the Honourable Patrick Burns, which would become distributable under the latter's will upon the death of Millicent Elizabeth Burns, and the matter in issue in this appeal is the value of that 15.9455 per cent interest on June 23, 1953 for the purposes of the *Dominion Succession Duty Act,* Statutes of Canada 1940-41, as amended.

It is agreed between the parties that on June 23, 1953, when Michael John Burns died, the assets held by the trustees of the estate of the late the Honourable Patrick Burns had a total value amounting to $13,260,593 and that Millicent Elizabeth Burns at that time had a life expectancy of approximately twenty-five years. The late the Honourable Patrick Burns had died in 1937, prior to the coming into force of the *Dominion Succession Duty Act.*

In the assessment under appeal, the Minister valued the 15.9455 per cent interest in question at $810,647.28, having reached this result by the following calculation:

15.9455% of $13,260,593.00 x .3833812 = $810,647.28

The figure .3833812 involved in this calculation was itself obtained by the following formula:

$$1-(.04 \times 15.41547)=.3833812$$

In this formula, .04 is a rate of interest and 15.41547 is the value on June 23, 1953 of an annuity of $1 per annum for life for a person of the age of Millicent Elizabeth Burns, according to a table of present value of life interests or life annuities approved by the Minister pursuant to s. 34 of the Act, which table itself is based on a standard of mortality prescribed by the Minister pursuant to s. 34 in another table.

In substance, the result of the formula is to subtract from each dollar of the value of the assets of the estate of the late the Honourable Patrick Burns a portion thereof in respect of the postponement of the time when the assets will become distributable and to produce a sum which, if invested at four per cent compound interest on June 23, 1953, would amount to $1 at the time of distribution. Thus the sum of .3833812, invested on June 23, 1953 at four per cent compound interest, would produce $1 at the termination of the life expectancy of Millicent Elizabeth Burns some 25 years thereafter and, as explained by Mr. W. Riese, who gave evidence at the trial, the sum of $810,447.28 so invested would then produce $2,114,467.86, which was equal to 15.9455 per cent of $13,260,593.

In support of the assessment, the Minister relied, both in his decision affirming it and in this Court, on s. 34 of the Act and on Regulation 20 of regulations made by him

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under s. 58 of the Act and published in the *Canada Gazette* on December 8, 1948. By s. 58(2), it was provided as follows:

58. (2) The Minister may make any regulations deemed necessary for carrying this Act into effect, and in particular may make regulations:—

* * *

(*c*) prescribing what rule, method and standard of mortality and of value and what rate of interest shall be used in determining the value of annuities, terms of years, life estates, income and interests in expectancy.

The regulations published as above mentioned are entitled "SOR/48-513 Dominion Succession Duty Act—Regulations made under Section 58 of the Act." Regulation 20 was entitled "Valuation of annuities, etc., Section 34." It provided as follows:

20. (1) The value of every annuity, term of years, life estate, income or other estate, and of every interest in expectancy, shall be determined,

(*i*) if the succession does not depend on life contingencies, on the basis of compound interest at the rate of four per centum per annum with annual rests; and

(*ii*) if the succession depends on life contingencies, on the basis of interest as aforesaid, together with the standard of mortality as defined in Table II below; and Tables I, III and IV, below, which are derived from the bases aforesaid, shall be used so far as they may be applicable in the valuation of any succession.

The tables referred to in this regulation were entitled as follows:

TABLES

The Tables hereby approved pursuant to Section 34 of the Act and referred to in Regulation 20 are as follows:

Table I

PRESENT VALUE OF DEFERRED GIFTS

* * *

Table II

PRESCRIBED STANDARD OF MORTALITY

* * *

Table III

PRESENT VALUE OF LIFE INTERESTS OR LIFE ANNUITIES

* * *

Table IV

PRESENT VALUE OF AN ANNUITY FOR A TERM CERTAIN

The figure 15.41547 appears in Table III as the value of an annuity of $1 per annum for life for a person of the age which Millicent Elizabeth Burns had attained on June 23, 1953. No other regulation was referred to or relied on.

In my opinion, the valuation made by the Minister cannot be justified under Regulation 20 or under any of the tables referred to therein. Broadly speaking, there are two purposes of the Act for which determinations of value must be made. The first is the ascertainment of the "aggregate net value" by which the initial rate of duty prescribed by s. 10 is governed. "Aggregate net value" is defined by s. 2(*a*) (so far as material to this case) as "the fair market value as of the date of death of all the property of the deceased wherever situated. . . ." The word "succession" does not appear in the material part of this definition. The value of the interest in question, as part of the aggregate net value of the estate of Michael John Burns, is what is in issue in these proceedings.

The other purpose of the Act for which determinations of value must be made is the ascertainment of "dutiable value" by which additional rates of duty prescribed by s. 11 are governed and to which both the initial and the additional rates are applied. "Dutiable value" is defined by s. 2(*e*) (so far as material to this case) as "the fair market value as at the date of death of all property included in a succession to a successor."

"Succession" is defined by s. 2(*m*) as follows:

2. In this Act, and in any regulation made thereunder, unless the context otherwise requires,

* * *

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

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"Successor" is defined as the person entitled under a succession, and "deceased person" is defined as meaning a person dying after the coming into force of the Act. The Act came into force on June 14, 1941. By s. 5(1), it is further provided:

> 5. (1) Notwithstanding that the value of the property included in a succession to which each heir, legatee, substitute, institute, residuary beneficiary, or other successor is entitled, cannot in any case be determined until the time of distribution, nevertheless, for the purposes of this Act, all such property shall be valued as of the date of death, and each successor shall be deemed to benefit as if such property less the allowances as authorized by section eight of this Act were immediately distributed, and as if each successor benefited accordingly.

It will be observed that the scheme of the statute is to impose taxation which is measured by the fair market value of property of persons dying after the coming into force of the statute. The taxation so imposed is thus dependent upon an objective and well-known criterion. It is one that may present difficulties where the property is of a kind not commonly bought or sold, but it is nevertheless one as to which a body of jurisprudence has been built up over a long period of time in the course of many judicial endeavours to apply it in particular situations. Whether difficult of application in particular instances or not, it is a concept capable of general application to all property, and in the provisions mentioned it is prescribed as one of the foundations on which the tax imposed by the statute is based. From this, it appears to me to follow that, under the *Dominion Succession Duty Act,* taxation by it is the rule and that any exception to it which may be found in the statute is to be strictly construed.

Now, when the statute came into force on June 14, 1941, it contained in s. 34 a provision the purpose of which, in my opinion, was to enable the Minister, in the cases therein mentioned, to prescribe rules, methods, standards, etc., by which the fair market value of property of the deceased from which annuities were to be paid, or in which life or other interests had arisen on the death of the deceased, might be apportioned to the several successors to interests in such property. The section read as follows:

> 34. The value of every annuity, term of years, life estate, income, other estate, and of every interest in expectancy *in respect of the succession to which duty is payable under this Act* shall for the purposes of

this Act be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide.

It will be noted that this section was applicable to the valuation of the property included in a succession. Valuation of property for the purpose of ascertaining aggregate net value is not mentioned.

In *Smith and Rudd v. Minister of National Revenue*[1], the Minister sought to apply this section and a regulation made pursuant to it in determining as part of the aggregate net value of the estate of Mary Catherine Fisher, who died after the *Dominion Succession Duty Act* came into force, the value of an interest which she held at the time of her death in the income to be derived from the estate of her father, Charles Woodward, who had died before the coming into force of the *Dominion Succession Duty Act,* such interest being terminable upon the death of the survivor of four named persons. Kellock J., in delivering the judgment of the Supreme Court of Canada holding that s. 34 had no application to the valuation of such interest as part of the property of Mary Catherine Fisher, said at p. 603:

> The important words for present purposes are the words, "*in respect of the succession to which duty is payable under this Act.*" The only successions in respect of which duty is payable under the Act are the successions of the appellants to the estate of Mary Catherine Fisher. The section in its clear terms, therefore, has no application to anything but the valuation for duty purposes of the interests of the appellants in that estate.

Then, after quoting the definitions of "aggregate net value" and "dutiable value" and s. 5(1) of the Act, the learned judge continued at p. 604:

> In my opinion, the appellants are right in their contention that the value of the asset of the Fisher estate here in question falls to be determined under the provisions of s. 2(*a*) and (*e*) and s. 5(1), in other words, at the fair market value at the date of the death of Mary Catherine Fisher on 23 October, 1943.

Now, both Regulation 20, above quoted, and the tables referred to therein purport to be made for the purposes of s. 34 of the Act, and at the time when they were made and published in December, 1948, s. 34 was still in the same form as it was when considered in *Smith and Rudd v. Minister of National Revenue.* Moreover, Regulation 20,

[1] [1950] S.C.R. 602.

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as well, is in precisely the same form as the one relied on and considered in that case. The regulation in question was number 19 of regulations published on July 12, 1941, as amended by a regulation published on November 8, 1941. By its terms it is limited to the valuation of annuities, etc., included in a *succession,* and it does not purport to be applicable to the determination of aggregate net value. Referring to this regulation, Kellock J. said at p. 604:

> Although it is not raised by the pleadings, Mr. Sheppard for the respondent contends that s. 58(2) is applicable independently of s. 34, and that under the relevant regulation the same result is arrived at as if the provisions of s. 34 applied.

Then, after quoting s. 58(2) and the portion of Regulation 19 corresponding to that of Regulation 20 above set out, and stating that the latter was the only regulation to which the Court had been referred, the learned judge proceeded:

> In my opinion, the terms of this regulation are thus expressly limited, as is s. 34 itself, to the valuation of the interests mentioned *which are included in the succession, the duty in respect of which is being determined.* Again, both a basis of interest and a standard of mortality enter into the computation and it is clear from Table II itself, which bears the heading, "Standard of mortality prescribed for the purposes of section 34", that the basis of computation prescribed by the regulation is for use only under that section. Even if s. 58 could stand alone, therefore, no regulation has been passed under it which could apply to the valuation of the item here in question as part of the residuary estate of Mary Catherine Fisher.

The wording of the heading of Table II, referred to in this passage, which appears in the tables published with the regulations on July 12, 1941, was not precisely the same as the heading quoted above of the tables published in December, 1948, but the latter heading applies to all four of the tables mentioned, and the effect, in my opinion, is the same. It follows, in my opinion, that neither Regulation 20 nor any of the tables therein referred to is applicable to the valuation of the interest here in question as part of the aggregate net value of the estate of Michael John Burns. If, therefore, the method used by the Minister for finding the value of the interest in question is to be upheld, authority for it must be found in s. 34 itself. That section, as in force when the *Smith and Rudd* case arose and when the regulations were published in December, 1948, was, however, repealed, and a new section was substituted by

Statutes of Canada 1952, c. 24, s. 8. In the section substituted, the words "in respect of the succession to which duty is payable under this Act" do not appear, and at the end of the section are found the words, "and the value so determined shall be deemed to be the fair market value." The substituted section is as follows:

> 34. The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy shall for the purposes of this Act be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide, and the value so determined shall be deemed to be the fair market value thereof.

The substitution of this provision seems to me to have wrought a considerable change, and it may well be that, on its present language, the scope of s. 34 has been made wide enough to apply to the valuation of the interest in question as part of the aggregate net value of the estate of Michael John Burns. But, as I interpret it, this provision is not, as contended on behalf of the Minister, an authority to him to decide individual cases by applying such rule, method, standard, etc., as he then sees fit to apply. Nor is it, as also contended, an authority to value arbitrarily. Despite the use in it of the words "may . . . decide", the authority conferred is not, in my opinion, a judicial power at all but is a power delegated to the Minister to legislate. It is an authority to decide from time to time what rule, method and standard of mortality and of value and what rate of interest shall be used in the determination of the value of property of the several kinds mentioned. It may be (though I do not think it is necessary for the purposes of this case to decide the point) that the decision to be made from time to time need not be made as a regulation under s. 58, though that is obviously one way in which the authority of s. 34 can be exercised, but on the other hand I do not think that such a decision can be made or that the power given by s. 34 can be exercised by the mere application to a particular case or to particular cases of what, in truth, is an inapplicable regulation or that the making of such a decision is to be inferred from the mere fact that such a regulation was applied in such cases even though, on its face, it was not applicable. The decision to be made in exercise of such a legislative authority, in my

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opinion, must be marked with more solemnity than that, and it must at least be a decision setting a rule, method or standard, etc. of general application to all like cases. Moreover, since s. 34 does not expressly or by any necessary intendment authorize the making of a decision with retroactive effect, I do not think any decision made pursuant to it can apply retroactively to the making of valuations the necessity for which under the statute has already arisen. The situation, accordingly, in the present case is that the interest of the deceased Michael John Burns in the estate of the late the Honourable Patrick Burns, which interest must be valued for the purposes of the Act, is property of a kind to which s. 34 may be applicable, but the Minister has not exercised the authority thereby conferred to prescribe a rule, method or standard, etc. by which property of this kind is to be valued.

By what rule, method, etc. then is the value to be determined? While the strictest interpretation of the word "shall" in s. 34 might lead to the conclusion that no valuation at all could be made in this situation, in my opinion that is not the effect of the section. Such a construction would run counter to the whole purpose and tenor of the statute. As I interpret s. 34, it means that the value of property of the kind therein mentioned is to be determined by such rule, etc., as the Minister may decide, in all cases for which he may prescribe an applicable rule, etc. Where he has not prescribed any applicable rule, etc. and until an applicable rule, etc. is prescribed, the situation is simply that the legislative power conferred by s. 34 to prescribe a rule, etc., for determining value in some way other than by the ascertainment of fair market value has not been exercised, and the test of fair market value of such property is not ousted by s. 34 or any decision made under it but remains applicable for the purposes of the Act. Accordingly, I am of the opinion that what is to be ascertained as the value of the interest in question for the purposes of the Act is its fair market value on June 23, 1953, unaffected by any statutory provision or regulation, and that such fair market value is to be ascertained by any relevant evidence of such value.

In approaching the problem of finding the fair market value of the interest in question, it is, in my view, important to bear in mind that the right to be valued was not at the material time a right to $2,114,467.86, either presently or in the future. While the interest was a right at some future time to 15.9455 per cent of an estate the assets of which, at the material time, were worth $13,260,593, the assets in question were not those of Michael John Burns at the time of his death, nor was he entitled to 15.9455 per cent of them. His right was simply to 15.9455 per cent of such capital assets as might be held by the trustees when the time for distribution arrived. In the meantime, the assets were subject to the terms of the trust in the lawful discharge of which by the trustees such assets by the time of distribution could be expected to change and might well become more or less valuable than they were when Michael John Burns died but would be quite unlikely to be worth the same. The uncertainty arising from this feature of the interest in question is compounded by the further uncertainty of the date when the assets would become distributable, depending, as it did, on the life of a person with a life expectancy of 25 years. When to these features is added the fact that no income or return can be derived from this interest pending the arrival of the date of distribution which, though it might come quickly, might also not come until long after 25 years had elapsed, it seems to me to be obvious that any prudent prospective purchaser of the interest would not be willing to give for it the amount which, if invested at four per cent, would produce $2,114,467.86 by the time the expected date of distribution would arrive. No doubt, if he bought it for that amount and the date of distribution arrived much earlier than expected, he would be likely to have a profit, depending largely on how much earlier than expected the date of distribution arrived. But prudence would, I think, prompt him to think that the risks of no gain at all or of loss were just as great, if, indeed, they were not greater in the circumstances. And where other and less speculative investments were available in which, even if the life expectancy were not exceeded, he could do as well as or better than

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four per cent and with less risk, I think the most he would be willing to give for the interest in question would be much less than the $810,647.28 at which the Minister valued it.

The appellants called two expert witnesses on the question of value. The first of these was Mr. T. P. N. Jaffrey, who estimated the fair market value of the interest in question at the material time at $486,035. He also expressed the opinion that the interest could only have been marketed or disposed of under the most favourable of market conditions and to a most unusual investor. He had in mind two persons in Canada who, for their own financial reasons, might be interested in purchasing such an interest but said that in the United States the market was not so limited. The other witness, Mr. Gordon Page, put the fair market value at $456,428. The evidence of these two witnesses, both of whom, in my opinion, were eminently well qualified to appraise the value of such an interest from an investor's point of view, satisfies me that its fair market value at the material time did not exceed $486,035. On the other hand, with the chance of a number of different persons either in Canada or the United States being interested, I do not think I should regard it as unlikely that that figure would be realized if the interest were offered to such persons. In the result, therefore, I adopt $486,035 as the amount at which the value for the purposes of the *Dominion Succession Duty Act* should be set.

The appeal will be allowed with costs and the assessment referred back to the Minister to be revised accordingly.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT.

1958
Dec. 22 & 23
1959
Jan. 20

BETWEEN:

OWNERS OF THE MOTOR VESSEL *LUBROLAKE* ..... PLAINTIFF;

AND

THE SHIP *SARNIADOC* ..... DEFENDANT.

Shipping—Collision in St. Lawrence River—One ship at anchor—Anchor lights—Regulations for Preventing Collisions at Sea, Rules 11, 29—Rules of the Road, 14(2)—"Forepart" of ship—Anchor lights placed on forward part of vessel comply with Rule 11—Negligent operation of ship bound downriver sole cause of collision—Excessive speed and slackness of watch kept by defendant ship—Attempt to clear anchored ship at too close quarters inexcusable.

In an action for damages resulting from the collision in the St. Lawrence River between the *Sarniadoc* bound downriver and the *Lubrolake* at anchor, the Court found the collision was brought about solely by the fault and negligence of those in charge of the *Sarniadoc*.

Held: That the anchor lights on the *Lubrolake* being placed forward of amidship were on the forward part of the vessel as opposed to her after part and so placed complied with Rule 11 of the *Regulations for Preventing Collisions at Sea.*

2. That under the circumstances even if the anchor lights of the *Lubrolake* were not so placed as to comply strictly with the rules this was not the cause of the collision which was brought about by the failure of the *Sarniadoc* to keep clear of the *Lubrolake* when by the exercise of ordinary prudence and good seamanship she might have done so.

3. That the *Sarniadoc* was proceeding at an excessive speed, and the slackness of the watch kept by her and the inexcusable attempt to to clear the anchored vessel at too close quarters all contributed to the collision.

ACTION for damages resulting from the collision of two vessels in the St. Lawrence River.

The action was tried before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District, sitting with assessors, at Montreal.

R. C. Holden, Q.C. and *A. S. Hyndman* for plaintiff.

Jean Brisset, Q.C. for defendant.

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

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OWNERS OF THE MOTOR VESSEL *Lubrolake* v. THE SHIP *Sarniadoc*

ARTHUR I. SMITH D. J. A. now (January 20, 1959) delivered the following judgment:

This litigation arises out of a collision which occurred in the St. Lawrence River approximately 3000 feet below Buoy 5M on the south side of the channel and abreast of Lanoraie, Quebec, at about 0535 hours on October 30, 1956.

The *Sarniadoc,* a twin screw motor vessel of the canaller type of 2289.9 gross tons and 1719.56 tons net register, having an overall length of 253.2 feet and a breadth of 44 feet and manned by a crew of 23 all told, was proceeding downriver on a voyage from Lorraine, Ohio, to Quebec with a full cargo of coal. She was carrying a pilot. Her speed at full ahead was 12½ knots.

The *Lubrolake,* a twin screw tanker of 1622.44 tons gross and 1224.56 tons net register, 250.4 feet in length overall and 43 feet in breadth. She was manned by a crew of 27 all told. She was on a voyage from Montreal to Chicoutimi but was at the time of, (and had been for a period of about 3½ hours prior to,) the collision at anchor.

The case for the plaintiff is that about 0200 hours on October the 30th, shortly after clearing the Ile St. Ours channel, fog began to set in and the *Lubrolake* went to anchor slightly south of midchannel below Buoy 5M, the current at that point being approximately 1.7 knots. It is alleged that Signal Service was notified by radio-telephone and the anchored position of the *Lubrolake* was thereafter broadcast by Signal Service at regular intervals to all ships. The plaintiff alleges that after the *Lubrolake* had been at anchor several hours the lights of a downbound vessel (which proved to be the *Sarniadoc*) were seen at a distance of about 1000 feet and bearing on the starboard bow of the *Lubrolake.* Warning signals of one short, one long and one short blasts were given by the *Lubrolake,* but the *Sarniadoc* came on at speed and with her port bow struck the starboard bow and stem of the *Lubrolake* causing heavy damage, after which the *Sarniadoc* continued on fast and disappeared in the fog. It is alleged that the said collision and the resulting damage were caused by the fault and negligence of the *Sarniadoc* and those on board her, in that they failed to keep a proper lookout, their

owners failed to provide her with efficient radar or failed to maintain same in proper order and those on board failed to make proper and seamanlike use of the radar or of their radio-telephone and other navigational aids; they navigated the vessel at an excessive speed and failed to sound proper fog signals, failed to ease, stop or reverse their engines in due time or at all, failed to keep clear of the *Lubrolake* or to exercise the precautions required by the ordinary practice of seamen or the special circumstances of the case and failed to take in due time or at all the proper or any steps to avoid the collision. It is alleged that those in charge of the *Sarniadoc* failed to comply with Rules 15, 16, 22, 23, 27, 28 and 29 of the *Regulations for Preventing Collisions at Sea.*

On the other hand the case for the *Sarniadoc* is that, although light fog was encountered by her between Cap St. Michel and Verchères and her speed reduced, the weather then cleared and visibility abeam Verchères was over 5 miles. Under these conditions the engines of the *Sarniadoc* were put again at full ahead, the radar being on the 2 mile range. It is alleged that the vessel's navigation lights were burning brightly and that a sharp visual and aural lookout was being kept. The defendant avers that in these circumstances and while the vessel was being steered on the Ile St. Ours course, the lights of a number of ships at anchor ahead were sighted and in particular the lights of a vessel aground on the south side of the channel, the lights of a vessel at anchor almost abreast Buoy 5M on the north side of the channel and those of another vessel (which turned out to be the *Lubrolake*) below Buoy 5M and slightly to the south of midchannel. The defendant alleges that the *Sarniadoc's* course was altered to starboard to make the bend in the channel above flashing Buoy 5M and in order to come onto the Lanoraie Range Lights course from the Ile St. Ours Range Lights course and that as the vessel was approaching Buoy 5M it was noticed that fog was rising from the water ahead and the engines of the *Sarniadoc* were put on slow ahead and the order given to steer on 31° True. The pilot decided to manoeuvre the ship in order to bring her to anchor below the *Lubrolake,* which then was noticed to be exhibiting the anchor lights of a laker. It is alleged that in order to accomplish this the

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pilot decided to pass the *Lubrolake* on her portside and to do so he altered course to 41° True and when the anchor lights of the *Lubrolake* came to bear about 5° on the port bow of the *Sarniadoc* the wheelsman was ordered to go another 10° to starboard and to steer a course of 51° True in order to give the *Lubrolake* a better offing, it being estimated at that time that the vessels would clear port-to-port at a distance of about 100 feet. It is alleged that during all of this time the hull of the *Lubrolake* was enveloped in fog and could not be seen but her lake anchor lights were visible above the fog. Suddenly however the bow of the *Lubrolake* loomed out of the fog bearing dead ahead and so close that the collision was inevitable; the wheel was ordered hard astarboard and both engines full speed astern, with the result that the stem of the *Sarniadoc* cleared the stem of the *Lubrolake* but the *Sarniadoc's* portside by way of forecastle came into contact with the *Lubrolake's* stem; the engines were immediately stopped and the starboard engines then ordered full ahead in order to swing the stern of the vessel away from the stem of the *Lubrolake*, but there was a second contact further aft than the point at which the first collision occurred.

It is alleged that the collision and the damage occasioned thereby were caused by the fault and negligence of the *Lubrolake* and those on board her, in that the *Lubrolake* was not carrying the lights prescribed by Rule 11 of the Regulations for Preventing Collisions at Sea and, in particular, was not carrying the proper anchor lights for lake vessels, since her forward anchor lights were not installed forward on the ship but rather were just forward of amidship in contravention of Rule 14 of the *Rules of the Road for the Great Lakes;* the *Lubrolake* was not ringing her bell as prescribed by Rule 15 of the said regulations; she appeared to be lying partly athwart the channel and those on board her were not keeping a proper anchor watch. It is alleged that the *Lubrolake* contravened Rules 11, 15, 27 and 29 of the *Rules of the Road.*

The proof shows that the *Lubrolake* came to anchor at a point approximately 3000 feet below Buoy 5M and slightly south of midchannel and that she lay heading upstream but at somewhat of an angle inclining towards the south shore.

The *Sarniadoc* left Montreal at about 0250 hours and the weather then being clear she proceeded at full speed until she reached a point between Cap St. Michel and Verchères, where she encountered some fog and reduced her speed. As she passed Verchères however she left the fog behind and her engines again were put full ahead. Those on board the *Sarniadoc* admitted that as the vessel approached Buoy 5M, it was noted that there was considerable dense low lying fog ahead and above the fog the anchor lights of a laker (which later proved to be the *Lubrolake*) were seen slightly on the *Sarniadoc's* starboard bow. Shortly after leaving the Ile St. Ours channel the *Sarniadoc,* which had been on course of about 002°, was brought on 30° True and apparently the pilot had by then decided to pass the anchored laker to starboard and come to anchor below her. According to pilot Dussault the course of the *Sarniadoc* was altered 10° to starboard shortly after she had come onto course 30° and subsequently he altered a further 10° to starboard to bring her onto a course of 50° with the object of keeping the *Lubrolake* well to port as he passed her.

There is contradiction between the testimony of the pilot Dussault and the first mate of the *Sarniadoc* as to the speed of the *Sarniadoc* as she approached the *Lubrolake.* According to the testimony of the first mate however she continued on at full speed until about 1000 feet from the *Lubrolake* when half speed was ordered. The first mate, who was with the pilot in the wheelhouse, stated that when the hull or bow of the *Lubrolake* was first sighted it was only from 25 to 50 feet distant. The pilot estimated this distance at from 20 to 50 feet. Up until that moment only the anchor lights of the *Lubrolake* showing above the fog had been seen.

Although a number of faults were alleged against the *Lubrolake* I am satisfied that none of these have been established unless it is her alleged failure to carry the anchor lights prescribed by law. There is evidence that the *Lubrolake* blew fog signals and rang her bell when the lights of the *Sarniadoc* were seen approaching. In any event those in charge of the *Sarniadoc* were well aware of her presence, and of the fact that she was at anchor, when the *Sarniadoc* was still over half a mile upstream from her.

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The defence, in fact, based its case at the hearing solely upon the alleged failure of the *Lubrolake* to carry the anchor lights prescribed by law.

The second paragraph of Rule 11 of the *Regulations for Preventing Collisions at Sea* provides that:

> A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20, and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than 15 feet lower than the forward light, another such light.

Rule 14 (2) of the *Rules of the Road for the Great Lakes* is to similar effect, except that it requires two white lights on the forward part of the vessel at the same height and not less than ten feet apart arranged horizontally and athwartship.

The proof is that the *Lubrolake* carried two anchor lights at the same level on her foremast and two anchor lights on her aftermast, these being the lights prescribed by the rules governing navigation in the Great Lakes. The basis of the defendant's complaint however is that the anchor lights on the foremast, instead of being in the bow of the vessel, were approximately 92 feet abaft her stem and it was argued that this did not constitute compliance with the rules above quoted.

It appears to me that there are two questions arising from this defence: 1) were the anchor lights so placed as to comply with the said rules; and 2) if not, was the fact that they were not so placed the cause or a contributing cause of the collision.

Neither the *Shipping Act* nor the rules above cited define the "forepart" of a ship and, in the absence of any legal definition, it would appear just and reasonable to give the term "forepart" its ordinary connotation and interpret it to refer to that part of the ship leading towards the bow.

There is evidence that the distance from the stem at which the forward anchor lights are carried on lake vessels varies widely from vessel to vessel. Apparently the normal distance is approximately 50 feet, but the evidence shows that some vessels carry their forward anchor lights considerably further aft at distances of 75 feet or more from the stem.

In the case of the *Lubrolake,* whose overall length is 250.4 feet, the forward anchor lights were 92 feet from the stem and therefore about 33 feet forward of amidship and hence on the forward part of the vessel as opposed to her after part.

As was pointed out by the Court of Appeal in the case of the *Philadelphian*[1] Smith A.L., the rule does not say that the forward light is to be carried at or near the stem, or that the after light is to be carried on the after part of the vessel. On the contrary, the rule stipulates that the after light shall be carried at or near the stern, while it is sufficient, according to the rule, that the forward light be placed on the forward part of the vessel.

After giving the matter the best consideration of which I am capable I am unable to conclude that it has been established that the *Lubrolake's* anchor lights did not meet the requirements of the rule.

The desirability of having the forward anchor lights closer to the vessel's stem would appear to be self-evident, and I can well imagine circumstances (particularly where vessels are compelled to navigate at night or in fog and at close quarters, e.g. in harbours, etc.) where the fact that the forward lights were so far from the stem as they were in the case of the *Lubrolake* might contribute to the danger of collision.

However, in the circumstances of the present case, I am convinced that even if the anchor lights of the *Lubrolake* were not so placed as to comply strictly with the rules this was not the cause of the collision which, on the contrary, was brought about by the failure of the *Sarniadoc* to keep clear of the *Lubrolake* when by the exercise of ordinary prudence and good seamanship she might have done so.

The anchor lights of the *Lubrolake* had been seen by those on board the *Sarniadoc* when she was approaching at a distance of approximately 3000 feet and at that time the *Lubrolake* was recognized as a laker at anchor. The river at that point is navigable over a width of about 2500 feet and I am satisfied (and I am so advised by the assessors) that in such circumstances there was ample time

[1] [1900] P. 43

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and space for the *Sarniadoc* to have so directed her course so as to have met and passed the *Lubrolake* safetly starboard to starboard. Although there was some suggestion that this might have involved difficulty having regard to a vessel anchored below the *Lubrolake,* the proof does not support such a proposition and pilot Dussault frankly admitted that this vessel was so far below the *Lubrolake* that it presented no difficulty whatever. Instead of passing to port of the *Lubrolake* (so as to leave her to starboard) the *Sarniadoc* elected to pass her to starboard which I am convinced (and I am so advised by the assessors) she had ample time and space to accomplish if she had altered course to starboard in time and had been proceeding at a speed consistent with the rules and good seamanship having regard to thick fog and other circumstances. (Rule 11 and Rule 29.)

Pilot Dussault testified that it was his intention to clear the *Lubrolake* at a distance of 25 feet. There is nothing in the evidence to excuse or justify the action of the *Sarniadoc* in attempting to clear the anchored vessel at such close quarters and, having regard to the heavy fog, the speed of the *Sarniadoc* and the fact that those on board her could not see the hull of the *Lubrolake* and therefore could not know how far her forward anchor lights were from her stem, the action of the *Sarniadoc* in attempting to do so was foolhardy and reprehensible.

In my opinion the proof amply justifies the conclusion not only that the course of the *Sarniadoc* was negligently laid in such a way as to needlesly bring her into too close proximity with the anchored vessel, but that the *Sarniadoc* was navigated at a speed which having regard to the fog was excessive and contrary to law. I am convinced moreover that the excessive speed of the *Sarniadoc* and the slackness of the watch kept by her indicated by the fact that the hull of the *Lubrolake* was only sighted at a distance of from 20 to 50 feet and that her fog signals were not heard by those on watch of the *Sarniadoc* were faults contributing to the collision.

I find therefore that the collision was brought about solely by the fault and negligence of those in charge of the *Sarniadoc.*

The plaintiff's action therefore is maintained with costs; and failing agreement by the parties as to the amount of damages sustained by the plaintiff there will be a reference to the Registrar for the purposes of having said damages established in accordance with the usual practice.

Judgment accordingly.

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BETWEEN:

1958

Sept. 18

1959

Feb. 2

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE COOPERATIVE AGRICULTURAL ASSOCIATION OF THE TOWNSHIP OF GRANBY .... RESPONDENT.

Revenue—Income tax—Co-Operative—Interest paid on preferred shares—Whether interest paid on borrowed money or dividends on capital paid out of profits— Cooperative Agricultural Associations Act, R.S.Q. 1941, c. 120, as amended, ss. 5(1), 14, 19, 20, 22, 24, 25—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(b)—The Income Tax Act, 1948, S. of C. 1948, c. 52, s. 11(1)(c), The Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(c).

The respondent, incorporated in 1938 under the *Cooperative Agricultural Associations Act,* (R.S.Q. 1927, c. 57) as amended, undertook in 1946 to finance its operations by the issue of $275,000 preferred shares. An endorsement on the back of the certificates covering the issue set out that the term was for 10 years from July 15, 1946; the interest rate 5% payable half-yearly; redemption, $27,500 annually; interest on all preferred shares issued to run from the date of subscription to the date of repayment.

In its annual income tax returns for the years 1947 to 1953 inclusive the respondent claimed as deductions under s. 5(1)(*b*) of the *Income War Tax Act,* and s. 11(1)(*c*) of the *Income Tax Act,* as interest paid on borrowed capital used in the business to earn income, the annual interest payments made to the preferred shareholders. The deductions were disallowed by the Minister but on appeal to the Income Tax Appeal Board allowed in part. On an appeal from the Board's decision

Held: That any attempt to pay the interest agreed upon between the respondent and the preferred shareholders other than out of the profits of the Society would be contrary to the provisions of the *Cooperative Agricultural Associations Act* and numerous decisions on the point.

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2. That the word "interest" as used in the statute when referring to preferred shares must be taken to mean "dividend" and that such dividend is payable out of the profits and not out of the capital of the Society.

3. That the respondent had no power by setting out on the back of the certificates the interest rate, dates of payment and conditions governing the redemption of the shares, to change the nature of this financial operation which was the issue of preferred shares. The amounts it received for the preferred shares belonged to its share capital and the payments made in the years 1949 to 1953 to the preferred shareholders were interest, or better still, dividends on capital invested by the shareholders and derived from the profits of the undertaking and for these reasons it followed that the provisions of the *Income War Tax Act* and *Income Tax Act* relied on by the respondent had no application.

APPEAL from a decision of the Income Tax Appeal Board.

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

Guy Favreau, Q.C. and *Paul Boivin, Q.C.* for appellant.

Albert L. Bissonnette for respondent.

FOURNIER J. now (February 2, 1959) delivered the following judgment:

Dans cette affaire, il s'agit d'un appel de la décision rendue le 9 juillet 1957 par la Commission d'Appel de l'Impôt sur le Revenu, accueillant l'appel de l'intimée, La Société Coopérative Agricole du Canton de Granby, de cotisations d'impôt sur le revenu pours les années 1947, 1948, 1949, 1950, 1951, 1952 et 1953.

L'intimée, se basant sur les dispositions de la Loi de l'Impôt de guerre sur le revenu et de la Loi de l'Impôt sur le revenu, a réclamé en déduction de son revenu pour les années 1947 à 1953 les montants de $15,516.47, $18,324.71, $18,714.91, $23,396.12, $13,719.30, $11,256.99 et $9,364.70 respectivement comme intérêts payés à ses détenteurs d'actions privilégiées sur du capital emprunté et employé dans le commerce pour produire le revenu. Le Ministre du Revenu national, en cotisant l'intimée pour les années en question, refusa de reconnaître à l'intimée le droit de déduire de son revenu les montants réclamés à titre d'intérêt payé sur capital emprunté. L'intimée en appela de cette décision

et la Commission d'Appel de l'Impôt sur le Revenu accueillit en partie cet appel et permit la déduction des montants susmentionnés du revenu de l'intimée pour les années d'imposition 1947 à 1953. L'appel de ce jugement par le Ministre du Revenu national a été déféré à cette Cour.

L'appelant soumet que les montants payés par l'intimée à ses détenteurs d'actions privilégiées pour les années 1947 à 1953 ne sont pas des montants payés pour intérêt sur capital emprunté mais des dividendes sur actions privilégiées et que ses cotisations d'impôt sur le revenu sont bien fondées. A l'appui de ses prétentions l'appelant invoque les dispositions de l'article 5 (1)(*b*) de la Loi de l'impôt de guerre sur le revenu et de l'article 11 (1)(*c*) de la Loi de l'Impôt sur le revenu.

A l'encontre des prétentions de l'appelant l'intimée soumet que l'intérêt payé fut remis à des personnes lui ayant fait des avances de fonds sous forme de prêts et qui reçurent en échange des certificats écrits comme "certificats d'actions privilégiées". Ces certificats conféraient aux détenteurs tous les droits d'un créancier mais aucun des droits d'un actionnaire. Au soutien de ses allégués l'intimée invoque les mêmes articles des lois d'impôt sur le revenu que l'appelant. Les dispositions de ces articles se lisent comme suit:

INCOME WAR TAX ACT

Sec. 5. *Exemptions and deductions.*—1. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*b*) *Interest on borrowed capital.*—Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow notwithstanding the rate of interest payable by the taxpayer, but to the extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security, by virtue of which the interest is payable;

INCOME TAX ACT

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

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(c) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on

(i) borrowed money used for the purpose of earning income from a business or property (other than property the income from which would be exempt), . . .

Voyons si dans cette cause la preuve offerte rencontre les exigences des articles précités permettant au contribuable de déduire de son revenu les montants payés à titre d'intérêts sur les emprunts effectués en vue de réaliser des profits dans ses opérations d'affaires.

L'intimée est une société coopérative agricole qui fut organisée en 1938 et qui, pendant les années qui nous intéressent, était régie par les dispositions de la Loi des coopératives agricoles, S.R.Q. 1941, c. 120 et ses amendements. C'est une entreprise de ventes, d'achats et de services pour le bénéfice de ses membres, organisée dans le but de travailler à la satisfaction des besoins spéciaux de ces derniers.

Se conformant aux dispositions de la loi, elle a commencé par se créer un capital au moyen de l'émission et de la vente d'actions ordinaires, puis en 1941 elle a augmenté ce capital en émettant des actions privilégiées, qu'elle offrait à ses membres, et ce en vertu de l'article 5 (1) qui se lit ainsi:

* * *

5. 1. La société a le droit d'émettre des actions privilégiées. Le bureau de direction peut en fixer la dénomination et déterminer le taux d'intérêt, lequel ne doit pas dépasser sept pour cent. Ces actions privilégiées sont rachetables par la société aux conditions fixées par le bureau de direction et indiquées dans le certificat d'émission. Les porteurs d'actions privilégiées n'ont pas le droit d'assister ni de voter aux assemblées de la société.

En 1944, vu que la société progressait, il fut décidé d'étendre ses activités et d'entreprendre la fabrication du lait en poudre. Pour ce faire il fallait construire une usine et y installer des machines spéciales. Afin d'acquitter certaines dettes et réaliser ce projet, la société avait besoin d'un montant de $275,000. Elle fit un appel à ses membres pour obtenir cette somme mais sans succès. Elle proposa ensuite d'émettre des actions privilégiées qui seraient remises à ses membres pour chaque montant de $50 qu'elle retiendrait de chacun d'eux à raison de 10c par 100 lbs de lait qu'ils lui vendraient. Elle ne put obtenir les fonds requis

de cette manière. Par résolution, il fut subséquemment décidé de faire une émission d'obligations et des démarches furent faites à cette fin auprès de courtiers en placements. A cette époque-là, l'émission d'obligations était impossible parce que, pour se conformer aux exigences de ceux qui s'engageraient à vendre ces obligations, il lui aurait fallu hypothéquer ses immeubles en garantie de l'emprunt, la loi défendant aux sociétés coopératives agricoles de fournir une telle garantie pour des dettes obligataires.

N'ayant pu réussir à obtenir les fonds nécessaires par les moyens précités, la société, après discussion, chargea le notaire Jacques Noiseux de trouver le capital dont elle avait besoin. Il accepta de trouver une solution au problème. A cet effet, il élabora un projet qui fut incorporé dans un contrat sous seing privé en date du 10 mai 1946, signé par des mandataires dûment autorisés à ce faire par résolution de l'intimée et par le notaire Noiseux. Copie de ce document forme partie du dossier.

Je crois utile à l'étude de la cause d'énumérer brièvement les conventions et obligations de l'intimée qui sont contenues dans ce contrat. L'intimée s'engage à emprunter une somme capitale de $275,000 par voie d'émission d'actions privilégées aux taux et conditions spécifiés—Durée, 10 ans du 15 juillet 1946—Taux, 5% l'an payable semi-annuellement—Remboursement, $27,500 annuellement, l'intérêt sur toutes les actions privilégiées émises devant courir à compter du jour de leur souscription jusqu'au jour de leur remboursement.

L'intimée s'oblige à permettre que la partie de deuxième part engage qui elle voudra pour l'aider dans la vente de la dite émission d'actions privilégiées. Elle s'oblige à payer tous les frais de publicité, impression ou autres découlant ou non du dit emprunt, l'autre partie ne s'engageant qu'à assumer ses frais de déplacement pour la vente des actions. Elle s'oblige à donner tous les pouvoirs ordinaires et extraordinaires nécessaires à la vente des actions.

Le contrat tout entier est à lire; je n'en cite que les clauses qui me semblent essentielles à l'étude de la question en litige.

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Après la signature du contrat, l'intimée fit imprimer des certificats d'actions privilégiées dont le texte contient la phrase suivante:

> Les dites actions privilégiées sont émises conformément à une résolution du Bureau de direction en date du 10 mai 1946, et sont sujettes aux dispositions énoncées au verso du présent certificat.

La résolution décrétait que le contrat serait signé par le président et le secrétaire-trésorier de la société.

Il n'y a pas de doute que cette résolution approuvait le contrat, donnait instruction à ses mandataires de le signer et autorisait une émission d'actions privilégiées aux conditions convenues.

Quelques jours plus tard commençait une campagne de souscription. Le mercredi 22 mai 1946, le journal "La Revue de Granby" publiait une nouvelle intitulée: "NOTRE SOCIÉTÉ COOPÉRATIVE LANCE UN EMPRUNT DE $275,000", avec sous-titres: "Les garanties sont exceptionnelles; le taux: 5%," suivis de: "Garanties: $416,000 de valeurs immobilières non hypothécables; 515 coopérateurs; remboursement assuré." Dans le texte de l'article se trouvent les paragraphes suivants:

> Pendant cette campagne d'emprunt qui débutera le 1er juin 1946 pour prendre fin vers le 1er octobre de la même année, la Société Coopérative Agricole du Canton de Granby émettra pour la somme de $275,000 de parts privilégiées dont la valeur nominale au pair sera de $50 la part, portant intérêt non cumulatif au taux de 5%.
>
> Cet intérêt non cumulatif, c'est-à-dire qui ne peut être ajouté au capital déjà investi, mais qui doit plutôt être nécessairement accepté par le prêteur, sera remboursable deux fois l'an, . . .

La campagne de sollicitation fut continuée jusqu'à ce que l'intimée réussisse à réaliser son objectif ou du moins une somme jugée suffisante pour rencontrer ses obligations et continuer les travaux nécessaires à l'expansion de ses opérations.

Sommairement, ces faits établissent que l'intimée avait besoin de fonds et qu'elle essaya plusieurs moyens pour les prélever. J'énumère: contributions des membres; émission d'actions privilégiées aux membres; décision de lancer un emprunt sous forme d'obligations et pourparlers à cet effet avec des courtiers en valeurs; garantie d'un emprunt par la Province. Comme ces moyens ne réussissaient pas, elle décida d'emprunter par voie d'une émission d'actions

privilégiées aux conditions stipulées au contrat intervenu entre l'intimée et le notaire Noiseux. Cette manière de procéder eut plus de succès que les moyens tentés précédemment. Comme on peut le voir, ce n'est pas tant la méthode à suivre qui semble avoir été importante, mais plutôt le fait de trouver un moyen qui permettrait à l'intimée de se procurer les fonds nécessaires. Elle a décidé que ce moyen serait l'émission d'actions privilégiées.

L'intimée a été formée sous l'autorité de la Loi des sociétés coopératives agricoles, S.R.Q. 1941, c. 120, et ses amendements. Voyons les dispositions pertinentes de cette loi.

L'intimée est une société de la nature d'une société par actions, la responsabilité de ses membres ou actionnaires étant limitée au montant de leurs mises respectives (voir article 4).

L'article 3 indique la composition de la société. Elle se compose de producteurs actionnaires, elle peut s'adjoindre des producteurs affiliés et peut comprendre des actionnaires privilégiés.

L'article 5 (1), déjà cité, lui donne le droit d'émettre des actions privilégiées.

L'article 5 (6) dit:

5. 6. Aucun sociétaire ne peut souscrire et détenir plus de dix actions du capital de la société.

Les articles 8, 9, 14, 19, 20, 22 et 24 décrètent:

8. La société se compose des personnes qui ont signé la déclaration mentionnée dans l'article 3 et de toutes celles qui, par la suite, souscrivent des actions ordinaires dans cette société.

9. A compter de la date de la publication dans la *Gazette officielle de Québec,* cette société devient une corporation sous le nom qui lui est donné dans cet avis.

* * *

14. Dans le cas où un producteur actionnaire néglige ou refuse de remplir les clauses du contrat qui le lie à la société coopérative dont il fait partie ou si, à l'expiration de ce contrat, il néglige ou refuse d'en passer un autre pour une nouvelle période de trois ans, le bureau de direction peut, s'il le juge à propos, rayer ce producteur actionnaire de la liste des membres de la coopérative et convertir ses actions ordinaires en actions privilégiées.

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Ces actions privilégiées ne peuvent redevenir actions ordinaires. Pour se faire réadmettre membre de la coopérative, le porteur de ces actions sera tenu de souscrire de nouvelles actions ordinaires tout comme s'il n'avait jamais appartenu à cette coopérative.

* * *

19. L'assemblée générale se compose de tous les producteurs actionnaires . . . Elle élit les membres du bureau de direction et un vérificateur. . . .

* * *

20. Un producteur actionnaire n'a qu'un seul vote, quelque soit le nombre de ses actions. . . .

22. Les comptes de la société sont tenus par le secrétaire-trésorier sous le contrôle du bureau de direction et sont vérifiés par le vérificateur. . . .

Après la clôture de l'exercice et pendant la première semaine de janvier, un état des affaires de la société est préparé et attesté par le secrétaire-trésorier. . . .

24. Cet état doit être approuvé par le vérificateur et contenir:

1° La liste des sociétaires existant au 31 décembre, le nombre d'actions souscrites et le montant payé par chaque actionnaire;

2° Un état succinct de l'actif et du passif de la société;

3° Un état des opérations de l'année avec indication des profits et pertes; . . .

* * *

Avant 1947, l'article 25 se lisait ainsi:

25. L'assemblée générale, se basant sur ce compte rendu, détermine le montant des bénéfices dont elle fait la répartition.

Après paiement du dividende en faveur des actions privilégiées et du montant à être versé au fonds de réserve, la société peut distribuer le surplus aux producteurs actionnaires . . .

Depuis 1947, cet article se lit comme suit:

25. L'assemblée générale détermine en se basant sur cet état le montant d'opérations à répartir. Elle affecte ce montant à la constitution de réserves ainsi qu'à l'attribution de ristournes aux membres.

Après avoir résumé les faits importants révélés par la preuve et cité les dispositions de la loi pertinentes au litige, je poserai la question qui est soumise à la Cour.

Les montants payés par l'intimée à ses détenteurs d'actions privilégiées sont-ils des montants payés pour intérêt sur capital emprunté et déductibles de son revenu pour fins d'impôt en vertu de l'article 5 (1)(*b*) de la Loi de l'impôt de guerre sur le revenu et de l'article 11 (1)(*c*) de la Loi de l'impôt sur le revenu?

Le capital de la société—laquelle, d'après l'article 9, est une corporation légale—est composé des argents réalisés par la vente d'actions ordinaires et d'actions privilégiées ainsi que d'une réserve. C'est la description donnée dans ses bilans. Seuls les membres de la société, désignés par loi (article 3) comme producteurs actionnaires, peuvent être détenteurs d'actions ordinaires, mais ils ne devront pas être porteurs de plus de dix actions. Ces actionnaires ont le droit d'assister aux assemblées générales, voter, élire le bureau de direction, prendre des décisions et faire des règlements pour l'administration générale de la société. C'est la disposition se rapportant à l'administration de la société.

Le public en général et les membres peuvent souscrire au capital en se portant acquéreurs des actions privilégiées émises conformément aux dispositions de l'article 5. Toutefois, leur qualité d'actionnaires privilégiés ne leur donne ni le droit d'assister aux assemblées, ni de prendre part aux délibérations, ni de voter. Par contre, ils jouissent de certains privilèges et préférences que les actionnaires ordinaires ne possèdent pas. Cette disposition traite de la constitution du capital de la corporation.

Cette interprétation de la constitution du capital-actions des sociétés coopératives agricoles est exprimée clairement dans les articles 33 et 37 de la loi, lesquels traitent des compagnies qui sont constituées en corporation en vertu des dispositions de la première partie de la Loi des compagnies de Québec (chap. 276) et qui sont converties en sociétés coopératives agricoles. Je cite:

37. La nouvelle société coopérative agricole doit répartir son capital-actions conformément au paragraphe 7 de l'article 5 de la présente loi, sur une base de cinq actions de dix dollars ou de dix actions de dix dollars. Le surplus du montant d'actions possédées par tout producteur actionnaire de la nouvelle coopérative est converti en actions privilégiées prévues par les dispositions du paragraphe 1 de l'article 5 de la présente loi. Quant aux actions possédées par des non-producteurs, elles sont totalement converties en actions privilégiées.

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La seule différence entre la formation du capital-actions d'une compagnie et celle d'une société coopérative agricole, c'est qu'une compagnie ne limite pas le nombre d'actions ordinaires que les actionnaires peuvent posséder, tandis que les sociétés coopératives limitent à leurs seuls membres (producteurs actionnaires) la possession des actions ordinaires, dont le nombre est fixé à cinq ou dix, suivant le cas, pour chaque membre. Dans le cas des deux corporations, il n'y a pas de limite quant au nombre d'actions privilégiées qu'une personne peut détenir.

Le détenteur d'actions ordinaires reçoit des ristournes sur sa mise de fonds et son apport aux activités de la société quand il y a excédents d'opérations à répartir. Le porteur d'actions privilégiées reçoit un intérêt déterminé par résolution et mentionné sur le certificat d'actions. Il a priorité pour le paiement de cet intérêt sur les montants versés à la réserve et les ristournes payables aux actionnaires ordinaires.

En termes généraux, l'intérêt est le loyer de l'argent; le bénéfice reçu de l'argent prêté; un droit éventuel à des bénéfices. Lorsque le législateur emploie le mot "intérêt" dans l'article 5, au deuxième paragraphe, il n'y a pas de doute qu'il parle du droit éventuel qu'un détenteur d'actions privilégiées a sur les bénéfices de la société et non de loyer ou bénéfice à recevoir sur de l'argent prêté. Le certificat d'actions privilégiées n'est pas une reconnaissance d'un prêt ou d'une créance, mais un titre de propriété d'une partie du capital d'une société constituée en corporation. Le capital-actions de l'intimée est employé dans une entreprise déjà décrite. Ce capital-actions et les biens de la corporation sont le gage de ses créanciers. Les propriétaires des actions ont droit aux excédents des opérations. si excédents il y a. Quant à leur responsabilité elle est limitée à leurs mises de fonds.

Au soutien de sa prétention à l'effet qu'il s'agit d'argent emprunté, l'intimée invoque les conditions mentionnées à l'endos du certificat d'actions privilégiées. L'engagement de la société de verser un intérêt de 5% aux détenteurs, à

dates déterminées, et de rembourser le montant payé pour les actions par versements annuels, sont des conventions entre l'intimée et ses actionnaires qui ne peuvent affecter l'opération des dispositions de la Loi de l'impôt sur le revenu.

D'ailleurs, le terme "intérêt", employé dans le sens de droit éventuel sur les bénéfices de la société, représente ni plus ni moins les dividendes payables aux détenteurs d'actions sur les profits réalisés comme résultat des activités de la corporation. Avant 1947, la loi mentionnait que le dividende en faveur des actions privilégiées serait payé avant les ristournes et le montant à être versé à la réserve. Comme l'émission des actions privilégiées est antérieure à l'amendement, je considère que c'est la disposition qui était en force avant 1947 qui s'applique au cas actuel. Depuis, vu qu'il est mentionné et déterminé par résolution ou contenu à l'endos du certificat sous la désignation "intérêt", il est entré au bilan qui établit l'état des opérations de l'année. Le taux de cet intérêt ayant déjà été fixé, il n'y a pas lieu de le déterminer à l'assemblée générale, comme il est fait pour la réserve et les ristournes.

Il me semble opportun de citer un passage des notes du juge Audette dans la cause de *Dupuis Frères Ltd. v. The Minister of Customs and Excise*[1], où il dit:

> It would be doing violence to the language of the Company's Act, to the letters patent, and I might add, to the custom of trade and of experience to call these preferred shares "borrowed capital" because of some alleged analogy, if any, to a bond, in that at the maturity, in 1936, the shareholder, whose share has not been in the meantime redeemed, can claim, as against the company—but after the creditors—his share at $110 and interest. The mere existence of some feature which might in such respect make it resemble a bond or debenture is not sufficient to make this preferred share, which is an actual part of the authorized capital of the company, a bond or debenture or anything like it, and thereby transform it into "borrowed capital" for the purpose of assessment.

Je ne puis accepter l'argument des procureurs de l'intimée que la mention à l'endos du certificat que le détenteur aurait droit à un intérêt au taux de 5% l'an, payable semi-annuellement, à dates fixes, et que les actions seraient

[1] [1927] Ex. C.R. 207, 210.

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rachetables par versements, sur une période de dix ans, a eu pour effet de changer la nature du certificat d'actions privilégiées et d'en faire un document équivalent à une reconnaissance de dette, ou d'un emprunt de la part de la société, ou d'une créance en faveur du détenteur du certificat. Le capital d'une société par actions ne se constitue pas avec du capital emprunté, mais bien par la vente de ses actions et l'accumulation de ses profits non distribués à ses actionnaires.

Vouloir payer les intérêts convenus entre l'intimée et ses actionnaires privilégiés autrement qu'à même les revenus de la société viendrait à l'encontre des dispositions de la Loi des coopératives agricoles et des nombreuses décisions rendues à ce sujet.

Je suis d'opinion que le mot "intérêt" employé dans le statut quand il s'agit d'actions privilégiées veut dire "dividende" et qu'un dividende est payable à même les profits et non à même le capital de la société.

Dans la cause de *In re National Funds Assurance Co.*[1], bien que le mot "intérêt" ait été employé, il fut décidé que ce terme avait le même sens que le mot "dividende". Le juge Jessel, M.R., fait, entre autres, les observations suivantes:

> The directors had no authority under the articles of association to declare a dividend which would be a return of capital.
>
> * * *
>
> The limited company trades upon the representation of being a limited company with a paid-up capital to meet its liabilities. It is wholly inconsistent with that representation that the company, having its capital paid up, should pay it back to its shareholders, and give the creditors nothing at all.

Voir aussi *Angus v. Pope*[2], où le sommaire du jugement décrète:

> Le capital de la compagnie doit demeurer intact lorsque les actionnaires reçoivent une rémunération sur leur capital placé dans la compagnie.

Dans *Hyde v. Scott*[3], le sommaire du jugement se lit en partie comme suit:

> Dividends have to be paid out of profits actually earned by the company and a dividend declared and paid by a company before it is actually earned and which infringes upon and lessens its capital is illegal.

[1] [1878-79] 10 Ch. D. 118, 127. [2] [1897] R.J.Q. 6 B.R. 45.
[3] [1919] R.J.Q. 28 B.R. 80.

Enfin, dans la cause de *Denault v. Stewart*[1] il a été décidé:

> Si un dividende est, par le conseil d'administration, déclaré à même le capital ou le fonds de réserve, la résolution adoptée à cette fin est illégale et rend les directeurs personnellement responsables.

Lorsque la société désire emprunter elle est sujette à une procédure particulière comprise dans l'article 13, laquelle n'a aucune application dans le cas d'une émission d'actions privilégiées. Même la société est limitée dans ses emprunts, puisqu'ils ne peuvent dépasser le montant des actions souscrites, qu'elles soient ordinaires ou privilégiées. Par conséquent, lorsque l'intimée dit vouloir emprunter par voie d'une émission d'actions privilégiées, dans mon opinion elle ne fait que déclarer qu'elle émettra des actions privilégiées pour obtenir un capital-actions additionnel lui permettant de rencontrer ses obligations et de continuer l'expansion de son entreprise.

Toute la preuve indique que l'intimée a fait une émission d'actions privilégiées qui ont été souscrites par des détenteurs de ses actions ordinaires et par le public en général; qu'elle a déterminé à l'avance le taux d'intérêt ou dividende qu'elle paierait aux actionnaires; qu'elle a déclaré que les actions seraient rachetables. Tout ce que l'intimée a fait semble avoir été basé sur les dispositions de la loi qui la régit et sur ce qui se fait régulièrement par les corporations désireuses d'augmenter leur capital-actions. De plus, les dividendes qu'elle a payés à ses actionnaires privilégiés provenaient des profits réalisés par suite de ses activités.

Je suis d'opinion que l'intimée avait le pouvoir en vertu de la loi de faire tout cela, mais qu'elle ne pouvait, par la mention, au dos du certificat, du taux d'intérêt, des dates de paiement et des conditions de rachat des actions, changer la nature de cette opération financière qui était l'émission d'actions privilégiées. Les montants qu'elle a reçus pour ses actions privilégiées font partie de son capital-actions et les paiements effectués pendant les années 1947 à 1953 aux actionnaires privilégiés sont des intérêts ou, mieux encore, des dividendes sur du capital investi par ces actionnaires et proviennent des profits de son entreprise. Le détenteur

[1] [1918] R.J.Q. 54 C.S. 209.

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d'actions privilégiées étant propriétaire partiel du capital de la société est donc débiteur, jusqu'à concurrence de sa mise de fonds, à l'égard des créanciers de la société.

Le débiteur peut-il être son propre débiteur et, partant, participer dans le gage des créanciers, et ce à leur détriment? Je ne le crois pas.

Pour ces raisons, je suis d'opinion que les dispositions de l'article 5 (1)(*b*) de la Loi de l'impôt de guerre sur le revenu et de l'article 11 (1)(*c*) de la Loi de l'impôt sur le revenu ne reçoivent pas d'application dans la présente cause, puisqu'il ne s'agit pas de paiements sur un emprunt mais de paiements faits sur du capital investi et qui résultent des profits de la société.

Je maintiens le présent appel et déclare que les sommes de $15,516.47, $18,324.71, $18,714.91, $23,396.12, $13,719.30, $11,256.99 et $9,364.70 pour les années 1947 à 1953 inclusivement sont sujettes à l'impôt sur le revenu de l'intimée. Le tout avec dépens.

Jugement en conséquence.

BETWEEN:

1956

Jan. 10,11,12

1959

Feb. 11

ROHM & HAAS COMPANY .....APPELLANT;

AND

THE COMMISSIONER OF PATENTS ..RESPONDENT.

Patent—Appeal from Commissioner of Patents' refusal to grant patent—Process Patent—Claims too broadly expressed—The Patent Act, 1935 S. of C. 1935, c. 32, s. 35(2) as amended.

In a divisional application for a patent for invention entitled "Fungicidal Compositions" the Commissioner rejected claims 1 to 6 and claims 10 to 13, but allowed claims 7 to 9 inclusive. Claim 1, which is typical of claims 1 to 6, reads:

"A fungicidal composition having as an active ingredient a salt of an alkylene bisdithiocarbamic acid."

Claim 10, which is typical of claims 10 to 13, reads: "A method of controlling the fungus growth on living plants which comprises applying to the plant a fungicidal composition having as an active ingredient a salt of ethylene bisdithiocarbamic acid."

On appeal from the Commissioner's decision

Held: That in order to comply with the provisions of s. 35(2) of *The Patent Act,* c. 32, 1935, Statutes of Canada, it is necessary to define all the ingredients of the composition in which an exclusive property is claimed. Claims 1 to 6 were properly rejected on the ground that they did not state definitely and in explicit terms the things or combinations which the applicant regards as new. The claims as drawn are so broad that they may cover compositions which the applicant "does not know and has not dreamed of" and they therefore fail to comply with the provisions of s. 35(2). *B.V.D. Co. Ltd. v. Canadian Celanese Ltd.,* [1937] S.C.R. 221, followed. *Continental Soya Co. Ltd. v. J. R. Short Milling Co.,* [1942] S.C.R. 187, distinguished.

2. That claims 10 to 13 cannot be allowed. They are process claims and as admittedly there is nothing new in the process itself, it cannot be patented. *Refrigerating Equipment Ltd. v. Waltham System Inc.,* [1930] Ex. C.R. 154, applied.

3. When the Commissioner requires that the claims in an application be divided, such requirement does not necessarily mean that all the claims so divided are considered to be valid.

APPEAL from the refusal of the Commissioner of Patents to grant a patent in respect of certain claims for an alleged invention entitled "Fungicidal Compositions."

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

David Watson for appellant.

K. E. Eaton for respondent.

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CAMERON J. now (February 11, 1959) delivered the following judgment.

This is an appeal from the refusal of the Commissioner of Patents to grant a patent in respect of claims 1 to 6 inclusive, and 10 to 13 inclusive, in the Application of William F. Hester, assignor of Rohm & Haas Company, the appellant, for Letters Patent for an alleged invention entitled "Fungicidal Compositions".

I should state here that while the decision of the Commissioner is dated August 24, 1954—and was therefore made after the coming into effect of *The Patent Act,* R.S.C. 1952, c. 203—it was agreed upon the hearing of the appeal that all references to *The Patent Act* would be understood to mean *The Patent Act* 1935, being c. 32 of the Statutes of Canada 1935, as amended. For the sake of convenience I shall adopt the same procedure in this opinion unless otherwise stated.

The application, Serial No. 558,568, was filed on May 3, 1947. By an amended petition filed on May 28, 1947, the petitioner requested that the application be treated as entitled to priority, having regard to U.S. application, Serial No. 407,674, filed August 20, 1941, it being stated that the claims in the application related to all of the claims in that U.S. application, which later application matured into Patent No. 2,317,765 on April 27, 1943 (Exhibit 1). On June 13, 1947, a request was made that "this application should be accorded all the benefits of s. 28A of *The Patent Act.*" On September 19, 1947, the Commissioner advised that "the Convention date asked, August 20, 1941, United States, has been made of record in the case".

On October 2, 1950, the applicant substituted nineteen claims in place of its original five claims. On July 21, 1952, the applicant was advised that claim 7—a method claim—was rejected, and that

> Only one process and the direct product thereof may be claimed in one patent application. Thus, claims 8 to 19 inclusive, may not be presented in the same case with the remaining claims herein—(see s. 37 of *The Patent Act*).

In response to that notice that division was required, the applicant retained claims 1 to 6 in the original application and on October 22, 1952, filed a divisional application for twelve claims representing the same subject matter as in

the former claims 8 to 19 inclusive. On that divisional application, Letters Patent No. 496,683 (Exhibit 3) were issued to the appellant on October 6, 1953, the expiry date being August 20, 1963. The first ten claims therein are for new chemical compounds stated to be effective in fungicidal compositions, and claims 11 to 12 are respectively method claims for preparing polyvalent and divalent metal salts of an alkylene bisdithiocarbamic acid.

The original application was then continued. Following certain correspondence, the attorney for the applicant on July 16, 1953, substituted a new set of thirteen claims, and as the appeal relates to this set of claims, it will be convenient to set them out in full. They are as follows:

The embodiments of the invention in which an exclusive property or privilege is claimed are defined as follows:

1. A fungicidal composition having as an active ingredient a salt of an alkylene bisdithiocarbamic acid.

2. A fungicidal composition having as an active ingredient a salt of ethylene bisdithiocarbamic acid.

3. A fungicidal composition having as an active ingredient the disodium salt of ethylene bisdithiocarbamic acid.

4. A fungicidal composition having as an active ingredient the cupric salt of ethylene bisdithiocarbamic acid.

5. A fungicidal composition having as an active ingredient the ferric salt of ethylene bisdithiocarbamic acid.

6. A fungicidal composition having as an active ingredient the zinc salt of ethylene bisdithiocarbamic acid.

7. A fungicidal composition comprising a water-insoluble salt of ethylene bisdithiocarbamic acid suspended in water.

8. A fungicidal composition comprising a salt of ethylene bisdithiocarbamic acid and a solid inert carrier such as clay.

9. A fungicidal composition comprising a salt of ethylene bisdithiocarbamic acid dissolved in water.

10. A method of controlling fungus growth on living plants which comprises applying to the plant a fungicidal composition having as an active ingredient a salt of ethylene bisdithiocarbamic acid.

11. A method of controlling fungus growth on living plants which comprises applying to the plant a fungicidal composition having as an active ingredient a divalent metal salt of ethylene bisdithiocarbamic acid.

12. A method of controlling fungus growth on living plants which comprises applying to the plant a fungicidal composition having as an active ingredient the sodium salt of ethylene bisdithiocarbamic acid.

13. A method of controlling fungus growth on living plants which comprises applying to the plant a fungicidal composition having as an active ingredient the zinc salt of ethylene bisdithiocarbamic acid.

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It may be noted here that claims 1 to 6 thereof are identical with the previous claims 1 to 6. In place of the former claim 7 which had been rejected, the applicant substituted new method claims 10 to 13 inclusive.

On October 1, 1953, the applicant was advised that claims 1 to 6 inclusive and claims 10 to 13 inclusive were finally rejected. No objection was taken to claims 7, 8 and 9, in which the claims are for fungicidal compositions comprising a salt of ethylene bisdithiocarbamic acid, either suspended in water, dissolved in water, or with a sold inert carrier such as clay. These claims specify the matter with which the salt is associated to make up the "fungicidal composition".

Before turning to the legal problems involved, it will be convenient to set out certain additional agreed facts. The appellant is a corporation of Delaware, U.S.A., which has been engaged for many years in the manufacture and sale of various chemical products. The invention of the application in suit was made by one of its chemists, Dr. William F. Hester, now deceased. The sodium, copper, zinc, ferrous, ferric and cadmium salts of ethylene bisdithiocarbamic acid were first made by Hester in 1935 and in January 1941 he proposed that they be used as fungicides. Field testing of these salts was carried out in 1941 and their effectiveness as fungicides was shown.

The first application for patent was filed in the United States on August 20, 1941, and issued to Patent 2,317,765 on April 27, 1943 (Exhibit 1). The five claims therein are for fungicidal compositions and are identical to claims 1 to 5 inclusive of the present application. That U.S. patent was re-issued as Re. 23,742 on November 24, 1953 (Exhibit 2). The re-issue included the original five claims and in addition eight claims for "the process of controlling fungus growth on living plants which comprises applying to the plant a fungicidal composition having as an active ingredient" a salt of an alkylene or ethylene bisdithiocarbamic acid, or the bivalent salts of the latter or the sodium, cupric, ferric, zinc or cadmium salts of the latter. Claims 7, 8, 9 and 10 of the re-issue correspond precisely

with claims 10 to 13 inclusive of the present application, except that in the former the word "process" is used instead of "method".

Prior to 1940, the commercially important agricultural fungicides were inorganic copper compounds and powdered sulphur which had but limited effectiveness and were injurious to many plants. Organic fungicides were being investigated by many people but without significant success. The suppliant markets three of the products referred to in the claims of this application under the trade names of Nabam, Zineb and Maneb which are respectively disodium, zinc, and manganese salts of ethylene bisdithiocarbamic acid, Zineb and Maneb being also covered by Canadian Patent No. 496,683. These three products have achieved considerable commercial success.

It is agreed that for the purpose of this appeal there was no proposal by others to use any of the compounds referred to in the claims of this application as fungicides or for analogous purposes prior to the filing in 1941 of the application for U.S. Patent No. 2,317,765. It is also agreed that the polyvalent metal salts of ethylene bisdithiocarbamic acid were not known to others or described in the literature prior to the filing of that U.S. application.

I shall first consider the appeal regarding claims 1 to 6. In his decision, the Commissioner stated:

> I have reviewed the prosecution of this application and I concur with the decision of the Examiner rejecting claims 1 to 6 and claims 10 to 13. Claims 1 to 6, notwithstanding any assertion to the contrary, overlap with the claims of Canadian Patent No. 496,683 (application Serial No. 637,902) and the overlapping is not of the type called genus and species as would be acceptable.
>
> I refer to the first paragraph on page 2 of the Examiner's report of October 1, 1953 and in the case where the composition is made up entirely of the active ingredient, claims 1 to 6 are no different from those of the divisional application which has now become a patent; in the case where something else goes into the composition to make a mixture there is no basis for allowing such claims under Section 36. (Note—formerly section 35 of the Patent Act 1935) They obviously do not state distinctly the things or combinations which the applicant regards as new. In fact these claims are much broader than the disclosures and may cover compositions which the applicant does not know and has never dreamed of. No inventor can be given protection for things he has not invented or does not know about.

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One of the grounds of appeal is stated as follows:

(2) The Commissioner erred in finding that claims 1 to 6 do not state distinctly the things or combinations which the applicant regards as new, are broader than the disclosure, and give protection extending beyond the invention. These claims specifically define the inventive step of providing a fungicidal composition having a specified substance as its active ingredient.

The Commissioner relied on the provisions of s. 35(2) of the Act, which is as follows:

35.(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations which the applicant regards as new and in which he claims an exclusive property or privilege.

The Commissioner's objection on this point relates to all of the first six claims, of which claim 1 may be taken as typical.

1. A fungicidal composition having as an active ingredient a salt of an alkylene bisdithiocarbamic acid.

On this point, the contention of the Commissioner—and this was one of the grounds on which he rejected claims 1 to 6—is that the claim relates to a composition the ingredients of which, other than the one specified active ingredient, are not named. He submits, therefore, that the appellant has not complied with the requirements of s. 35(2).

Now there can be no doubt that the fungicidal composition referred to in claim 1 (and also in claims 2 to 6) is not made up solely of the named salt. The use of the phrase "having as an active ingredient" clearly implies that in addition to the salt named as an active ingredient there are one or more other ingredients.

During the prosecution of this application, the attorney for the applicant in a letter to the Commissioner dated November 27, 1953, said:

It is submitted that in Claims 1 to 6 it is clear that applicant is using the term "composition" to include only admixtures of the active ingredient with one or more further ingredients. When claims such as Claim 1 are regarded as a whole, it will be appreciated that the salt in question could not be referred to as an "ingredient" if it represented the whole composition. The use of the word "ingredient" qualifies "composition" and makes it clear that other substances are present in the mixture. The other substances are not specifically defined in the claims, but as the inventive step is the inclusion of a salt of alkylene bisdithiocarbamic acid as an active ingredient in the composition, the present claims distinctly and explicitly define what applicant regards as new, as required by *The Patent Act*.

Then at the hearing of this appeal, counsel for the appellant stated:

> Therefore it is important to obtain a range of claims and these claims for the fungicidal composition cover fungicidal compositions other than those consisting solely of the chemical compound represented by the salt as the only ingredient.

And later he said:

> In the present case, the applicant's essentially active ingredient has been very carefully and concisely defined and the possibility has been left open in the remainder of the claim for including not a limited added ingredient such as water or some specific carrier, but a number of different ingredients, but . . . that is not the type of indefiniteness which is objectionable because it does not relate to the essential feature of the applicant's invention.

And again he said, "The other ingredients which may be included in that fungicidal composition are indicated in the disclosure but are not specifically defined in the claims."

In the specification it is stated:

> The salt, whether soluble or insoluble, may be suspended or dissolved in an aqueous spray, or may be mixed with or coated on a carrier, such as clay, magnesium carbonate, or similar inert material, and applied from a dust or from an aqueous spray. The salt may be used as the sole fungicidal material or it may be used in conjunction with other fungicidal agents. Also, the salt of a bisdithiocarbamic acid may be used in conjunction with an insecticidal agent or insecticidal agents.

It seems to me, therefore, that the fungicidal composition claimed in claim 1 is not made up of the named salt and a carrier such as water or an inert material such as clay. Compositions of that type are found in claims 7, 8 and 9, all of which have been allowed. It seems equally clear that what is claimed in claim 1 is a fungicidal composition comprising in part the named salt and also one or more other ingredients (not intended as carriers), none of which is specified in the claim. If these unnamed other ingredients are not carriers, it would seem (if the disclosure can be relied on to support the claim) that there must be some other fungicidal agent or agents or some insecticidal agent or agents, or perhaps both. If that be so, then the claim is broad enough to include *any* fungicidal composition in which the named salt is an active ingredient but in which fungicidal composition there are one or more active

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ingredients of a fungicidal or insecticidal nature, or of both. The inventive step, it is said, is the inclusion of the named salt as an active ingredient in any such fungicidal composition.

Now it seems to me that the property or privilege claimed in claim 1 is quite unambiguous. It is for *any* fungicidal composition in which the named salt is *an* active ingredient but in which there are also one or more unspecified ingredients, the nature and function of which are not stated. That, in my view, is the natural and ordinary meaning of the words used. In these circumstances, therefore, it would not be legitimate to refer to the other parts of the specification to explain what I think are the plain words of the claim itself.

In *Electric and Musical Industries v. Lissen, Ltd.*[1], Lord Russell said:

> The Court of Appeal have stated that in their opinion no special rules are applicable to the construction of a specification, that it must be read as a whole and in the light of surrounding circumstances; that it may be gathered from the specification that particular words bear an unusual meaning; and that, if possible, a specification should be construed so as not to lead to a foolish result or one which the patentee could not have contemplated. They further have pointed out that the claims have a particular function to discharge. With every word of this I agree; but I desire to add something further in regard to the claim in a specification.
>
> The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit and not to extend the monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document, and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere. It is not permissible, in my opinion, by reference to some language used in the earlier part of the specification, to change a claim which by its own language is a claim for one subject-matter into a claim for another and a different subject-matter, which is what you do when you alter the boundaries of the forbidden territory. A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims. As Lord Cairns said, there is no such thing as infringement of the equity of a patent (*Dudgeon v. Thompson,* 3 A.C. 34). . . .

And at p. 41 he said:

> I would point out that there is no question here of words in Claim 1 bearing any special or unusual meaning by reason either of a dictionary found elsewhere in the specification or of technical knowledge possessed by persons skilled in the art. The *prima facie* meaning of words used in

[1] 56 R.P.C. 23 at 39.

a claim may not be their true meaning when read in the light of such a dictionary or of such technical knowledge, and in those circumstances a claim, when so construed, may bear a meaning different from that which it would have borne had no such assisting light been available. That is construing a document in accordance with the recognized canons of construction. But I know of no canon or principle which will justify one in departing from the unambiguous and grammatical meaning of a claim and narrowing or extending its scope by reading into it words which are not in it; or will justfy one in using stray phrases in the body of a specification for the purpose of narrowing or widening the boundaries of the monopoly fixed by the plain words of a claim.

A claim is a portion of the specification which fulfils a separate and distinct function. It, and it alone, defines the monopoly; and the patentee is under a statutory obligation to state in the claims clearly and distinctly what is the invention which he desires to protect. As Lord Chelmsford said in this House many years ago: "The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented" (*Harrison v. Anderston Foundry Co.*, 1 A.C. 574). If the patentee has done this in a claim the language of which is plain and unambiguous, it is not open to your Lordships to restrict or expand or qualify its scope by reference to the body of the specification. Lord Loreburn emphasized this when he said: "The idea of allowing a patentee to use perfectly general language in the claim and subsequently to restrict or expand or qualify what is therein expressed by borrowing this or that gloss from other parts of the specification is wholly inadmissible" (*Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co.*, 25 R.P.C. 61, at p. 83). Sir Mark Romer expressed the same view in the following felicitous language: "One may and one ought to refer to the body of the specification for the purpose of ascertaining the meaning of words and phrases used in the claims, or for the purpose of resolving difficulties of construction occasioned by the claims when read by themselves. But where the construction of a claim when read by itself is plain, it is not, in my opinion, legitimate to diminish the ambit of the monopoly claimed merely because in the body of the specification the patentee has described his invention in more restricted terms than in the claim itself" (*British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.*, 49 R.P.C. 495, at p. 556).

In my view, claim 1 does not comply with the requirements of s. 35(2) in that it does not state distinctly or in explicit terms the thing which the applicant regards as new—namely, the fungicidal composition; it fails to define and limit with precision that which is claimed to be the invention. In a composition which undoubtedly comprises more than one substance, only one ingredient is named. The reader is left in doubt as to how many other ingredients there may be and must speculate as to what they actually are. The claim as drawn is so broad that it includes any

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fungicidal composition in which the specific salt is included and in which there are other ingredients of a useful nature which neither the applicant nor any one else has knowledge of.

In order to comply with the requirements of s. 35(2), I think it is necessary to define all the ingredients of the composition in which an exclusive property or privilege is claimed. Counsel for the appellant relies on the decision of McLean P. in this Court in *J. R. Short Milling Co. (Canada) Ltd. v. George Weston Bread and Cake, Ltd., et al.*[1], and on the decision of the Supreme Court of Canada in the same case, reported as *Continental Soya Co. Ltd v. J. R. Short Milling Co.*[2]. He submits that in that case, in which the validity of the plaintiff's patents was upheld, one of the claims was for a process of making bread comprising incorporating with unbleached or lightly bleached flour to further bleach it "and with other ingredients to form a dough batch"—a certain carotin-decolourizing agent. He points out that while the words "with other ingredients to form a dough batch" were not further defined, the patent was upheld. I think it may be assumed, however, that to anyone conversant with such matters, the other ingredients necessary to form a dough batch would be clearly understood. In any event, a careful reading of the judgments in the case indicates that no question was raised at any time as to whether that claim lacked the distinctiveness and clarity required by s. 35(2) or its predecessor, and that matter was not mentioned in any way or adjudicated upon. On that point, therefore, the case is of no assistance to the appellant.

Counsel for the Commissioner referred to a number of cases on this point but I think it necessary to refer to only one—*B.V.D. Co. Ltd. v. Canadian Celanese*[3]—a decision of the Supreme Court of Canada. In part, the headnote reads as follows:

> Throughout the specification of the Dreyfus patent, there is a continuous reference to the use of the thermoplastic derivative of cellulose in the form of yarns, filaments or fibres and it is plainly the very essence of the disclosure in the specification; but the inventor did not state in his Claims the essential characteristic of his actual invention.

[1] [1941] Ex. C.R. 69. [2] [1942] S.C.R. 187.
[3] [1937] S.C.R. 221.

The Court is invited to read through the specification and import into the wide and general language of the claims that which is said to be the real inventive step disclosed. The claims are unequivocal and complete upon their face; it is not necessary to resort to the context and as a matter of construction the claims do not import the context. In no proper sense can it be said that though the essential feature of the invention is not mentioned in the claims the process defined in the claims necessarily possesses that essential feature. The Court cannot limit the claims by simply saying that the inventor must have meant that which he has described. The claims in fact go far beyond the invention and upon that ground the patent is invalid. *The Patent Act* specifically requires that the specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege. *The Patent Act,* 1923 (13-14 Geo. V, c. 23, s. 14, ss. 1); *The Patent Act,* 1935 (25-26 Geo. V, c. 32, s. 35, ss. 2).

The judgment of the Court was delivered by Davis J. and in part he said at p. 237:

In the Canadian patent involved in this appeal before us the inventor did not state in his claims the essential characteristic of his actual invention though it does appear in the claims in his British and United States patents. No explanation is offered. We are invited to read through the lengthy specification and import into the wide and general language of the claims that which is said to be the real inventive step disclosed. But the claims are unequivocal and complete upon their face. It is not necessary to resort to the context and as a matter of construction the claims do not import the context. In no proper sense can it be said that though the essential feature of the invention is not mentioned in the claims the process defined in the claims necessarily possesses that essential feature. The Court cannot limit the claims by simply saying that the inventor must have meant that which he has described. The claims in fact go far beyond the invention. Upon that ground the patent is invalid.

I am entirely in agreement with the finding of the Commissioner that claims 1 to 6 should be rejected on the ground that they do not state definitely and in explicit terms the things or combinations which the applicant regards as new, that they are so broad that they may cover compositions which the applicant "does not know and has not dreamed of", and that consequently they fail to comply with the provisions of s. 35(2) of the Act. The appeal as to these claims fails on these grounds and it is unnecessary to discuss at length the other objections raised by counsel for the Commissioner.

I am of the opinion, however, that when a claim to a compound has been allowed, a claim to a fungicidal composition merely having that compound "as an active ingredient" is not patentable. The mere use in claims 4,

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5 and 6 of words which are broad enough to permit the inclusion of some unspecified ingredient or ingredients in addition to the compounds claimed and allowed in claims 8, 9 and 5 of the issued patent does not seem to justify a finding that such claims in the application and in the issued patent define different inventions. The utility of the compounds as fungicides is fully set forth in the specification of the patent which has been allowed; to name the compound as a fungicidal composition is merely to recite one of its inherent qualities.

It is of considerable interest to note that claims similar to claims 1 to 6 were disallowed in two cases by the United States Court of Customs and Patent Appeals. In *re Jones*[1], claims 1 to 3 were for new products and claims 4 to 9 were "product-use" claims in which the specified active ingredients were the same products as in claims 1 to 3. Claim 5 thereof may be taken as a sample.

It reads:

> An insecticidal and fungicidal composition having as an active ingredient thereof 1-naphthyl methyl thiocyanate.

The Court reversed the Board of Appeals and allowed the product claims 1 to 3, but affirmed the Board's decision disallowing claims 4 to 9. The reasons are succinctly stated as follows:

> With respect to claims 4 to 9 inclusive we are in agreement with the Tribunals of the Patent Office in holding that they are "product-use" claims, and would only cause multiplicity where the product per se is held to be new and patentable. It is trite to state that a patentee, is entitled to every use of which his invention is susceptible, and claims 4 to 9 are merely for such use.

In the same Court, a similar decision was arrived at in the case of *In re Jones*[2]. In disallowing the "product-use" claim, the Court followed *In re Thuau*[3] in deciding that the addition of a statement of use to a claim to a compound does not produce a substantially different claim. In part the Court said at p. 152:

> Counsel for appellant seek to distinguish this case from *In re Thuau*, supra, on the ground that claims 6, 7, 9, 10, and 11 are not drawn to the compounds of claims 1, 2, 4, and 5, per se, but to growth regulating compositions or insecticidal and fungicidal compositions having those compounds as active ingredients. However, claims 6, 7, 9, 10, and 11 do not state that the growth regulating or insecticidal and fungicidal composi-

[1] [1945] 65 USPQ 480. [2] [1947] 74 USPQ 149.
[3] 57 USPQ 324.

tions include anything in addition to the compounds called for in claims 1, 2, 4, and 5. The mere use in claims 6, 7, 9, 10, and 11 of language which is broad enough to permit the inclusion of some unspecified ingredient or ingredients in addition to the compounds of claims 1, 2, 4, and 5, does not justify a holding that the claims of the two groups define different inventions.

[4] The issue presented as to claims 6, 7, 9, 10, and 11 is substantially identical with that *In re Jones,* 32 C.C.P.A. (Patents) 1020, 149 F. 2d 501, 65 USPQ 480. In that case we held that when a claim to a compound had been allowed, a claim to an insecticidal and fungicidal composition having that compound as an active ingredient was not patentable.

I should refer, however, to one other matter mentioned by counsel for the appellant. He submits that the applicant could not be prejudiced by the fact that the Commissioner under s. 37 required that the applicant should divide his claims. He says that in doing so, the Commissioner must have recognized that the original application as filed did contain more than one valid claim, for inventions. I cannot agree with that submission. It seems to me that at the time division was required, the Commissioner made no decision as to the validity of any of the claims advanced, nor was he required to do so. He was merely stating that from the material filed it appeared that more than one invention was claimed. The validity of all the claims as so divided was a matter for later determination.

There remains the question as to the rejection of claims 10 to 13 inclusive. The Commissioner's main reasons for rejecting these claims apply equally to all five claims of which claim 10 is a sample.

Claim 10. A method of controlling fungus growth on living plants which comprises applying to the plant a fungicidal composition having as an active ingredient a salt of ethylene bisdithiocarbamic acid.

The Commissioner's reasons for rejecting these claims was stated as follows:

The question of claims 10 to 13 is an obvious one. It is sufficient to invoke the provisions of Rule 53.

The United States actions or laws have no bearing on the Canadian practice. I shall point out here that notwithstanding the rulings of the United States courts sustaining this type of claim, it still left the situation so unsettled that legislation had to be introduced in *The Patent Act* in an effort to settle the question. No such legislation is in force or contemplated in Canada.

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The claims do not disclose anything new over the composition of matter claims. No new method is involved in applying the composition. These claims are not necessary for the full protection of the applicant and they come under the provisions of Rule 53.

Rule 53 is as follows:

No more claims will be allowed than are necessary adequately to protect the invention disclosed; if two or more claims differ so slightly that the several claims could not be allowed in separate patents the applicant may be required to elect which of such claims he desires to have allowed and to cancel the others.

The Notice of Appeal in relation to these claims is as follows:

3. The Commissioner erred in rejecting Claims 10 to 13 inclusive on the basis of Rule 53, as

(*a*) the protection given by Claims 10 to 13 is not coextensive with that given by others of the claims, and Claims 10 to 13 are required for adequate protection;

(*b*) Rule 53 applies only to the claims of a single application;

(*c*) Rule 53 can only justify a requirement for election and not a rejection.

4. The Commissioner erred in sustaining the Examiner's rejection of Claims 10 to 13 inclusive as not describing a patentable process.

It is to be noted at once that in these claims the fungicidal composition to be applied is lacking in definiteness and clarity to the same extent as I have found in regard to claims 1 to 6, in that only one of the ingredients is specifically named and that the manner of "applying" the fungicidal composition to the plant is not defined.

Claims 10 (as well as claims 11 to 13) is a process claim. Clause 3(*d*) of the agreed Statement of Facts defines fungicide as "a substance which is applied to crops and other living plants to preserve the plants from deterioration due to fungus diseases such as mildew, potato blight and tomato blight". By clause 3(*d*), it is agreed that the manipulative steps of a method of controlling fungus growth on living plants by applying to the plants a fungicidal composition were well known prior to 1935. It is also common ground that the salts specified in claims 10 to 13 were new compositions at the date of the original application. The main question, therefore, is whether under the provisions of the Act, the well known method or process

of applying a fungicidal composition to living plants is patentable as a method or process when the fungicidal composition has as *an* active ingredient composition which was new at the date of the original application.

Invention is defined in *The Patent Act* as follows:

2.(*d*) "Invention" means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;

Briefly, the contention made on behalf of the appellant is that the process for which protection is claimed is not limited to the manipulative steps of the process (which are admittedly old), but is rather the entire process which includes both the manipulative steps of "applying" the fungicide, and the use of the specified ingredients in the fungicidal composition. That, it is said, constitutes the invention. It is common ground that Hester, the assignor of the appellant, was the first to apply the specified salts to living plants as a fungicide.

Earlier, I have set out the course followed in securing the patents in the United States and have pointed out that claims 6 to 13 of the re-issue were process claims almost identical in form to the present claims 10 to 13, except that "process" is used instead of "method" and there are some differences in the specified salts. The parties are in agreement that there is no essential difference between the words "method" and "process".

Counsel for the appellant referred me to two decisions of the U.S. Patent Office Board of Appeals. In *Ex parte Kittleson*[1], a decision dated September 28, 1950, the Court allowed an appeal from a decision of the Examiner rejecting the following claim:

9. The method of combatting fungi, bacteria and insects, which comprises treating material liable to attack by said fungi, bacteria and insects, with a composition containing a N-trichloromethylthio-imide of a dicarboxylic acid as an active ingredient.

It was held:

(4) In the instant case, claim 9 contains a feature of patentable novelty, i.e., treating the recited material with a new material not analogous to that of Gertler, thereby securing an unobvious result. Even though this claim to a method recites only the single step—"treating"—nevertheless the step is performed by using a compound that is not

[1] 88 USPQ 295.

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analogous to the compound of Gertler due to the unpredictability of the results. The presence in the case of the allowed claims to a different invention can have no adverse effect on claim 9. (The reference to "a different invention" is to the compounds themselves.)

In *Ex parte Wagner*,[1] dated October 6, 1950, the Court allowed an appeal from a decision of the Examiner who had rejected claims 14 to 17 to well drilling process claims employing drilling mud claims which had been allowed. It was held:

> In application wherein claims to well drilling mud have been allowed, Board allows claims to well drilling process employing such mud; presence or absence of composition claims should have no effect on patentability of process claims; manipulative processes may be patentable although they are otherwise old except for employment of different material; many processes, which are old in procedural sense, become new when new result is accomplished by use of different agent; in considering patentability of such processes, real criterion is not whether steps are shown in prior art but whether use of material in process is suggested by prior art; it is not proper to disregard specific nature of material employed in process which is responsible for unobvious result and determine patentability of process solely on novelty of physical manipulative steps; if result of process is unobvious and particular use of material is not suggested by prior art, process claims should be allowed, even if material is old for nonanalogous use.

Counsel for the appellant submitted that the principles stated in these two cases are equally applicable under our Patent Act. It seems to me, however, that they cannot be reconciled with the two cases which I have referred to earlier, namely, *In re Jones*[2], and *In re Jones*[3], both of which are decisions of the Court of Customs and Patent Appeals. As I read those cases, the findings were that when a claim to a compound has been allowed—and even allowed in the same application—a further claim to an insecticidal or fungicidal composition having that compound as an active ingredient was not patentable. If that be so, then it would seem to be the case that the fungicidal composition was not new in an inventive sense and could not be patented. From these considerations, it would seem to follow that a claim for a well-known method of applying the fungicidal composition and which fungicidal composition was not itself patentable inasmuch as the specified ingredient therein was patented, would be disallowed.

[1] 88 USPQ 217.

[2] [1945] 65 USPQ 480.

[3] [1947] 74 USPQ 149.

Neither the manipulative steps of the method nor the fungicidal composition could be considered as novel in an inventive sense.

By reason of the provisions of the new *United States Patent Act* of January 1, 1953, it would seem that the problem there has been put at rest. The relevant provisions are as follows:

100. When used in this title unless the context otherwise indicates—

(b) The term "process" means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

101. Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. (R. S. 4886; 35 U.S.C., 1946 ed., 31.)

Under these provisions it would appear that a patent for a claim such as claim 10 now before me might be granted as being a new use of a known process or new use of a composition of matter or material.

On the other hand, the decision in the English courts would seem to indicate that a claim similar to claim 10 could not be the subject of a patent. There, invention is defined in s. 101 of *The Patent Act* 1949, as follows:

"invention" means any manner of new manufacture the subject of letters patent and grant of privilege within section six of the Statute of Monopolies and any new method or process of testing applicable to the improvement or control of manufacture, and includes an alleged invention.

Under that Act an invention, to be patentable, must be either "a manner of new manufacture" or a new method or process of testing applicable to the improvement or control of manufacture (*Terrell and Shelley on Patents,* 9th Ed., p. 12).

In *G. E. C.'s Application*[1], which was for a method of extinguishing incendiary bombs, Morton J. said at p. 4:

In my view a method or process is a manner of manufacture if it (*a*) results in the production of some vendible product or (*b*) improves or restores to its former condition a vendible product or (*c*) has the effect of preserving from deterioration some vendible product to which it is applied. In saying this I am not attempting to cover every case which may arise by a hard and fast rule.

[1] 60 R.P.C. 1.

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These so-called rules in the *G. E. C.* case were considered by the Patents Appeal Tribunal *in the Matter of an Application for a Patent by Alexander Lenard*[1]. That case in many respects is similar to the present one. The application was in respect to "improved methods for meeting or offsetting the advance of disease in clove trees", and was based on the alleged discovery by the applicant that the disease known as Dieback and Sudden Death was due to a fungus as opposed to a virus. The improved method was described in the provisional specification as follows: "It is held that pruning would cause death of clove trees but my findings are that it heals and that mortality caused by disease can be reduced by carrying out drastic tree surgery and long pruning, provided the raw surfaces are protected with good sterilizing dressing to prevent the entry of fungi".

The Examiner considered that the application appeared to be concerned with a method of agriculture or horticulture which is not regarded as a manner of manufacture. On appeal, Lloyd-Jacob J. said in part at p. 191-2:

> For my own part, I think that it is clear that when Morton, J., in the R. H. F. case was approving Mr. Oates' decision he was approving it upon the basis that in considering the word "vendible" or "vendibility" the exclusion from it of, for example, fruit was a proper exclusion, and I regard that decision as indicating that there must be that limitation applied to the word "vendible" when the so-called rules in the G. E. C. case are being applied. It is true that in that particular instance the limitation was only in respect of the application of the first rule, namely, the rule which says that a manner of manufacture must result in the production of some vendible product; but, seeing that it was in fact a limitation of the "vendibility", in my judgment it must necessarily apply, not only to the first, but to the second and third rules alike, and therefore the G.E.C. rules must be applied against the background of the limitation upon the scope of "vendible product", not only in respect of the exclusion of fruit and the like, but also in the light of the subsequent considerations expressed by the present Master of the Rolls in other cases. Attention must be directed to the industrial or commercial or trading character of the process alleged to be patentable. If in a field of activity which can fairly be said to have a manufacturing characteristic the alleged invention finds its place, this difficulty will not normally present itself. There may, no doubt, be borderline cases, but, in my judgment, once the end product of an alleged invention is defined it becomes possible to consider whether in the preparation or formulation of that end product a manner of manufacture has been utilised.
>
> Mr. Gratwick has urged that in this case the end product is the clove tree as improved, that is to say, as pruned and sprayed and thereby rendered resistant to or unaffected by further outbreaks of disease, but I cannot hold this to have proceeded from a manner of manufacture.

[1] 71 R.P.C. 190.

It appears to be plain that a great advance may have been made in the culture of clove trees—an advance which may well result, not only in great prosperity in the territory in which clove trees are cultivated, but also to all those persons in trade and commerce who are concerned with the distribution of cloves. It may be unfortunate that someone who by the application of his ingenuity and ability has conferred this benefit upon the world is unable to get the form of protection for his discovery which is afforded to persons following other lines of development; but I sit here to apply the Statute and, so long as the law remains as it is at present, I can find no way of persuading myself that a method of agricultural or horticultural treatment such as the present can fairly be said to come within the present *Patents Act*.

Accordingly, I must dismiss this appeal.

Reference may also be made to the case of an application by *N. V. Philips' Gloeilampenfabrieken*[1]—a decision of Lloyd-Jacob J. sitting as the Patent Appeal Tribunal. The application was for "improvements in and relating to methods of producing a new form of Poinsettia." It was rejected by the Examiner and his decision was affirmed by the Tribunal. The judgment in part is as follows:

It is true, as Mr. Graham has explained, that under modern conditions the circumstances surrounding the development of agricultural and horticultural products approach the conditions obtaining in productive industries. The use of equipment and appliances and premises, the nature of the labour, skilled and unskilled, which is required find parallels in the production of articles in respect of which patent protection is conferred. That cannot be a useful, and certainly not an accurate, criterion when the question whether or not a manner of manufacture is disclosed in the specification under examination. The "manner of manufacture" has to be disclosed as an essential ingredient of the invention itself, and cannot satisfactorily be found in the means by which the invention is exploited.

From these two decisions, it would appear likely that a claim similar to claim 10 could not be the subject of a patent under *The Patents Act* 1949, since the method or process relates to the control of fungus growth on living plants which are not considered to be "a manner of manufacture".

The English and United States decisions have been considered at some length out of deference to the arguments submitted to me by counsel. It seems to me that in the United States it was necessary to amend the statute, as was done in *The Patent Act* which came into effect on

[1] 71 R.P.C. 192.

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January 1, 1953, in order to permit the grant of a valid patent for such claims as claims 10 to 13 in the instant case. There is no similar provision in our Act.

After full consideration of the matter, I have reached the conclusion that claims 10 to 13 cannot be allowed. They are process claims and admittedly there is nothing new in the process itself. I am in agreement with the view of this matter taken by the late President of this Court in *Refrigerating Equipment Ltd. v. Waltham System Inc.*[1] The facts of that case need not be detailed. The learned President's opinion on this point is stated at p. 166:

> Conceding for the moment that the patent in question describes a true method or process patent as distinguished from an apparatus or manufacture, yet before the applicant became entitled to a patent, it would be necessary that the method be new. If the method described is not new it cannot be patented as a process. Where the method is old, and the instrumentalities new, the latter may be patented as a machine, or manufacture, if to do so required invention.

In my opinion, also, there is no necessity under our Act for granting a patent for claims such as claims 10 to 13. A patentee is entitled to every use of which his invention is susceptible. To the extent that the assignor of the applicant has invented the compounds for which patents have been issued, the applicant has full protection for such patents.

For these reasons, the appeal from the Commissioner will be dismissed, but without costs.

Judgment accordingly.

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BETWEEN:

SEMET-SOLVAY COMPANY LIMITED ..APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE) AND KAISER STEEL CORPORATION .....RESPONDENTS.

Practice—Tariff Board finding—Motion to extend time of application for leave to appeal therefrom—Customs Act, R.S.C. 1952, c. 58, s. 45(1).

[1] [1930] Ex. C.R. 154.

Section 45(1) of the Customs Act, R.S.C. 1952, c. 58, provides:

> "any of the parties to an appeal under s. 44 . . . may, upon leave having been obtained from the Exchequer Court or a judge thereof, upon application made within 30 days from the making of the . . . declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law."

The appellant on July 24, 1957 gave notice of an application to be made on August 6, 1957 for: (*a*) Leave to appeal from a decision of the Tariff Board dated June 27, 1957; (*b*) An order extending the time to make the application to August 6, 1957. The applications were heard on the latter date and leave granted subject to the Deputy Minister's right to object to the jurisdiction of the Court to extend the time for making the application after the 30-day period provided by s. 45(1) had elapsed.

On this objection being raised at the hearing of the appeal

Held: That the words "or such further time as the Court or judge may allow" as in s. 45(1) are, on their face, wide enough to embrace the exercise of a discretion by the Court or judge to entertain an application for leave to appeal either before or after the expiry of the 30-day period, and as Parliament has not seen fit to express any limitation as to the time when the discretion may be exercised, no limitation should be held to exist. *Banner v. Johnston,* L.R. 5 H. L. 157 at 170, 172; *Gilbert v. The King,* 38 Can. S.C.R. 207 at 209; and *Stratton v. Burnham,* 41 Can. S.C.R. 410, applied. *Glengarry Election* case, 14 Can. S.C.R. 453, *Quebec Election* case, 14 Can. S.C.R. 434, considered.

Revenue—Customs—Value for duty—Fair market value—Meaning of "under fully competitive conditions" and "under comparable conditions of sale"—Customs Act, R.S.C. 1952, c. 58, s. 35(1).

At the time of the importations in question Section 35(1) of the Customs Act provided:

> "35. (1) Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value of such or the like goods when sold for home consumption in the ordinary course of trade under fully competitive conditions, in like quantities and under comparable conditions of sale at the time when and place whence such goods were exported by the vendor abroad to the purchaser in Canada; or, except as otherwise provided in this Act, the price at which the goods were sold by the vendor abroad to the purchaser in Canada, exclusive of all charges thereon after their shipment from the place whence exported direct to Canada, whichever may be greater."

The appellant exported to Canada foundry coke manufactured in Detroit by a company which sold like foundry coke to users in the Detroit area at $26.50 per ton, delivered, and to users elsewhere in the United States on an f.o.b. Detroit basis at prices ranging from $18.47 to $25.50 per ton, depending on the competition at the point to which the coke was to be shipped. Where the coke was sold to a user in an area wherein competition would not dictate a lower price, the price charged was $25.50 per ton, f.o.b. Detroit. On an appeal against a customs valuation of the coke so exported to Canada at $25.50 per ton, which valuation had been confirmed on review by the

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Deputy Minister of National Revenue for Customs and Excise, the Tariff Board upheld the valuation and in its declaration stated the problem before it as being that of selecting one of many varying prices as the one to be deemed the fair market value.

On further appeal to the Exchequer Court *Held:* That the expression "under comparable conditions of sale" in s. 35(1) connotes a comparison of the conditions of the transaction itself in which the importer acquires the goods sought to be imported with that in which like goods are sold for consumption in the country of origin. It refers to the conditions of the transaction of sale rather than to extraneous considerations which may affect prices.

2. That there was no error in law in the use by the Board of the sales at $25.50 f.o.b. Detroit as sales "under comparable conditions of sale" of the kind described in s. 35(1), as indicative of fair market value.

3. That on the evidence it was also open to the Board to regard such sales as sales "under fully competitive conditions" within the meaning of that expression in s. 35(1).

4. That in determining the fair market value the Board proceeded on an erroneous interpretation of s. 35(1). Its problem was not to select one of many varying prices as the one to be deemed the fair market value but to find as nearly as it could the fair market value from the evidence of prices paid in sales of the kind described in s. 35(1), whether the value so found coincided with one of the prices or not, and its declaration showed that it had proceeded on an erroneous interpretation of s. 35(1) and on too restricted a view of the manner in which the problem of finding fair market value was to be solved, and that the finding of value so made could not be allowed to stand.

Application under s. 45(1) of the *Customs Act* for leave to appeal from a decision of the Tariff Board and for an order extending the time to make the application.

APPEAL on a question of law from a declaration of the Tariff Board.

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

André Forget, Q.C., for appellant.

D. H. W. Henry, Q.C., for the Deputy Minister of National Revenue (Customs and Excise), respondent.

J. M. Coyne for Kaiser Steel Corporation, respondent.

THURLOW J. now (June 10, 1958) delivered the following judgment:

This is an appeal under s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, by Semet-Solvay Co. Ltd. from the declaration of the Tariff Board dated June 27, 1957 in appeal No. 401. The matter in issue before the Board was the value for

duty of two carloads of foundry coke purchased by Canadian Iron Foundries Ltd. from the appellant and imported into Canada from the United States by Canadian Iron Foundries Ltd. under Three Rivers customs entries No. 8709 and 8715, dated January 18, 1955. By its declaration, the Board affirmed a valuation of $25.50 per ton, which had been confirmed on review by the Deputy Minister of National Revenue for Customs and Excise. In the proceedings before the Board the present appellant, as well as Canadian Iron Foundries Ltd. (which was the appellant before the Board), contended that the value for duty of the coke should be set at $22.52 per ton, which was the price at which it was sold by the appellant to Canadian Iron Foundries Ltd. The present appeal is brought pursuant to leave granted to the appellant by the President of this Court to appeal on the question:

> Did the Tariff Board err as a matter of law in determining $25.50 per ton, U.S. funds, f.o.b. Detroit, as the value for duty of foundry coke imported under Three Rivers entries No. 8709 and 8715, dated January 18, 1955?

When granting leave to appeal on this question, the President also extended the time for making the application for such leave but reserved the right of the Deputy Minister to contest at the hearing of the appeal this Court's jurisdiction so to order upon the ground that the appellant's application was heard more than thirty days after the date of the Tariff Board's declaration. This question was raised and argued at the opening of the hearing of the appeal.

The applicable provision of the *Customs Act* is s. 45(1), which provides as follows:

> 45. (1) Any of the parties to an appeal under section 44, namely,
> (*a*) the person who appealed,
> (*b*) the Deputy Minister, or
> (*c*) any person who entered an appearance with the secretary of the Tariff Board in accordance with subsection (2) of section 44,
>
> may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the order, finding or declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

In the present case, the Tariff Board's declaration was made on June 27, 1957, and notice of application to extend the time for applying for leave to appeal and for leave to

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appeal was served on July 24, 1957, but it was not returnable nor was the application heard until August 6, 1957. On that day the application came on before the President and was granted, as already mentioned. The contention of counsel for the Deputy Minister was that the Court's jurisdiction to extend the time for applying under s. 45(1) can be exercised only while the thirty-day period is still running and that, once it had expired, the Court no longer had jurisdiction to extend it.

In *Banner v. Johnston*[1] Lord Cairns, in dealing with a similar objection, said at p. 172:

> In truth, my Lords, it is entirely a narrow construction of the word "extended" to say that extension of time must be made within the period of time first allotted. The time may be extended just as well after the three weeks have expired as before. The argument assumes that the Act of Parliament is worded in this way: No appeal shall be brought except within three weeks, unless the Court of Appeal sanctions, within the three weeks, an extension of time to a longer period. But it is not so framed. I think, therefore, that the appeal is altogether in time, having regard to the order that has been made.

It may be noted here that, unlike some of the statutory provisions which were interpreted in cases which were referred to on the argument, of which *Banner v. Johnston* (*supra*) was one, s. 45(1) does not use the words "extend" or "enlarge", and so the argument that an extension or enlargement cannot be made when the period to be extended or enlarged no longer exists does not apply.

In the same case the Lord Chancellor, Lord Hatherley, reached the same conclusion, but on grounds related more to the object of the enactment than to the particular language of it. He said at p. 170:

> Mr. Jessel also rested very much on the course taken in Bankruptcy; but I do not think that turns in any way upon the words of the statute being in the same form as they are here. What we have to look at in substance is this: Is it contrary to the meaning of the word "extend" to give longer time after the original time has passed? Time is not a material with respect to which it may be said that the matter itself having ceased, there is no farther subject to operate upon. Although the time has passed, it may well be that the Legislature intended to say there should be a power in the Court of Appeal to say that it would be reasonable that an additional time should be given. When we think of the difficult subjects that are likely to come before the Courts under the *Winding-up Act* it seems impossible to conceive that the Legislature could have thought

[1] (1871) L.R. 5 H.L. 157.

it desirable to impose a peremptory prohibition against any extension of the time, on a consideration of all the circumstances that may have occurred after the period of three weeks has elapsed.

A similar approach to the problem is evident in the judgment of Davies J. in *Gilbert v. The King*[1]. In that case the statute gave the prisoner a right of appeal to the Supreme Court of Canada on serving notice of appeal "within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof," a provision the language of which is very similar to that of s. 45(1). Davies J. said at p. 209:

> The only question upon which I had any doubt was as to my power to grant the extension after the expiration of the fifteen days. A construction requiring the application to be made within the fifteen days would, in a section such as this dealing with the criminal law and where sometimes, as in the case before me, the prisoner's life is at stake, be a very narrow one and might in many cases which can be conceived of in a country of the extent of the Dominion of Canada, if adopted, defeat the object which Parliament seems to have had in view. I, therefore, felt strongly inclined to adopt the broader construction and to hold that the power of extension is exercisable under the section even after the expiration of the prescribed period.
>
> There are two authorities which seem to be conclusive upon the point. One is that of *Banner v. Johnston,* L.R. 5 H.L. 157, at pages 170 and 172, and the other that of *Vaughan v. Richardson,* 17 Can. S.C.R. 703.

Most of this reasoning would apply with equal force in the present case, and, I think, with even greater force, in view of the requirement of s. 45(2) of the *Customs Act* that there be seven clear days' notice of the hearing of the application and that such notice be served on all parties (of whom there may have been many) to the proceeding before the Tariff Board.

In *Stratton v. Burnham*[2] a similar question arose on the construction of s. 18(1) of the *Controverted Elections Act,* which was as follows:

> Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, within ten days after the day on which the petition has been presented, or within the prescribed time, or within such longer time as the court, under special circumstances of difficulty in effecting service, allows, be served on the respondent or respondents at some place within Canada.

[1] (1907) 38 Can. S.C.R. 207. [2] (1909) 41 Can. S.C.R. 410.

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The Chief Justice, Sir Charles Fitzpatrick, with whom three other judges concurred, said at p. 414:

> It is not doubted that the *service* made in conformity with the order of the 2nd December, 1908, would be valid if this were a civil case, and that order is in my opinion as effective made as it was within the extended period as if made before the expiration of the 10 days allowed for service, if the judge had jurisdiction to grant the extension after the 10 days within which the service should be made had expired, of which I have no doubt. *Gilbert v. The King*, 38 Can. S.C.R. 207, and cases there cited.

A contrary conclusion had been reached, however, in the *Glengarry Election Case*[1], where the problem arose on the construction of ss. 32 and 33 of the *Controverted Elections Act*. Section 32 provided that, except in a special instance, the trial of an election petition should be commenced within six months of the time when such petition was presented and should be proceeded with from day to day until the trial was over, and further that if, at the expiration of three months after the petition was presented, the time for trial had not been fixed, any elector might, on application, be substituted for the petitioner. Section 33(1) was as follows:

> 33. (1) The court or a judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on an application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary;

Ritchie C. J. and Gwynne J. were of the opinion that the time for commencement of the trial might be enlarged under s. 33(1) after the six months had expired, but Henry, Fournier, and Taschereau JJ. held the contrary view. Henry J. adhered to a view expressed by him in the *Quebec County Election Case*[2], in which he had said at p. 450:

> After the expiration of the prescribed six months during which the legislature has limited the time for the commencement of the trial a judge could not try the case unless he went contrary to the provision of the statute. If, then, he had no jurisdiction as to the trial, if he could not try the merits of the petition, say, three days after the expiration of the prescribed six months, how could he give himself jurisdiction by enlarging the time to a future day? I can find no decision nor any principle upon which such a proposition could be sustained.

Taschereau J., however, with whom Fournier J. concurred on this point, rested his interpretation on what he considered the policy or object for which the statute was passed, that is to say, to eliminate delay in the trial of election

[1] (1888) 14 Can. S.C.R. 453. [2] 14 Can. S.C.R. 434.

petitions in view of the public interest involved in having the representation of the constituency settled as expeditiously as possible. He was of the opinion that the power to enlarge the time for the commencement of the trial given by s. 33(1) could not be exercised after the time limited by the previous section had expired and that to hold otherwise would be to render the six months' limitation fixed by s. 33(2) of no effect. The judgment appears to have turned on the object and, to a lesser extent, on the wording of the particular provisions and, though there was a difference of opinion as to the result, I do not think that it varies in principle from *Banner v. Johnston* (*supra*) or the later cases in the Supreme Court of Canada to which I have already referred.

In *General Supply Co. Ltd. v. Deputy Minister of National Revenue*[1] Cameron J. granted leave to appeal under the section of the *Customs Act*, R.S.C. 1927, c. 42, corresponding with s. 45(1) of the present statute on an application made after the thirty-day period had expired, but the precise point now raised does not appear to have been argued. Cameron J. said at p. 187:

> I do not think that an application can be considered to have been made until at least the date fixed for the hearing of the application. It is then only that the application comes before the Court for consideration, and the notice previously given is nothing more than an intimation that the application will be made on the date specified. Indeed, in the application now before me the opening words are, "Take notice that an application will be made . . ." My opinion, therefore, is that the application for leave to appeal was not "made within thirty days from the making of the Order."
>
> That, however, does not conclude the matter for a very wide power is conferred by the words, "or within such further time as the Court or judge may allow." It is submitted that no substantial reason has been advanced to explain the delay and it is pointed out that at the opening of the hearing before the Tariff Board, the agent (not the counsel) for the appellant intimated that he then had instructions to appeal the Board's finding if its decision were not in his favour. It would be advisable, I think, that an application for leave to extend the time should be supported by one or more affidavits explaining the reasons for requiring such extension, but that was not done in this case. However, Mr. Henderson, counsel for the appellant, stated that the typewritten record of the proceedings before the Tardiff Board was not available until two weeks after the hearing, that when it was received, the agent, Mr. Hooper, was away from his office, and that immediately upon his return the appeal proceedings were launched. In this case I shall accept that explanation as a reasonable one which accounts for the delay, more particularly as

[1] [1953] Ex. C.R. 185.

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the practice has not heretofore been settled and as it was admitted that the respondents had not been prejudiced in any way. The application to extend the time for applying for leave to appeal will therefore be granted.

The main consideration urged in favour of the suggested limitation was the great, indeed the national importance, from the point of view of the revenue and from the point of view of those engaged in trade, of having questions of the kind on which appeals to the Tariff Board may be made, relating as they do to matters such as value for duty and tariff classifications, rendered certain as expeditiously as possible. These are, no doubt, matters of great importance, but they are equally cogent as reasons why there should be no appeal at all, and in my opinion they should not be allowed to prevail over what I think is the manifest object of s. 45(1), namely to give a right of appeal, notwithstanding such considerations, from the judgments of the Tariff Board in the circumstances and under the conditions set forth in the language of that subsection. One of the conditions is that leave to take such appeal must have been obtained on an application made within thirty days "or within such further time as the Court or judge may allow." As I read this provision, it simply means that the application is to be made within thirty days or such longer time as the Court or judge, in its or his discretion, regards as appropriate in the particular case. It clearly contemplates that more than thirty days will be appropriate in some cases and gives the Court or judge an unfettered discretion to allow the application to be made within a longer time. The words used in the subsection are, on their face, wide enough to embrace the exercise of such discretion either before or after the expiry of the thirty-day period, and as Parliament has not seen fit to express any limitation as to the time when the discretion may be exercised I do not think any such limitation should be held to exist. In my opinion, neither the language nor the object of s. 45 requires the suggested limitation and further time may in appropriate cases be allowed on an application made after the thirty-day period has expired. I therefore rule that the Court had jurisdiction to grant the extension and to hear the appeal.

Turning now to the question on which the appeal is taken, at the time of the importations in question s. 35(1) of the *Customs Act,* on the interpretation of which the problem depends, read as follows:

35. (1) Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value of such or the like goods when sold for home consumption in the ordinary course of trade under fully competitive conditions, in like quantities and under comparable conditions of sale at the time when and place whence such goods were exported by the vendor abroad to the purchaser in Canada; or, except as otherwise provided in this Act, the price at which the goods were sold by the vendor abroad to the purchaser in Canada, exclusive of all charges thereon after their shipment from the place whence exported direct to Canada, whichever may be greater.

It will be observed that under this section the value for duty is defined as the fair market value of like goods when sold in sales of a particular kind or, except as otherwise provided in the Act, the price at which the goods sought to be imported were sold to the Canadian importer, whichever may be greater. It was, accordingly, incumbent on the persons administering the Act to ascertain the fair market value as indicated by sales of the kind mentioned and, subject to the alternative provision of s. 35(1), to adopt such fair market value as the value for duty.

The facts are not in dispute. Semet-Solvay Co. Ltd., the appellant, is a Canadian subsidiary of Allied Chemical and Dye Corporation, a United States corporation which manufactures and sells furnace coke at Detroit. The latter corporation carries on its business of manufacturing and selling the coke under the name "Semet-Solvay Division, Allied Chemical and Dye Corporation," and for convenience I shall hereafter refer to the parent company as "Semet-Solvay". The two carloads of coke in question were acquired by the appellant from Semet-Solvay, f.o.b. that company's coke ovens at Detroit, pursuant to a standing contractual arrangement between them and were sold by the appellant to Canadian Iron Foundries Ltd., f.o.b. the same point, under a contract of sale resulting from a purchase order issued by Canadian Iron Foundries Ltd. at Montreal and accepted by the appellant at Toronto. This contract provided, among other things, that delivery should be f.o.b. Detroit and that payment of the purchase price

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at $22.52 per ton was to be made, net cash, by the 15th of the month following shipment. The shipping dates, as shown on the invoices, were January 14 and 15, 1955.

Semet-Solvay is the largest producer of foundry coke in the United States and the only producer of it in the vicinity of Detroit. The bulk of the coke so produced is sold to customers for consumption in the United States, but some of it is sold to the appellant which, is turn, re-sells it to Canadian customers. Approximately fifteen per cent of the coke produced by Semet-Solvay is sold to consumers in what was referred to as the Detroit switching area, an area comprising the city of Detroit and its immediate vicinity, and approximately twenty per cent in an area near Detroit which was referred to in the evidence as the Detroit base area. This area extended from the northern boundary of Ohio to Lake Huron and for some distance west of Detroit and included Flint, Saginaw, Pontiac and other places where consumers of considerable quantities of foundry coke were located. In these two areas Semet-Solvay enjoyed a competitive advantage over other producers of foundry coke, arising from its position within the area as well as its greater productive capacity. Because of this, competitors set their prices for foundry coke to customers within these areas by reference to the prices charged by Semet-Solvay. Their price to such a customer would not be the same as the price charged to a customer near their coke ovens but would be such amount as would enable the customer in the Detroit base area or the Detroit switching area to pay for it and have it carried to his plant at a total cost not exceeding what he would have to pay for Semet-Solvay coke and freight on it to his plant. Despite Semet-Solvay's advantage, however, in the Detroit areas, its sales accounted for only slightly in excess of fifty per cent of the coke purchased by customers in the Detroit base area. The remainder of the coke produced by Semet-Solvay, excluding, of course, what was sold to the appellant for export, was sold to customers in the states of New York, Pennsylvania, Indiana, Illinois, and Wisconsin.

At the material time Semet-Solvay sold foundry coke to customers in the Detroit switching area on a delivered basis at $26.50 per ton. This was said to net Semet-Solvay

just under $25.50 per ton for the coke, the other dollar being the average cost of delivering it to the customers' plants. To customers within the Detroit base area and, for that matter, to customers anywhere where competition did not dictate a lower price, the price per ton was $25.50, f.o.b. Detroit. To customers outside the Detroit switching area and the Detroit base area, where competition from other producers rendered it necessary Semet-Solvay sold coke at a price which would enable the customer to pay for it and have it carried to his plant at a total cost not exceeding what he would be obliged to pay for other coke and freight on it to his plant. Considerably more than half of the coke produced by Semet-Solvay was sold to customers whose plants were beyond the Detroit switching area and the Detroit base area and, so far as the evidence shows, save for coke destined for Windsor and Toronto the prices were all below $25.50 and ranged from $18.47 to to customers in Reading, Pennsylvania to $22.75 to customers in Syracuse, New York. Sales of coke by Semet-Solvay to such customers were always made on an f.o.b. Detroit basis and on terms of payment and general contractual conditions similar to those on which the appellant sold to its Canadian customers. The contract forms in use by both the appellant and Semet-Solvay contained a condition that the acknowledgment of the order constituted the entire agreement between the parties and that there were no understandings, representations, or warranties of any kind, express or implied, not expressly set forth therein. On its face this excluded as part of the contract any contractual obligation upon the buyer requiring him to have the coke transported to his plant, but from the point of view of maintaining its price to its Detroit customers, as well as to customers in places where the price was higher, Semet-Solvay was much concerned with the destination of coke sold to its distant customers. It would not quote a price except for a particular destination, and it would not sell again to a customer who, after obtaining coke f.o.b. Detroit, changed its destination to a place where the price to customers of Semet-Solvay was higher. In practice, coke sold at prices set for particular destinations was carried to such destinations and, while the purchaser was in a legal position to divert a shipment immediately after the coke

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had been loaded at Detroit and the contract of carriage made and thus to incur such sanctions as Semet-Solvay might impose, in the ordinary and normal course of business the problem rarely arose. Of the various destinations for which prices lower than $25.50 were charged, the largest amount of coke sold was to customers in Buffalo, New York, which accounted for about four per cent of Semet-Solvay's output. There was no change in Semet-Solvay's prices for coke to any of its customers in the United States during January, 1955.

The price at which the coke in question in this appeal was sold to Canadian Iron Foundries Ltd. was set by the same formula as that used by Semet-Solvay in dealing with its customers beyond the Detroit areas. There was a competing manufacturer of coke in Montreal, whose price was $26.10. Freight per ton from Montreal to Three Rivers would bring the cost of such coke at Three Rivers to $29.00. To meet this competition, the appellant set a price of $22.52 which, with freight of $6.30 from Detroit to Three Rivers, and exchange of 18 cents, made the cost to the consumer the same as it would have had to pay for Montreal coke.

The question for determination in the proceeding before the Tariff Board was what, on these undisputed facts, was the value for duty of the two carloads of coke imported under the entries in question. Subject always to the alternative provision of s. 35(1), the answer to this question depended on the answer to the further question, what was the fair market value of foundry coke as indicated by sales made in Detroit in January, 1955 in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale of foundry coke in like quantities for consumption in the United States? On this question the onus of showing a fair market value different from that estimated by the appraiser and confirmed by the Minister, in my opinion, rested on the appellant, and the Board could properly take the position that the value as so estimated should not be disturbed unless the Board was

satisfied by a preponderance of evidence that such estimate was wrong. In its declaration, the Board, after reviewing the evidence, said:

> Wherever in Section 35, as above quoted, reference is made to "fair market value", the phraseology is precise and plain: "*the* fair market value". There can be no inference from these words other than that Parliament contemplated the existence of *one* fair market value—and one only. Yet the evidence in the case at issue establishes beyond any doubt whatsoever that for Semet-Solvay foundry coke in the Detroit area on the date of the export to Three Rivers there were many fair market values, f.o.b. ovens, Detroit. Counsel for the Crown—defending the deputy Minister's determination on the basis of the "list price" of $25.50—said in argument: "The evidence here makes it quite clear that there are many what might be termed fair market prices". No rule of construction, no application of the principle that the words of the statute should be given their common and ordinary meaning, can bring the facts of this transaction into harmony with what was the obvious intent of the legislators as regards "fair market value". Faced, therefore, with a situation where, to his knowledge, there existed varying prices, f.o.b. ovens, Detroit—any one of which might be deemed to be the fair market value of the coke seeking entry—the deputy Minister determined the proper one to be the price cited in the so-called "Detroit list price", viz.: $25.50 per ton. The Board, in turn, confronted with the problem of selecting *one* of many varying prices as the one to be deemed to be the fair market value, finds in the abundant evidence before it no sound reason for rejecting the figure of $25.50 determined by the deputy Minister, and, equally, no sound reason for selecting any other value as being, in the circumstances, the fair market value, or the value for duty.
>
> Accordingly, the Appeal is dismissed.

On the present appeal, the question for determination differs from that which was before the Board. Here the question is not, what was the value for duty, but, did the Tariff Board err as a matter of law in reaching its conclusion that the value for duty of the coke in question was $25.50 per ton?

In *Canadian Lift Truck v. Deputy Minister of National Revenue*[1] Kellock J., in discussing a question similar in form to that in the present appeal, said at p. 498:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.
>
> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal

[1] [1956] 1 D.L.R. 497.

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of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination; *Edwards v. Bairstow,* [1955] 3 All E.R. 48.

The appellant contended that the Board erred in selecting the Detroit base area price as the fair market value because sales to customers in that area were not affected by conditions of sale comparable with those affecting the export sale in question. In particular, it was argued that the presence of competition from the Montreal producer affected the price which a purchaser in Three Rivers would pay, that the Detroit base area price was not dictated by competition from the Montreal producer or from any local producers and, accordingly, the sales to Detroit base area customers were not under comparable conditions of sale. The sales to customers in the United States, outside the Detroit base area, however, were, it was submitted, at prices dictated by comparable, though not identical conditions of sale. In my opinion, the expression "under comparable conditions of sale" in s. 35(1) connotes a comparison of the conditions of the transaction itself in which the Canadian importer acquires the goods sought to be imported into Canada with the transactions in which like goods are sold for consumption in the country of origin, the purpose being to ensure that what the purchaser who buys for consumption in the country of origin receives for his money is comparable with what the Canadian importer receives for his, and I do not think that the expression refers to market conditions affecting prices. If it does refer to the market conditions, I think it is obvious that situations in which the subsection can be applied will be rare, if not entirely non-existent. The expression is not "comparable market conditions" but "comparable conditions of sale," and as I interpret it the reference is to the conditions of the transactions of sale rather than to extraneous considerations which may affect prices. Here the conditions as to delivery f.o.b. Detroit and payment by the 15th of the month following shipment, as well as the other terms of the contract, were readily comparable, and I can see no

error in law in the use by the Board of the Detroit base area sales as sales under comparable conditions of sale of the kind described in s. 35(1) as indicative of fair market value.

The appellant also contended that the Board erred in treating the Detroit base area sales as sales under fully competitive conditions within the meaning of that expression in s. 35(1) because Semet-Solvay enjoyed what was referred to as a competitive advantage in marketing its coke in the Detroit base area. As has been mentioned, this advantage arose from Semet-Solvay's location in the area, which enabled it to give service to its customers more expeditiously than its competitors could give and because of its greater productive capacity. It was said that the word "fully" must be given some meaning and that it contemplated conditions such as Semet-Solvay faced when it was compelled to reduce its price to meet competition in destinations where other producers exercised more control on the price. I disagree with this contention. In principle, I see no reason for holding that conditions were not fully competitive simply because competition was even sharper elsewhere. In the circumstances disclosed and particularly in the light of the evidence that, despite its advantage, Semet-Solvay supplied only slightly in excess of fifty per cent of the coke consumed in the Detroit base area, I think it was clearly open to the Board to regard the Detroit base area sales as sales under fully competitive conditions.

The situation, as I view it, is one in which, on the uncontradicted evidence, the sales both to customers in the Detroit base area and to customers in the United States beyond the Detroit base area and the Detroit switching area were all sales of the kind referred to in s. 35(1). They were all sales of like goods for home consumption, that is in the United States, in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale. They were all sales at Detroit and the prices paid in them prevailed throughout the material time. The prices, however, ranged from $25.50 down to $18.47 despite the fact that in each case the sale was a sale of coke f.o.b. Detroit and on the same contractual terms. It was the Board's problem to determine the fair market value

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of foundry coke at Detroit as indicated by these sales. But, as I see it, while the fair market value may well have been the same as one of these prices, it was not necessarily one of them but rather that amount which, in the judgment of the Board, most nearly represented the fair market value, having regard to the several prices with the volume of sales made at each of them individually and in groups and the varying weight to be attached to each of them as indications of fair market value in view of such volume and any special circumstances or features influencing the vendor to sell or the purchaser to buy at each of such prices.

The expression "fair market value" has been defined in different ways, depending generally on the subject matter which the person seeking to define it had in mind. Because of this, suggested definitions of fair market value, for example, of real estate, are not of assistance in a matter of this kind. But, in my opinion, the discussion of the meaning of the expression in *Untermyer Estate v. Attorney-General for British Columbia*[1] is useful as a guide to the meaning of the expression in s. 35(1). There prices of shares of a certain company on different stock exchanges ranged at the material time from 2.08 bid and 2.11 asked to 2.27 bid and 2.30 asked, and a commissioner appointed to determine the fair market value made a finding that it was $2.00 per share. This the appellant contended was too high. There was no cross-appeal in the Supreme Court of Canada. Mignault J., in delivering the unanimous judgment of the court, affirming this finding, said at p. 91:

> We were favoured by counsel with several suggested definitions of the words "fair market value." The dominant word here is evidently "value," in determining which the price that can be secured on the market—if there be a market for the property (and there is a market for shares listed on the stock exchange)—is the best guide. It may, perhaps, be open to question whether the expression "fair" adds anything to the meaning of the words "market value," except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market. The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. Many factors undoubtedly influence the market price of shares in financial or commercial companies, not the least potent of which is what may be called the investment value created

[1] [1929] S.C.R. 84.

by the fact—or the prospect as it then exists—of large returns by way of dividends, and the likelihood of their continuance or increase, or again by the feeling of security induced by the financial strength or the prudent management of a company. The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

There are, of course, many differences between the situation in the *Untermyer* case and the present one which would make it readily distinguishable. In particular, it must be observed that here the statute directs that fair market value be ascertained by particular kinds of sales and thereby excludes from consideration sales which are not of the kind described, such as, for example, the sales by the appellant to its Canadian customers. But it will be observed that in the passage quoted the learned judge treats the market prices not as the *fair market value* but as the best test or, as I think, the best evidence of fair market value, and I am of the opinion that this is how in the present case the prices paid in the several sales of coke f.o.b. Detroit for consumption in the United States should be regarded in determining fair market value under s. 35(1) from sales of the kind therein described.

In my opinion, each group of sales having the characteristics referred to in s. 35(1) afforded some indication of the fair market value of coke when sold at the material time and place in sales of the kind mentioned in s. 35(1), but in my view it was open to the Board to treat them as not being all of equal weight as indications of the fair market value of coke when so sold. Sales at some prices were made in greater volume than others. Some were affected by weaker competition than others, and some were made in circumstances which might be regarded as depreciative of their weight as indications of fair market value. On such evidence, it was, in my opinion, open to the Board, in making its finding of fair market value, to adopt any of these prices which, in its opinion, represented the fair market value, but it was, in my opinion, also open to the Board to consider that no one of those prices represented exactly the fair market value as indicated by such sales as a whole, and to adopt such other amount within the range of prices disclosed by the evidence as it thought more nearly represented the fair market value. It is obvious

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that, on the evidence, the fair market value as indicated by such sales lay somewhere within the range of prices from $18.47 to $25.50 per ton, these being prices charged by the same vendor in selling like goods on the same terms. The problem would have been much the same had there been several vendors selling coke at Detroit, each at a single price but each at a price differing from the other vendors. Now, the Board by its finding has adopted as the fair market value one of the prices within the range above mentioned and, as I see it, this finding is not open to attack on the ground that it is contrary to the evidence. But, on the other hand, I think it is apparent on the face of the Board's declaration that the Board considered it had no course but to adopt one of the prices as the fair market value. It said:

> The Board, in turn, confronted with the problem of selecting *one* of many varying prices as the one to be deemed to be the fair market value, finds in the abundant evidence before it no sound reason for rejecting the figure of $25.50 determined by the deputy Minister, and, equally, no sound reason for selecting any other value as being, in these circumstances, the fair market value, or the value for duty.

With respect, I am of the opinion that, in adopting this approach to the problem before it, the Board proceeded on an erroneous interpretation of s. 35(1) and on much too restricted a view of the manner in which the problem before it was to be solved. In my opinion, the Board was not faced with the problem of selecting one of the varying prices but with the problem of finding the fair market value from the evidence of prices paid in sales of the kind described in that subsection.

There remains the question whether or not this error, which I regard as one of law, vitiates the Board's finding. In *Edwards v. Bairstow*[1] Lord Radcliffe put the matter thus at p. 56:

> The field so marked out is a wide one, and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the commissioners, special or general, to the effect that a trade does or does not exist is not "erroneous in point of law"; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being

[1] [1955] 3 All E.R. 48

upset by the court on appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the Case that they have misunderstood the law in some relevant particular.

The present situation is, in my opinion, one of the kind referred to in the last sentence of the passage quoted. While the value as found would, on the evidence, be warranted, in my opinion the Board's declaration shows that that finding was made by the application of what I conceive to be an erroneous test and one that, in my opinion, unduly circumscribed the power and function of the Board to find the fair market value as nearly as it could from the evidence before it of sales of the kind described in s. 35(1). It may well be that the finding would have been the same had the Board interpreted its function as I think it should have been interpreted, but on the evidence as a whole I cannot conclude that it would necessarily have been the same. It follows that the finding cannot stand and that the question on which the appeal is taken must be answered in the affirmative.

The appeal will be allowed and the matter referred back to the Tariff Board for re-hearing. The appellant is entitled to its costs in this Court to be taxed and paid by the Deputy Minister.

Judgment accordingly.

BETWEEN:

PREMIER MOUTON PRODUCTS INCORPORATED ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Revenue—Excise tax—"Furs"—"Mouton"—Sheepskins—Moneys collected as taxes paid under protest—Action to recover payment by Petition of Right—"Quasi-contract resulting from reception of a thing not due"—Excise Tax Act, R.S.C. 1952, c. 100, ss. 24(1), 46(5)(6)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 36—Civil Code, arts. 1047, 1048, 1140.

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The suppliant relying on s. 36 of the *Exchequer Court Act* sought by petition of right to recover moneys it claimed were wrongfully exacted from it by the Crown. It alleged that in the operation of its business it processed raw sheep-skins into finished "mouton" and that the Department of National Revenue contending such processed skins were "furs" within the meaning of the *Excise Tax Act* illegally compelled it between March 30, 1950 and January 29, 1952 to pay some $25,269 as excise tax thereon. That it had from the outset opposed payment and made all payments by cheques on the back of which it inscribed "tax paid under protest" or "paid under protest" and each time, at the suggestion of the respondent, made application for refund as provided by the *Excise Tax Act* and that although the Supreme Court of Canada in *Universal Fur Dressers and Dyers Ltd. v. The Queen* [1956] S.C.R. 632, decided that sheepskins as processed by the suppliant were not subject to excise tax, the Department refused to reimburse the suppliant the sums it had illegally and wrongfully collected from it.

Held: That the suppliant's goods were not subject to the provisions of s. 24 of the *Excise Tax Act* and the Department of National Revenue acting in the name of the Crown, in imposing, levying and collecting an excise tax on goods which were not furs, acted illegally and committed an act *ultra vires* of the powers conferred upon it by Parliament. *Universal Fur Dressers and Dyers Ltd. v. The Queen* (*supra*) applied.

2. That as the Act imposed an excise tax on furs and not on "mouton", the sums claimed and levied as taxes on "mouton" were not taxes nor could the payments made by the suppliant be considered as the payment of taxes and the procedure set out in subsections (5) and (6) of s. 46, which refer only to the payment or overpayment of *taxes* by error of fact or law, could not be followed.

3. That when the respondent by its agents under pretext that the tax imposed was payable claimed amounts supposedly due, it obtained through an error of fact or of law sums not due it which it is bound to restore. (art. 1047 C.C.).

4. That the suppliant when called upon to pay did not believe it was indebted to the respondent, but the representations of officers in authority led it into error. Consequently it paid believing itself by error to be indebted to the respondent. (art. 1048 C.C.).

5. That the payments made by cheque "under protest" indicate that the suppliant intended to exercise its recourse against the respondent if the information the latter had furnished proved to be neither true or justified. This became the case following the Supreme Court judgment in *Universal Fur Dressers & Dyers* case, (*supra*). From that moment it was evident that the suppliant could not have recourse to the provisions of subsections (5) and (6) of s. 46 of the Act but there remained recourse by Petition of Right by virtue of the provisions of s. 36 of the *Exchequer Court Act* to claim that which it had erroneously and unduly paid.

6. That its claim was based on the provisions of the Quebec *Civil Code* relating to quasi-contracts resulting from the reception of "a thing not due" which gives the right of action to recover the thing

not due, and the suppliant having established all the elements required to support such a claim was entitled to recover from the Crown the sums paid under the heading of taxes which the latter had received without justification and should repay.

PETITION OF RIGHT to recover moneys demanded and collected as excise taxes, paid by the taxpayer under protest.

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

Roch Pinard, Q.C. for suppliant.

Yves Laurier, Q.C. for respondent.

FOURNIER J. now (February 23, 1959) delivered the following judgment:

Par sa pétition de droit, la requérante cherche à recouvrer de la Couronne une somme de $25,269.76 qu'elle allègue avoir payée "sous protêt" au ministère du Revenu national parce qu'elle aurait été imposée, prélevée et perçue comme taxe d'accise de 25 p. 100 sur la valeur marchande courante sur des fourrures apprêtées, des fourrures teintes et des fourrures apprêtées et teintes, alors que les marchandises de la requérante ainsi taxées n'étaient pas imposables en vertu de la Loi sur la taxe d'accise.

La taxe fut réclamée et perçue du 30 mars 1950 au 24 janvier 1952. Pendant cette période, la taxe d'accise en question était exigible sur les fourrures en vertu des Statuts du Canada, 1947, c. 60. Cette disposition est maintenant contenue au chapitre 100, article 24, des Statuts Revisés du Canada, 1952. Je cite:

24. (1) Est imposée, prélevée et perçue une taxe d'accise égale à vingt-cinq pour cent de la valeur marchande courante de toute fourrure apprêtée, fourrure teinte et fourrure apprêtée et teinte,

a) importée au Canada, payable par l'importateur ou le cessionnaire de ces marchandises avant qu'elles soient enlevées de la garde du préposé compétent des douanes; ou

b) apprêtée, teinte, ou apprêtée et teinte au Canada, payable par l'apprêteur ou le teinturier au moment où il en donne livraison.

Voici les faits. A l'enquête le procureur de l'intimée a admis que la requérante, pendant la période qui nous intéresse, achetait des peaux de moutons et des "shearlings", c'est-à-dire des peaux de moutons qui n'avaient été tondus qu'une fois; qu'elle apprêtait et transformait ces peaux en produits finis communément appelés

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"mouton" et qu'en sa qualité de grossiste elle vendait ces produits finis à des manufacturiers qui s'en servaient dans la fabrication de gants, manteaux, galoches et autres articles de même nature. Se basant sur les dispositions de l'article 24 précité, le ministère du Revenu national entreprit d'imposer, prélever et percevoir de la requérante une taxe d'accise sur les dites peaux de mouton.

Lorsque la requérante commença ses opérations, en 1950, elle reçut la visite de deux inspecteurs du ministère qui venaient faire l'évaluation ou l'estimation de ces marchandises pour fins d'imposition de la taxe d'accise. Il y eut discussion entre les inspecteurs et un représentant de la requérante. Ce dernier a exprimé l'opinion que les peaux de mouton n'étaient pas soumises à la taxe d'accise sur les fourrures. L'inspecteur lui aurait répondu "qu'il fallait payer cette taxe, que c'était la loi."—"S'il faut payer, nous paierons *sous protêt*."—"Très bien, payez comme vous voudrez, mais payez." L'inspecteur se rappelle avoir discuté avec les représentants de la requérante, mais il ne peut se souvenir si ces derniers lui ont dit que la taxe n'était pas exigible. Toutefois, vers ce temps-là, il avait entendu dire par des personnes intéressées dans l'industrie et le commerce de fourrures que les peaux de mouton séchées, apprêtées et transformées n'étaient pas imposables.

Un autre directeur de la requérante a souvent pris part aux discussions avec les officiers du ministère. Il prétend qu'il y était question des évaluations et cotisations et de la taxe. Dès les débuts, les paiements ont été faits sous protêt parce que la requérante croyait que les peaux de mouton apprêtées n'étaient pas des fourrures et qu'elles étaient, par conséquent, non imposables. Les gens du métier partageaient cette opinion. Même les inspecteurs auraient entendu des remarques à ce sujet.

A la suite de ces discussions et après avoir été informée que ses permis pourraient être annulés si elle ne se conformait pas à la loi, la requérante décida de payer les montants cotisés, mais par chèques endossés "Taxe payée sous protêt" ou "Payé sous protêt". La requérante a produit une liasse de chèques comme pièce P-1, lesquels portent

l'endos susdit, sauf quelques exceptions. D'ailleurs, l'intimée dans sa défense admet que le montant payé par la requérante pour taxe, du 30 mars 1950 au 29 janvier 1952, s'élève à $24,681.

Avant de passer à un autre point, je dois dire qu'il est en preuve que la requérante, dans ses opérations, se servait de peaux de mouton de l'espèce "merino". Loin d'être contredit, ce fait semble avoir été admis implicitement.

Les peaux de mouton de l'espèce "merino", traitées, apprêtées, teintes et transformées en "mouton" devant servir dans la fabrication de certains articles, peuvent-elles être considérées comme des fourrures et tombent-elles sous le coup des dispositions de l'article 24 du chapitre 100 des Statuts Revisés du Canada, 1952?

Cette question avait d'abord été décidée dans l'affirmative par l'honorable juge Cameron de cette Cour en 1954: *The Queen et Universal Fur Dressers and Dyers Limited*[1]. La cause fut portée en appel et le jugement de première instance fut renversé par la Cour suprême du Canada le 11 juin 1956[2]. L'honorable juge Cartwright, rendant le jugement du tribunal, fait les remarques suivantes:

> A consideration of all the evidence and of the authorities and dictionary definitions brings one to the conclusion that neither in technical terms nor in common speech nor in that of those who deal in such products would the skin of a mature merino sheep with the wool or hair attached to it be described as a fur. It does not appear to be possible to take an article or substance which is not fur and by dressing and dyeing it to produce a dressed or dyed fur. The merino sheep is a wool-bearing animal and not a fur bearing one.

En conséquence, l'appel fut maintenu et l'action renvoyée. Cela dispose de notre question puisque les faits dans les deux causes sont identiques en ce qui concerne les opérations des parties. Les produits de la requérante ne peuvent être considérés comme des fourrures et ne sont donc pas imposables.

Il faut dans cete cause déterminer si la procédure suivie par la requérante est bien celle prévue par la loi. Le procureur de la requérante a procédé par voie de pétition de droit, se basant sur l'article 36 de la Loi de la Cour de l'Echiquier du Canada et sur certaines décisions. Je cite la partie pertinente de cet article.

[1][1954] Ex. C.R. 247. [2][1956] S.C.R. 632.

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36. (1) Toute réclamation contre la Couronne peut être poursuivie par pétition de droit, ou peut être référée à la cour par le chef du ministère dont l'administration a occasionné la réclamation.

C'est une disposition générale qui n'impose aucune limitation quant à la nature de la réclamation. Il semble que toute personne ayant une réclamation contre la Couronne peut intenter la poursuite par pétition de droit.

Le procureur de la requérante dit qu'il ne conteste pas la validité du statut imposant une taxe d'accise sur les fourrures, mais soutient que les marchandises de la requérante ne sont pas des fourrures et qu'elles n'étaient pas assujetties aux dispositions de la loi concernant les fourrures. Le ministère n'avait aucune autorité légale pour imposer et percevoir une taxe d'accise sur ces articles. La requérante n'a payé qu'après avoir été induite en erreur. Elle a payé, non sans protester, des deniers qu'elle ne devait pas et l'intimée a reçu des argents auxquels elle n'avait aucun droit. Il s'ensuit qu'elle s'est enrichie au détriment de la requérante.

La prétention du procureur de la Couronne est à l'effet que, si la requérante croyait que ses marchandises n'étaient pas imposables et que les taxes réclamées n'étaient pas exigibles, elle devait ou refuser paiement et contester toute réclamation devant les tribunaux ou se conformer aux dispositions de l'article 46 de la loi pour réclamer remise des montants payés. Je cite les parties pertinentes de cet article:

46. (1) Il peut être accordé une déduction ou remise de toute taxe imposée par la présente loi

a) lorsque le contribuable a effectué un paiement en trop;

b) lorsque la taxe a été payée par erreur;

* * *

(5) Nulle remise ou déduction de quelqu'une des taxes imposées par la présente loi ne doit être effectuée à moins que la personne y ayant droit ne produise une demande par écrit à cet effet dans les deux ans de la date à laquelle cette remise ou déduction est devenue en premier lieu exigible en vertu de la présente loi ou de règlements édictés sous son régime.

(6) Si quelqu'un, par erreur de droit ou de fait, a payé ou a payé en trop à Sa Majesté des deniers dont il a été tenu compte à titre de taxes imposées par la présente loi, ces deniers ne doivent pas être remboursés à moins que demande n'ait été faite par écrit dans les deux ans qui suivent le paiement ou le paiement en trop de ces deniers.

L'intimée ajoute que les procédures susdites auraient dû être suivies: Elle argumente que lors de l'imposition et de la perception de cette taxe d'accise le mouton était considéré comme une fourrure. Ce n'est qu'en 1957, plus d'une année après le jugement de la Cour suprême du Canada déclarant que le "mouton" n'était pas une fourrure, que la requérante eut l'arrière-pensée de faire la présente réclamation, alors que le délai pour demander une remise des paiements effectués était expiré.

Maintenant, je veux résumer ce qui me semble être la position des parties dans la présente cause. L'article 24 de la Loi sur la taxe d'accise autorise l'imposition d'une taxe d'accise sur les fourrures. Cette taxe est imposée sur des marchandises de la requérante que le ministère considère comme fourrures. Plus tard, la Cour suprême du Canada déclare que ces marchandises ne sont pas des fourrures. Pendant l'intervalle entre l'imposition de la taxe et le jugement de la Cour suprême, la requérante, convaincue que la taxe n'est pas exigible sur ses marchandises, en avise qui de droit. Elle s'objecte au paiement de la taxe. Toutefois, elle paye la taxe sous protêt parce que les officiers du ministère l'informent qu'elle doit payer, parce que c'est la loi, et que, si elle ne paye pas, son industrie et son commerce seront fermés. Sa décision de payer résulte du fait que les autorités l'ont convaincue que c'était la loi et qu'elle a craint de voir ses opérations industrielles et commerciales mises en danger. Les paiements se continuent, toujours sous protêt, après des pourparlers sur le quantum des évaluations et des cotisations. Le 8 octobre 1957, à la suite du jugement de la Cour suprême, elle se rend compte qu'elle a été induite en erreur; elle demande, par pétition de droit, le remboursement des sommes qui, sans cause et à son détriment, ont été ainsi payées.

L'article 46 stipule que des remises de taxes peuvent être accordées lorsque le contribuable a effectué un paiement en trop ou lorsque la taxe a été payée par erreur. Le paragraphe (5) décrète que le contribuable ayant payé un montant de taxe en trop, ou ayant payé une taxe par erreur, doit produire une demande par écrit à cet effet dans les deux ans de la date à laquelle cette remise est devenue en premier lieu exigible en vertu de la loi ou des règlements. Je ne vois rien dans la loi qui détermine la

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date à laquelle une remise s'appliquant aux cas ci-dessus devient exigible. Cette dernière partie de la phrase pourrait peut-être s'interpréter comme devant signifier que l'exigibilité de la remise date du jour du paiement de la taxe payée en trop ou payée par erreur ou du jour de la connaissance de l'erreur. Encore faut-il qu'il s'agisse de taxe payée en trop ou par erreur. Est-ce le cas qui nous intéresse? S'agit-il de taxe au sens de la loi?

La preuve est à l'effet que dès le début les représentants de la requérante ont soutenu que le "mouton" n'était pas taxable comme fourrure et qu'elle ne devait pas payer les montants réclamés. Avisée par les officiers du ministère que "c'était la loi et qu'elle devait payer si elle voulait continuer son industrie et son commerce", craignant de perdre ses permis, elle commença à payer après discussion sur la valeur des marchandises et le quantum des montants cotisés.

A l'article 46(6) il est dit que, si les paiements ont été faits par erreur de droit ou de fait, la demande de remise doit être faite dans les deux ans du paiement. Il n'y a pas de doute dans mon esprit que le mot "paiement" veut dire "paiement volontaire". Les paiements ont-ils été faits volontairement? Je reviendrai sur ce point. Je présume que le législateur dans toutes les dispositions sous étude veut dire "taxe légalement imposée, prélevée et perçue". Or, si cela est vrai, une taxe imposée sur des marchandises non imposables n'est pas une taxe au sens de la loi. Les sommes perçues par l'intimée sur la valeur de ces marchandises peuvent avoir été considérées par les officiers du ministère comme perçues à titre de taxes, mais ces sommes ne peuvent être considérées comme des paiements de taxes par la requérante puisque ses marchandises n'étaient pas assujetties à une taxe d'accise. Elle n'a payé les montants réclamés que lorsqu'elle y a été contrainte par les représentations du ministère et non sans protester avec véhémence. Les paiements ont été effectués par erreur, mais erreur causée par les faits et paroles des officiers chargés de l'imposition, du prélèvement et de la perception de la taxe sur les fourrures. Je crois que les représentations étaient faites de bonne foi, mais qu'elles étaient erronées. Les sous-paragraphes (5) et (6) de l'article 46 sont-ils applicables dans les circonstances?

Examinons la procédure de la requérante. Elle poursuit la Couronne en vertu de la disposition générale de la Loi de la Cour de l'Echiquier du Canada qui permet la poursuite de toute réclamation par voie de pétition de droit. Elle prétend qu'elle a payé, sur les représentations des officiers de l'intimée, une taxe non existante. Elle invoque l'article 1140 du Code Civil qui se lit:

> Tout paiement supposé une dette; ce qui a été payé sans qu'il existe une dette est sujet à répétition.

Il s'ensuit que pour qu'il y ait répétition il faut qu'il y ait paiement, que ce paiement ne soit pas dû et qu'il ait été fait par erreur. Toutes ces conditions se rencontrent dans sa réclamation: il y a absence de dette vu le jugement de la Cour suprême déclarant que le "mouton" n'était pas une fourrure; il y a eu paiement (voir les chèques portant l'inscription "sous protêt"); enfin l'erreur a été de payer, sur les instructions des officiers en autorité, ce qui n'était pas dû. Son action serait donc une action en répétition de l'indu.

Dans son volume intitulé "The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec", 2e éd., 1952, l'honorable George S. Challies, juge de la Cour supérieure de la province de Québec, décrit cette action comme suit (p. 185):

> The rule that no man may enrich himself unjustly at the expense of another is a general rule in Quebec law, sanctioned by the action *de in rem verso*. This action, which is of quasi-contractual origin, lies if there be enrichment; impoverishment; a causal connection between the enrichment and impoverishment; no contract, text of law, or natural obligation as justification for the enrichment or impoverishment; and no imperative rule of law contravened. The action is personal; lies for the least of two amounts, enrichment or impoverishment, that is in existence at the time of the action; lies both for and against incapables; and is prescribed by thirty years.

Cette description semble couvrir tous les aspects d'une réclamation en répétition de l'indu. D'ailleurs, l'honorable juge Galipeault, dans la cause de *Ville de Louiseville v. Ferron*[1], a exprimé l'opinion que cette action était ouverte dans tous les cas où elle n'éludait pas des dispositions légales impératives.

[1] [1947] B.R. 438, 443, 446.

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On y voit dans ces autorités faisant jurisprudence et dans d'autres, plus particulièrement l'étude de l'honorable président actuel de la Cour suprême, M. le juge Rinfret [(1937) 15 Can. Bar Rev. 331] qu'il ressort que pour l'exercice de l'action prise, les éléments suivants doivent se trouver:

1. Enrichissement d'une partie; 2. Appauvrissement d'autre part; 3. Lien causal entre les deux; 4. Absence de justification ou de cause; 5. Que ce ne soit pas un moyen d'éluder les dispositions légales impératives.

En Angleterre, il n'existe pas, comme dans la province de Québec, de théorie relative au quasi-contrat de répétition pour l'enrichissement sans cause; mais certaines règles sont généralement suivies dans les cas de répétition de l'indu (recovery of money as money had and received). Si le paiement est fait volontairement et en connaissance de cause, il n'y a pas de recours; mais s'il n'est pas fait volontairement, il y a droit d'action. Cette règle est expliquée dans "Halsbury's Laws of England", 3e éd., vol. 8, p. 240, nº 417. Je cite:

417. A person who voluntarily pays a sum of money on another person's demand cannot claim a return of it from a payee as money had and received to his use, for, since he might have resisted the demand, the payment must be taken to have been voluntary; but if the payment is made under duress or some form of compulsion other than legal compulsion, it is deemed to be involuntary, and the sum paid is recoverable in this form of action.

A payment is not considered voluntary when made under threat of a penal action, or of an execution, even though no execution could lawfully issue; or when illegally demanded and paid under colour of an Act of Parliament or of an office, or under an arbitrator's award which is *ultra vires;* or when one party is in a position to dictate terms to the other; nor is a payment considered voluntary merely because the person making it has not waited to be sued or has been allowed time for payment. There may be "practical" as well as "actual legal" compulsion.

Le jugement rendu dans *Brocklebank Ltd. v. The King*[1] semble faire autorité pour déclarer qu'un paiement effectué à la suite d'une demande illégale de paiement sous prétexte d'une loi du Parlement doit être considéré involontaire. La note explicative et le "jugé" en tête du rapport se lisent comme suit:

The Shipping Controller, purporting to act under the authority of the Defence of the Realm Regulations, required as a condition of a licence to the suppliants to sell one of their ships to a foreign firm that they

[1] [1925] 1 K.B. 52.

should pay a percentage of the purchase money to the Ministry of Shipping, and the suppliants paid the said percentage. On a petition of right to recover back the money so paid:—

Held, (1.) That the imposition of the condition was illegal, and that the payment was not a voluntary payment. . . ."

Dans la cause de *Maskell v. Horner*[1], Lord Reading C.J. dit dans ses remarques:

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C.B. and per Parke B. in *Atlee v. Backhouse* [3 M. & W. 633, 646, 650]). The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy v. Manley* [1 C.B. 594, 602, 603]).

Les règles contenues dans les citations susdites ont beaucoup d'analogie avec les dispositions du Code Civil relatives au quasi-contrat résultant de la réception d'une chose non due. Toutefois, en Angleterre, il ne semble pas que la théorie de l'enrichissement sans cause donne toujours ouverture à l'action en répétition. Par contre, il y a une jurisprudence assez constante à l'effet que celui qui a payé par erreur une somme non due à une personne qui l'a réclamée, peut la répéter si le paiement n'a pas été volontaire. Nous verrons si les paiements dont il s'agit dans la présente cause ont été faits volontairement.

Il est en preuve—fait d'ailleurs admis par le procureur de l'intimée au début du procès—que les marchandises étaient des peaux de mouton type "merino" apprêtées et transformées en un produit appelé "mouton". Au surplus, la requérante a établi que les peaux de mouton étaient de l'espèce "merino". Dans la cause type de *Universal Fur Dressers* et *Dyers Ltd.* (*supra*), où il s'agissait de déterminer si des peaux de mouton dites "merino" transformées

[1] [1915] 3 K.B. 106, 118.

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en "mouton" étaient des fourrures, la Cour suprême du Canada a décidé qu'au point de vue de la loi sur la taxe d'accise ces marchandises n'étaient pas des fourrures. Toutefois, les marchandises de la requérante avaient été taxées pour droit d'accise en vertu des dispositions de l'article 24 de la loi taxant les fourrures, et ce, sans autorité légale. Je ne connais pas d'autre disposition de cette loi autorisant l'imposition d'une taxe d'accise sur le "mouton".

Les procureurs des parties, au cours du débat, m'ont fait remarquer qu'il s'agissait de l'application de droit statutaire, c'est-à-dire de droit strict. Comme les dispositions de la loi sont clairement exprimées, le sens littéral doit s'appliquer et peu d'explications sont nécessaires.

Je suis d'opinion que les marchandises de la requérante ne pouvaient être soumises aux dispositions de l'article 24 de la loi et que le ministère du Revenu national au nom de la Couronne, en imposant, prélevant et percevant une taxe d'accise sur ces marchandises, qui n'étaient pas des fourrures, a agi illégalement et a posé un acte *ultra vires* des pouvoirs accordés par le Parlement. Cet acte ne pouvait avoir d'effet juridique ni créer un lien de droit entre la Couronne et la requérante.

En matière de droit fiscal il y a de nombreuses décisions à l'effet qu'une taxe ne peut être imposée ou perçue d'une personne à moins que le cas ne soit expressément compris dans les termes du statut qui l'impose. Dans une cause de *Minister of National Revenue v. MacInnes*[1] le président de cette Cour a clairement exprimé la règle que je viens de mentionner. Je cite:

> *Held,* That a tax liability cannot be fastened upon a person unless his case comes within the express terms of the enactment by which it is imposed. It is the letter of the law that governs in a taxing Act.

Les marchandises de la requérante ayant été taxées illégalement, cette dernière pouvait difficilement recourir aux dispositions de l'article 46(5)(6) de la loi pour obtenir la répétition des montants payés sans cause à la Couronne. Je le répète, lorsque le paragraphe (5) de l'article 46 parle de remise ou déduction de quelqu'une des taxes imposées par la présente loi, il n'est même pas nécessaire de présumer qu'il s'agit de taxes dont la dite loi autorise l'imposition.

[1] [1954] Ex. C.R. 181.

La loi est claire: elle impose une taxe d'accise sur les fourrures et non sur le "mouton". En conséquence, les sommes réclamées et perçues comme taxes sur le "mouton" ne sont pas des taxes et, partant, les paiements effectués par la requérante ne peuvent être considérés comme des paiements de taxes. La requérante a tout de même payé à l'intimée des deniers qu'elle ne lui devait pas et que celle-ci a reçus sans aucun droit. Ce n'est que dans le cas de paiement de *taxes,* ou en trop, par suite d'erreur de fait ou de droit, que la procédure indiquée aux paragraphes (5) et (6) de l'article 46 doit être suivie.

Il me paraît indubitable que lorsque l'intimée, par ses représentants, sous prétexte que la taxe imposée était exigible, a réclamé les montants supposés dus, elle n'a fait qu'obtenir, par suite d'erreur de fait et de droit, des sommes qui ne lui étaient pas dues et qu'elle est obligée de restituer (voir article 1047 C.C.).

De plus, les circonstances et la preuve m'ont convaincu que la requérante, lorsqu'elle a été requise de payer, ne se croyait pas la débitrice de l'intimée, mais que les représentations des officiers en autorité l'ont induite en erreur. Elle a, en conséquence, payé, se croyant erronément débitrice de l'intimée (voir article 1048 C.C.).

Je suis d'opinion que les paiements qu'elle a faits par chèques "sous protêt" indiquent qu'elle entendait exercer son recours contre l'intimée si les renseignements qu'on lui avait fournis s'avéraient ne pas être véridiques ou justifiables. Ceci est devenu le cas par suite du jugement de la Cour suprême du Canada (voir *Universal Fur Dressers & Dyers Limited* et *The Queen, supra*). A compter de ce moment, il est évident qu'elle ne pouvait plus recourir à la procédure de l'article 46 (5) (6) de la loi. Mais il lui restait le recours par pétition de droit en vertu des dispositions de l'article 36 de la Loi de la Cour de l'Échiquier pour réclamer ce qu'elle avait erronément et indûment payé.

Sa réclamation est basée sur les dispositions du Code Civil du Québec relatives au quasi-contrat résultant de la réception d'une "chose non due", qui donne ouverture à l'action pour répétition de l'indu. Certains éléments sont essentiels à la réussite de cette action: il faut un paiement

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pour acquitter une dette qui n'était pas due et que le paiement ait été fait par erreur, avec le résultat que celui ayant reçu le paiement s'est enrichi aux dépens de celui qui a payé. Pourvu toutefois, suivant certains auteurs et de nombreux arrêts, que l'action n'ait pas été un moyen d'éluder des dispositions légales impératives.

Ces éléments se présentent-ils dans la présente réclamation?

La preuve est à l'effet que la requérante a fait des paiements de deniers par chèques endossés "sous protêt", réclamés à titre de taxe d'accise par le ministère du Revenu national pour et au compte de la Couronne. La loi n'autorisait pas l'imposition de telle taxe sur les marchandises de la requérante; elle a donc payé ce qu'elle ne devait pas, après avoir protesté le paiement.

La Couronne a reçu les deniers de la requérante sans justification ou cause, la taxe ayant été illégalement imposée et perçue et n'étant pas exigible. Il s'agit donc d'un cas d'inexistence de dette.

La réception de ces deniers a certainement eu pour effet d'enrichir l'intimée, et ce, aux dépens de la requérante, car par suite de ses prestations elle a vu son actif diminué d'autant.

Enfin, pour les raisons exprimées dans mes notes, je suis d'opinion qu'il n'y avait pas de dispositions légales impératives pouvant empêcher la requérante de poursuivre par voie de pétition de droit pour répétition de l'indu.

La requérante a-t-elle payé ces deniers par erreur? Il n'y a pas de doute qu'elle ne les aurait pas payés si elle n'avait pas été intimidée par les remarques et informations des officiers du ministère du Revenu national, à l'effet qu'elle devait payer parce que c'était la loi et qu'au cas de refus elle pourrait voir son entreprise close. La preuve m'autorise, je crois, à conclure qu'elle a réellement pensé qu'elle devait payer et que la taxe était exigible; le paiement a donc été fait par erreur. Dans ces circonstances, il est logique de croire que son consentement au paiement a été vicié par les représentants des autorités et que les paiements n'ont pas été faits volontairement mais par suite d'erreur et de crainte d'un mal sérieux.

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Pour ces raisons, la requérante doit réussir et a droit de recouvrer de la Couronne les sommes payées à titre de taxes. Cette dernière, qui a reçu ces montants de deniers sans cause ou justification, doit les restituer.

Il y a au dossier une liasse de chèques qui ont été émis par la requérante entre le 23 mars 1950 et le 7 septembre 1951 à l'ordre du Receveur général du Canada, lesquels indiquent le paiement d'une somme totale de $19,137.80.

La requérante a dû retirer du dossier certains chèques dont le paiement avait été fait après le 24 janvier 1952, parce que sa requête n'alléguait pas ces paiements.

La Cour maintient la réclamation de la requérante et déclare qu'elle a droit de recouvrer de la Couronne la somme de $19,137.80 avec dépens.

Jugement en conséquence.

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THE OWNER OF THE TANK-SHIP *BRITAMLUBE* ..... PLAINTIFF;

AND

THE SHIP *PRINS FREDERIK WILLEM* AND HER OWNERS DEFENDANTS AND COUNTER-CLAIMANTS.

Shipping—Action for damages—Collision between two ships in Montreal Harbour—Defendant ship held sole cause of collision—Failure to comply with Regulations for Preventing Collisions at Sea—Regulations of the National Harbours Board governing the Harbour of Montreal—Negligent operation of defendant ship—Failure of defendant to comply with the Rules of the Road and display ordinary good seamanship—Defendant ship negligent in attempting to cross channel without warning and without due regard to downbound shipping—Plaintiff ship not negligent in failing to secure permission of Harbour Master to leave berth, or sound blast in accordance with Rule 43(b).

In an action for damages arising out of a collision between the *Britamlube* downbound and the *Prins Frederik Willem* upbound, in the harbour of Montreal, the Court found that the *Britamlube* in keeping to midchannel and proceeding at the speed she did was acting in accordance with the usual practice, having regard particularly to the contour of the channel and the currents which characterize that area, and that she committed no fault which could properly be

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considered as having caused or contributed to the collision which was rendered inevitable by the wrongful and imprudent action taken by those in charge of the *Prins Frederik Willem* which was found solely responsible for the collision.

Held: That as the view upriver of those in charge of the *Prins Frederik Willem,* as she left her berth and lined up preparatory to crossing the channel, was very limited and obstructed, even if no warning signals had been heard by them the possibility of a downbound vessel suddenly coming into view should have been anticipated by those in charge of her and due precautions should have been taken to deal with such an eventuality, notwithstanding which she set a course across channel with her engines at half speed and without any signal.

2. That under the circumstances the burden of proving its inability to stop, reverse or ease in accordance with Rule 23 rested upon the defendants and was not discharged.

3. That those in charge of the defendant ship failed to comply with the Rules of the Road and display ordinary good seamanship; had they done so the defendant ship should have been able to avoid the collision.

4. That those in charge of the *Prins Frederik Willem* were negligent in entering and proceeding to cross the channel as they did without warning and without taking reasonable means to assure themselves that this manœuvre could be made without risk of collision with downbound shipping.

5. That the collision was caused by the fact that those in charge of the defendant ship attempted to cross the channel without warning and without due regard to downbound shipping and in violation of Rules 22, 23 and 25 of the International Rules.

6. That neither the fact that the *Britamlube* failed to secure the permission of the Harbour Master on leaving Lock No. 1, nor the fact that she did not blow a long blast when abeam the Marine Tower in accordance with Rule 43(*b*) constituted fault or negligence contributing to the collision since those on board the *Prins Frederik Willem* first sighted the *Britamlube* at a distance and under circumstances which provided ample time and space for the *Prins Frederik Willem* to avoid collision had she taken the means which were at her disposal and which should have been taken.

ACTION for damages arising out of a collision between two ships in Montreal Harbour.

The action was tried before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District, sitting with assessors, at Montreal.

F. O. Gerity and *A. S. Hyndman* for plaintiff.

Jean Brisset, Q.C. and *R. G. Chauvin* for defendants.

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

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SMITH D. J. A. now (March 2, 1959) delivered the following judgment:

This litigation, comprising claim and counterclaim, arises out of a collision which occurred in the Harbour of Montreal, on the 20th day of June, 1958, at about 12:12 P.M. between the Tankship *Britamlube* and the M/V *Prins Frederik Willem*. The *Britamlube*, registered at the Port of Toronto, having a length of 250 feet and a breadth of 44 feet, a maximum speed of 8 to 9 knots, was downbound from Lock No. 1 of the Lachine Canal. Her draft was 8'0" and 13'6" aft. She was carrying a pilot.

The *Prins Frederik Willem*, registered at Rotterdam, having a length of 258' with a width of 42 feet and tonnage of 1598 tons gross and 838 tons net register, was powered by a Diesel motor with a right-hand propeller and manned by a crew of 30 all told, had left Shed No. 24, where she had been tied up starboard side to, intending to proceed upriver. She also had a pilot.

The case for the plaintiff is that the *Britamlube* departed Lock No. 1 in ballast, at about 12:03 P.M. bound down-river for the McColl Frontenac water-lot premises in Montreal East. Prior to leaving Lock No. 1 safety calls were made by radio-telephone and a prolonged blast on the whistle was sounded. It is alleged that the *Britamlube*, having cleared Alexandria Pier, was headed down-river on the starboard side of the buoyed channel proceeding at full harbour speed in order to obtain manœuvrability in the heavy currents to be encountered further down. While thus proceeding two vessels were seen ahead both upbound and in the vicinity of Jacques-Cartier bridge. On approaching the down-river end of Victoria Pier a ship, later known to be the *Prins Frederik Willem*, was sighted coming up from behind Victoria Pier and heading across the channel. Almost simultaneously that vessel sounded a two blast signal to which the *Britamlube* replied with a danger signal and later with one blast. At the same time the helm of the *Britamlube* was put hard-a-starboard and then just prior to the impact hard-a-port in an attempt to clear the other vessel. The *Prins Frederik Willem*, however, maintained its course and speed, but sounded one blast and the vessels collided in the vicinity of Buoy 201 M, the *Prins Frederik Willem* coming into

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heavy contact with the *Britamlube* on her portside in the way of No. 4 tank. At the time of the collision the head of the *Britamlube* had commenced to swing to port. It is alleged that, other than the signals above-mentioned, none were heard from the *Prins Frederik Willem,* nor were any radio-telephone messages received at any time. The plaintiff alleges that the collision and damages resulting therefrom were brought about by the negligence of those in charge of the *Prins Frederik Willem,* in that they failed (*a*) to keep adequate radio-telephone watch; (*b*) to hear or heed radio-telephone calls made by the *Britamlube*; (*c*) to hold back or maintain position on their own side of the river until traffic had been observed and a course shaped upriver which could be followed in safety; (*d*) they shaped a course and maintained speed without due regard to traffic and without sanction of the Harbour authorities; (*e*) they failed to broadcast their navigational intentions; (*f*) to slacken speed, stop or reverse in due time or at all; (*g*) to carry out the ordinary practice of seamen as required by the special circumstances and the custom and usage of the mariners navigating in the vicinity of the collision; (*h*) to follow the *Regulations for Preventing Collisions at Sea,* more particularly Rules 19, 22, 23, 28 and 29 thereof.

On the other hand, the case for the defendants and counter-claimants is that the *Prins Frederik Willem* was berthed at Section 24 starboard side to and that shortly after twelve noon she left her berth in charge of a duly licensed and competent pilot to proceed on her voyage up the Lakes. When all lines were in and the ship clear of her berth, the order half speed was given (at about 12:10) the ship having been lined up to enter the channel at an angle of 45° in order to stem the current which at that time flowed in a north-westerly direction below the Clock Tower and was of a velocity of about 5 or 6 knots.

When the ship was about in line with the low level wall of Victoria Pier, the bow of a downbound vessel, which proved to be the *Britamlube,* was sighted then coming out of the corner of the Clock Tower and past the bow of a large ship which was tied up to the wharf at the Clock Tower with her bow slightly overlapping the corner of the wharf. The *Britamlube* appeared to be proceeding on her left-hand side of the channel and upon sighting her the

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wheel of the *Prins Frederik Willem* was ordered hard-a-port, a signal of two blasts blown and her engines put slow ahead in order to cause the bow of the *Prins Frederik Willem* to swing down-river and avoid the collision by giving the downbound vessel, which was then from 5 to 6 ship's lengths away, as much sea-room as possible.

Shortly thereafter the *Britamlube* was heard to give a danger signal of a number of short blasts and appeared to be swinging to starboard, whereupon the engines of *Prins Frederik Willem* were put full speed astern and a signal of 3 short blasts blown. The *Britamlube* was seen bearing down broadside to the current on the stem of the *Prins Frederik Willem*, which by then was starting to gather sternway, and the collision could not be avoided. The stem of the *Prins Frederik Willem* came into contact with the portside of the *Britamlube* forward of her afterhouse; the angle of collision being about 80°.

The weather was fine and clear and visibility good with the wind from the south-east with a force of 1 to 2.

It is alleged that the collision and damage occasioned thereby were caused by the fault and negligence of the *Britamlube* and those on board her, in that: (*a*) they contravened Section 24 of the Regulations of the National Harbours Board governing the Harbour of Montreal; (*b*) they contravened Section 43, ss. (*a*) and (*b*) of said regulations; (*c*) they failed to keep to the right of midchannel in compliance with said Regulation 43 (*a*) and of Article 25 of the International Rules of the Road; (*d*) they failed to take proper or any or sufficient helm or engine action in due time or at all; (*e*) they failed to indicate by proper signals the action which they actually took; (*f*) proceeded at an excessive and immoderate speed in contravention of the *Harbour Regulations*; (*g*) they failed to exercise the precautions required by the ordinary practice of seamen or the special circumstances of the case; (*h*) they failed to take in due time or at all any steps to avoid the collision; (*i*) they contravened articles 22, 25, 27, 28 and 29 of the *International Rules* and Articles 35, 42 and 43 of the *National Harbours Board Regulations*.

The proof shows that the *Britamlube* left Lock No. 1 at 12:03 P.M. The evidence indicates that she did so without first obtaining the permission of the Harbour Master,

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in accordance with Rule 42 of the Harbour Rules. The evidence of those on board is that although calls were made to the office of the Harbour Master these calls were not answered. There is evidence that the *Britamlube* blew one long blast as she left the lock in compliance with Rule 43 (*a*) and while those on board the *Prins Frederik Willem* denied having heard this warning signal, the testimony of those in charge of the *Britamlube* that it was given is corroborated by persons on board the two vessels which were upbound and then in the vicinity of Jacques-Cartier bridge. There is also evidence that the *Britamlube* made a number of security calls over her radio-telephone as she left Lock No. 1. None of these appears to have been heard by those on board the *Prins Frederik Willem.*

The evidence shows that the *Britamlube* after clearing Alexandria Pier put her engines full ahead and proceeded down-river in the centre of the channel.

The *Prins Frederik Willem* on the other hand left her berth at Shed No. 24 shortly after 12:00 o'clock and with the intention of crossing the channel to proceed upriver she was put on a course calculated to bring her close to Buoy 201 M on the South side of the channel. The testimony of those in charge of the *Britamlube* is that after she was lined up on this course (which was calculated to bring her across the channel at an angle of about 45°) and when she was opposite, and about 500 feet below, the Clock Tower (which is at the lower end of Victoria Pier) and just at the edge of the current, the *Britamlube* was seen coming down in the centre of the channel. She was first sighted about 3 points off the starboard bow of the *Prins Frederik Willem* and at a distance of from 1500 to 2000 (according to defendants' Preliminary Act a distance of about 5 to 6 ship's lengths. Captain Hoekstra however estimated it at from 6 to 8 ship's lengths). There is a discrepancy as to the speed of the *Prins Frederik Willem* at the moment the *Britamlube* was first sighted. According to defendants' Preliminary Act her engines were half ahead and her speed about $1\frac{1}{2}$ knots, whereas the testimony of Captain Hoekstra is that the engines at that moment were full ahead. He stated that he reported seeing the *Britamlube* to the pilot and that for a time his engines remained full ahead as the *Britamlube* was being watched.

However, very shortly after the *Britamlube* had been sighted, the wheel of the *Prins Frederik Willem* was ordered hard-a-port, a two blast signal given and her engines put "slow ahead". At about the same time that the *Prins Frederik Willem* sounded its two blast signal those on board the *Britamlube* sighted the former as she appeared around the end of Victoria Pier, whereupon the *Britamlube* blew a danger signal of 5 or more short blasts in rapid succession and at the same time her helm was put hard-a-starboard and then just prior to the collision was ordered hard-a-port in the hope that the stern of the *Britamlube* might swing clear of the other vessel.

The proof is that the wheel of the *Prins Frederik Willem* was kept hard-a-port from the time the *Britamlube* was first sighted right up to the moment of the collision and that on hearing the *Britamlube*'s danger signal the *Prins Frederik Willem's* engines were put full astern and a signal of 3 blasts blown.

The evidence shows that the collision occurred approximately in midchannel in the vicinity of Buoy 201 M, about in line with the Clock Tower. The contact was between the stem of the *Prins Frederik Willem* (which was pushed slightly to port) and the portside of the *Britamlube* in the way of No. 4 tank forward of her afterhouse; the angle of collision appears to have been between 60° and 80°. The proof shows that the stem of the *Prins Frederik Willem* opened a vertical hole or gash of considerable proportions in the side of the *Britamlube,* which extended from the deck to a point well below the portside fendering causing very considerable damage.

Although the *Prins Frederik Willem* is charged with negligence in the matter of keeping a proper lookout and failing to hear and heed radio-telephone warnings sent out by the *Britamlube,* the principal complaint made against her is that she failed: (See Preliminary Act)

(5) to hold back, or maintain position, on their own side of the river until traffic had been observed and a course shaped up river which could be followed in safety;

(6) Shaping a course, and maintaining speed, without due regard for the movement of traffic in the river and without sanction for the movement from those in charge of the Harbour and Lachine Lock operations;

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It is apparent that the view upriver of those in charge of the *Prins Frederik Willem,* as she left her berth and lined up preparatory to crossing the channel, was very much limited and obstructed by the lower end of Victoria Pier and the Clock Tower and the large vessel tied up there, and, in such circumstances, I consider, and I am so advised by the Assessors, that even if no warning signals had been heard by them the possibility of a downbound vessel suddenly coming into view is one which should have been anticipated by those in charge of the *Prins Frederik Willem* and that due precaution should have been taken to deal with such an eventuality. Notwithstanding this however the *Prins Frederik Willem* set a course across channel with her engines at half speed (if not at full speed) and without signal of any kind.

At the hearing the question of whether or not it was possible for the *Prins Frederik Willem,* at the moment she first sighted the *Britamlube* at a distance of from 1500 to 2000 feet, to have stopped, come to starboard, gone astern or taken other action by which the collision might have been averted was argued.

Having regard to the circumstances, I am satisfied that the burden of proving its inability to stop, reverse or ease in accordance with Rule 23 which, in the circumstances, rested upon the defendants was not discharged.

The evidence does not, in my opinion, support the view that when the *Prins Frederik Willem* first sighted the *Britamlube* the former had not both time and space in which to avoid the collision had those in charge of her complied with the *Rules of the Road* and displayed ordinary good seamanship.

On the other hand, it was argued that when she first sighted the *Britamlube* the *Prins Frederik Willem* was already irrevocably committed to a cross channel course. In my opinion, the proof does not justify this conclusion. If the testimony of Captain Hoekstra and others is accepted, the ship *Prins Frederik Willem* at that moment was proceeding at a speed of about $1\frac{1}{2}$ knots approximately 500 feet below the lower tip of and in line with Victoria Pier and had just reached the edge of the current. The Assessors

advise me that in such circumstances the *Prins Frederik Willem* should have been able to avoid the collision had she complied with the rules and practice of good seamanship.

Moreover, regardless of whether or not the *Prins Frederik Willem* could by the exercise of reasonable care and skill have avoided the collision after she sighted the *Britamlube*, I am convinced, and I am so advised by the Assessors, that those in charge of the *Prins Frederik Willem* were negligent in entering and proceeding to cross the channel as they did without warning and without taking reasonable means to assure themselves that this manoeuvre could be made without risk of collision with downbound shipping.

Although the pilot of the *Prins Frederik Willem* endeavoured to convey the impression that his hard-a-port action was taken deliberately, in the face of the danger of and, with the considered object of avoiding the collision, I am convinced that such was not the case. The evidence leaves no doubt in my mind that, from the moment of casting off, it was the pilot's intention to cross and proceed upriver on the portside of the channel. It was sought to justify such a course on the ground that it is common practice for vessels to meet in the channel starboard to starboard in that area. I am advised however that although this practice is followed to some extent when downbound and upbound ships are meeting, such is the case only when the meeting vessels have exchanged signals and are agreed upon such a course.

On the proof as a whole, and having regard to the advice of the Assessors in which I concur, I conclude that the *causa causans* of the collision was the fact that those in charge of the *Prins Frederik Willem* attempted to cross channel without warning and without due regard to downbound shipping and in violation of Rules 22, 23, and 25 of *The International Rules*.

It was alleged and argued that the *Britamlube* was at fault, in that it failed to comply with Rules 42 and 43 of the Harbour of Montreal. In my view however neither the fact that the *Britamlube* failed to secure the permission of the Harbour Master on leaving Lock No. 1, nor the fact that she did not blow a long blast when abeam the

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Marine Tower in accordance with Rule 43 (*b*) constituted fault or negligence contributing to the collision, since it is admitted by those on board the *Prins Frederik Willem* that the *Britamlube* was first sighted at a distance of from 1,500 to 2,000 feet (which would put her just about abeam of the Marine Tower) and since I am advised that under these circumstances the *Prins Frederik Willem* had ample time and space to avoid the collision had she taken the means which were at her disposal and which should have been taken.

Although it was also alleged that the *Britamlube* was at fault, in that she failed to keep to her starboard side of the channel and was proceeding at an excessive speed, I am advised that in keeping to midchannel and proceeding at the speed she did the *Britamlube* was acting in accordance with the usual practice, having regard particularly to the contour of the channel and the currents which characterize that area.

It was admitted that it was impossible for the *Britamlube* to avoid the collision by going further to starboard, and on the whole I am satisfied that she committed no fault which could properly be considered as having caused or contributed to the collision which was rendered inevitable by the wrongful and imprudent action taken by those in charge of the *Prins Frederik Willem*.

I find therefore that the defendants were solely responsible for the collision and accordingly maintain plaintiff's action and dismiss defendants' counterclaim, with costs; failing agreement between the parties as to the amount of the plaintiff's damages there will be a reference to the Registrar in order that the said damages may be calculated and assessed by him in the usual manner.

Judgment accordingly.

BETWEEN:

DONNACONA PAPER COMPANY LIMITED ..... APPELLANT;

AND

JOSEPH DESGAGNE ..... RESPONDENT.

1958
Oct. 30
1959
Mar. 2

Shipping—Damage at berth—Vessel invitee of wharfinger—Duty to warn.
The plaintiff's motor barge while docked alongside the defendant's wharf received damage by taking the ground at low tide so as to render her a total loss. In an action in damages brought by the plaintiff against the defendant in the Quebec Admiralty District, Smith, D.J.A., held that the barge was rendered a total loss due to the fact that the berth at which she docked was defective and unsafe. That the berth was owned and controlled by the defendant and the plaintiff's vessel was there as an invitee, and on business relating to that of the defendant. That the defendant had not established it had taken reasonable measures to make the berth safe for vessels docking at the wharf, or for the plaintiff's vessel in particular, nor had the defendant warned or notified the plaintiff of the unsafe condition of the berth and in the circumstances must be held liable for the loss and damage sustained as a consequence.

Held: (Affirming the judgment appealed from) that where the Court below had ample evidence on the matters of fact and good reasons on the question of law to justify its decision, an appellate tribunal ought not to disturb the decree. *Fraser v. S. S. Aztec* 20 (Can.) Ex.C.R. 450 at 452, followed.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Quebec.

Jacques deBilly, Q.C. for appellant.

Maurice Jacques and *Leopold Langlois* for respondent.

DUMOULIN J. now (March 2, 1959) delivered the following judgment:

This is an appeal from a judgment, rendered on January 16, 1958, by the Honourable Arthur I. Smith, then sitting in Exchequer Court of Canada for the Quebec Admiralty District. The respondent's action to recover damages sustained by his vessel, supposedly due to negligence of the respondent, was allowed by the learned trial judge.

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DONNACONA PAPER CO. LTD. v. DESGAGNE

Joseph Desgagné, plaintiff in the Court of first instance, a master mariner, owned and operated, at all material times, a motor vessel of small tonnage, 30 tons net, called the *St-Mathieu.*

On August 8, 1955, this barge loaded with a cargo of pulpwood, had berthed, some hours previous, at one of the appellant's wharves opposite Donnacona village, on the St. Lawrence river.

It is claimed that as the tide ran out, and on account of some unevenness or otherwise defective condition of her berth, the *St-Mathieu* grounding, was strained and damaged to such an extent that she became a complete loss.

Respondent alleges the customary rules of law obtaining in similar occasions: implied instructions to use this berth; a consequent representation, if not an actual warranty, that it was safe; that appellant had attended to its security in the absence of any warning to the contrary.

More precisely, paragraph 10, sub-paragraphs *a*) *b*) and *c*), of the statement of claim reproaches defendant below with having:

> *a*) Allowed . . . said vessel to be placed in a berth which he knew or had the means of knowing was not safe for her to lie in;
>
> *b*) Failed to take any or proper steps to ascertain whether the berth was safe before allowing the said vessel to be berthed therein;
>
> *c*) Failed to warn the master of the said vessel that the berth was unsafe or that he had not taken any or proper steps to ascertain that the berth was safe.

The defendant below admits owning and occupying this particular quay, when the mishap occurred, but from then on denies all other allegations, emphasizing that it received no remuneration for affording wharf facilities; that it was not owner or occupier of the river bed; that Captain Desgagné was well aware of the immediate conditions since he previously had moored his barge at this precise berth.

Furthermore, paragraph 13 of the amended defence reads:

> 13. Defendant had taken adequate steps to render the said berth safe.

Finally, the factual cause of the loss (amended defence, paragraph 18) is attributed to the *St-Mathieu's* ". . . bad state of repairs, and because . . . the greater part of its cargo

was stowed on deck and liable to capsize". Also the ship-master or his crew would have omitted necessary precautions when berthing the motor barge ". . . and more particularly failed to moor said vessel properly".

An ultimate repudiation of responsibility to maintain the berth in a fit or proper state concludes the statement of defence, paragraph 19. Needless to say the charge of pulpwood was intended for delivery at the Donnacona Company's paper mill close by.

An interlocutory motion urged by appellant must now be disposed of before devoting further consideration to the merits of this appeal.

Setting forth the remedy foreseen in s. 166 of the *General Rules and Orders in Admiralty,* this motion asserts that:

> WHEREAS two witnesses for the appellant, ERIC AUBRY CROCKER [the transcript of evidence reads: Crockett] and JAMES BARRYMAN had testified before the Court in the English language;
>
> WHEREAS the transcript of the evidence of those two English-speaking witnesses was hopelessly full of errors and omissions, which the attorneys of record, with the Court reporter, could not correct and rectify adequately;

With an inference of grievous and irremediable prejudice to appellant, were the case submitted with a transcript containing such errors and inaccuracies, it is moved to have Messrs. Crocker and Barryman ". . . heard again before the Registrar . . ." and the ensuing record filed as part of the proceedings. I reserved my decision on this point and directed counsel to proceed with the argument.

A careful perusal of the impunged testimonies convinces me that such a request cannot be entertained. True, Crocker's evidence (or is it Crockett?), as reproduced on pages 88 to 93, deserves the double qualification of incoherence and idiomatic nonsense. But, on the other hand, that of James Barryman, far more important (see transcript, pages 55 to 62 and 84 to 87), in his capacity of appellant's wharf superintendent, is readily understandable and satisfactorily covers, *inter alia,* all the ground in which Mr. Crocker's would-be version through no fault of his, was made to flounder.

Errors and inaccuracies mar only a testimony of mediocre purport, a shortcoming fully compensated elsewhere, which therefore does not becloud a fair appreciation of all essential factors.

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DONNACONA PAPER CO. LTD. v. DESGAGNE

Dumoulin J.

Adverting now to the subject-matter at issue, I would review that which impresses me as constituting the gist, in fact and law, of the learned trial judge's decision.

In pursuit of its industrial needs, Donnacona Paper Company, owned several wharves alongside which its suppliers could berth their lumber loaded schooners or barges, toll free. Mr. Leslie Palmer, one of appellant's vice-presidents (cf. pages 53 and 54), and Mr. James Barryman, wharf superintendent, make this clear (cf. p. 56).

For some few years past, the respondent had performed several trips to Donnacona, and this ill-fated call was the eighth one in 1955. However, as pointed out by the vessel's skipper, Gaudiose Desgagné, one of the owner's many brothers, never before, in 1955, had the *St-Mathieu* slipped into moorings close by the eastern or Old Wharf, at right angles with the newer quays (cf. p. 47). When asked if he was aware that the river bed had a much softer consistency some few feet off the wharf, Desgagné replies negatively, adding he received no warning of this danger, and that had he known of it, he surely would not have run the risk of his vessel grounding on an uneven or canting surface (cf. p. 44).

It is, I trust, a matter of general knowledge that most river beds consist of mud overlying streaks of jagged rock, the St. Lawrence being no exception to the rule. In shallow waters, along tidal wharves, this coating becomes shifting or disturbed by the ebb and flow, as also by the strain of grounding vessels, and the churning of propellers as they arrive or depart. Such are the prevalent conditions herein suggested.

I noted, and will summarize accordingly, the evidence of four defence witnesses, with their indication of remedial precautions resorted to.

Mr. Barryman says the river bottom affords, by the wharf, a coating of mud; that since the accident no dredging operations were undertaken on this spot, and in reply to a pointed question from his company's counsel, whether "...the ship was damaged by rocks there?", answers: "No." (cf. p. 61). This last assertion, nonetheless, leaves unrebutted a preceding one, at page 60, that he would

"... qualify the ground, as far as the grounding is concerned", as "...allright, but it is not too convenient for the bottom of the ships".

Fernando Ratté, a labourer in the company's employ, indicates it is customary, from the spring season on, to clear the muddy bottom by the wharves in order to prevent silting-up. Ratté also notes that occasional "lumps" develop, or in his own words: "Ça peut arriver qu'il y ait des bosses, ce que la mer entraîne, on ne voit pas tout le temps", (pp. 76, 77).

One Ubaldo Marcotte, then engaged in general maintenance jobs, explains why it became necessary to dredge the river ooze piling up after a certain time. This occurred, with consequent removals, about twice yearly. In 1955, up to July, one dredging was had (cf. pp. 67, 68).

The defendant below also called a nautical mechanic and former shipmaster, Gabriel A. Dufour, who claims a long-standing experience of local wharfing conditions at Donnacona.

A rather verbose and somewhat exuberant person, Dufour describes the berth as one of the best, with a coating of mud six to seven feet thick, and a harmless rock spread underneath: "C'est comme si on aurait échoué sur de la plume; ... c'était du papier mâché..." (cf. p. 5). Despite this auspicious prelude, the eider-down touch came to an abrupt end, as one may gather from Dufour's further statement on page 8: "... du côté sud-ouest, il y avait un trou où c'était plus clair; si le bateau échouait sur ce trou-là, il aurait cassé en deux. C'était toutes des choses qu'il fallait savoir". This appraisal of the state of things was indeed vindicated throughout, with a trifling oddity: the good ship *St-Mathieu* instead of splitting in twain, elected to break open.

Another "old timer" who, during 25 years, navigated between the lower St. Lawrence, Donnacona and the upper reaches, Captain Joseph Harvey, cited by the respondent, is quite emphatic concerning some concealed perils at this place. Harvey is asked: "Vous avez été là combien de temps?" He replies: "Ça fait peut-être vingt (20), vingt-cinq (25) ans que je vais là." Next question: "D'après vous, pour entretenir l'échouage (grounding berth) comme celui de Donnacona, est-ce qu'il serait suffisant de dragger

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ça une (1) ou deux (2) fois par année?" Answer: "Non. Ah non. Ah non. Non, faudrait que l'échouage de Donnacona, la place où on se met les petits bateaux, faudrait que ce soit arrangé à tous les jours."

I am of the opinion that Barryman falls far within and Joseph Harvey somewhat beyond the objective mark; the former when he asserts dredging was superfluous, the latter in claiming this berth required a daily dragging. The upshot would be that soundings, at requisite intervals, though necessary, were practically omitted and no warning given.

Appellant also failed to show the ship's perilous listing, at low tide on August 8, resulted from a top-heavy cargo or improper mooring arrangements. Lumber stowed on deck did not exceed eight feet in height, a normal practice, according to the shipmaster G. Desgagné and Joseph Harvey (cf. pp. 41 and 26). As for the barge's attachment alongside the quay, it was attended to in the usual way: four cables being fastened, two astern and two at the bow. Captain Harvey corroborates Desgagné regarding the adequacy of this method.

The learned trial judge assuredly did not err in his conclusion of facts that the berthing space, extended to the *St-Mathieu,* hid a lurking insecurity which appellant took no steps to correct and made no attempt to disclose.

What would accordingly be the legal implications flowing from this set of facts?

Roscoe's Admiralty Practice, 5th Edition, page 85, procures a comprehensive analysis of the law in such matters. I quote:

> Harbour and dock authorities owe a duty to the owners of the vessels which they invite to enter and make use of the harbours, docks and berths under their control, to use reasonable care to ensure that such harbours and berths are reasonably safe for the vessels which they invite to them, or to give warning of any defect not known to the shipowners, or that they have not taken the steps necessary to satisfy themselves that the berth is safe, so as to negative the representation implied in the invitation to the vessel to make use of the berth. . . .
>
> A like duty is owed by a wharfinger to the vessels which he invites to make use of his wharf, although the berth at which vessels lie whilst alongside the wharf is not subject to his control. The duty extends to the occupier of a wharf, and to a wharfinger who received no direct benefit from the use of his wharf; in the latter case it is sufficient that he should enjoy some indirect advantage, such as the receipt of freight for the land carriage of goods discharged at his wharf. . . .

The duty is not an absolute duty in the nature of a warranty, but is limited to the taking of reasonable care to ensure the safety of the vessel.

Two well known precedents: the *Moorcock*[1] and *Grit* cases, the latter, more especially, have such analogy to the actual one that relevant excerpts will bear repetition, albeit reproduced in the decision below.

THE MOORCOCK

The defendants, wharfingers, in consideration of charges for landing and storing the cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendants' jetty, which extended into the River Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the Conservators. The defendants had no control over the bed of the river, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel, on grounding, sustained damage from the uneven condition of the bed of the river adjoining the jetty:—
Held, affirming the judgment of Butt, J., that the defendants were liable, for the use of their premises by the plaintiff could not, under the circumstances, be had without the vessel grounding, and the defendants must, therefore, be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

Lord Esher, M.R. commented as follows:—

Now the owners of the wharf and the jetty are there always, and if anything happens in front of their wharf they have the means of finding it out, but persons who come in their ships to this wharf have no reasonable means of discovering what the state of the bed of the river is until the vessel is moored and takes the ground for the first time.

What, then, is the reasonable implication in such a contract? In my opinion honest business could not be carried on between such a person as the respondent and such people as the appellants, unless the latter had impliedly undertaken some duty towards the respondent with regard to the bottom of the river at this place. If that is so, what is the least onerous duty which can be implied? In this case we are not bound to say what is the whole of the duty. All we have got to say is whether there is not at least the duty which the learned judge in the court below has held does lie on them and to be implied as part of their contract. The appellants can find out the state of the bottom of the river close to the front of their wharf without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes, they find out what is there by

[1] [1889] 14 P.D. 64, 66, 67.

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sounding, and they can feel for the bottom and find out what is there with even more accuracy than if they saw it with their eyes, and when they cannot honestly learn what they are desiring to learn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the botom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so. That I think is the least that can be implied as their duty, and this is what I understand the learned judge has implied, and then he finds as a matter of fact that they did not take reasonable means in this case, and in that view also I agree. I therefore think the appellants broke their contract, and that they are liable to the respondent for the injury which his vessel sustained.

The *Grit*[1] case, as already indicated, has many striking aspects in common with the instant one; comparable conditions prompted Hill J. in Probate Division, to apply the doctrine of "invitee".

It was held:

(1) That, although the defendants did not charge dues for the use of the wharf, they derived benefit therefrom by reason of the freight earned for the land carriage of the cargo, and that they were in the position of persons who had invited vessels to use the wharf; that they owed a duty, therefore, if they had not taken steps to see that the berth alongside the wharf was safe for vessels to ground in, to warn that they had not done so.

Hill J. then proceeded to elaborate those statements of law and I quote from his speech:

In my judgment the defendants did invite the *Grit* to load at the wharf and came under the liabilities of those who own a wharf but not the bed of the river alongside the wharf, and invite ships to load at the wharf. Further, the defendants knew that ships which loaded at the wharf often did take the ground and, by their servant the stationmaster, knew that the *Grit* was of a size to take a cargo of 280 tons, and they knew, or ought to have known, that the *Grit* was likely in the ordinary course to take the ground. Their duty therefore extended to the safety of the ship as a ship which might take the ground when alongside the wharf. The duty is defined in *The Moorcock* (14 P.D. 64, 70). In that case Bowen L.J. said: "I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so" . . .

[1] [1924] P.D. 246, 252.

Numerous other decisions to a like effect could be added to those above.

I also fully agree with Audette J., who spoke thus, *in re Fraser v. S.S. Aztec*[1]:

> Sitting as a single judge, in an Admiralty Appeal from the judgment of a judge of first instance assisted [or not] by two assessors, while I might with diffidence, feel obliged to differ in matter of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere . . . unless I came to the conclusion that it was clearly erroneous.
>
> Indeed, as said by Lord Langdale, in *Ward vs Painter* (1839, 2 Beav. 85): "A solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule without being clearly satisfied in my own mind that the decision is erroneous".

The Court below had ample evidence on the matters of fact and good reasons on the question of law to justify its decision; therefore an appellate tribunal ought not to disturb the decree.

The appeal will be dismissed with costs, including those on appellant's interlocutory motion.

Judgment accordingly.

Reasons for judgment of Smith D.J.A.:—

The plaintiff sues to recover damages alleged to have resulted from the total loss of its motor-vessel *St. Mathieu*. It is alleged that on or about August 7, 1955, the said vessel while berthed with a full cargo alongside the wharf at Donnacona, known as the "Quai aux barges" or "Le Vieux Quai", which wharf was owned and occupied by the defendant, took the ground at low tide and owing to the uneven and defective state of the said berth was so strained and damaged that she became a total loss.

It is alleged that the defendant impliedly ordered the said vessel to use the said berth to await her turn to discharge cargo and by so doing warranted that the said berth was safe for the said vessel and that the defendant had taken all reasonable means to make it safe, or that he would give plaintiff due notice if said berth was unsafe. The plaintiff alleges, moreover, that it was the duty and obligation of the defendant to take all reasonable measures to make it safe and/or to give notice to the plaintiff if it was or became unsafe. In particular, it is alleged that the defendant was at fault, in that:

a) He allowed the said vessel to be placed in a berth which the defendant knew or had means of knowing was not safe for her to lie in;

b) Failed to take any or proper steps to ascertain whether the berth was safe before allowing the said vessel to be berthed therein;

[1] 20 (Can.) Ex. C.R. 450 at 452.

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c) Failed to warn the master of the said vessel that the berth was unsafe or that he had not taken proper steps to ascertain that the berth was safe;

The plaintiff concludes accordingly that the defendant be held liable in respect to the damage sustained by the plaintiff.

For plea to the plaintiff's action, the defendant declares that it is ignorant as to plaintiff's ownership of the said vessel; it is admitted that at all material times the defendant was the owner or occupier of the said wharf, but denies all the other allegations of plaintiff's statement of claim, and, in particular, denies that the defendant was the owner or occupier of the said berth.

The defendant alleges, moreover, that it received no remuneration from the plaintiff for the use of the said wharf and that the defendant was not the owner or occupier of the river bed. It is alleged that the plaintiff had berthed his said vessel at the said wharf on previous occasions and was fully aware of the condition of the berth and/or had full opportunity to ascertain its condition at both high and low tides.

The defendant alleges that it had taken adequate steps to render the said berth safe; that the condition of same could be examined easily at low and high tide and that it had previous to October 29, 1955, examined the said berth which at that time was safe for the plaintiff's vessel. It is alleged that the vessel had berthed on numerous occasions preceding October 29, 1955, and no accident had occurred or been reported to the defendant, who had no reason to believe that the said berth was unsafe.

The defendant alleges that the plaintiff's said vessel was in a bad state of repair and had been remodelled and that, in particular, her bottom had been altered and the deck raised several feet, with the result that the balance of the vessel was defective and it was the remodelling and bad state of repair of the said vessel which caused the disaster.

The defendant alleges that the plaintiff's vessel by reason of its construction and the fact that the greater part of its cargo was stowed on deck was liable to capsize, and the plaintiff and its employees failed to take the necessary precautions when berthing the vessel to insure against such an eventuality and, in particular, failed to moor the vessel properly.

It is alleged that the defendant was under no obligation to maintain the said berth and furthermore that if same was unsafe and defective, which is denied, it was due to the fact that vessels berthing there had left the said berth when the tide was still low, or was due to the tide and sea or to other causes over which the defendant had no control and could neither foresee or prevent.

For answer to defendant's statement of defence, the plaintiff prays acte of the various admissions contained in same and in the particulars furnished in respect thereof and otherwise denies the allegations of said defence. The plaintiff alleges, moreover, that the said vessel was properly constructed, was in an excellent state of repair, properly loaded and moored, the whole in accordance with the usage normally practiced for such vessels engaged in that trade in the St. Lawrence River.

The *St. Mathieu*, with a full cargo of pulpwood, arrived at Donnacona on the evening of August 7, 1955, and tied up alongside the quai known as "Le Vieux Quai" or "Le Quai aux Barges" at about 11:00 p.m. (approaching high tide).

At about 5:00 a.m. the following morning, it was noted that the vessel was canting somewhat to port (away from the wharf). During the hour or hour and a half which followed, the *St. Mathieu* continued to cant more and more to port and when she finally grounded at low tide she canted completely over onto her port-beam in such a manner that she was so strained and damaged as to be rendered a total loss.

It is established that the wharf at which plaintiff's vessel docked was owned and controlled by the defendant and that the *St. Mathieu* was carrying a cargo destined for the defendant's plant.

The evidence satisfies me that the *St. Mathieu* was moored at the said wharf in the generally accepted manner and that she was there at the implied invitation, or at least with the permission, of the defendant and on business relating to the latter.

The plaintiff complains that the wreck of the *St. Mathieu* was caused by the uneven, defective and dangerous condition of the berth due to the fact that the river bottom at that point was uneven, the sound or stable portion of the river bed close to the wharf being considerably higher than that part further away from the wharf, with the result that when the vessel grounded at low tide, as she was bound to do, she tipped or canted away from the said wharf.

Captain Gaudiose Desgagné, Master of the *St. Mathieu,* testified that after the vessel had grounded he walked on the river bed and made an inspection of it and of the vessel's bottom. His testimony, which is corroborated by the testimony of the plaintiff and of Ross Desgagné, a member of the crew of *St. Mathieu,* is that although there was soft mud, mixed with sawdust and bark on the river bed which made it appear level, beneath the said mud and debris, there was a solid base which was considerably higher close to the wharf than it was further away. According to these witnesses it was this unevenness in the river bed which caused the *St. Mathieu* to cant over onto her port-beam when she grounded.

The testimony of the witnesses abovenamed was to some extent corroborated by that of the witnesses Dufour and Marcotte heard on behalf of the defendant, who testified that the use made by vessels of the said berth often had the effect of causing unevenness on the river bed and stated that they knew that from time to time one or more holes had existed in the river bed at or close to the place where the *St. Mathieu* was berthed. Dufour also acknowledged the danger of damage to a vessel grounding at a place where such a hole or unevenness existed.

On the other hand the defendant produced two witnesses who purported to attribute the accident to the fact that the *St. Mathieu* had been improperly moored and, in particular, tied up too close to the wharf. Neither of these witnesses however saw the *St. Mathieu* at her berth prior to the grounding and their testimony appeared to be little more than mere surmise or supposition. Furthermore, the testimony of several witnesses heard on behalf of the plaintiff was that the *St. Mathieu* was properly loaded and moored in accordance with the approved practice.

Several witnesses heard on behalf of the defendant testified that the river bed where the *St. Mathieu* grounded, being perfectly level and covered with mud, provided a safe and excellent berth. The testimony of these witnesses however was based solely upon a visual inspection. None of them had ever

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taken soundings and consequently were without knowledge of what lay below the soft mud and water.

I am convinced that although the bed of the river at low tide may have appeared to be level, this appearance was attributable to the fact that the river bed was covered with soft mud, mingled with sawdust and bark which filled all of the holes and unevenness in such a way as to conceal these irregularities, the existence of which could only have been ascertained by soundings.

The weight of the evidence justifies the conclusion that the river bed at the place where the *St. Mathieu* was berthed was in fact uneven and that the canting and consequent damage to the plaintiff's vessel was brought about by the fact that she took the ground at a berth which was unsafe for a vessel of her type.

It appears to be well established that the owners or persons having control of a wharf who invite vessels to make use of such wharf owe such vessels the duty of taking reasonable care to ascertain and assure that the bottom of the river adjoining same is in such a condition as not to cause injury to or endanger vessels berthing there.

The Moorcock[1]

The defendants, wharfingers, in consideration of charges for landing and storing a cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendant's jetty which extended into the River Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the Conservators (not in the defendant). The defendants had no control over the bed of the river and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel on grounding sustained damage from the uneven condition of the bed of the river adjoining the jetty.

Held: affirming the judgment of Butt J.; That the defendants were liable for the use of their premises by the Plaintiff, could not under the circumstances be had without the vessel grounding, and the defendant must therefore be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

LORD ESHER, M.R. page 66:

Now the owners of the wharf and the jetty are there always, and if anything happens in front of their wharf they have the means of finding it out, but persons who come in their ships have no reasonable means of discovering what the state of the bed of the river is until the vessel is moored and takes the ground for the first time. What then is the reasonable implication in such a contract?

In my opinion honest business could not be carried on between such a person as the respondent and such people as the appellants, unless the latter had impliedly undertaken some duty towards the respondent with regard to the bottom of the river at this place. If that is so, what is the least onerous duty which can be implied? In this case we are not bound to say what is the whole of the duty. All that we have got to say is whether there is at least the duty which the learned judge in the court below has held does lie on them and is to be implied as part of their contract. The appellants can find out the state of the bottom of the river close to the front of their wharfs without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes, they find out what is their sounding and they can feel the bottom and find out what is there with much more accuracy than if they saw it with their eyes and when they cannot honestly

[1] 14 P. 64.

learn what they are desiring to learn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purposes for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is, and then have it made reasonably fit for the purpose, or inform the persons with whom they have contracted, that it is not so, That I think is the least that can be implied as their duty. . . .

The Grit:[1] In the case of *The Grit* the defendants were the owners of the wharf but not of the river bed. They collected no charges from the plaintiff for use of the said wharf. The vessel took the ground and was damaged by reason of the presence of stones on the river bottom.

Held: (1) That although the defendants did not charge dues for the use of the wharf they derived benefit therefrom by reason of the freight earned for the land carriage of the cargo and that they were in the position of persons who had invited vessels to use the wharf; that they owed a duty, therefore, if they had not taken steps to see that the berth alongside the wharf was made safe for vessels to ground in, to warn they had not done so.

HILL J. at page 252:

In my judgment the defendants did invite The Grit to load at the wharf and came under the liabilities of those who own a wharf but not the bed of the river alongside the wharf, and invite ships to load at the wharf. Further, the defendants knew that ships which loaded at the wharf often did take the ground and their servant the station-master, knew that The Grit was of a size to take a cargo of 280 tons, and they knew, or ought to have known, that The Grit was likely in the ordinary course to take the ground. Their duty therefore extended to the safety of the ship as a ship which might take the ground when alongside the wharf. The duty is defined in the Moorcock: In that case Bowen J. said: I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken reasonable care, it is their duty to warn persons with whom they have dealings, that they have not done so.

See *The Bearn*[2]. Also *The Kate*[3].

Roscoe's Admiralty Practice, 5th Edition, p. 85:

Harbour and dock authorities owe a duty to the owners of the vessels which they invite to enter and make use of the harbours, docks and berths under their control, to use reasonable care to ensure that such harbours and berths are reasonably safe for the vessels which they invite to them, or to give warning of any defect not known to the shipowners, or that they have not taken the steps necessary to satisfy themselves that the berth is safe, so as to negative the representation implied in the invitation to the vessel to make use of the berth.

A like duty is owed by a wharfinger to the vessels which he invites to make use of his wharf, although the berth at which vessels lie whilst alongside the wharf is not subject to his control. The duty extends to the occupier of a wharf, and to a wharfinger who received no direct benefit from the use of his wharf; in the latter case it is sufficient that he should enjoy some indirect advantage, such as the receipt of freight for the land carriage of goods discharged at his wharf.

The duty is not an absolute duty in the nature of a warranty, but is limited to the taking of reasonabe care to ensure the safety of the vessel.

The plaintiff, having established that his vessel was damaged by the defective and dangerous condition of the river bed at the berth provided by the defendant, the latter, in order to escape liability, was obliged to prove either that: a) it had taken all reasonable measures to render the said berth safe and proper; or b) that it has

[1] [1924] P. 266.

[2] [1906] P. 48 at 76.

[3] [1935] P. 100.

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given plaintiff due warning of the unsafe and defective nature of the said berth.

It was not pretended by the defendant that any notice or warning was given to the plaintiff. On the contrary the defendant, by its plea, merely denies that the said berth was in any way defective or dangerous.

It remains to determine whether the defendant has discharged the burden of proving that it exercised all reasonable measures to provide a berth which was safe for the vessels making use of the said wharf, and, in particular, for the *St. Mathieu*.

Not only does the proof show that the river bed at the said berth was uneven and unsafe at the time of the grounding of the *St. Mathieu* and that it was this unevenness which brought about the loss of the said vessel, but there is evidence that it was known to the defendant that as a result of the action of the water and of the repeated berthing and manoeuvring of numerous vessels at or near the said berth, there was a tendency for the river bed close to the wharf to become raised and elsewhere to develop humps and holes or depressions. Such even is the testimony of various witnesses heard on behalf of the defendant, notably Marcotte, Ratté and Dufour.

That the defendant was well aware of this tendency and that it recognized that some action to prevent the development of such unevenness on the bed of the river was necessary is shown by the evidence and, in particular, by the testimony of Marcotte and Ratté.

Nothwithstanding this knowledge however no soundings were taken by the defendant and there is no evidence that any measures were adopted during the months immediately preceding the accident either to determine the condition of the berth or to insure that it was safe for vessels docking there.

In fact, very little attempt was made to show that any care or attention had been devoted to the condition of the river bed at the place where the *St. Mathieu* grounded and such evidence as was submitted was merely to the effect that it was a practice of the defendant to do dredging twice a year. The witness Marcotte however, who testified as to this practice, had to admit that he did not know whether dredging had, in fact, been done at the place of the accident in 1955 prior to the loss of the *St. Mathieu,* but he thought not.

The witness Berryman, Wharf Superintendent for the defendant, and the person who was in charge of dredging, was unable to state when dredging had last been done prior to the accident.

There is therefore no actual proof that any dredging or other work had been performed on or in respect of the said berth during the year 1955 up to the time of the loss of the *St. Mathieu,* or that any steps were taken to insure that the said berth was safe.

Even if the Court were to accept the statement of Marcotte and others that it was the custom to dredge twice during a season, the first dredging being done in the spring, and even if dredging had been done at that place in the spring preceding the accident, this in itself, in my opinion would not have constituted the care and attention required of the defendant. This is borne out by the testimony of the witness Harvey (Page 102). Moreover, it is obvious that without soundings it would have been impossible to judge the effect of any dredging which may have been done, or to form any reliable opinion as to

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the actual condition of the river bed either prior or subsequent to such dredging.

CONSIDERING that the weight of the evidence supports the conclusion that the *St. Mathieu* was rendered a total loss due to the fact that the berth at which she docked was defective and unsafe;

CONSIDERING that the wharf at which the *St. Mathieu* berthed was owned and controlled by the defendant and that the plaintiff's said vessel was there as an invitee, and on business relating to that of the defendant;

CONSIDERING that the defendant has not established that it had taken reasonable measures to make the said berth safe for vessels docking at the said wharf, or for the plaintiff's vessel in particular, nor had the defendant warned or notified the plaintiff of the unsafe condition of the said berth;

CONSIDERING that in such circumstance the defendant must be held liable for the loss and damage sustained as a consequence of the wrecking of plaintiff's said vessel;

DOTH MAINTAIN plaintiff's action AND DOTH CONDEMN the defendant to the payment of the damages sustained by the plaintiff as a result of the said accident, with interest and costs; and in the event of the parties failing to agree as to the amount of such loss and damage, DOTH REFER the present case to the Registrar of this Court in order that he, with the assistance of merchants, if necessary, may take account of such loss and damage and establish the amount thereof.

Judgment accordingly.

January 16, 1958.

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BETWEEN:

JACQUES ANCTIL .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Damages—Slander—Privilege of witness—Servant of the Crown—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 4(2); art. 1054 C.C.

In an action brought against the Crown to recover damages alleged to have been suffered as the result of defamatory statements made by a Brigadier, a servant of the Crown, when testifying before a court martial.

Held: That a witness testifying under oath before a judicial tribunal does so in discharge of a public duty which has no relation to the duties of his employment. At such a time the doctrine of *respondeat superior* has no application and since the employer may in no way control the servant's evidence neither may he be held responsible for what the servant may say.

2. That since the words complained of were not spoken while the witness was in the performance of the work for which he was employed by the respondent but when he was complying with a public duty

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imposed upon him that had no connection in law with his status as an officer of the Crown, they gave no cause of action under *The Crown Liability Act*, S. of C. 1952-53, c. 30. *Curley v. Latreille*, 60 Can. S.C.R. 131 at 174; *The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*, [1923] S.C.R. 414 at 427.

3. That it was the settled law of England prior to 1763, that the privilege of a witness when giving evidence before any court or tribunal recognized by law is absolute and unqualified. *Rex v. Skinner*, Lofft 55; *Seaman v. Netherclift*, 2 C.P.D. 53; *Munster v. Lamb*, 11 Q.B.D. 588 at 602. *Langellier v. Giroux*, 52 C.B.R. 113 at 114 questioned.

4. That even if it were assumed the privilege was a qualified one, the witness could not be held accountable under the rule referred to in *Paquet v. Boivin*, 34 R.L.N.S. 346.

PETITION OF RIGHT to recover from the Crown damages alleged to have been suffered by the suppliant in consequence of defamatory statements made by a witness, a servant of the Crown, when testifying before a court martial.

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

Gabriel Lapointe and *René Hamelin* for suppliant.

André Nadeau for respondent.

DUMOULIN J. now (March 18, 1959) delivered the following judgment:

Le requérant, par cette pétition de droit, réclame de l'État un montant de $100,000, à titre de dommages-intérêts en compensation du préjudice moral, professionnel et même social, que lui auraient causé certaines déclarations d'un préposé de l'intimée, le brigadier Frank Fleury, au cours d'une déposition sous serment devant un tribunal militaire.

Voici ce dont il s'agit.

Âgé de 33 ans, le réclamant, M[e] Jacques Anctil, fait partie du Barreau de la Province de Québec depuis huit ou neuf ans. Marié, il est le père de deux enfants. En 1951, il s'enrôla dans l'armée canadienne. Après un stage en Extrême-Orient, il fut rappelé au pays et affecté, avec le grade de capitaine, au service légal de la Défense nationale, à Québec. Son chef hiérarchique immédiat était le major Pierre Gelly, avocat, qui relevait lui-même du lieutenant-colonel Alfred Crowe, membre du Barreau, en charge du bureau régional à Montréal.

Le 27 juillet 1955, le commandant du secteur militaire de Québec (Quebec Command), le brigadier Fleury, ordonna d'enquêter secrètement sur certains agissements louches à l'École d'entraînement de l'armée au camp de Valcartier.

Le 22 ou le 23 août 1955, le rapport d'audition des registres de caisse de l'École militaire fut remis au brigadier Fleury qui, en conséquence, enjoignit au major Pierre Gelly de procéder aux mesures disciplinaires requises.

Au mois de septembre, même année, ou, selon Gelly, le 3 octobre, le pétitionnaire apprit de cet officier légal que l'on soupçonnait un capitaine Weiner et le commandant de l'école de s'être approprié des fonds régimentaires. A ces dates, Anctil ne pouvait ignorer que l'identité des suspects, puisqu'il avoue avoir, à la fin d'août, reçu du colonel Crowe, à Montréal, l'information "qu'un officier juif du camp de Valcartier" serait incessamment traduit en cour militaire. Il précisera que, peu après, Gelly lui dit: "Prépare-toi, il te faudra rédiger les 'synopsis', soit l'acte d'accusation, dans le cas de Weiner et de l'autre."

Dorénavant l'affaire prend une tournure plutôt complexe.

Le 28 octobre 1955, mise aux arrêts du capitaine Weiner qui, aussitôt, par le ministère de Me Raymond Maher, avocat, exerçant à Québec, obtient l'émission d'un bref *d'habeas corpus,* rapportable le 14 novembre.

Rebroussons route, un moment, pour noter qu'à l'occasion de l'entrevue Gelly-Anctil, à Valcartier, le 3 octobre, ce dernier confiait au premier que Weiner sollicitait son avis au sujet de certaines initiatives privées, et, ajoutait Anctil, "cela m'embarrasse". Sur ce, Gelly dit à son collaborateur d'être prudent dans ses relations avec Weiner, dont il suspectait la bonne foi, et auquel, du reste, Anctil n'était aucunement obligé de prodiguer des consultations.

Le 2 novembre, Gelly et Anctil sont assignés par exploit d'huissier à comparaître en Cour supérieure, le 14 de ce mois. Le major Gelly rapporte que, sur réception d'un subpœna, Anctil aurait manifesté de l'étonnement d'être cité en témoignage. Quelques jours après, vers le 9 novembre, le colonel Crowe, venu de Montréal à Québec, Gelly

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et Anctil, confèrent ensemble, les deux premiers s'exprimant sans réticence, persuadés que leur collègue sera entendu comme témoin uniquement lors du débat sur *l'habeas corpus*.

L'on se figure assez bien la surprise et le dépit du colonel Crowe, du major Gelly et du brigadier Fleury informés des conversations antérieures, en constatant que leur subalterne, le capitaine Anctil, agissait à la fois en qualité de témoin et de défenseur de Weiner, avec Me Maher, le 14 novembre, lors du rapport de *l'habeas corpus*. Signalons que ce bref fut annulé et trois autres qui suivirent.

Le 19 décembre, le commandant du district émit le décret de convocation du tribunal militaire, communément appelé ici: cour martiale, afin de disposer des accusations portées contre le capitaine Weiner, dont le défenseur légal était encore le capitaine Anctil.

Ce tribunal inaugura ses séances à Québec vers la mi-janvier 1956.

A l'audition du 17 janvier, Me Anctil, officier défenseur du prévenu Weiner, interrogeant le témoin, Frank Fleury, commandant du district, lui demande (vide, pièce 4, pages 233 et 234):

> Q. 1109 Did you tell Colonel Cathcart [commandant le camp de Valcartier, à 18 milles de Québec] to inform or order his officers, on Captain Weiner's Case and Major Sutherland's, not to speak to me?

A l'objection soulevée par le procureur de la poursuite, Me Anctil réplique:

> Qu'il plaise à la Cour, je suis l'officier défenseur du Capitaine Weiner et si j'essaie d'avoir des informations sur le cas du Capitaine Weiner et que les officiers ont eu l'ordre de ne pas me parler, comment voulez-vous qu'on prépare une défense.

L'instant d'après, le témoin, coupant court à toute discussion, offre de répondre; il dit:

> A. 1109 The answer to the question is yes, I did issue such an instruction.

Fleury, à la question 1136, page 242, persiste dans cette réponse. Il ajoute que cette interdiction fut émise vers le milieu d'octobre 1955.

Puis, voici la cause même du litige, le *corpus delicti*, la réponse du brigadier à la question 1139 que lui pose, en contre-interrogatoire, le procureur à charge (p. 242):

Q. 1139 Would you tell the Court what brought you to issue these instructions?

A. Yes, I issued this instruction because I had very serious doubts about the ability and integrity of Captain Anctil, either as an officer of the Regular Army and as a lawyer.

Il est obvie qu'une attitude pareille, suivie avec déférence par les subalternes, défie tout commentaire. Elle jugulait le droit de l'inculpé à une "pleine et entière défense" selon la phraséologie traditionnelle. Aussi les deux déclarations de culpabilité retenues contre Weiner, sur appel subséquemment interjeté, furent-elles infirmées à l'unanimité des quatre membres du "Court Martial Appeal Board", le 15 mars 1957, et un nouveau procès ordonné (cf. pièce 5).

Ceci relaté à seule fin de ne laisser inédite aucune des répercussions de ces regrettables incidents, mais l'on saisit bien que l'actuel problème se présente ici en tout autre lumière.

Voici comme le pose le demandeur à tels articles de sa pétition de droit.

8°. Les paroles mensongères du Brigadier Fleury, [formulées en réponse à la question 1139 déjà lue] ont blessé votre Requérant dans son honneur; ont nui à sa réputation, ont causé du dommage au point de vue militaire, social, politique et professionnel;

9°. Votre Requérant a été conséquemment licencié des forces de Sa Majesté;

* * *

12°. Votre Requérant soumet en outre que le licenciement et ses termes le préjudicient gravement ; votre Requérant éprouve et éprouvera de la difficulté au point de vue gouvernemental, affaires, fonctions politiques ou administratives;

* * *

L'intimée, par contre, admet le prononcé des paroles incriminées, mais leur nie toute relation légale avec le remède demandé. La défense amendée explicite comme ci-après ce moyen de droit.

a) Que le brigadier Fleury, interrogé sous serment, devait apporter une réponse précise (subjectivement à tout le moins) à la question 1139;

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b) que ce témoin ". . . était justifié d'entretenir les doutes sérieux dont sa réponse fait état . . ." parce qu'à l'insu de ses supérieurs et avant la convocation de la cour martiale, Anctil aurait accepté d'être le procureur de Weiner devant les tribunaux militaires et civils, en violation des règlements.

c) que le capitaine Anctil, aviseur légal au service de l'armée, de par cette fonction même, devait connaître ". . . le sens et la portée de la réglementation militaire . . ." qui, au surplus, avant les incidents ci-haut relatés, aurait été spécialement rappelée à son attention par ses chefs hiérarchiques.

d) Et, enfin, que le 2 novembre 1955, lors de l'entrevue avec le major Gelly, le requérant ". . . avait délibérément trompé ses supérieurs immédiats en niant avoir eu toute relation antérieure avec Weiner".

Avant le 15 novembre 1954, (voir la Gazette du Canada, vol. 88, page 3796, livraison supplémentaire du 8 novembre 1954), il était très douteux que la loi (1952, S.R.C. ch. 98, art. 18) sur la Cour de l'Echiquier eû permis d'intenter à l'État une action comme celle-ci. La lecture de l'article 18 de ce premier statut ne me fait rien voir qui en aurait autorisé l'admissibilité.

Mais, depuis la date précitée, la loi 1—2 Elizabeth II, ch. 30, sur la responsabilité de la Couronne en matière d'actes préjudiciables, édicte que:

3. (1) La Couronne est responsable *in tort* des dommages dont elle serait responsable, si elle était un particulier en état de majorité et de capacité,

a) à l'égard d'un acte préjudiciable commis par un préposé de la Couronne, . . .

L'article 4.(2) vient compléter cette disposition:

4. (2) Il ne peut être ouvert de procédures contre la Couronne, en vertu de l'alinéa a) du paragraphe (1) de l'article 3, relativement à quelque acte ou omission d'un préposé de la Couronne, à moins que l'acte ou omission, indépendamment des dispositions de la présente loi, n'eût entraîné une cause d'action *in tort* contre le préposé en question ou son représentant personnel.

Ce texte législatif a donc pour effet de soumettre le différend à la loi du lieu où aurait été commis le délit. En l'occurrence, le poursuivant entend exercer l'action oblique contre l'intimée, et l'article 1054 du Code Civil, septième alinéa, conditionnera ce recours.

Conséquemment, il incombe au tribunal de rechercher si le brigadier Fleury, tenant les propos que l'on sait sous la foi et la contrainte du serment judiciaire, doit être considéré comme un préposé dans l'exécution des fonctions auxquelles il est employé. Puis, advenant une solution affirmative, si pareil témoignage peut se réclamer d'un privilège au moins relatif dont il satisferait les exigences.

A la seconde, et derechef à l'avant-dernière séance, de l'audition qui en a occupé neuf, la Cour souleva d'office la première de ces questions de droit, à savoir: le lien de subordination chez un préposé persiste-t-il au point que son témoignage, au cours d'un débat judiciaire, puisse engager, par la présomption de l'article 1054, l'éventuelle responsabilité du commettant? Il est à propos de consigner que le savant procureur de l'intimée, à l'instar de l'habile avocat du requérant, n'a pas retenu ce moyen, soutenant qu'un témoignage au sujet d'incidents survenus dans le déroulement normal des occupations du témoin constituait, en quelque sorte, la prolongation de ses fonctions. C'était là une appréciation sérieuse du problème, mais qui ne parvient pas à me persuader qu'elle donne la vraie réponse. La déclaration assermentée se prête à une très simple analyse. Et d'abord, quelle autorité, sinon celle du souverain, assigne une personne en témoignage "toutes affaires cessantes"? Et encore, à l'égard de qui le témoin contracte-t-il la solennelle obligation de dire toute la vérité sinon envers la Justice humaine, Dieu cautionnant la véracité des assertions? En cas de parjure, la partie offensée sera toujours la Justice publique qui infligera la pénalité prévue.

Ce mécanisme moral, que l'on me passe l'expression, ne fait nullement acception des occupations de l'individu, ni de l'employeur dont, par ailleurs, le témoin peut dépendre.

Autre critère des relations caractéristiques entre maître et serviteur, préposé et patron, la prérogative de celui-ci d'intimer à celui-là des directives auxquelles il devra se conformer.

Un arrêt de la chambre civile de la Cour de Cassation[1] concrétise bien la réalité de cette norme; je citerai:

> Les rapports de commettant à préposé se caractérisent par un lien de subordination permettant au premier de donner au second des instructions et des ordres.

[1]Civ. 16 juin 1936; D.H. 1936, 427.

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Est-ce à dire que le commettant puisse le moindrement du monde influer, de façon licite, sur le témoignage de son commis? Il arrivera parfois même que le serviteur, soucieux du devoir de vérité entière, devra déposer à l'encontre des prétentions du maître, au risque de voir ce dernier perdre sa cause. Soutiendra-t-on que l'employeur l'aura préposé à ce soin?

Or, en ce dernier cas, s'il faut reconnaître une rupture du lien de dépendance à l'endroit du mandant, n'est-il pas manifeste que pareille solution de continuité, indivisible de sa nature, persiste, en ce qui concerne le maître, à l'égard des tiers, *erga omnes*.

De ce qui précède, la conséquence paraît découler logiquement: le brigadier Fleury, assigné devant un tribunal militaire, ne témoignait point dans l'exécution des fonctions auxquelles l'intimée l'employait, mais déférait à une obligation d'ordre public, sans rapport juridique avec sa qualité privée d'officier au service de l'Etat.

M. le juge Mignault, naguère de la Cour suprême du Canada, faisait nettement ressortir la nature inférentielle et présomptive de cette responsabilité patronale et, partant, de l'interprétation restrictive qu'elle doit recevoir dans les limites de l'hypothèse prévue au septième alinéa de l'article 1054.

L'éminent juriste, dans l'instance *Curley v. Latreille*[1] écrivait que:

> On enseigne en France que les dispositions qui rendent une personne responsable du fait d'un autre, étant fondées sur une présomption légale de faute, doivent par cela même recevoir une interprétation stricte. Baudry Lacantinerie et Barde, Obligations, No. 2938.

Avec quelques réserves quant à certaines disparités entre notre texte et l'article 1384 du Code Napoléon, M. le juge Mignault partage cette opinion des commentateurs français. Cet avis, il le fait sien effectivement à la page 175, où nous lisons que:

> Etant donné que l'interprétation stricte s'impose en cette matière, . . . dans la province de Québec, le maître et le commettant sont responsables du dommage causé par leurs domestiques et ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés*, ou, pour citer la version anglaise de l'article 1054, C.C., *"in the performance of the work for which they are employed"*.

[1] (1920) 60 S.C.R. 131, 174, 175, 176.

Et le savant juge de conclure:

Ceci me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier *à l'occasion seulement de ses fonctions, si on ne* peut dire que ce fait s'est produit dans l'exécution de ses fonctions . . .

L'honorable juge Mignault reproduisait textuellement cette doctrine dans la cause de *The Governor and Company of Gentlemen Adventurers of England* (la compagnie de la Baie d'Hudson) *v. Vaillancourt*[1]. A la page 427 du compte rendu, on pourra lire la citation. L'on sait, du reste, que la loi du Québec en la matière tire son origine de la Coutume d'Orléans dont elle est le décalque fidèle, comme le démontre, entre autres commentaires, cette leçon de Pothier (*Oeuvres de Pothier,* éd. Bugnet, vol. 2, No 121.)

121. . . .

On rend aussi les maîtres responsables du tort causé par les délits et quasi-délits de leurs serviteurs ou ouvriers qu'ils emploient à quelque service. Ils le sont même dans le cas auquel il n'aurait pas été en leur pouvoir d'empêcher le délit ou quasi-délit, *lorsque les délits ou quasi-délits sont commis par lesdits serviteurs ou ouvriers dans l'exercice des fonctions auxquelles ils sont employés par leurs maîtres,* quoique en l'absence de leurs maîtres; ce qui a été établi pour rendre les maîtres attentifs à ne se servir que de bons domestiques.

A l'égard des délits ou quasi-délits qu'ils commettent hors de leurs fonctions, les maîtres n'en sont point responsables.

Ce moyen de droit serait, je crois, une fin de non-recevoir suffisante à la pétition du requérant. Toutefois, cela reviendrait à passer sous silence le débat judiciaire tel que conçu et engagé par les parties qui, avec des conclusions nécessairement opposées, se sont toutes deux réclamées de la théorie du privilège conditionnel ou relatif reconnu aux témoignages judiciaires.

Ceci requiert certains développements assez fastidieux, qui me seront peut-être pardonnés à la pensée que j'en aurai tout le premier subi le fardeau.

La Cour d'appel de la Province de Québec, décidant, en 1931, l'instance *Langelier v. Giroux*[2] passée en force de *locus classicus,* posait la question ainsi, page 116:

Quelle est l'étendue du privilège accordé par la loi au témoin pour les déclarations qu'il fait devant le tribunal et qui peuvent nuire à la réputation des parties ou des tiers?

[1] [1923] S.C.R. 414, 427.
[2] (1932) 52 C.B.R., 113, 114, 116, 117.

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A ceci le tribunal répond:

C'est une question de droit public comme tout ce qui a trait aux lois aministratives, à l'organisation des tribunaux et à l'administration de la justice. En principe, c'est donc le droit anglais qui s'applique, et par droit anglais il faut entendre le *common law* d'Angleterre tel qu'il existait en 1763 avec les modifications qu'il a subies par le droit statutaire et par la jurisprudence dans la Province de Québec.

Quelques lignes plus bas, nous lisons:

A l'époque de la conquête, on peut considérer que Blackstone, contemporain de Pothier, et qui jouit en Angleterre de toute l'autorité dont ce dernier jouit en France, représente bien l'état du droit anglais à cette époque. Voici ce qu'il dit des privilèges de l'avocat:

. . . but if he [le procureur *ad litem*] mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured.

Et la Cour d'ajouter:

Il faut remarquer que le privilège du témoin est le même que celui de l'avocat et du juge, et pour la même raison, qui est l'intérêt de la justice.

Ici, une brève digression: Le juge serait-il passible de prise à partie en conséquence de quelque remarque, critique ou reproche erroné ou même fallacieux et préjudiciable formulé au cours d'un procès; *quaere*?

Sur la foi, apparemment, du sentiment de Blackstone, la Cour d'appel conclut (page 114):

. . . que le droit coutumier anglais avant 1763 reconnaissait que le privilège du témoin ne s'étend pas au témoignage faux et non pertinent à la cause où il est rendu;

Postulat qui détermina l'arrêt que voici:

Page 113 Le privilège d'un témoin, rendant témoignage devant une cour de justice, n'est pas absolu. Le témoin encourt une responsabilité civile pour les déclarations diffamatoires qu'il énonce faussement ou sans pertinence à l'interrogatoire.

Que le poids prépondérant de la jurisprudence britannique, avant 1763 (Traité de Paris), ait penché dans le sens du privilège relatif peut sembler une interprétation à tout le moins problématique. Sans remonter au déluge, ni précisément à l'année de la Cession, je rappellerai une décision célèbre, de référence fréquente, celle de Lord Mansfield, en 1772, in re: *The King v. Skinner*[1].

[1] (1776) Lofft's Reports, 55, 56.

Ce juriste réputé écrivait que:

What Mr. Lucas has said is very just; neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for words spoken in office. If the words spoken are opprobious or irrelevant to the case, the court will take notice of them as a contempt [tout autre chose qu'une poursuite individuelle], and examine on information . . .

Puis, ces paroles très significatives, à mon sens, en ce qu'elles paraissent exclure la probabilité d'une évolution récente de la jurisprudence anglaise concernant l'immunité testimoniale. Lord Mansfield souligne que:

I am willing, *as neither Serjeant Davy, nor Mr. Buller, find any precedent in the History of England, for an indictment of this kind,* to give them till next term to find any.

Et ceci, répétons-le, se disait à peine neuf ans après la conclusion du Traité de Paris, et trois ans après la parution du dernier livre de Blackstone en 1769.

Un autre précédent de grande autorité en Angleterre: *Seaman v. Netherclift*[1], rallia l'assentiment du juge en chef de la Cour des plaidoyers communs (Court of Common Pleas), Lord Coleridge, puis sur appel interjeté, du juge en chef Cockburn, en 1876, au sujet, toujours, du privilège absolu accordé aux témoins. Je relaterai l'arrêt d'appel et un passage des notes de jugement qui décèlent un état statique de cette doctrine remontant fort loin dans l'histoire. L'arrêt, page 53:

Held, that the words were spoken by defendant as a witness and had reference to the inquiry before the magistrate, as they tended to justify the defendant, whose credit as a witness had been impugned; *and that the defendant was, therefore, absolutely privileged.*

Et maintenant le commentaire du juge en chef Cockburn, page 56:

If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in the course of his examination. *Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant,* and questions might be, and are, constantly asked which are not strictly relevant to the issue. *But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases,* the last of which is *Dawkins v. Lord Hokeby,* 8 Q.B. 255; L.R. 7 H.L. 744, *after which to contend to the contrary is hopeless.*

Autre décision non moins connue, également revêtue d'une haute autorité: *Munster v. Lamb*[2] de 1883, émanant de la Cour du Banc de la Reine, qui déclare sans ambiguïté

[1](1876) 2 C.P.D. 53, 56. [2](1883) 11 Q.B.D. 588, 602, 603.

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que l'exonération privilégiée des propos testimoniaux fut, en droit anglais, une constante et séculaire maxime, donc, antérieure de beaucoup à la date fatidique de 1763. La citation est longue; je crois néanmoins qu'elle en vaut la peine.

C'est le "Master of the Rolls", ou juge en chef, Brett, de la Cour du Banc de la Reine, qui s'exprime en ces termes:

However, the question is not as to the form of the action, but whether an action of any kind will lie for defamation uttered in the course of a judicial proceeding. Crompton, J., in *Harrison v. Broomhead* 4 H. & N. 569 at 579, also said: "No action will lie for words spoken or written in the course of any judicial proceeding. *In spite of all that can be said against it, we find the rule acted upon from the earliest times.* The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. *By universal assent it appears that in this country no such action lies.* Cresswell, J., pointed out in *Revis v. Smith* 18 C.B. 126 that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the Court." It is there laid down that the reason for the rule with regard to witnesses is public policy.

La conclusion à cet égard du juge en chef Brett est la suivante:

Therefore the cases of both witnesses and judges fall within the rule as to privileged occasions, notwithstanding it may be proved that any defamatory words spoken by them were uttered from an indirect motive and to gratify their own malice . . .

Dans son traité intitulé *On Libel and Slander,* 4th Ed. 1953, le savant commentateur Gatley note que:

Page 170 *The authorities are clear, uniform and conclusive* that no action of libel or slander lies, whether against *judges, counsel, witnesses* or *parties,* for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law.

Page 171 This rule of law is not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but is founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, *and a witness in giving evidence, oral or written, in a court of justice,* shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.

Je joindrai à ceci qu'un éminent historien du droit de l'Angleterre, W.S. Holdsworth, ne corrobore guère la thèse du privilège restrictif antérieurement à 1763. Cet auteur, au volume VIII, page 376, de son oeuvre *A History of English Law*, énonce que:

It was settled by the first quarter of the seventeenth century [conséquement dès 1625], *that no action lay against judges, witnesses, or counsel for defamatory statements made in the conduct of litigation*; . . .

Enfin, cette recherche, déjà trop longue, ne saurait toutefois omettre ce que le plus exhaustif des traités enseigne sur la matière. La référence qui suit est tirée du tome 20 de *Halsbury's Laws of England*.

563. More than a hundred and sixty years ago Lord Mansfield said that neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office. The authorities are clear, uniform, and conclusive that no action lies, whether against judges, counsel, witnesses, or parties, for words spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law. It is manifest that the administration of justice would be paralysed if those who are engaged in it were to be liable to actions of libel or slander *upon the imputation that they had acted maliciously* and not *bona fide*.

The doctrine is not confined to the administration of justice in the superior courts. It has been applied in its fullest extend to county courts, a recorder's court, coroners' courts, and magistrates' courts. It applies not only to all kinds of courts of justice, but to other tribunals recognised by law acting judicially

* * *

Thus the doctrine has been applied to a military court of inquiry, where the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it, . . .

Une jurisprudence aussi nombreuse et surtout aussi constante et de même esprit depuis le 17e siècle, en Angleterre, ne permet-elle point d'accueillir avec un déférent scepticisme l'opinion accréditée dans l'affaire: *Langelier v. Giroux*[1] après quelques autres, "que le droit coutumier anglais, avant 1763, reconnaissait que le privilège du témoin . . ." n'est pas absolu?

Les mêmes raisons qui m'ont induit à ne pas disposer du litige sur le seul motif que le préposé de l'intimée n'agissait point dans l'exercice de ses fonctions, lors de sa déposition devant la cour martiale, m'engagent aussi à ne pas

[1] (1932) 52 C.B.R. 113, 114.

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m'arrêter à la théorie de l'immunité absolue, sans rechercher ce qu'il adviendrait des paroles contentieuses sous l'égide de l'immunité relative.

Quels doivent être les facteurs et les limites du privilège conditionnel? Dans la cause: *Paquet v. Boivin*[1] M. le juge Letellier, de la Cour supérieure de Québec, les précise. Le témoin, dit-il,

> ne peut être appelé à répondre en justice pour les déclarations qu'il a faites dans ce témoignage, les croyant vraies et les basant sur de justes raisons de les croire vraies. Il ne suffit pas que ces témoignages contiennent des choses qui sont fausses; il faut de plus, qu'ils contiennent des faussetés que le témoin sait être fausses, ou n'être basées sur aucune raison ou sur aucune probabilité.

La pertinence de la réponse à l'interrogatoire sera une autre condition (cf. *Langelier v. Giroux supra*).

A ce point, il faut reprendre l'examen des faits; commençons par la relation des propos visés à la question posée.

Le brigadier Fleury, le 17 janvier 1956, cité devant le tribunal militaire, répond affirmativement à cette demande du capitaine défenseur Anctil (voir la pièce 4, aux pages 233, 234 et 242):

> Q. 1109 Did you tell Colonel Cathcart to inform or order his officers, on Captain Weiner's case and Major Sutherland's, not to speak to me?
>
> A. 1109 The answer to the question is yes, I did issue such an instruction?

En contre-interrogatoire, le procureur à charge, assez naturellement, demandera:

> Q. 1139 Would you tell the Court what brought you to issue these instructions?

Et le témoin de répondre:

> A. 1139 Yes, I issued this instruction because I had very serious doubts about the ability and integrity of Captain Anctil, either as an officer of the Regular Army and as a lawyer.

Pour l'instant, il ne s'agit que de décider si cette explication était pertinente à la question. Certes, elle l'était, et ainsi disparaît d'emblée un premier motif technique de faute.

Fleury, alléguant des doutes sérieux quant à la compétence professionnelle et à l'intégrité d'Anctil, avait-il de justes raisons de croire ces appréhensions fondées, selon les exigences de l'arrêt *Paquet v. Boivin (supra)*?

[1] (1928) 34 R.L.N.S. 346.

Entendu le 14 novembre 1955, devant l'hon. juge Boulanger, lors du débat sur le bref d'*habeas corpus,* émis à la requête de Weiner, le capitaine Anctil affirme et réitère que, dès le début de septembre 1955, le major Gelly l'informait que lui, Anctil, aurait probablement à s'occuper "d'une cause ou de l'autre", celle de Weiner ou de Sutherland, et à préparer les dossiers ou "synopsis" (cf. pièce C, pages 20 et 21). A la page 22, même pièce, Me Jacques Anctil répond ce qui va suivre aux interpellations de son confrère, Me Maher:

Q. A quel moment avez-vous été retenu pour représenter le capitaine Weiner?
R. Le capitaine Weiner a été arrêté le 28 octobre, et c'est peut-être quinze jours avant le 28, environ.
Q. Vers le 10, le 13, le 14 octobre?
R. Oui.

Quelques lignes plus bas:

Q. Après ça il [Weiner] vous a retenu comme Aviseur?
R. Oui.
Q. Ce serait entre le 10 et le 15 octobre?
R. Oui.

A l'enquête devant cette Cour, Anctil voudra corriger cette indication, disant qu'il s'était mal expliqué, le 14 novembre 1955, et que Weiner, à la mi-octobre, avait requis son aide pour une requête "en redressement de griefs". Mais il reste que le brigadier Fleury, présent à l'audition du 14 novembre, entendant alors les précisions réitérées du capitaine Anctil, ne pouvait guère prévoir que, le 25 novembre 1958, celui-ci rectifierait cette déclaration en Cour de l'Échiquier.

Selon le requérant, il aurait été consulté, vers le 28 octobre, par Me Raymond Maher, procureur civil de Weiner. ". . . au sujet des règlements militaires, du droit militaire. Toute la conversation porta sur la détention illégale du capitaine Weiner et sur l'utilité de recourir à l'*habeas corpus*". Me Anctil exprima l'opinion que ce bref devrait être maintenu "parce que les règlements militaires n'avaient pas été suivis et qu'il n'y avait pas eu, préalablement de commission d'enquête". A cet effet, le colonel Alfred Crowe témoignera que, le 9 novembre, à Québec,

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discutant avec le major Gelly et le capitaine Anctil de la tactique à suivre en Cour supérieure, Anctil manifesta des craintes identiques, sans révéler pour autant ses relations d'avocat avec Weiner, et la discussion se serait poursuivie en toute confiance. A cette occasion, Crowe fit un reproche à Anctil d'ignorer l'amendement, quelques mois auparavant, de la loi militaire dispensant des formalités d'une commission d'enquête. Le colonel Crowe ajoute que, cette même année, en mai ou juin 1955, il aurait signalé à l'attention de son jeune confrère l'article 163-2(4)(*a*) des "Canadian Army Orders" (pièce F) qui se lit:

"(163-2) Limitations.

4. Service legal aid will not be provided:

(*a*) In cases involving service discipline".

Selon le juge-avocat général adjoint cette disposition interdisait au capitaine Anctil d'accepter le mandat de défendre le capitaine Weiner, inculpé d'une dérogation disciplinaire, à savoir, détournement de fonds régimentaires.

Le pétitionnaire n'oppose aucun démenti formel, se bornant à dire "qu'il ne se souvient pas de s'être rencontré, le 9 ou le 10 novembre, avec le colonel Crowe et le major Gelly au bureau de celui-ci à Québec. Il soutient que Weiner requit, le 2 novembre 1955, ses services légaux.

Le major Pierre Gelly, enfin, qui remplissait alors les fonctions d'assistant avocat général pour le secteur est du "Quebec Command", affirme "qu'avant d'avoir entendu M^e^ Raymond Maher dire en cour, le 14 novembre 1955, que le capitaine Anctil lui servait de conseil, il ignorait ce fait". Voilà pour la période précédant le 14 novembre.

Nous avons vu qu'à cette date, l'honorable juge Oscar Boulanger entendit les parties sur le mérite du premier bref d'*habeas corpus*. Le brigadier Fleury, le colonel Crowe et possiblement le major Gelly assistèrent à l'audition; tout à l'heure, je devrai reprendre le fil des témoignages de ces deux derniers. Avant de ce faire, je transcrirai presque textuellement certaines paroles de Fleury:

I was advised early in November that a writ of *Habeas Corpus* had issued at the request of Capt. Weiner, with hearing set for November 14. I was present in the Superior Court. It was at this point that I gathered the opinion that a former impression of mine [à l'égard d'Anctil] was founded.

Such opinion was strengthened as a result of what took place before Mr. Justice Boulanger. It was to the effect that Capt. Anctil was acting irregularly when appearing for Weiner before the Civil Court and was thereby, so to say, playing both sides of the street. Subsequently, after I had perused the Court's decision, on or after November 21, I contacted Colonel Cathcart, at Valcartier, and asked him if he was aware of one of his legal officer's conduct. Col. Cathcart replied he had heard that Anctil had been summoned to appear as a witness, but, like myself, was shocked to learn what had really occurred.

Le brigadier Fleury dit encore:

Prior to the 21st of November, 1955, I certainly had given no instructions to Col. Cathcart to sever all dealings with Capt. Anctil, although I may have discussed before that date with Cathcart and Gelly the advisability of getting rid of Anctil for those reasons just stated, his apparent double-play in Weiner's *Habeas Corpus*.

Ce fut donc un sentiment personnel de suspicion, et non l'opinion d'autrui, que le commandant du district exprima, deux mois après, dans les termes que l'on connaît. Supposé que pareille déduction fut erronée, cette méprise de bonne foi ne saurait être invoquée à son détriment, selon la théorie du privilège restrictif.

Quelques mots maintenant des réactions provoquées par suite de l'incident, chez le major Gelly et le colonel Crowe. Gelly relate que:

Le 14 novembre, je fus étonné de voir Anctil au côté de Weiner. Le témoignage d'Anctil devant le juge Boulanger me fut relaté et me parut contenir de flagrantes erreurs. Surpris de cette conduite équivoque j'en fis aussitôt rapport au brigadier Fleury, spécifiant qu'Anctil avait divulgué des conversations privilégiées que j'avais eues avec lui; que, conséquemment, pour ma part, je ne saurais dorénavant le considérer comme l'un des officier légaux à Valcartier.

Le colonel Crowe témoigne au même effet.

Les agissements d'Anctil depuis le début de novembre, fait-il, m'avaient enlevé toute confiance en lui. A l'issue de l'audience de Cour, le 14 novembre, j'exprimai au brigadier Fleury mon étonnement défavorable de la participation active et de l'attitude du capitaine Anctil, ajoutant que je rédigeais un mémoire détaillé à l'intention du juge-avocat général, à Ottawa. Le brigadier Fleury me conseilla vivement de n'en rien faire avant que l'honorable juge Boulanger n'eut rendu sa décision. Je me rangeai à cet avis et ne transmis ce rapport à mon officier supérieur, Lawson, qu'au début de mars 1956.

Cette pièce nombre 6 est au dossier; elle comprend aussi le rapport du colonel Cathcart, le 26 mars 1955; le colonel Crowe n'a pas daté le sien.

Je ne crois pas indispensable de les transcrire ici. Il suffit de noter que le commandant du camp de Valcartier, et davantage l'avocat général adjoint, désapprouvent

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énergiquement les procédés de leur subordonné sous le double aspect de loyauté au service et du savoir professionnel. Mis au courant de ces opinions, Fleury était certes excusable d'éprouver "des doutes sérieux" sur le compte d'Anctil.

Le 21 mars 1956, le pétitionnaire rencontrait, à Ottawa, le brigadier Lawson, juge-avocat général qui, l'ayant convoqué, lui suggéra de quitter le service afin d'éviter les plaintes prochaines de ses chefs régionaux. Anctil refusa; nous verrons tantôt quel fut le dénouement final.

Il me reste à dire que, proférée en d'autres circonstances qu'à l'occasion d'un procès, cette réponse à la question 1139 (pièce 4, p. 242) eut été assurément diffamatoire. Et, alors seule la triple concordance de la véracité objective, de l'intérêt public et de la bonne foi, permettrait d'innocenter l'auteur. Mais, devant le tribunal militaire, ces propos, pertinents à l'interrogatoire, échapperont au blâme pourvu que le témoin les ait crus véridiques.

Telle est la distinction essentielle entre justification et privilège relatif; dans un cas ce que l'on affirme doit être intrinsèquement vrai; il suffira dans l'autre qu'on l'ait pensé tel.

Cette dernière hypothèse de l'exonération, selon le privilège qualifié, est celle que je dois retenir.

Le brigadier conçut une opinion personnelle, par constation directe des incidents. Confirmée par les censures réitérées et véhémentes de ses conseillers naturels, les officiers-légistes Crowe et Gelly, cette impression créa dans son esprit à tout le moins "un doute sérieux". Cela étant, comment prétendre que Fleury ait menti sciemment en s'exprimant comme il le fit.

Pour peu que cette pétition eut été fondée, que serait-il advenu de la réclamation pécuniaire? Il n'y aurait eu ouverture, semblerait-il, qu'à des dommages-intérêts moraux.

Le requérant se plaint d'avoir dû quitter Québec, où la déclaration de Fleury lui aurait interdit de s'établir. C'est le grief basique dont tous autres découlent. Voici comme il se lit à l'article 6 de la pétition de droit:

> Votre Requérant soumet que le rang social du Brigadier Fleury donnait du poids à ses paroles, qui supportées par ses fonctions et sa qualité d'officier de Sa Majesté, avaient comparativement chez le public l'effet d'un jugement.

Ces lignes, manifestement, ne traduisent que la pensée conjecturale ou même "comparative" d'Anctil, et ne le peuvent dispenser d'une preuve corroborative qui manque totalement. En d'autres termes, le réclamant substitue son propre jugement à celui du public, qui ne fut jamais informé de ces péripéties, ni par la presse ni par le truchement de la radio ou de la télévision.

Le capitaine Anctil voudrait aussi que ". . . les paroles mensongères du brigadier Fleury . . . aient occasionné son renvoi des forces de Sa Majesté", (articles 8 et 9 fusionnés); puis, à l'article 12, il ". . . soumet en outre que *ce licenciement et ses termes le préjudicient gravement*".

Or, qu'apporte-t-il à l'appui de cette prétention? Rien d'autre qu'un certificat réglementaire, du 13 juillet 1956, lui décernant une "mention honorable" de démobilisation (pièce 2). Cette attestation est ainsi libellée:

> Captain Anctil, Jacques, Hervé, Served on Active Service with the Canadian Army (REGULAR), from 1 October, 1951, and is *HONORABLY released* under the provisions of R (Army) 15.01 item 5(*b*)(*iii*) .

La solution des indications sigillaires se lit comme suit au volume I, "The Queen's Regulations and Orders for the Canadian Army, 1952":

> 15.01 5(*b*)(*iii*) when the officer or man is not advantageously employable in his present rank

Il va de soi que seul un militaire averti pourrait pressentir un indice de restriction mentale à l'égard des qualifications spécialisées de l'officier concerné. Quant aux profanes, s'en trouverait-il un qui voulût scruter plus avant l'attestation de licenciement honorable?

On n'a pas établi que l'expression "honorably released" ne constitue point la formule usitée à l'endroit de tous militaires, officiers et soldats, qui obtiennent leur congé

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définitif après avoir bien mérité du pays. Dans ces circonstances, comment une Cour de Justice pourrait-elle tenir qu'un parchemin officiel, comportant une mention honorable, entrainât une interprétation péjorative?

Il m'est enfin loisible, en conclusion, de conjuguer les deux empêchements dirimants qui interdisent d'accueillir cette pétition.

En l'occurrence, les paroles litigieuses, émanant d'un préposé de l'intimée, ne furent pas prononcées dans l'exécution des fonctions auxquelles ce dernier était employé; subsidiairement, l'eussent-elles été que le privilège relatif leur assurerait l'immunité.

L'acte du brigadier Frank Fleury, selon les termes de l'article 4(1)(2) du statut 1—2 Elizabeth II, chap. 30, ". . . n'aurait pas entraîné une cause d'action *in tort* contre le préposé", condition indispensable à tout recours corollaire contre la Couronne.

Par ces motifs, cette Cour ordonne et décide que ledit pétitionnaire n'a pas droit au recours sollicité dans sa pétition, et que Sa Majesté la Reine devra recouvrer dudit pétitionnaire les frais taxables de l'instance.

Jugement en conséquence.

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April 21

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Mar. 9

BETWEEN:

BAYRIDGE ESTATES LIMITED } APPELLANT,

AND

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

Revenue—Income—Income tax—Company purchased land to construct motel and service station as investment—Sold land at profit when unable to finance scheme—Capital or income—The Income Tax Act, R.S.C. 1952, ss. 3, 4 and 139 (1)(e).

The appellant was incorporated as a private company under the Quebec *Companies Act* in November 1951 with powers wide enough to include dealing in real estate. In December it acquired from one of its three shareholders a parcel of undeveloped land for which it issued fully paid shares of its capital stock. It planned on subdividing

the land into building lots and erecting buildings for rent and for sale but abandoned the project when it was unable to finance the construction costs and in August 1952 accepted an offer of $63,200 for half the property. (It was admitted in these proceedings that the profit realized on such sale was income). A few weeks later the appellant purchased for $50,000 another parcel of undeveloped land on which it proposed erecting a service station and motel but again was unable to finance the scheme and in June 1953 sold the property at a net profit of $24,912.78. The Minister included this amount in his assessment of the appellant's 1953 income. In an appeal from a judgment of the Income Tax Appeal Board upholding the assessment the appellant contended that the land in question was not purchased by it in the course of dealing in real estate but for the sole purpose of constructing and operating thereon a motel and service station. That it was only when such purpose failed because it was unable to borrow the money required to carry out that purpose that it accepted an offer for the property and, that in these circumstances, the profit realized was a capital gain and not income.

Held: That the sale of the propery for profit was one of the several alternative purposes for which the property was acquired, and it was in the carrying out of that alternative purpose, when it became clear that the preferred purpose was unattainable, that the profit in question was made. It was, accordingly, a profit made in an operation of business in carrying out a scheme for profit-making and was properly assessable.

APPEAL from a decision of the Income Tax Appeal Board.

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

Philip Vineberg for appellant.

Raymond Décary and *J. M. Poulin* for respondent.

THURLOW J. now (March 9, 1959) delivered the following judgment:

This is an appeal from a judgment of the Income Tax Appeal Board,[1] dismissing an appeal by the appellant against an assessment of income tax for the year 1953. In making the assessment, the Minister brought into the computation of the appellant's income a net profit of $24,912.78 which the appellant had realized in that year on the sale of a parcel of real estate, and the question in the appeal is whether or not this sum was income or a capital gain.

The appellant was incorporated in November, 1951 under the *Quebec Companies Act* by letters patent, in which the purposes of the corporation are expressed in terms wide

[1] 56 D.T.C. 581.

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enough to include dealing in real estate. On December 31, 1951, the appellant acquired from one of its three shareholders a parcel of undeveloped land at Baie d'Urfé, some miles west of Montreal, for which it issued to the three shareholders as fully paid up 102 common shares of $100 each par value and 402 preferred shares of $100 each par value of its capital stock. The appellant's plan, in purchasing this property, and the purpose for which the company was incorporated were described as follows by Mr. Bercovitch, one of its three shareholders and directors:

> A. The land—or if I may and if the Court would permit, sir—the whole object of the company being formed was to develop an investment situation wherein the two professional men would participate and I, as a business man, would do the chasing and do the dog spotting work, if we may say so. That was the intent of the three gentlemen when we joined hands. To implement that policy, and this line of attack, we decided that we would buy land; we would build houses; we would hope or we hoped we would be able to build a shopping center and generally go into two types of real estate, income-producing real estate, through building and renting; then to build and sell houses in this area at Baie d'Urfe. That was our broad interpretation and we started on that basis. So the land, to answer the question, was purchased to implement the policy of the three members of the corporation.

The appellant obtained the approval of the local authorities at Baie d'Urfé for a subdivision of a part of the land into 12 building lots but was unable to obtain mortgage moneys to finance the construction of so much as one dwelling house thereon. Accordingly, it abandoned this scheme and, on August 18, 1952, accepted an offer of $63,200 for about half, though no doubt the more valuable half, of the property. The purchase price was payable as to $15,000 in cash and as to $48,200 in one year with interest. It is admitted that the profit realized on this sale was income. The appellant continued to hold the remaining portion of the land, presumably for sale, if not for development and sale, and ultimately sold it in 1956.

On August 29, 1952, the appellant purchased for $50,000 another parcel of undeveloped land, this one being located in Lachine about a mile east of Dorval airport. Of the purchase price, $1,000 was paid on the making of the agreement, $24,000 was paid on the transfer of the property to the appellant on October 27, 1952, and the balance was payable with interest on April 27, 1953. On June 3, 1953,

the appellant sold this property to the Shell Oil Company of Canada Limited for $80,000 in cash, and it is the profit realized in this transaction that is in issue in this appeal. These were the only purchases and sales of real estate made by the appellant up to that time, and none save the sale of the remaining land at Baie d'Urfé have been made since then, the appellant having in the meantime invested its funds in bonds and other securities.

The case put forward on behalf of the appellant is that the land at Lachine was not purchased in the course of any business of dealing in real estate but was acquired for the sole purpose of constructing and operating a motel and service station thereon, that it was only when such purpose failed because of the appellant's inability to borrow the moneys required to carry out that purpose that the appellant accepted an offer for the property and realized the profit in question, and that, in these circumstances, the profit was a capital gain and not income.

There is ample evidence that the appellant had such a scheme for the property in mind both before and at the time when the property was purchased and for some time thereafter, and I think it is also clear that the location was selected as one suitable for such a project. After making the contract to purchase, Mr. Bercovitch made a tour of motels in the New England States and collected information as to their operation and costs. Another director, Mr. Greenspoon, an architect, had some time earlier made a study of motels and had prepared a report on them, and in September, 1952, he prepared an artist's sketch and a floor plan of the proposed building. On the plan part of the property was indicated as the site of a proposed service station. Besides the service station and motel, the plan included a proposed restaurant and cocktail lounge. The appellant proposed to lease the service station to an oil company for a term of 20 years or thereabouts but had not decided whether it would take a sub-lease from the oil company and operate the station. It contemplated operating the motel but had no settled plan for operating the restaurant or cocktail lounge on its own. Shortly after purchasing the property, the appellant negotiated with the British American Oil Company for a loan of $100,000 to finance the building of the motel and service station, but after a time

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these negotiations ended abruptly with the refusal of that company to make the loan. The appellant thereupon applied to the McColl-Frontenac Oil Company for a loan of similar amount to finance the project. The application was strongly recommended by Montreal officials of that company but was turned down by their superiors in New York. When this occurred, the appellant made further efforts to obtain the loan from the Shell Oil Company, an insurance company, and private investors in turn but did not succeed in getting the money. In May or June the appellant abandoned the scheme and put the property up for sale.

The property in question was an area of 3.86 arpents, with a frontage of 425.5 feet on Cote de Liesse Road and 511 feet on 55th Avenue, Lachine. Both roads were heavily travelled, one carrying Montreal-New York traffic and the other Montreal-Toronto and Montreal-Ottawa traffic. The land was situated in a rapidly developing area, and the value of the portion at the corner formed by the intersection of the roads as a service station location was obvious. When acquiring the property, the directors knew that oil companies were interested in it and anxious to get it. At the same time, the amount of the purchase price paid for it represented the bulk of the appellant's resources, both of invested capital and debenture borrowings, and the appellant could not finance the motel and service station project without a loan of $100,000 or thereabouts. So long as the land remained undeveloped, however, it would produce no revenue for the appellant. That the whole motel and service station project was conditional upon the appellant's being able to secure such a loan is apparent as an inference from the circumstances, and it appears as well in the evidence of Mr. Bercovitch and Mr. Greenspoon. On that point, Mr. Bercovitch said:

Q. And you felt—did you feel that you could?

A. Providing we could get a first mortgage loan, there was no reason why we couldn't.

Q. But you needed outside help?

A. Definitely.

Mr. Greenspoon said:

Q. Well, the main reason you did not go ahead with this building of the motel then was that the efforts to raise one hundred thousand dollars ($100,000.00) failed?

A. Our first mortgage did not succeed, that is right. That was the cardinal sort of pivot on which the whole thing depended.

* * *

Q. Now, this whole plan hinged on the obtaining of a first mortgage loan?
A. Yes, sir.
Q. Of sufficient size to finance the construction of the motel?
A. Yes.

The same witness, when asked as to what the appellant intended to do with the property in the event of failure to obtain the loan, gave the following evidence:

Q. What plan did your company have for the property if it could not get the loan?
A. Frankly, sir, I do not think we considered it in that light. We were practically so sure from all the glowing reports and all the encouragement we got and from the enthusiasm that we never even gave it a serious thought that we would not be successful, only actually when we were turned down by the head offices of Texaco Company.
Q. Was that possibility not discussed amongst the Directors?
A. Well, if it was discussed, we did not put too much emphasis on it, sir, because we thought we were almost sure to succeed with that. You can usually tell by negotiations whether a thing is going to work or is not going to work out; and that seemed to click right from the beginning.
Q. You say the optimism was such that you did not seriously consider what would become of this property?
A. No sir.
Q. If the financing could not be arranged?
A. No, sir, I don't think in our records, if you look through the records, there was too much emphasis put on that aspect of the operation.
Q. You say not too much emphasis. I am anxious to find out how much?
A. Well, it is a number of years now and I don't recall us discussing that at any great length.
Q. But can you conceive of you having purchased a property at fifty thousand dollars ($50,000.00) for a particular purpose for which the money was not yet available and not having given some consideration to what would happen if you did not get the money?
A. As I say, sir, we did not discuss it in very great details. Probably in the back of our minds we thought, well, perhaps, when the time came we could put another type of building on the property. I was in the building business, the architectural end of it; and we felt that property could be put to some use by somebody sometime. We did not spell it out.

In my opinion, the substance of this is that, when purchasing the property, the directors gave some little consideration to what course was to be followed in the event of the motel scheme failing and that they intended, in that event,

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to turn the property to account for profit in some way but that the course that might be taken was not settled. It appears, however, from the evidence of Mr. Bercovitch that the only course actually considered when it became obvious that the loan could not be obtained was that of sale. Speaking of this decision, he said:

> A. It was agreed, after considerable time had elapsed, I would say, right through to the spring of the following year, if I am not mistaken—sometime in May or June. The land lay dormant, of course, throughout the entire winter. My co-partners and associates felt that I just was not able to find the financing. Within our own orbit, we did not have it, so they said *the only thing left to do was put the land up for sale.*

By s. 3 of the *Income Tax Act*, R. S. C. 1952, c. 148, the income of a taxpayer is declared to be his income from all sources, including income from all businesses, and by s. 4 it is provided that, subject to the other provisions of Part I of the Act, income from a business or property is the profit therefrom for the year. "Business" is defined in s. 139(1) (*e*) as including "a trade, manufacture or undertaking of any kind whatsoever and an adventure or concern in the nature of trade." The question whether or not the profit in question was income or capital turns on whether or not the profit was profit from a business as so defined. The Minister, in making the assessment, has proceeded on the assumption that the profit in question arose from such a business, and in this appeal the onus is upon the appellant to satisfy the Court that this assumption is wrong. *Johnson v. Minister of National Revenue.*[1]

The test to be applied in determining whether the profit in question was income from a business is that stated by the Lord Justice Clerk in *Californian Copper Syndicate v. Harris*[2]. Referring to that test, Lord Buckmaster, in *Ducker v. Rees Roturbo Development Syndicate*,[3] said:

> My Lords, I think it is undesirable in these cases to attempt to repeat in different words a rule or principle which has already been found applicable and has received judicial approval, and I find that in the case of the *Californian Copper Syndicate v. Harris*, 5 Tax Cas. 159, it is declared that in considering a matter similar to the present the test to be applied is whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit-making." That principle was approved in a judgment of the Privy Council in the case of *Commissioner of Taxes v. Melbourne Trust*, [1914] A. C. 1001, and it is, I think, the right principle to apply.

[1] [1948] S.C.R. 486.

[2] (1904) 5 T.C. 159 at 165. [3] [1928] A.C. 122 at 140.

In applying the test to the case before the House, Lord Buckmaster continued at p. 141:

> These reports show that the directors were contemplating from the beginning the possibility of the sale of some of these patents. It is quite true that they preferred not to sell them if a sale could be avoided, but the statement in para. 11 of the case is quite plain, that "the possibility of the sale of the foreign patents or rights has always been contemplated by the appellant company in respect of such interest as it possessed in the foreign patents." It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property, but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake.

In the present case, the evidence, in my opinion, points to the conclusion that the property was acquired with the overall intention of turning it to account for profit. The method favoured by the directors by which this intention was to be carried out was that of developing the property as the site of a motel and service station if the moneys necessary to carry out that purpose could conveniently be borrowed, and for that reason they turned down the early offers received for the property. They intended, however, if such moneys could not conveniently be borrowed, to turn the property to account for profit in any way that might present itself, and in my opinion such ways included sale of the property. In purchasing the property, the directors relied on their own knowledge of real estate and acted without any independent appraisal of the property, and in the transaction they committed the bulk of their company's financial resources for an unproductive, but saleable, property. I am far from satisfied that men of their ability and experience would have done this for the purpose of building a motel and service station without having arranged for the funds to finance this construction and without, at the same time, having in mind the most obvious alternative course open to them for turning the property to account for profit. Despite their optimism the possibility, if not the probability, of their not being able to obtain the necessary loan must, in my opinion, have been present in their minds, and the experience of the appellant's first project alone would have suggested both the necessity for an alternative course and the availability of the alternative course which

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was in fact followed less than a year after the property was purchased. To my mind, it is not without significance that that course was the only alternative course considered and that it was decided upon as *the only thing left to do*. In my opinion, the sale of the property for profit was one of the several alternative purposes for which the property was acquired, and it was in the carrying out of that alternative purpose, when it became clear that the preferred purpose, was unattainable, that the profit in question was made. It was, accordingly, a profit made in an operation of business in carrying out a scheme for profit-making and was properly assessed.

The appeal will be dismissed with costs.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1959

Apr. 7, 8, 9, 10 & 13

Apr. 14

BETWEEN:

NEW ENGLAND FISH COMPANY OF OREGON and LEO A. WOODS .... } PLAINTIFFS;

AND

BRITAMERICAN LIMITED, Owner of the Ship *BRITAMERICAN* and THE BRITISH AMERICAN OIL COMPANY LIMITED ..... } DEFENDANTS.

Shipping—Collision between two ships—Narrow channel—Ships equally to blame—Negligent navigation.

In an action arising out of a collision between the *Ocean Cape* owned by the plaintiff company and the *Britamerican* owned by the defendant company the Court found the two vessels equally to blame.

Held: That that part of Johnstone Strait between Pender Island and Ripple Point where the collision occurred is a narrow channel within the Collision Regulations.

2. That at all material times the *Britamerican* was on the wrong side of the channel, and also carried on at full speed, when it should have reduced speed, until collision was inevitable.

3. That the *Ocean Cape* though on the right side of the channel was navigated negligently; a proper lookout was not kept and the deckhand in charge at the time of the collision should have called the Master, who was only a few yards away from him, when he sighted the *Britamerican*.

ACTION for damages resulting from a collision between two ships.

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

J. R. Cunningham and *N. A. Drossos* for plaintiffs.

J. I. Bird and *A. F. Campney* for defendants.

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

SIDNEY SMITH, D.J.A. now (April 14, 1959) delivered the following judgment:

This litigation arises out of a collision which took place in Johnstone Strait in the reach, running east and west, between Rock Point and Ripple Point; and particularly that part to the west of Pender Island, the most easterly of the Walkem Islands. The vessels involved were the diesel motor vessel *Ocean Cape,* 48.9 feet long, 15.6 feet beam and of 28 tons register; and the oil tanker *Britamerican* 125 feet long, 43.2 feet beam and of 485 tons register.

The owner of the *Ocean Cape* was the plaintiff, New England Fish Company of Oregon; and the Britamerican Limited was the owner of the *Britamerican.* Both vessels were under bare-boat charter, the former to Leo A. Woods of Seattle and the latter to the British American Oil Company Limited. Counsel agreed that in effect the controversy is one between the *Ocean Cape* and the *Britamerican* and that the determination of this issue (apart from the question of limitation of liability) would settle the matter.

At the relevant times the *Britamerican* was proceeding westward and the *Ocean Cape* to the eastward. The collision took place in that part of Johnstone Strait between Pender Island and Ripple Point. I have no hesitation in finding such part a narrow channel within the *Collision Regulations.* I also find on the evidence as a whole that the *Britamerican* at all material times was on the wrong side of the channel. Her Master (who gave his testimony as a Master should) said his vessel was "approximately mid-channel". The Chief Officer said that he was following

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a normal course but that does not necessarily mean that such normal course was on the starboard side of the mid-channel as it should have been. The Preliminary Act is silent on this point but the Statement of Claim says the *Britamerican,* when the *Ocean Cape* was first observed, "was maintaining a course about in mid-channel". This is far from precise. Finally, the estimated points of collision as marked on the chart by both parties are somewhat to the south of mid-channel. There are three such points marked. I shall not be far wrong in adopting the centre of the three as being the most likely point. All distances given were estimates only—sometimes nothing more than a guess.

The case for the *Britamerican* is that she was proceeding on her normal course of 263° mag. from Rock Point with the white mast headlight and the green side light of the *Ocean Cape* close on her port bow. At Pender Island she altered to her normal course which was 14° to starboard. Later she altered 4° to starboard to give the other vessel more room, and three minutes later she again altered course another 7° to starboard and blew one short blast. Almost immediately afterwards she went full astern.

I find this blast was given but I also find it was not heard by those on board the *Ocean Cape.* The *Britamerican* proceeded with the *Ocean Cape* continuing to show her green side light and twice showing, in addition, glimpses of her red light. Those on the *Britamerican* were expecting her to alter her course to starboard and so pass port to port. But this she did not do. Very shortly the after blast the *Britamerican* put her helm hard-a-starboard and immediately she switched on her searchlight. The *Ocean Cape* then appeared to alter her course to port. The *Britamerican* sounded a series of short blasts (these also were not heard on the *Ocean Cape*), stopped her engines and put them full astern. Very shortly thereafter the *Ocean Cape* crossed ahead from port to starboard and the *Britamerican* crashed into her starboard side at about right angles. What followed was all in the tradition of good seamanship. The *Britamerican* remained in the hole in the crashed side of the *Ocean Cape,* put a line on board, assured herself that no one was hurt and stood by until satisfied another fishing vessel, the *Cape George* (that

had been following behind the *Ocean Cape* a mile or so away) had taken charge of the *Ocean Cape* (then half submerged) and had beached her in Knox Bay. As to this, the *Ocean Cape* asked for and obtained advice and instructions from the Chief Officer of the *Britamerican*.

But the previous navigation of the *Britamerican* was not so satisfactory. It will be observed that for some six or seven minutes she saw the green light of the *Ocean Cape* on her port bow and as she progressed saw glimpses of her port light as well. From this she knew that the *Ocean Cape* was close on her port bow heading directly towards her. It is true she starboarded 4°, then held on for a little over two or three minutes. Then when only one-half to three-quarters of a mile away she again altered course 7°, gave one short blast, and carried on. Soon afterwards her helm was put hard-a-starboard and she switched on her searchlight. This disclosed little more than the *Ocean Cape's* lights already had indicated, namely, that the *Ocean Cape* was heading into the *Britamerican*. Then the *Ocean Cape* appeared to alter course to port and crossed her bow, and the collision ensued. I think the showing of the searchlight in the manner shown was a grievous and wrong thing to do, as was readily admitted by her Master.

I am of opinion that the *Britamerican* should have realized the danger sooner. She was proceeding at 9 knots plus a 3 knot tide and so 12 knots over the ground. She did not know the speed of the other vessel but ought to have had a very good idea of it. In fact the speed of the *Ocean Cape* was 9 knots through the water and 6 knots over the ground. The combined speed of the two was 18 knots, so that the situation was one calling for the greatest care from the moment the *Ocean Cape's* green light on the *Britamerican's* port bow was observed. Timely action was not taken. At or just after Pender Island, they should have slowed down to steerage way only and remained thus, sounding danger signals, until the situation was clarified. They cannot be excused for carrying on at full speed, as they did, till collision was inevitable. The vessel was on the wrong side of the channel, the Master was in the wheelhouse whence he had gone to note the weather conditions. He testified the first officer

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remained in charge and gave all orders; but the Master, without saying a word, took over when the searchlight was exhibited. In my opinion this is not good practice in such circumstances. It should always be definitely understood by the spoken word who is in charge. I think this might well be the subject of a standing order together with a re-consideration of the mid-channel courses along the area in question.

The *Britamerican* was a well-found and well-manned ship with all necessary navigational appliances. So was the *Ocean Cape* according to the standards of her sister fishing vessels. She was on a voyage from Alaska to Seattle with five men on board. The deckhand, Mr. Rorabeck, was in charge at the time. He was a 19 year old lad whose education included one year at the university and who had had some previous experience on the coast. Another deckhand was in the galley and the Master was there too, immediately at hand.

Rorabeck said he passed Ripple Point a quarter of a mile away and then steered a course for Rock Point of 093°, mag. I do not doubt this, though in the course of his cross-examination he gave some curious answers. His trouble was that he talked too much without pausing to think over what he was saying and how others would construe it. But I formed the view that he was trying to tell me the truth as he saw it. In my opinion he did not "keep close to the beach" as he said. On the contrary, due to lack of awareness on his part, his vessel, perhaps due to tidal conditions or lack of care, set to the southward having all the time the *Britamerican* close on his port bow (not starboard as he said) or ahead. He saw from time to time all three lights of the *Britamerican,* occasionally only the white and green lights. It would seem the two vessels were not far from being end on to each other with the *Ocean Cape* fluctuating somewhat. In any event, when the searchlight of the *Britamerican* was shone upon him, and continued so, he was blinded and lost control of his ship and must have ported his helm. This is in conformity with the evidence of the *Britamerican,* to the effect that they flashed on the searchlight and *then* the *Ocean Cape* appeared to alter her course to port. As I have said, he was blinded by the

searchlight and the collision ensued. The Captain points out, in his letter of October 1, 1958, to his owner's agents, this feasible explanation:

> That part of the channel at that stage of the tide is subject to fairly heavy tide swirls, and the only logical conclusion I can come to regarding the behavior of the *Ocean Cape* prior to the collision is that he was not under proper control, and that just prior to our putting the helm hard to starboard he had run into a tide swirl which caused him to sheer to port.

Although on the right side of the channel, his navigation was negligent. He ought to have kept a better lookout and should have called the Master who was only a few yards away. Fault must be attributed to the *Ocean Cape* not less so and not greater than to the *Britamerican*. I find the two vessels equally to blame with corresponding costs.

The *Britamerican* is entitled to limit her liability under the provisions of the *Canada Shipping Act*. There will be judgment accordingly.

Judgment accordingly.

1958
Sept. 25
1959
Apr. 6

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE PEOPLE'S THRIFT AND INVESTMENT COMPANY ... RESPONDENT.

Revenue—Income—Income tax—Purchase of shares of subsidiary—Whether interest deductible on loan made to repay money previously borrowed to purchase such shares—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 11(1)(c) and 12(1)(c).

The respondent loan company in 1945 subscribed for shares in a wholly-owned subsidiary loan company at a cost of $500,000 and paid for the shares by instalments in 1945, 1946 and 1947 out of moneys borrowed for that purpose. In 1949 it borrowed $1,900,000 and in 1951 a further $400,000 and in its income tax return for the latter year claimed a deduction of $85,372.93 as interest in respect of monies borrowed for the purposes of its business. The Minister disallowed $20,704.15 of the claim as being an expense for the acquisition of the shares of its subsidiary, the income from which would be exempt under the *Income Tax Act*. The respondent appealed from the assessment to the Income Tax Appeal Board contending that the interest payments were deductible in full as having been made pursuant to its legal obligation to pay interest on borrowed money used for the purpose of earning income from its business. The appeal having been allowed, the Minister in his appeal to this Court submitted that the money he had disallowed was in respect of the purchase of property the income from which would be exempt under ss. 11(1)(*c*) and 12(1)(*c*) of the Act and that the said amount was not interest on borrowed money used for the purpose of earning income from the respondent's business within the meaning of s. 11(1)(*c*).

Held: That it was established that the sums borrowed by the respondent in 1949 and 1951 were not used to pay for stock of the respondent's subsidiary but, to a certain extent, to repay previously borrowed sums which were used to buy the subsidiary's stock and since ss. 11(1)(*c*) and 12(1)(*c*) do not expressly apply to a taxpayer who borrows money to repay borrowed money used to acquire property the income from which would be exempt, the respondent was entitled to the deduction claimed.

APPEAL under the *Income Tax Act*.

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

J. W. Long, Q.C. and *J. C. Couture* for appellant.

H. H. Stikeman, Q.C. for respondent.

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FOURNIER J. now (April 6, 1959) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board[1] dated June 20, 1956, allowing the appeal of the respondent from an assessment to income tax for its taxation year 1951.

The parties agree on the following facts. The respondent is a company incorporated in 1926 under the laws of the province of Quebec for the purpose of making loans in excess of $500 each. The Community Finance Corporation is a wholly-owned subsidiary of the respondent and was incorporated in 1930 under the laws of the Dominion of Canada for the purpose of making loans under $500 each. On March 1, 1945, the respondent subscribed for 5,000 shares of Community Finance Corporation at $100 per share, or a total consideration of $500,000. This subscription was paid off by the respondent in periodic instalments, namely, $160,000 in 1945, $190,000 in 1946 and $150,000 in 1947, the latter amount representing the balance of the subscription.

On September 12, 1949, the respondent borrowed a sum of $1,000,000 from The Prudential Insurance Company, on which a balance of $900,000 was still due on December 31, 1951. On the same date, it borrowed $840,000 from The Bank of Nova Scotia, which amount was still due on December 31, 1951. On May 23, 1951, it borrowed $400,000 from The Great-West Life on an issue of 4 3/4% debentures. This amount was still due at the end of 1951. The total amount borrowed is $2,240,000.

The respondent in its income tax return for its taxation year 1951 claimed a deduction of $85,372.93 as interest in respect of monies borrowed for the purposes of its business. On July 8, 1953, the appellant advised the respondent that $20,704.15 of the amount claimed as a deduction of interest had been disallowed as a deduction, it being an expense for the acquisition of shares of its subsidiary. The respondent objected to the assessment on the ground that the interest payments were deductible in full as having been made pursuant to a legal obligation to pay interest on borrowed money used for the purpose

[1] 15 Tax A.B.C. 257; 56 D.T.C. 332.

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of earning income from its business. On March 15, 1954, the appellant confirmed the assessment objected to, contending that the $20,704.15 was an expense for the purchase of property the income from which would be exempt within the meaning of the statute. The respondent appealed to the Income Tax Appeal Board from the appellant's assessment on the same grounds as alleged in its objection. The appeal was allowed and the matter referred back to the appellant for him to deduct from the respondent's income for the taxation year 1951 the sum of $20,704.15 and re-assess accordingly.

It is from this decision that the Minister of National Revenue appeals to this Court.

The sections of the *Income Tax Act* to be particularly considered in this matter are sections 11(1)(*c*) and 12(1)(*c*). The relevant parts read as follows:

11. (1) . . ., the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

* * *

(*c*) an amount paid in the year or payable in respect of the year . . ., pursuant to a legal obligation to pay interest on

(*i*) borrowed money used for the purpose of earning income from a business or property (other than property the income from which would be exempt), or

(*ii*) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt), . . .

* * *

12. (1) In computing income, no deduction shall be made in respect of

* * *

(*c*) an outlay or expense to the extent that it may reasonably be regarded as having been made or incurred for the purpose of gaining or producing exempt income or in connection with property the income from which would be exempt.

The appellant bases his appeal on the ground that the interest amounting to $20,704.15 was in respect of the purchase of property the income from which would be exempt within the meaning of the above sections and that the said amount was not interest on borrowed money used for the purpose of earning income from the respondent's business within the meaning of section 11(1)(*c*) of the Act.

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On the other hand, the respondent contends that the interest payments it made in its taxation year 1951 were paid pursuant to a legal obligation to pay interest on borrowed money used for the purpose of earning income from its business; in other words, the interest paid was the cost of the moneys required for the purpose of earning income from its business of making loans and was deductible under the provisions of the above section 11(1)(*c*).

To arrive at the sum of $20,704.15 which the appellant states is not deductible in the computation of the respondent's taxable income, the Department of National Revenue devised the following formula:

$$\frac{\text{Average borrowings re stocks } \$\ 516{,}987.20}{\text{Average borrowings } \$2{,}045{,}000.00} \times \text{Int. exp. } \$81{,}897.54 = \$20{,}704.15$$

I will summarize the explanation given by the appellant with regard to the meaning of the formula. From its incorporation in 1926 up to the end of 1951, the respondent invested approximately $1,023,000 in stocks of its subsidiary and other companies. Its own capital stock and the surplus account which appear on its financial statements total $585,328.20. This represents the shareholders' equity or the amount of invested capital as distinct from borrowed capital. Had all the proceeds of its capital-stock and surplus been invested in the shares of its subsidiaries, the balance of the purchase price of these shares still would have had to come from other sources. As its financial statements show that a sum of $83,462.04 was expended for office furniture and equipment, this sum should be deducted from the possible amount which could have been invested in stocks.

Since its investments in the shares of the other companies totalled $1,023,000 and its own capital-stock and surplus amounted only to a little over $500,000, the balance of its investment in these stocks came from borrowed capital in the amount of, say, $522,133.84.

Instead of taking the above figures, the Department averaged those figures with similar figures for the year ended 1950 and arrived at $516,987.20 as representing borrowed funds invested in stocks. Then the borrowings of the respondent for the years 1950 and 1951 were averaged. The average borrowings amounted to $2,045,000,

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on which the total interest expense of the respondent amounted to $81,897.54. The final step was to divide up the interest expense in the ratio that the amount of borrowed funds invested in stocks bore to the total borrowed funds. The formula was the fraction $516,987.20 divided by $2,045,000 multiplied by $81,897.56, which gave $20,704.15, the interest paid in 1951 on borrowed monies, which amount was not deductible in computing the respondent's taxable income for the year 1951.

It is apparent that the facts and figures used in the formula were gathered from the financial statements of the respondent which are annexed to its income tax return and the documents filed as exhibits herein. The evidence establishes that the sum of $500,000 the respondent paid for the stock of its subsidiary company in the years 1945, 1946 and 1947 was borrowed monies. The appellant did not challenge the original claim to deduct interest on the $500,000 borrowed to pay for the shares bought in 1945 and paid for in the above years. Two years after the stock had been paid for, the respondent borrowed again, from two sources, sums amounting to $1,840,000. At the end of December 1951, only $100,000 had been reimbursed. In 1951, a further amount of $400,000 was borrowed. The appellant contends that part of these monies were to a certain extent used to replace the monies borrowed in 1945, 1946 and 1947. There is no evidence to this effect and both parties stated that it was impossible of proof without the creation of separate segregated bank accounts to keep the money distinct in terms of its real, physical self and that this was impracticable. That being so, the formula was based on the assumption that some proportion of the newly borrowed funds in 1949 and 1951 was subsequently used to replace monies borrowed two or three years earlier to take up the stock. The formula presupposes that some portion of the money borrowed in 1949 and thereafter was substituted for monies borrowed previously and which had been invested in shares. The above facts are in accordance with the evidence adduced.

The question to be determined is whether the statute as it read during the respondent's taxation year under review, to wit, 1951, authorized the appellant to disallow interest

on borrowed monies in 1949 and thereafter which were substituted for monies borrowed in 1945, 1946 and 1947 to pay for stocks purchased in 1945.

There are certain basic principles of income tax law which have to be kept in mind in deciding the question at issue. A person cannot be subject to a tax liability unless the facts of his case come within the express terms of the statute by which it is imposed. The letter of the law is supreme. This was laid down by the House of Lords in the authoritative case of *Partington v. The Attorney-General*[1], where Lord Cairns made the following statement (p. 122):

> . . . If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. . . .

The intention to tax cannot be assumed, it must be clearly expressed in the provisions of the law. The Court has to decide in conformity with the express words or terms of the statute. This rule was contained in the remarks of Lord Halsbury L.C. in the *Tennant v. Smith* case[2]:

> . . . And when I say "what is intended to be taxed," I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.
>
> Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation.

Reference was made before the Court to the ruling of the Supreme Court in the case of *Johnston v. The Minister of National Revenue*[3] that in an appeal from an assessment of taxable income under the *Income War Tax Act* the onus was on the taxpayer to demolish the basic fact on which the taxation rested.

[1] [1869] L.R. 4 H.L. 100. [2] [1892] A.C. 150, 154.
[3] [1948] S.C.R. 486.

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Here are some remarks of Rand J., who delivered the judgment of the Court, (p. 489):

> . . ., the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

This decision established that an assessment carries with it a presumption of validity and legality and the onus of showing that it is erroneous in fact or in law is on the taxpayer appealing against it. In the case at bar, there does not seem to be any dispute as to the rule that the onus of proof rests on the taxpayer. The facts and the provisions of the statute on which the Minister relies for his assessment are challenged by the taxpayer.

Did the respondent establish that the facts of the case did not come within the express terms of the statute is the question to be answered.

This litigation arises from the fact that in 1945, 1946 and 1947 the respondent borrowed monies to pay for its subscription of shares of its subsidiary, or, in other words, to pay for property the income from which would be exempt, and that the appellant, in computing the respondent's income, did not disallow the interest paid on the said borrowings in the years they were made. For the year 1951, the assessors of the department devised the formula which has been dealt with *supra*. They assumed that the money borrowed in the years 1949 and 1951, or part thereof, was used to replace the money borrowed earlier, which money was used to pay for the stock of its subsidiary, though the actual tracing of the borrowed money and its disposition was impossible. It seems clear to me that the assessment in 1951 of the respondent's income is solely based on the fact that the purchase price of the subsidiary's stock cannot be accounted for out of the respondent's capital in 1945, 1946 and 1947 and has

to be accounted for out of something else. Well, the conclusion is that the purchase price is accounted for by the respondent's borrowings in the above years and not out of its capital. I believe this to have been the situation at the end of 1947.

But two years later and thereafter the respondent borrowed other monies which the appellant assumes to have been borrowed to replace the borrowed monies used to pay the stock of its subsidiary. For the sake of argument, I shall take for granted that the appellant's assumption is correct and that the sums borrowed from The Prudential Life, The Great-West Life and The Bank of Nova Scotia in 1949 and 1951 were used, to a certain extent, to repay the borrowings of 1945, 1946 and 1947.

The question then to be answered is whether or not the *Income Tax Act* in effect in 1951 empowered the Minister to disallow the deduction of the interest on the portion of the borrowed monies in 1949 and 1951 used to repay previous loans as established by the appellant's formula.

The amount of the tax in dispute is $9,441. It arises from the disallowance by the Minister of an amount of interest of $20,704.15 which is part of a larger sum of interest, to wit, $85,372.93. The entire sum of interest was claimed as a deduction by the respondent in 1951. This interest was paid on the bank loans which appear on Exhibit R^2 as being $1,000,000 from The Prudential, $400,000 from The Great-West Life and $840,000 from The Bank of Nova Scotia. The evidence shows that the respondent borrowed the above sums to produce stock-in-trade, to produce dollars which it loaned to its customers and to its subsidiary and some dollars with which it paid off the bank loan in part. There is no evidence that any portion of the above sums were used to buy shares of its subsidiary. The appellant's witness, Mr. Neil, could not say that the monies borrowed in 1949 and 1951 were used to pay for shares of the respondent's subsidiary. He did say that, though he made no attempt to trace the actual disposition of loans made in any one year, he had no doubt that the money necessary to invest in the subsidiary was derived from bank loans, subsequently reduced or repaid out of subsequent borrowings.

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Fournier J.

I believe it well established that the above-mentioned borrowed sums of money were not used to pay for stock of the respondent's subsidiary; but it would seem that these sums of money, to a certain extent, were used to repay previous borrowed sums which were used to buy subsidiary stock. Then the formula would be to the effect that interest on monies borrowed in 1945, 1946 and 1947 could be deducted in computing the respondent's income for the year 1951 because they were substituted by monies borrowed in 1949 and 1951.

Is this the meaning of sections 11(1)(*c*) and 12(1)(*c*), as it existed in 1951, on which the appellant relies in this matter?

Section 11(1)(*c*), I repeat, states in essence that "in computing the income of a taxpayer for a taxation year there may be deducted the amount paid in the year pursuant to a legal obligation to pay interest on borrowed money used for the purpose of earning income from a business or property,—other than borrowed money used to acquire property the income from which would be exempt".

I am of the opinion that the section states clearly that it applies to borrowed monies used to acquire property for the purpose of earning income from that property. In that case, the interest on the borrowed monies paid or payable in the taxation year was deductible. On the other hand, if the borrowed monies were used to purchase property the income from which would be exempt, the interest would not be deductible. The language of the statute being clear, I cannot believe that another meaning could be given to its terms or that its wording would justify the inclusion of the words "interest on borrowed monies used to repay monies borrowed previously and used to acquire property the income from which would be exempt is not deductible". If this had been the intention, Parliament would have said so in express terms, as it did later on, in 1954. In that year the *Income Tax Act* was amended by adding subsection (3*b*) to section 11. Subsection (3*b*) reads:

For greater certainty it is hereby declared that, where a taxpayer has used borrowed money to repay money borrowed previously, the borrowed money shall, for the purpose of paragraph (*c*) or (*d*) of sub-

section (1), be deemed to have been used for the purpose for which the money borrowed previously was used or was deemed by this subsection to have been used.

In my view, the important terms of this amendment are not the opening words "For greater certainty" but the following: "borrowed money to repay money borrowed previously shall be deemed to have been used . . .". So it is apparent that "money borrowed to be used for a purpose" cannot mean "money borrowed to repay the money previously borrowed and used for another purpose". When the term "deemed" is applied, it is generally understood that it gives a meaning to the word or phrase considered which the word or phrase would not have otherwise.

The Court cannot assume the words "borrowed money to repay previously borrowed money to be used for a specified purpose" mean that the money so borrowed could have been used to acquire stock when it was borrowed to repay money borrowed to acquire the said stock. In my opinion, the terms of the section apply only to the money borrowed to acquire property the income from which would be exempt. In this case the monies borrowed to acquire property the income from which would be exempt were not borrowed in the 1951 taxation year.

Since sections 11(1)(*c*) and 12(1)(*c*) relied upon by the appellant do not expressly apply to a taxpayer who borrows money to repay borrowed money used to acquire property the income from which would be exempt, the respondent was entitled in his taxation year 1951 to claim a deduction of $20,704.15, interest on borrowed money, which the Minister disallowed.

For these reasons, the appeal is dismissed with costs.

Judgment accordingly.

1958
Mar. 26
1959
Feb. 27

BETWEEN:

LEE SHEDDY ..... APPELLANT,

AND

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

Revenue—Income—Income Tax—Sale of oil and gas leases by syndicate for lump sum—Capital or income—Whether profit from sale of leases income from a "business"—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(c) (j) and 139 (1) (e).

The appellant was a member of a syndicate which by the merger in 1952 of two syndicates formed in 1950, acquired a number of Alberta petroleum and natural gas leases. Prior to the merger the original syndicates had entered into an agreement with a company which provided that the company was to carry out a seismic survey of the lands with an option to drill. If producing wells were brought in certain payments were to be made and all leases were to be assigned to the company. The survey was made and the option dropped. The new syndicate subsequently granted an option to an oil operator which was followed by formal agreements whereby he agreed to drill the lands at his own expense, to pay $200,000 for the first producing well and $25,000 for each other well brought into production plus certain royalties. The syndicate agreed to assign all its leases to him. One well was brought in in 1952 and ten in 1953 and payment made the syndicate as agreed which in turn paid the appellant his proportion of the payments. The Minister added to the latter's declared income for 1952 and 1953, the amounts so received and re-assessed him accordingly. An appeal from the assessment to the Income Tax Appeal Board was dismissed. On an appeal from the Board's decision to this court appellant contended that the syndicate was not an adventure in the nature of a trade and alternatively, if it could be so described, the leases were capital assets acquired for the purpose of development and in fact so developed; that neither the syndicate nor its members were traders in leases and the isolated sale by the syndicate was the sale of a capital asset.

Held: That on the evidence the conclusion is inescapable that there never was a firm and fixed intention on the part of the members of the Syndicate to regard the leases as an investment to retain and develop on its own account.

2. That the Syndicates were formed for the purpose of carrying on business for profit and the acquisition and sale of leases was one of the contemplated modes of carrying on business in the scheme for profit-making and the profits realized were acquired in the operation of such business and are therefore income from a business within the meaning of s. 3(*a*) of the *Income Tax Act,* or at least within the extended meaning of "business" as found in s. 139 (1)(*e*) of the Act.

APPEAL from a decision of the Income Tax Appeal Board.

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

R. L. Fenerty, Q.C. for appellant.

Michael Bancroft and *T. E. Jackson* for respondent.

CAMERON J. now (February 27, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated May 24, 1957, dismissing the appellant's appeals from re-assessments made upon him for the years 1952 and 1953. The decision of the Board was based on its finding in another matter heard as a test case at the same time, namely, *Kidd v. M. N. R.*[1]. Similarly, in the hearing of this appeal before me, it was agreed that the evidence tendered should apply to a number of other cases and that the decision which I shall now give would apply to all such appeals.

In each of the years in question, the appellant was a member of and the owner of a number of units in the Drumheller Leaseholds Syndicate. In 1952 and 1953, the Minister added to his declared income the amounts received by him from that syndicate, namely, $16,493.83 and $21,318.39, and re-assessed him accordingly. There is no dispute as to the actual amounts so added, it being admitted that if they constituted taxable income in his hands, the re-assessments made in each year are valid.

For the appellant it is contended that they were merely the realization of a capital asset and as such were not taxable. For the Minister it is submitted that the sums were in the nature of income from a business and therefore within ss. 3, 4 and 139(1)(*e*) of *The Income Tax Act;* and that they also fall within the provisions of s. 6(*j*) of the Act as being amounts received which were dependent on production from property as well as within s. 6(*c*) as being income from a syndicate.

Before considering the legal problems involved, I think it advisable to set out in detail the circumstances surrounding the formation of Drumheller Leaseholds Syndicate and the nature of the operations which resulted in the payment of the amounts in question.

[1] 17 Tax A.B.C. 180; 57 D.T.C. 280.

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The main witness on behalf of the appellant was Mr. Russell Kidd. He appears to have taken a leading part in the formation of all the syndicates and in all their operations. In 1950 he was a garage proprietor in Drumheller, Alberta. It appears that he and a number of friends in the area, who met regularly in a restaurant for coffee, had discussions about the discovery of oil and gas in Alberta and eventually came to the conclusion that as citizens of the area they themselves should take a part in the "oil boom" and participate in such benefits as might accrue therefrom. Accordingly, the group decided to take up petroleum and natural gas leases in the area from the provincial Government, if such leases were available. Certain individuals applied for and were granted such leases from the province.

Exhibit 1 is an agreement dated November 10, 1950 between three such individuals (called the "Trustees") who had acquired leases for a twenty-one year period from August, 1950 over 960 acres, or 6 quarter sections—and twelve persons (including the said three Trustees), called the Beneficiaries. By that agreement, it was declared that the Trustees held the leases in trust for the twelve beneficiaries in equal shares and that the parties thereto were to be known as the "Drumheller Leaseholds", the said Russell Kidd to be the secretary thereof.

Exhibit 2 is a similar agreement dated November 23, 1950, and thereby Glen Phillips, who had secured a similar lease for twenty-one years from August 19, 1950, over 640 acres (4 quarter-sections) in the same locality, declared himself as trustee thereof for five named beneficiaries to be known as the "Munson Leaseholds".

Exhibit 3 is an agreement dated April, 1952, and by its provisions the individuals who were then members of the two syndicates above mentioned, agreed to join together in a new syndicate to be called the "Drumheller Leaseholds". The capital of the new syndicate consisted of 1,600 units and clause 3 of the agreement sets out the respective beneficial interests of the individuals therein, 189 units being allotted to the appellant. Bylaws governing the operations of the Syndicate were passed and therein provision was made for the appointment of officers consisting of

a chairman (Mr. Kidd), the secretary-treasurer, and three directors, who together formed "the Management Committee" of the Syndicate.

On April 25, 1952, the new Syndicate gave to one Louis Diamond of Calgary a 15-day option "on the petroleum and natural gas rights" in all its properties (Exhibit 8). If the option were taken up, Diamond was to drill a well to be selected by Phillips—one of the members of the Syndicate—the expense of such well to be paid in the first instance by Diamond. He was entitled to recoup such expense out of production and thereafter "the production is to be split equally between Diamond and the Syndicate". Then, following the completion of the well, "the rest of the acreage is to be split equally between the Syndicate and Diamond". Provision was made for a more formal agreement if the option were exercised.

Diamond exercised the option and on June 17, 1952 (Exhibit 9), a formal agreement was signed and by its terms Diamond agreed to drill a test well. All the leases held by the Syndicate were to be deposited with a trust company, together with assignments thereof as to 5 quarter-sections (800 acres) to Diamond, who, upon registration thereof, was to be the absolute owner of all the Syndicate's rights therein, provided proof was given that the test well had been drilled to contract depth. As provided in the option, Diamond had the right to recover his drilling costs out of production and thereafter the proceeds from production from the test well were to be divided equally between the Syndicate and Diamond. The general result of the agreement was that Diamond and the Syndicate had equal and joint rights in two legal subdivisions (40 acres each), Diamond and the Syndicate each owning separately 5 quarter-sections less one legal subdivision.

Diamond wanted further rights in the properties retained by the Syndicate and by a further agreement of the same date (Exhibit 10) it was provided that if the Syndicate, after the drilling of the test well, should receive any offer for the acquisition of any rights therein, Diamond should have an option to take up such offer according to its terms. Trident Drilling Co. Ltd. made such an offer on October 20, 1952 (Exhibit 12). Diamond decided to exercise his rights under the second agreement of June 17, 1952, and to enter

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into the same agreement as had been offered by Trident. Accordingly, Exhibit 11 (an agreement dated November 4, 1952) was entered into with the Syndicate. By its terms, Diamond agreed to drill a well, or wells, on the Syndicate's property and to pay $200,000 in cash for the first producing well and $25,000 each for all other wells brought under production. In addition, the Syndicate was to receive a gross royalty of 12½ per cent. of all production of leased substances. In the result, eleven legal subdivisions were drilled out on the properties and the Syndicate received $200,000 for the first well in 1952 and $250,000 for the remaining ten producing wells in 1953. The appellant in 1952 and 1953 received from the Syndicate his proportion of these payments and it is the nature of these receipts which is now in question. Certain royalties were also received but these were included in the appellant's tax returns and therefore no question arises in regard thereto.

One other transaction should be noted. Prior to the formation of the new Drumheller Leaseholds Syndicate, the members of the former syndicates—the Munson group and the Drumheller group—entered into an agreement on June 30, 1951 (Exhibit 5) with Great Plains Development Co. of Canada, Ltd., by the terms of which the latter was within ninety days to commence a seismic survey of the lands and was to have the option of drilling wells thereon. If producing wells were found, Great Plains out of production would recover its costs and the balance of production would be divided equally between it and the members of the syndicate. In addition, if crude oil were discovered in the first well, each member of both syndicates would receive $1,000, or a total of $14,000. It was a term of the said agreement that *all* the leases held by the Syndicate and covering 1,600 acres should be assigned outright to Great Plains. The seismic survey was duly carried out and in the result Great Plains on February 14, 1952, notified the Syndicate that it did not choose to exercise its option to drill wells (Exhibit 6). That letter also stated that Great Plains would take steps "to re-assign the Drumheller Syndicate leases to the persons as provided for in the agreement". It was following that notice that the Syndicate gave to Diamond the option of April 25, 1952 (Exhibit 8).

It is abundantly clear from the evidence as a whole that from the formation of the two original syndicates onwards, the members of the Syndicate were in business. Officers and a management committee were appointed; many meetings were held and the minutes duly recorded; legal transactions were entered into, properties were acquired and options granted. Admittedly, they were in business for the purpose of making a profit. It is urged, however, that from the inception, the intention was to acquire the oil leases and to hold them for the benefit of the members by exploring, drilling wells, and operating them, on their own account; that there was no intention to trade in leases. Now there is some oral evidence to support this view and there is also evidence of letters written on behalf of the Syndicate indicating that it was not anxious to part with the leases by sale. Apparently, it hoped to enter into an agreement with a well driller who would undertake to drill wells at his own expense, take a share of production in compensation and permit the Syndicate to retain ownership of the leases. In this it was totally unsuccessful.

Now it must be kept in mind that the members of the Syndicate had no experience in exploration or drilling for oil or in the operation of oil wells. They were amateurs in this field and possessed of relatively little capital. It is said that the cost of drilling the first successful well which came into production in September 1952, was $112,000. In any event, the members of the Syndicate did not at any time take any steps on their own behalf to acquire any equipment for drilling purposes, or anything of that sort. All that they contributed was a small amount necessary to pay the annual fee of one dollar per acre to the provincial government, nothing being contributed for the purpose of drilling. The unlikelihood of the Syndicate ever drilling a well on its own account was expressed very clearly by Kidd, who, when asked if the Syndicate had ever considered drilling a well, said, "We talked if it come to the worst we would drill a well because we had, a few of us had a few dollars, we have businesses and farms".

On the whole of the evidence, I am satisfied that the leases were acquired with the intention of turning them to account for the benefit of the members in the best manner possible. There is nothing in any of the Syndicate's agree-

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ments which evidenced the intention of the members to hold and operate the leases themselves, and while they may have considered that the most desirable method, it is obvious they were willing to consider other methods, including the disposal of the leases themselves. The original syndicates were formed in November 1950, and the minutes of all syndicate meetings are found in Exhibit 4. The first meeting of the Drumheller Leaseholds was held on December 19, 1950, and the minutes show that the members authorized the officers and directors "to consider any deals and carry out correspondence with all interested parties in connection with our holdings". The next meeting of the two original syndicates was held on April 18, 1951, and authorization was then given to enter into the agreement with Great Plains Development Co., the terms of which had been apparently negotiated in the meantime. That agreement, it will be recalled, provides for the assignment to Great Plains of all the leases outright and apparently that was done.

A consideration of the whole of the evidence and particularly that relating to the Great Plains option, the Trident offer which the Syndicate was prepared to accept if Diamond had not exercised his prior rights in regard thereto, and the several contracts entered into with Diamond, leads me to the conclusion that almost from the time the leases were acquired, the Syndicate was prepared to dispose of some or all of the leases by sale. All were assigned to Great Plains, but were later re-assigned. In the final result, it did dispose of 8 quarter-sections in that manner, retaining only two on which it has expended nothing for development.

The relevant sections of *The Income Tax Act* applicable on this point are as follows:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

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

* * *

139.(1) In this Act,

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

As stated in *Minerals Ltd. v. M. N. R.*[1]—a decision of the Supreme Court of Canada—the test to be applied in resolving the issue as to whether such receipts represent taxable income or a capital increment, is the frequently cited statement of the Lord Justice Clerk in *Californian Copper Syndicate v. Harris*[2].

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the *Income Tax Act* of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and therefore seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

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

In *Sutton Lumber and Trading Co. Ltd. v. M. N. R.*[3], Locke J., in delivering the judgment of the Court, said:

The question to be decided is not as to what business or trade the company might have carried on under its memorandum, but rather what was in truth the business it did engage in. To determine this, it is necessary to examine the facts with care.

The same point was emphasized by the learned President of this Court in *M. N. R. v. Taylor*[4], where he stated:

The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity. And the taxpayer's declaration that he entered upon the transaction without any intention of making a profit on the sale of the purchased property should be scrutinized with care.

[1] [1958] C.T.C. 236.
[2] [1904] 5 T.C. 159 at 165.
[3] [1953] 2 S.C.R. 77 at 83.
[4] [1956] C.T.C. 189 at 212.

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It is what he did that must be considered and his declaration that he did not intend to make a profit may be overborne by other considerations of a business or trading nature motivating the transaction.

In this case, when one considers the evidence as a whole, particularly what the Syndicate actually did with its leases, the conclusion is inescapable that there never was a firm and fixed intention on the part of the members of the Syndicate to regard these assets as an investment which the Syndicate would retain and develop on its own account. They may have hoped to do so, but were prepared very shortly after the acquisition of the leases, and at the first joint meeting of the two syndicates, to dispose of them in their entirety as evidence by the Great Plains agreement, as well as by the later ones. The sales made were entirely voluntary, were carried out in a business manner and in accordance with the normal practice of those engaged in the buying and selling of leases.

I find, therefore, that the Syndicates were formed for the purpose of carrying on a business for profit; that the acquisition of leases and the sale thereof was one of the contemplated modes of carrying on its business in its scheme for profit-making and that the profits realized and now in question were acquired in the operation of such business. Such profits are, therefore, income from a business within the meaning of s. 3(*a*) of the Act, or at least within the extended meaning of "business" as found in s. 139(1)(*e*).

In view of this finding, it becomes unnecessary to consider whether, as contended on behalf of the Minister, the receipts also fall within s-ss. (*c*) and (*j*) of s. 6.

The appeals for both years will therefore be dismissed and the re-assessments made upon the appellant affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

1958
Sept. 23
1959
Apr. 2

BETWEEN:

JAMES VOORHEES DRUMHELLER ....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..RESPONDENT.

Revenue—Income—Income Tax—Payment to petroleum engineer for aid in obtaining gas franchise—Capital or income—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 5, 127 (1) (e) (l) (aa).

The appellant, a petroleum engineer, entered into a joint venture with one B for the purpose of obtaining a franchise to supply a town with natural gas. The arrangement between the parties was that after the franchise was obtained it would be transferred to a company and the appellant would receive a 25% interest therein and be appointed manager. The early stages of the negotiations were carried on by both the appellant and B but before they were completed the appellant found it necessary to find other employment and the franchise was issued to B who caused it to be transferred to a company formed for the purpose. The appellant subsequently sold his interest and all other rights to B for $10,000 and treated the payment as a capital receipt. The Minister assessed the payment as an income receipt and on an appeal to the Income Tax Appeal Board the assessment was confirmed. On an appeal from the Board's decision to this Court

Held: That the joint project in which the appellant and B engaged was a planned course of action which clearly falls within the meaning of the expression "an undertaking of any kind" as defined by s. 127(1)(*e*), now s. 139(1)(*e*), of *The Income Tax Act*.

2. That the sum received by the appellant in no sense represents a return of appreciation of capital invested in the joint project, the appellant's contribution being nothing but his personal efforts.

3. That what the appellant and B had in joint ownership at the time of the appellant's withdrawal represented, so far as the appellant was concerned, not invested capital but the product of the operation of the undertaking. This was profit from the undertaking and the sum which the appellant accepted as his share thereof was properly assessed as a revenue or income receipt.

APPEAL from a decision of the Income Tax Appeal Board.

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

T. J. Duckworth for appellant.

H. E. Manning, Q.C. and *T. E. Jackson* for respondent.

THURLOW J. now (April 2, 1959) delivered the following judgment:

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Thurlow J.

This is an appeal from the judgment of the Income Tax Appeal Board[1], dismissing an appeal by the appellant against an income tax assessment for the year 1951. The question to be determined is whether a sum of $10,000, which the appellant received in September, 1951, was an income or a capital receipt.

The sum in question arose in the following circumstances. The appellant is a petroleum engineer who from 1945 to 1948 had been engaged as an employee, first by the Standard Oil Company and later by the Gulf Oil Company. After the conclusion of the second of these employments, he was engaged on a fee basis in supervising drilling operations on behalf of oil companies which had no engineering or geological staffs of their own. The services offered by the appellant included arranging for a contractor to do the well drilling or advising thereon, attending at the site of the drilling operation and supervising the work in the interests of the owner, deciding when, in the course of drilling, tests should be made, arranging for such testing to be carried out, reporting the results to his client, and supervising the completion or abandonment of the operation. While the primary object of such operations was to discover oil, it was part of the appellant's duty to be on the lookout for indications of other substances, including natural gas, sulphur, and salt. Work of this kind was well paid but uncertain, and the appellant was anxious to turn to something more secure.

In the spring of 1949, an oil drilling operation in which the appellant had not participated on a property near the town of Stettler, Alberta, had resulted in the discovery of the presence of natural gas. The property belonged to a company in which a Mr. Brook was interested, and shortly after the discovery was made Mr. Brook and the appellant embarked on a scheme the object of which was to obtain a franchise for the supply of gas to the residents of the town of Stettler. For this purpose, it was necessary to obtain through testing an estimate of the quantity of gas available from the well in question and to locate, as well, other economical sources of supply. Upon establishing the existence of sufficient reserves, it was proposed to apply

[1]17 Tax A.B.C. 60; 11 D.T.C. 212.

to the council of the town of Stettler for the franchise and, upon obtaining it, to transfer it to a company which would raise the necessary finances by debenture issues and proceed to construct and operate the distributing system. The appellant expected to be given the position as manager of such company. He also expected to have a 25 per cent interest in the franchise, if and when it was obtained, or in the company. Mr. Brook at the time was manager of an oil company and had had experience as a stock broker, and the arrangement between the appellant and him was that, in carrying out the project, each would do what he was qualified to do.

In furtherance of this scheme, the appellant arranged for a testing company to examine and test the well, and he himself spent most of his time for about a month during the summer of 1949 observing the conduct of the tests and taking what part he could. The tests indicated that the well was a good one. In the months that followed, Mr. Brook arranged for the drilling of wells on other properties, and ultimately the presence of sufficient reserves was established. In the spring of 1950, the application was made for the franchise, and after a plebiscite it was granted to Mr. Brook. In connection with the application for the franchise, the appellant attended meetings of the town council with Mr. Brook, and over the period from the time the scheme was originated until the franchise was granted they had numerous conferences with one another. The appellant, however, had nothing to do with the drilling or testing of the other wells, nor did he contribute to the expenses of engaging an expert who made a study of the project, prepared a report, and presented the application to the council. By the time the franchise was granted and the financing of the project arranged, the appellant had become involved in another business venture known as Redwater Servicing Company, by which he was employed as manager, and he was no longer interested in the position of manager of the gas distributing company. He discussed this with Mr. Brook, and it was then agreed that Mr. Brook should take over his interest in the project for $10,000. In September, 1951, the appellant, being in need of money to purchase or build a dwelling, applied to one of Mr. Brook's companies, he being away, for payment of the $10,000, and

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Thurlow J.

that sum was thereupon paid to him. Subsequently, in April, 1952, the appellant at the request of the company signed a document acknowledging receipt of the $10,000 from the company on behalf of Mr. Brook, as payment in full for all his rights and interest in the Stettler gas franchise.

The appellant maintains that the sum so received was capital, but the Minister takes the position that it was either a profit from a business or the salary, wages, or other remuneration from an office or employment and further that the onus is upon the appellant to establish that it was neither a profit from a business nor salary, wages, or other remuneration from an office or employment.

By s. 3 of *The Income Tax Act*, S. of C. 1948, c. 52, which was applicable to the year in question, the income of a taxpayer for a taxation year is declared to be his income for the year from all sources inside or outside Canada and to include income from all (*a*) businesses, (*b*) property, and (*c*) offices and employments. By s. 4 it is declared that, subject to the other provisions of Part I of the Act, income for a taxation year from a business or property is *the profit therefrom* for the year. The expression "business" is defined by s. 127(1)(*e*) [now s. 139(1)(*e*)] as including a profession, calling, trade, manufacture, or undertaking of any kind whatsoever, and as including an adventure or concern in the nature of trade but not including an office or employment.

By s. 5, income from an office or employment is declared to be the salary, wages, and other remuneration, including gratuities, received by the taxpayer in the year.

"Office" is defined as follows in s. 127(1)(*aa*) [now 139(1)(*ab*)]:

127. (1) In this Act,

* * *

(*aa*) "office" means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a Minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly, senator or member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and also includes the position of a corporation director; and "officer" means a person holding such an office;

"Employment" is defined in s. 127(1)(*l*) [now 139(1)(*m*)]:

127. (1) In this Act,

* * *

(*l*) "employment" means the position of an individual in the service of some other person (including His Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position;

In *Johnston* v. *Minister of National Revenue*[1] the onus of proof in cases of this kind is discussed by Rand J. as follows at p. 489:

Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

* * *

The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts and the pleadings are to facilitate the determination of the issues. It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy. But unless the Crown is to be placed in the position of a plaintiff or appellant, I cannot see how pleadings shift the burden from what it would be without them. Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him.

In the present case, the taxation of the sum in question is based on alternative and mutually exclusive assumptions, and it becomes necessary to determine whether and to what extent they have been disproved. I shall deal first with the plea that the sum was salary, wages, or remuneration from an office or employment. In my opinion, it is obvious that this sum was neither salary nor wages and that it did not arise from an office as defined in the statute. The question is thus narrowed down at once to whether or not the sum was remuneration from an employment, as defined in s. 127(1)(*l*). On this issue, the appellant contends that

[1] [1948] S.C.R. 486.

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the relationship between himself and Mr. Brook was a joint venture and not an employment, and on the evidence I am of the opinion that the appellant has made out his case. There are circumstances, such as the payment of expenses by Mr. Brook, the making of important decisions by him alone, and the appellant's lack of knowledge of details which one might expect a partner to know, which militate against the conclusion that the project was a joint venture, but I accept as credible the appellant's evidence that that was the relationship between them, and I think this view is supported by the size of the sum paid by Mr. Brook, having regard to the minor extent of the appellant's participation in the project. Accordingly, I find that the sum was not remuneration from an employment.

I turn now to the Minister's alternative plea that the sum was profit from a business. Business is defined by the statute in wide terms. It is not limited to trading or manufacturing but includes, as well, the carrying on of a profession or vocation. It also includes an undertaking of any kind and an adventure or concern in the nature of trade but not an office or employment. The expressions used in this definition are not mutually exclusive, nor are they all equally broad. Some overlap with others. In particular, the expression *an undertaking of any kind* appears to me to be wide enough by itself to embrace any undertaking of the kinds already mentioned in the definition; that is to say, trades, manufactures, professions, or callings, and any other conceivable kinds of enterprise as well.

In the present case, it is clear that what the appellant and Mr. Brook were doing when they embarked on their joint project was not engaging in a mere hobby or game but carrying out a deliberate and planned course of action with economic gain as its object. Whether or not this project can properly be classified either as a trade or as an adventure or concern in the nature of trade is, to my mind, quite immaterial for, in my opinion, it clearly falls within the meaning of the expression *an undertaking of any kind* and must accordingly be regarded as a business for the purposes of *The Income Tax Act*. It is, however, only *the profit therefrom* that is subjected to tax as income under the Act, and it does not follow that, because there was profit,

such profit was *ipso facto* profit from such business. An answer must accordingly be sought to the further question, was the $10,000 which the appellant received for his interest in this business a profit which accrued to him from the carrying on of the business, otherwise referred to as an income receipt, or was it a return with appreciation of his capital invested therein?

In *Ryall* v. *Hoare*[1] Rowlatt J. at p. 454 expressed this distinction as follows, in determining that a commission received in an isolated transaction by the director of a company for guaranteeing its overdraft was taxable under Case VI of Schedule D of the English *Income Tax Act* as an annual profit or gain:

> First, anything in the nature of capital accretion is excluded as being outside the scope and meaning of these Acts confirmed by the usage of a century. For this reason, a casual profit made on an isolated purchase and sale, unless merged with similar transactions in the carrying on of a trade or business is not liable to tax. "Profits or gains" in Case 6 refer to the interest or fruit as opposed to the principal or root of the tree.

In *Lowry* v. *Field*[2] several individuals had invested money in prospecting enterprises carried out by a company of which they were not shareholders. If the prospecting turned out satisfactorily, the company would exercise an option to purchase the property and a development company would be formed in which the company and the individuals would be allotted shares in proportion to their several investments in the enterprise. The individuals were assessed upon the difference between the amount of their subscriptions and the nominal value of the shares allotted to them. On the facts Lawrence J. held the profit on the subscriptions to be of a capital nature. After referring at p. 741 to *Cooper* v. *Stubbs*[3] and observing that in that case Atkin L. J. had "found an element of revenue in the profit which he was there considering largely from the fact that there was no investment of capital," Lawrence J. said at p. 741:

> . . . I am inclined to think that wherever there is an investment of money there must be a possibility of the profit upon that money recurring for it to be a revenue profit, and where, as here, the particular profit which it is sought to tax is not a profit which can recur, it is in such a case a profit of a capital nature. In my view that reasoning harmonises with the cases which have held that recurring profits where there is no investment of money may be of a revenue nature, *the conception being that the capital*

[1] [1923] 2 K.B. 447. [2] [1936] 2 All E.R. 735.
[3] [1925] 2 K.B. 753.

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there involved is nothing more than the individual's efforts, and the individual's efforts always being capable of recurring, the profit which is so derived from the individual source is treated as being a casual profit which may fall under case VI. It seems to me to agree with the principle of the decision in *Cooper v. Stubbs* and with the observation of ATKIN, L. J., that there was no investment of capital at all.

Lowry v. *Field* is also authority for the view that the tax position is not necessarily the same for all parties to such a joint enterprise, for in that case the company's share in the profit from it was considered to be a revenue item. In this connection Lawrence J. observed at p. 736:

> There is no doubt that the Selection Trust, Ltd., carries on a trade in respect of those ventures and is taxable on the balance of its profits and gains in connection therewith.

The situation in the present case is in sharp contrast with that of the individual participants in *Lowry* v. *Field.* The sum received by the appellant in no sense represents a return or appreciation of capital invested in the joint project, for he had put no money or property into it. Nor did he or his associate have a franchise, when they embarked on their joint scheme. What they put into the project was almost entirely personal effort. Indeed, the appellant's contribution was nothing but his personal efforts, and his rights in the assets (which consisted principally of the franchise) gained in carrying out the venture represented his return for what those efforts, carried out as they were in conjunction with further efforts by Mr. Brook, had produced. Nor is it without significance on this question that each was to do what he was qualified to do and that, in arranging for and attending the testing of the well, the appellant was doing much the same sort of thing as he customarily did in carrying out his profession as an engineer. The arranging for testing of the well, the testing of it, and the supervision of the testing were all part of the procedure which it was necessary or desirable to carry out to attain the first objective of the project; that is, to acquire the franchise, which in itself was a thing of value. While the plan envisaged a further stage in which, in exchange for the franchise, the appellant and his associate would obtain shares in the proposed company, the project, so far as it was their personal project, was substantially that of putting forth the efforts necessary to obtain the franchise and promote the company. They had no scheme for operating or

even for acquiring a gas distributing system for themselves. Their personal venture would be completed when the company to be incorporated came into the picture and purchased what assets had in the meantime been acquired. Had the scheme proceeded to its conclusion as planned, I think it is clear on the authority of the judgment in the *Gold Coast Selection Trust, Ltd.* v. *Humphrey*[1] that the appellant would have been required to bring into the computation of his income from this undertaking the value of the shares issued to him. In the view I take of the case, what the appellant and his associate had in joint ownership at the time of the appellant's withdrawal from the project represented, at least so far as the appellant was concerned, not invested capital at all, but the product of the operation of the undertaking. This, in my opinion, was profit from the undertaking, and the appellant realized his share of it, not in the form of shares as originally planned, but in cash, when he accepted $10,000 for his interest therein. Accordingly, I am of the opinion that the sum in question was a revenue or income receipt rather than capital and that it was properly assessed.

The appeal therefore fails, and it will be dismissed with costs.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

1959
May 14
May 20

BETWEEN:

N. M. PATERSON & SONS LIMITED, ...PLAINTIFF;

AND

CANADIAN VICKERS LIMITED, ...DEFENDANT.

Shipping—Interest payable under a judgment dates from date judgment is rendered unless otherwise ordered—Discretion of Court to vary date.

In an action for damages judgment was delivered in favour of the plaintiff on March 19, 1959, in the sum of $2,810.83 with interest and costs. The sum of $2,810.83 represented repair bills paid by the plaintiff in the month of May 1953. Plaintiff now moves for an order fixing the date from which interest is payable as the date or dates on which the various repair bills were paid.

[1] [1948] 2 All E.R. 379.

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N. M. PATERSON & SONS LTD. v. CANADIAN VICKERS LTD.

Held: That the judgment carries interest from the date of the judgment or from such other date as the judge or judgment directs.

MOTION to fix date from which interest is payable under a judgment.

The motion was heard before the Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

Léon Lalande, Q.C. for the motion.

Alex K. Paterson contra.

SMITH D. J. A. now (May 20, 1959) delivered the following judgment:

The plaintiff moves "for an order fixing the date or dates from which interest is payable" under a judgment rendered by this Court on March 19, 1959, in this case which is an action for the recovery of damages arising out of a fire which occurred on the plaintiff's vessel while it was in the defendant's drydock undergoing repairs.

The defendant was "condemned to pay to the plaintiff the sum of $2,810.83 with interest and costs."

In support of its motion it was argued on behalf of the plaintiff that the judgment requires clarification having regard to the difference of opinion which exists between the parties as to the meaning of the judgment insofar as the condemnation to pay interest is concerned, it being the plaintiff's submission that interest runs from the date or dates upon which the plaintiff paid the various repair bills, while the defendant contends that interest is payable only from the date of the judgment.

The general rule is that all judgments under which money is payable in Admiralty matters carry interest from the date of the judgment or from such other date as the judge or judgment directs.

Williams & Bruce Admiralty Jurisdiction and Practice 3rd Edition, page 488: "By the operation of the 76th Section of the Judicature Act 1873 the 1-2 Victoria, Chapter 110, now applies to all divisions of the High Court of Justice, and all judgments under which money is payable in Admiralty actions without exception carry interest at the

rate of 4% per annum from the date of the judgment or from such other day as is directed by the order of the Court or of a judge".

Roscoe Admiralty Practice, page 344: *The Jones Brothers*[1].

In the present case, the Court in awarding damages condemned the defendant to pay interest thereon without exercising the discretion which it undoubtedly had to depart from the general rule and the effect of the judgment is clearly to obligate the defendant to the payment of interest only from the date of the judgment, and such was the intention of the Court.

I was referred by counsel for the plaintiff to various authorities supporting the view that in damage actions of this nature it is usual to award interest in respect of repair bills from the date of the payment of same and it may well be that the circumstances of the present case justified a departure from the general rule and that the failure of the Court to exercise its discretion in favour of the plaintiff amounted to an error, if so the plaintiff's remedy is by way of appeal.

To grant the present motion and hold the defendant condemned to the payment of interest calculated from the date or dates upon which the repair bills were respectively paid (in the month of May 1953) would be to render a judgment substantially different from that given on March 19, 1959; something I am without jurisdiction to do. (*Halsbury Laws Of England,* 2nd Edit. Vol. 19, page 262).

I am therefore forced to conclude that the plaintiff's motion is unfounded and same is dismissed, with costs.

Order accordingly.

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[1]37 L.T. 164; (1877) 3 Asp. 478.

1958
Sept. 7
1959
Feb. 5

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

SAVOY SHIPPING LIMITED ..... PLAINTIFF;

AND

QUEBEC HYDRO-ELECTRIC COMMISSION AND LUCIEN BLOUIN .. } DEFENDANTS;

AND

ANGLO CANADIAN PULP AND PAPER MILLS LIMITED ..... } MIS-EN-CAUSE.

Shipping—Action for damages in form of demurrage—Jurisdiction of Admiralty Court—Failure to prove custom or usage governing stevedoring at point of unloading—Time to unload unreasonable and excessive—Party properly added as defendant though he did not sign charter party as intended—Damages based on expenses of maintaining ship and crew—Claim for loss of profits not established.

In an action for damages in the form of demurrage alleged to have resulted from undue delay in unloading plaintiff vessel M/V *Savoy* the Court found that the defendant Blouin was properly added as a defendant and that the time taken to unload the *Savoy* was unreasonable and exceeded the time it should have taken to discharge her.

Held: That the Admiralty Court has jurisdiction to hear the action since s. 18, s-s. 3 of the *Admiralty Act* gives that Court jurisdiction to hear and determine "any claims arising out of an agreement relating to the use or hire of a ship".

2. That the defendant Blouin was properly added as a defendant since he did not act solely as agent of the defendant commission because although the charter party was not signed by him he is named therein as charterer and the document, prepared by the plaintiff, was handed to Blouin on the understanding that he would sign and return it to the plaintiff which he had failed to do.

3. That neither does the plea in the defence justify the admission of evidence as to the custom or usage governing stevedoring at the port of unloading nor does the evidence heard establish the existence of any such custom or usage.

4. That taking into consideration and making reasonable allowance for prevailing weather conditions and the difficulty of obtaining personnel at the port of unloading the time taken to unload the *Savoy* was unreasonable and exceeded the time that it would have taken to unload her if reasonable diligence had been exercised.

5. That the plaintiff is entitled to recover the expenses of maintaining ship and crew at that time of year but that its claim for compensation for alleged loss of profit has not been established.

ACTION for damages for delay in unloading plaintiff's vessel.

The action was tried before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

Leopold Langlois and *Maurice Jacques* for plaintiff.

Louis N. LaRoche for defendant Quebec Hydro-Electric Commission.

François deB. Gravel for defendant Lucien Blouin.

No one appeared for Anglo-Canadian Pulp & Paper Mills Ltd., mis-en-cause.

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

SMITH D.J.A. now (February 5, 1959) delivered the following judgment:

By its action the plaintiff seeks to recover damages in the form of demurrage alleged to have resulted from the undue delay in discharging its vessel M/V *Savoy* which had been chartered by the defendant Blouin to transport a cargo of cement and steel from Quebec to Forestville.

Although originally the action was directed solely against the defendant Commission, with Blouin named as mis-en-cause, the plaintiff was permitted to amend its action in order to add Blouin as a defendant.

The action, insofar as Blouin is concerned, is based on his alleged undertaking as charterer to have the vessel discharged immediately upon her arrival at Forestville and as against the defendant Commission by reason of its obligations as consignee to discharge the vessel with all reasonable dispatch.

The plaintiff instituted the present action by way of petition of right taken in the Superior Court for the District of Quebec in virtue of Art. 1011 *et seq.* C.P. and said petition of right was granted by the Lieutenant-Governor on the 1st day of February 1956 without prejudice and under reserve of the rights of the Crown and of the Quebec Hydro Electric Commission, allowing the plaintiff to sue the defendant Commission in the Admiralty Court.

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A. I. Smith D.J.A.

Although by their respective pleas to plaintiff's action the defendants do not allege lack of jurisdiction on behalf of the Admiralty Court to hear and adjudicate upon the present proceedings, both defendants argued at the trial that this Court is without jurisdiction to hear and adjudicate upon a claim against Her Majesty in the right of the Province of Quebec and that such lack of jurisdiction may be urged at any stage of the proceedings.

I do not propose to deal at any length with the question of whether or not the proceedings taken by way of petition of right are regular and well founded, first, because the defendant Commission, by its plea, neither attacked nor put in question the said proceedings; and second, because, in my opinion, it was unnecessary for the plaintiff to initiate its action by proceedings in the nature of petition of right.

Since neither the Rules of the Admiralty Court, nor those of the Exchequer Court contain any reference to proceedings by way of petition of right in respect of claims against Her Majesty in the right of the Province, and since the only provision contained in the *Code of Civil Procedure* of the Province of Quebec relating to petition of right apply to proceedings taken before the Superior Court or Magistrate Court of this province, the law and practice in force in England must be applied. (*Admiralty Rules*—Rule No. 215—*Exchequer Court Rules*—Rule 2)

Since the enactment of the *Crown Proceedings Act (England) 1947* (10-11 George VI, Chapter 44, Section 1) actions *in personam* against the Crown, in cases of the nature of the present litigation, may be instituted as of right without it being necessary to proceed by petition of right.

The question concerning the jurisdiction of this Court to hear and determine the issues raised by the present action, in so far as it is directed against the Crown, is a serious one to which I have given considerable attention.

By Section 91 of the *British North America Act* the Parliament of Canada was given exclusive jurisdiction to legislate in respect of "Shipping and navigation". The Admiralty Court, although constituted as that part of the

Exchequer Court having jurisdiction in Admiralty matters, is given a jurisdiction which is different and distinct from that vested in the Exchequer Court by the *Exchequer Court Act*.

Section 18, Subsection 1 of the *Admiralty Act* provides that, subject to what is elsewhere contained in the Act, the Admiralty Court shall have the same jurisdiction over "like places, persons, matters and things" as the Admiralty jurisdiction now possessed by the High Court of Justice in England, and subsection 2 of the same section provides that "without restricting the generality of subsection (1) of this section, and subject to the provisions of subsection (3) thereof, Section 22 of the *Supreme Court of Judicature (Consolidated) Act* 1925 of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, insofar as it can, apply to and be applied by the Court, *mutatis mutandis*, as if that section of that Act had been by this Act re-enacted, with the word 'Canada' substituted for the word 'England' etc. . . ."

Subsection 3 of Section 18 of the *Admiralty Act* gives the Admiralty Court jurisdiction to hear and determine (1) "any claims arising out of an agreement relating to the use or hire of a ship" and a similar provision is contained in Section 22 of the *Supreme Court of Judicature (Consolidated) Act* 1925.

Moreover actions *in personam* have for many years lain to enforce claims of the nature of that which forms the basis of the present action, against the Crown or its agencies. (*Halsbury Statutes of England*, 2nd Edit. Vol. 6, page 47—Footnote to Section 1 of the *Crown Proceedings Act*)

As above noted the defendants filed separate pleas. The defence relied upon by the defendant Blouin is two fold: *a*) that he was not a party to the contract of affreightment, since he did not sign the charterparty (Produced as Exhibit P. 5) and to the knowledge of the plaintiff acted throughout solely as the agent of the defendant Commission; and *b*) that, in any event, the plaintiff's vessel was discharged with all due dispatch at Forestville, having regard to the time of her arrival and the prevailing circumstances.

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A. I. Smith D.J.A.

I find no satisfactory evidence to support the allegation that Blouin contracted merely as the agent of the defendant Commission. On the contrary the weight of the evidence is that the contract of affreightment was between the plaintiff and the said Blouin personally.

Although the said charterparty was not signed by the defendant Blouin he is named therein as the charterer and it was admitted that this document, which was prepared by the plaintiff, was handed to Blouin on the understanding that Blouin would sign and return it to the plaintiff, which however he failed to do. Blouin admitted that the said charterparty was in fact the contract between the parties. The following question was put to him by his counsel;

> Q. There was produced this morning as exhibit, I think, P-5 a charter party bearing the signature of Langlois as owner. Is it the contract which intervened between you and Savoy Shipping Limited?
>
> A. Yes, sir. (Page 45)

Moreover Blouin admitted that there was a further and supplemental agreement entered into between him and the plaintiff in accordance with which the amount of hire for the vessel was increased over the sum mentioned and a still further agreement that the vessel would be discharged immediately following her arrival at Forestville. It is true that Blouin sought to qualify this latter promise by stating that it was given subject to the vessel's arrival at Forestville on Tuesday, December 27, 1954. This condition was categorically denied by the plaintiff's representatives and I have serious doubts that Blouin's testimony on this point should be relied upon. He testified that this promise to unload the vessel on her arrival at Forestville, provided that she arrived there on Tuesday, December 21, was given Saturday evening December 18. However it must at that time have been obvious that the vessel would not be loaded before Tuesday at the earliest and that therefore she could not possibly reach Forestville by Tuesday; and it would have been nonsense to have agreed to unload her immediately upon her arrival at Forestville provided she arrived there on Tuesday.

I conclude therefore that Blouin contracted with the plaintiff in his own name and that he expressly agreed that the plaintiff's ship would be immediately discharged after her arrival at Forestville and that the sole remaining

question is whether or not the undertaking on behalf of the defendant Blouin, as charterer, and of the defendant Commission, as consignee, was carried out.

In the absence of any stipulation in the charterparty as to the lay-days to be allowed for unloading it was the obligation of Blouin, in virtue of his said undertaking and of the defendant Commission as consignee who accepted the cargo, to employ all reasonable diligence in unloading the vessel upon her arrival at Forestville. (Scrutton on *Charter Parties,* 15th Edit., p. 353 *et seq.* and p. 363; C.C. 2458 *et seq.*)

The proof shows that the M/V *Savoy* reached Forestville at approximately 3:00 o'clock in the afternoon of December 24. The defendant Blouin knew when the *Savoy* would reach Forestville and had, in fact, advised the representatives of the defendant Commission as to the time of her arrival. Moreover, due notice of her arrival and readiness to discharge was given by the plaintiff to the defendant Commission. In spite of this, unloading was not commenced until 7 a.m. on December 27, 1954, and was only completed at 8 P.M. on December 28, with the result that the vessel could not leave Forestville until the morning of the 29th. Does the proof justify the conclusion that the vessel was unloaded with all reasonable diligence?

Although the evidence as to the time it would normally have taken to discharge the said cargo was contradictory, I consider that it justifies the conclusion that the normal time required would have been approximately 15 hours.

The defendants contend that having regard to the fact that the vessel reached Forestville only on the afternoon of the day preceding Christmas, and considering the difficulty in securing personnel during the holiday period and the prevailing weather conditions, the ship was unloaded in due time and with reasonable dispatch.

Defendants brought considerable evidence with a view of establishing that according to the custom or usage prevailing at Forestville no stevedoring work is done at that port on the afternoon of December 24, or on Christmas day (which in this case was a Sunday). This evidence was taken under reserve of the objection that no such

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custom or usage had been alleged and, in my opinion, this objection is well founded. The only allegation which it was suggested might have relevancy to this point was that contained in Paragraph 41 of the plea of the defendant Commission, which reads as follows:

41. Les 25 et 26 décembre 1954 étaient des jours fériés et d'inactivité pour les quais, spécialement celui de Forestville.

I do not believe that this allegation is an allegation of custom or usage. It is not alleged that such was the custom or usage but is merely stated that in the year 1954 the 25th and 26th of December were holidays on the quais generally and specially at Forestville. It is not alleged whether or not this was in consequence of an order or regulation and certainly it is not alleged that stevedoring work was barred on those days by reason of a long established practice and custom.

Not only is there nothing in the plea to justify the admission of evidence as to the custom or usage argued for at the trial but, in my opinion the evidence heard falls short of establishing the existence of any such custom. (*Scrutton* on *Charter Parties*, 15th Edit. p. 26)

It remains to consider whether or not the *Savoy* was in fact unloaded with reasonable diligence having regard to the circumstances. In considering this question, I believe that I must make reasonable allowance for prevailing weather conditions, and the difficulty, which undoubtedly existed, of obtaining personnel at Forestville on December 24 and 25. However, after taking all of these factors into consideration, I am convinced that the time taken to unload the *Savoy* was unreasonable and exceeded the time that it would have taken to discharge her.

Making reasonable allowance for the adverse weather conditions which prevailed and the difficulties involved in securing stevedoring personnel during the holiday season, I am of the opinion that the vessel should have been completely unloaded not later than December 27, 1954, and that she was detained for a period of 24 hours in excess of the time required to unload her if reasonable diligence had been exercised.

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The proof shows, and it was admitted, that the expenses of maintaining ship and crew at that time of year totalled the sum of $220.50 per day, and I conclude that the plaintiff has established its right to recover this sum from the defendants jointly and severally.

I find however that the plaintiff's claim for compensation for alleged loss of profit has not been made good. The proof shows that the trip to Forestville was to be her last voyage of the season, after which she was destined to be laid up for the winter, and there is no evidence to justify the conclusion that she would have earned at profit even if she had been unloaded at Forestville on December 27, 1954, as she should have been.

The plaintiff's action will therefore be maintained and the defendants be condemned jointly and severally to pay to the plaintiff the sum of $220.50 with interest and costs.

Judgment accordingly.

1959

Jan. 19

Feb. 22

BETWEEN:

A/S *MOTOR TRAMP* .....APPELLANT (*Defendant*);

AND

IRONCO PRODUCTS LIMITED RESPONDENT (*Plaintiff*).

Shipping—Practice—Appeal from order of District Judge in Admiralty—Appeal Court will not interfere with discretion of trial judge unless exercised on wrong principle or there had been a wrongful exercise of the discretionary power—Appeal from District Judge in Admiralty dismissed.

Held: That an Appeal Court should not interfere with the discretion of a Judge acting within his jurisdiction unless the Appeal Court is clearly satisfied that he was wrong and the wider the discretion of the Court below, the less disposed should be the Court of Appeal to reverse the trial judge's order.

2. That the Appeal Court in order to reverse the trial judge's order must say that he applied a wrong principle or there had been a wrongful exercise of his discretionary power even though the Appeal Court might have exercised his discretion differently if he had been the judge of first instance.

APPEAL from order of District Judge in Admiralty for the British Columbia Admiralty District.

1959

A/S *Motor Tramp* v. IRONCO PRODUCTS LTD.

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

Francis Gerity for appellant.

D. McKenzie Brown for respondent.

KEARNEY J. now (April 22, 1959) delivered the following judgment:

This appeal concerns a matter of procedure and practice and involves the application of the General Rules and Orders in Admiralty of this Court. The Honourable Mr. Justice Sidney A. Smith, District Judge in Admiralty, British Columbia Admiralty District, by an *ex parte* order dated August 11, 1958, granted to the respondent an extension of time, within which to effect service on the appellant of a writ of summons which had been issued on August 31, 1956. The appellant moved to have the order set aside. By judgment rendered at Vancouver on October 23, 1958, the learned District Judge held, *inter alia,* that the long delay which occurred was due to a *bona fide* misunderstanding between counsel, and he confirmed his previous order. The appellant contends that the existing circumstances did not warrant the foregoing extension. Hence the present appeal.

The respondent's claim is for damages caused to goods in transit. It is based on a bill of lading in virtue of which Clay Cross (Iron & Foundries) Ltd. shipped from Hull, England, to the respondent as consignee, a quantity of pipe on the SS *Vedby,* which was delivered allegedly in a damaged state at Vancouver, on or about June 26, 1955. The terms and conditions of shipment are contained in three bills of lading but reference need be made to only one of them, copy of which was filed as respondent's exhibit "G". By clause 1 of the conditions of this bill of lading, it was agreed by the parties thereto that the rules of the United Kingdom statute entitled *The Carriage of Goods by Sea Act,* 1924, 14 and 15 Geo. V, c. 22, should apply, and the material portion of article III, rule 6, states:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

Apart from the shipper Clay Cross (Iron & Foundries) Ltd. and the respondent as consignee, the other parties to the bill of lading were Canadian Transport Co. Ltd. as charterer, hereafter sometimes referred to as "the transport company" or "the charterer", and the appellant as carrier, sometimes referred to later as "the owner-appellant" or "the owner"; and the bill of lading was signed on the latter's behalf (name on photostat illegible) per W. F. Knowles, as agents.

The bill of lading contained also what is known as a demise clause which has the effect of exonerating the charterer of the ship who is a time charterer and not a charterer by demise, from personal responsibility for any damage in transit to the goods of the respondent.

The charterparty (Ex. "I") is described as a uniform time-charter, and by clause 9 the charterer is required to indemnify the owner for losses such as contemplated in the present instance.

The relevant General Rules and Orders in Admiralty approved by His Excellency the Governor General in Council, P.C. 1495, dated June 22, 1939, effective June 29, 1939, which require consideration are:

Rule 5—Every action shall be commenced by a writ of summons which, before being issued shall be indorsed with a statement of the nature of the claim and of the relief or remedy required, and of the amount claimed, if any. Forms of writ of summons and of the indorsements thereon will be found in the Appendix hereto, Nos. 5, 6, 7, 9 and 10;

Rule 9—The Judge may allow the plaintiff to amend the writ of summons and the indorsements thereon in such manner and on such terms as to the Judge shall seem fit;

Rule 17—The writ of summons, whether *in rem* or *in personam*, may be served by the plaintiff or his agent within *twelve months* from the date thereof, and shall, after service, be filed with an affidavit of such service;

Rule 200—The judge may enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed;

and Form No. 6, pp. 44 and 45, which prescribes the form and content of a writ of summons *in personam*, the material portion thereof being as follows:

Memorandum to be subscribed on the Writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

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On August 31, 1956, the respondent issued three concurrent writs: one against the SS *Vedby,* another against the transport company, and the third against the owner-appellant in the present case. The writ against the ship was never served, but under circumstances later described, on July 18, 1957, service of the writ against the transport company was accepted by its counsel, and the writ giving rise to the present action was served on the appellant on September 15, 1958.

Prior to the intervention of counsel in the case, the respondent shortly after the arrival of the goods in question wrote directly to the charterer under date of June 30, 1955, to notify it that it was being held responsible for damage sustained by the shipment in question and that a detailed claim would be prepared as soon as the extent of the loss, which it felt would be considerable, had been ascertained. Nothing further occurred until June 4, 1956, when counsel for the respondent, owing to the delay of the respondent's insurance underwriters in determining the amount of the damage, wrote to the charterer requesting an extension of three months within which to issue writs of summons against the SS *Vedby* and/or her owners and charterers. The charterers referred this request to their attorneys whose reply of June 5 is couched in these terms:

re: SS *VEDBY*—Ironco Products Ltd. claim

Your letter to Canadian Transport Company Limited has been handed to us for attention.

We are instructed to allow Ironco Products Ltd. an extension of time for filing suit for three months from today. The extension therefore will expire on September 4, 1956.

The next exchange of correspondence occurred in July of the following year, when counsel for the respondent requested the same counsel who apparently, on behalf of the SS *Vedby,* her owner and charterer, had granted the three months' extension to accept service of these writs. The reply received was the following:

Re: Ironco Products Ltd. v. The Steamship *Vedby*
Ironco Products Ltd. v. Canadian Transport Company Ltd.
Ironco Products Ltd. v. A/S *Motor Tramp*

We have your letter of July 15, 1957.

We are obtaining instructions regarding accepting service of the Writ on behalf of Canadian Transport Company Limited and will advise you in due course.

We have no instructions from the SS. *Vedby* or her owners A/S *Motor Tramp* and consequently, cannot accept service of either of these Writs. We return them herewith.

This evidence was before the learned District Judge, together with copies of further correspondence between the solicitors and of their conflicting affidavits, dealing with the nature and purpose of discussions which occurred between them. It shows that, while conceding that its action against the charterer is untenable in law, the solicitors for the respondent contended that the writs of summons issued against the SS *Vedby* and the appellant were not served upon the ship or its owner within the delay prescribed by Form 6 because of the negotiations carried on between them and the solicitors for the charterer, from April 1957 to August 1, 1958. These negotiations had led the solicitors for the respondent to believe that the charterer and its counsel had authority to negotiate and effect a settlement on behalf of the ship and its owner, and that an offer of settlement was to be made.

The proof likewise discloses that counsel for the charterer denied the respondent's contentions and alleged that they were concerned with the defence of the claim against the charterer and nobody else; that this should have been obvious to counsel for the respondent at the time when acceptance of service of the writs issued against the ship and her owner was refused and the writs returned to them; that meetings were held only to ascertain the *quantum* of damages the respondent could prove, and that at these meetings nothing was said that would have justified a belief that an offer of settlement was to be made, or that the charterer would assume liability, as that question had not been discussed. Further, that the solicitors representing the charterer stated also that they were well aware of the demise clause but that the solicitors for the respondent apparently were not, and their failure to serve the writs on the owner or the vessel was due either to a misconception on the part of the solicitors for the respondent of the latter's rights, or the failure to ascertain that the charterer had no responsibility with respect to the carriage of the goods.

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In the judgment appealed from the learned District Judge observed that the main ground upon which the appellant had relied to set aside his previous *ex parte* order granting the extension was that, under his own ruling in *Donald H. Bain Ltd. v. The Ship Martin Bakke*[1], he had held that he had no power to make such an order. The learned District Judge went on to say that, on the strength of rule 200 which had not been cited in the *Bakke* motion, he had come to the conclusion that he did have such power of extension. He then added:

> It is not suggested here that any statute of limitations has run, but affidavits have been filed to show that I should have exercised my discretion against extension because the Plaintiff's solicitors had not shown due diligence in serving the writ, and it was said the delay was not adequately explained. I think possibly greater diligence could have been shown, but that there was a *bona fide* misunderstanding between the solicitors as to the authority of those negotiating for the "ship" interests, and that there was reasonable excuse for the delay in service. I am decidedly of opinion that the Court, where it has power should lean against technical objections tending to prevent the litigation of reasonable claims.
>
> I therefore hold that my former order should stand. However as my language in the Martin Bakke case gave grounds for the motion, its dismissal will be without costs.

Counsel for the appellant in his submission that the learned District Judge should not have exercised his discretion in the manner he did, placed great reliance on a leading case in England of *Battersby v. Anglo-American Oil Co. Ltd.*[2] and its applicability to the facts of this case. The High Court reversing a previous order refused to grant the renewal of a writ which, although issued within the governing statutory limitation of one year as provided in the *Fatal Accidents Act,* 1846, was not served during its currency of twelve months, and an application to renew it instead of being made before the writ had expired was made considerably later.

The Court considered R.S.C., Or. 8, r. 1 and Or. 64, r. 7, which read as follows:

> Or. 8, r. 1: No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or a judge if satisfied that reasonable efforts have been made

[1] [1955] Ex. C.R. 241. [2] [1945] K.B. 23.

to serve such defendant, or for other good reason, may order that the original . . . writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ . . . and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

Or. 64, r. 7: The court or a judge shall have power to enlarge or abridge the time appointed by these rules . . . for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed . . .

The issue was highly controversial, as appears from the notes of Lord Justice Goddard who read the Judgment for the Court and stated at p. 28:

So when Stable J. renewed the writ, not only had the time for renewal expired, but more than twelve months had elapsed since the death of the deceased. The plaintiffs, however, contend, and in this have the support of the decision in *Holman v. George Elliot & Co., Ltd.*, [1944] K.B. 591. that the court has a discretion under Or. 64, r. 7, to enlarge the time for renewing the writ, and that it was, accordingly, open to Stable J. to renew the writ notwithstanding that the application was made more than twelve months after the date of issue. That the widest discretion is given to the court under that rule none will deny, but there is a line of authority, unbroken till the recent decision in *Holman's* case (*supra*), that the court will not exercise that discretion in favour of renewal, nor allow an amendment of pleadings to be made, if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued.

Counsel for the respondent, while pointing out that although under English rules the Court has a wide discretion, agreed that, if these rules were made to apply in this case, it would be difficult for him to succeed. He added with justification, I think, that, since special and markedly different provisions regarding extension of time with respect to service of a writ are contained in the *Canadian Admiralty Rules and Forms,* s. 35 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, cited hereunder, has no application:

The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in Her Majesty's High Court of Justice in England on the 1st day of January, 1928. 1928, c. 23, s. 4.

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The most important difference between the two sets of rules is the fact that no equivalent to Or. 8, r. 1, is to be found in *Canadian Admiralty Rules,* and it was on this rule that Lord Justice Goddard based his conclusion that a writ unserved during its currency is a nullity. He stated at p. 29:

> If the writ has ceased to be in force the position is the same as if it had never been issued. Otherwise we see no reason for the concluding words of r. 1 of the order which provides for a renewed writ preventing the operation of statutes of limitations.

The words, "This writ may be served within twelve months from the date thereof, exclusive of the day of such date, but not afterwards," as contained in Form 6, and which appear on the writ as a *nota bene* below the signature of the registrar who issued it, though less mandatory, bears, it is true, some resemblance to the first three lines of Or. 8, r. 1, but there all similarity ends. Our Admiralty Rules do not appear to attach special significance to the delay within which an application for extension is to be made, as is the case in England. Counsel for the respondent referred to a judgment of McRuer C.J.H.C. in *Robinson et al v. City of Cornwall*[1] with respect to another aspect of the present case, which I will deal with later, but it is worth noting here that, although his observations appear to be *obiter,* the learned Chief Justice made a comparison of Or. 8, r. 1, with rule 8 of the Supreme Court of Ontario, which reads as follows:

> The writ shall be in force for twelve months from the date thereof, including the day of such date; but if for any sufficient reason any defendant has not been served, the writ may at any time before its expiration, by order, be renewed for twelve months, and so from time to time during the currency of the renewed writ. The writ shall be marked by the proper officer, "renewed", with the date of the order.

The learned Chief Justice came to the conclusion that the terms of the above rule are more flexible than those of Or. 8, r. 1, and do not imply that a writ which is allowed to expire is null for all purposes, but that, if it is not served within the period of twelve months of its date, it is no longer in force for service, and speaking of discretion, he said at p. 599:

> In no case either in our Courts or in England has the question been dealt with on a basis that there is no discretion vested in the Court, but

[1] [1951] O.R. 587, 598.

rather on the basis of whether the discretion should be exercised to extend the time for renewal of the writ and service after the period fixed by the Statute of Limitations has run.

The memorandum referred to in Form 6 is what may be termed an endorsement on the writ with which we are concerned, and under Rule 9 the plaintiff may be allowed to amend the writ or an endorsement "on such terms as to the judge shall seem fit." The concluding words of Rule 200 are in similar terms and permit the judge to extend the time prescribed by the rules and forms "upon such terms as to him shall seem fit, and any such enlargement may be ordered after the expiration of the time prescribed."

I think that the discretionary power under Form 6 combined with Rule 200 is considerably wider than that afforded by the corresponding rules 8 and 176 of the Supreme Court of Ontario and, *a fortiori,* exceeds the discretionary power referred to in the *Battersby* case, and indeed a wider power of discretion would be difficult to envisage.

The learned Chief Justice of the High Court, in the *Robinson* case (*supra*), allowed the extension of the writ on an application made after its expiry date on the grounds that the plaintiff was induced to withhold service of it in the mistaken belief that the action would be settled. Counsel for the respondent submitted that a similar circumstance existed in the present case, inasmuch as the same counsel who had admittedly granted the extension of three months, which would have postponed the last day for service of the writ to September 5, 1957, requested counsel for the respondent, in a letter dated August 26, 1957 (Ex. E), to suspend further negotiations "until the second week in September because one of our members is away at a convention." The foregoing postponement meant that the extended period for the service of the writ, in the meantime, would have expired. It was also pointed out by counsel for the respondent that, at the time the postponement was suggested, counsel who made the suggestion was aware that no direct action lay against the charterer because of the demise clause. I have no doubt that counsel for the respondent mistakenly believed that a settlement would be forthcoming without the necessity of further proceedings, but I do not think counsel for the

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charterer was under any obligation to draw his attention to the existence of the demise clause which is to be found in the fine print but which is not an unusual one in modern bills of lading. See *Scrutton on Charterparties,* 16 ed., p. 62.

Although it may be urged that counsel for the respondent should not have allowed himself to be lulled into a false sense of security by the attitude adopted by counsel for the appellant, the fact remains, I think, that such was the case, and the important point is does such an occurrence under the circumstances serve to build up a reasonable excuse for the delay in service, and this depends on an appreciation of the facts.

The main purpose of placing a limitation on the time within which writs may be served is to prevent the prejudice caused by claims being brought against a defendant without prior notice, when due to lapse of time the memory of events has faded and evidence thereof is impossible or more difficult to procure. The learned District Judge was not dealing with a case where the respondent suffered such a prejudice because, apart from having had prior notice, the *quantum* of damages had been thoroughly and exhaustively investigated by counsel for the charterer.

As prescription was interrupted when a three months' delay for the commencement of the action was granted, which was binding on the appellant, I think it was in this sense that the learned District Judge used the expression "It is not suggested here that any statute of limitations had run." It is admitted that the charterer was in the position of having to indemnify the appellant against loss by reason of damage to the cargo.

The foregoing are some of the peculiar circumstances of this case which likely prompted the learned District Judge to exercise his discretion in the manner in which he did.

The appellant claims, however, and I must say that I think it has considerable merit, that even granting that for a time counsel for the respondent had good reason to think that the same counsel was acting on behalf of the owner, ship and charterer, he was no longer justified in doing so when on July 16, 1957, counsel for the charterer refused to accept service of the writs against the ship and its owner and returned them to counsel for the respondent.

In my opinion, the respondent and its advisers failed to attach to the letter of July 16 the importance it deserved and, although the wording of the letter could have been clearer, thereafter they had little justification for assuming that counsel for the charterer had authority to act in any capacity for the appellant. On receipt of that letter, the prescribed period for service of the writ still had about six weeks to run, during which the respondent should have either caused it to be served on the appellant or applied for an extension period within which to do so.

Apart from revealing the existence of a demise clause which required investigation, a careful perusal of the bill of lading would have also shown that, although the name of the charterer, Canadian Transport Company Limited, was printed in large bold type, the said bill of lading was not signed by the latter or by an agent on its behalf, but by an agent on behalf of the owner under the authority of the Master, which would be an indication that the owner, and not the charterer, was the carrier.

What I think appears to have occurred was that counsel for the respondent, notwithstanding the return of the two writs, continued in good faith to misjudge the intent of his discussions with opposing counsel which, if they had led to a settlement, might well have obviated further unnecessary costs. Such an understanding or misunderstanding of the situation, in my opinion, is attributable at least in part to failure to adhere sufficiently closely to prescribed rules of procedure. Where in lieu of observing the delays prescribed in the rules, counsel, believing that the only point at issue is the *quantum* of damages, chooses to rely on discussions with counsel for an adverse party, it is the part of prudence and sound practice to procure an admission of liability and a waiver of the prescriptive period provided in any relevant statute of limitations. It may be that in some quarters Admiralty Rules are taken less at the foot of the letter than are those governing other types of actions in the Exchequer Court, but such a course is fraught with danger and fails to take into account that opposing counsel in the interest of his client may be required to insist on a strict observance of the rules.

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Wetmore J., many years ago, in the case of *Moore v. May*[1], said:

> It may be very convenient to carry on a suit under a loose system of practice and in many cases such a style of practice may work out all right, but when a dispute arises, trouble is sure to come, and counter affidavits, inconveniences and unpleasant contradictions are sure to arise; whenever understandings are come to, they certainly ought to be carried out strictly and honourably, but practitioners so often have different impressions of the terms of an understanding that with the most correct intentions they differ most materially in their conclusions. In the present case, I shall decide the points before me upon my view of the correct practice of the Court . . . As to loose understandings, I say nothing about them except attorneys, if they think proper to practice upon them, of course, can do as they please; if they come out all right well and good, if not they must put up with the inconveniences so likely to arise, and not expect aid from the Court . . . in carrying them out when difficulties arise.

It is interesting to note that the above case and a similar one, *Knox v. Gregory*[2], were quoted with approval but not followed in *Ferguson v. Swedish-Canadian Lumber Company Limited*[3], a case in which, owing to a misunderstanding between counsel or someone's mistake, a judgment had gone by default. In annulling the default judgment and ordering a new trial, Barry J., speaking for the Court, said:

> We have, however, notwithstanding these adverse cases, unanimously come to the conclusion that under the peculiar circumstances of this case, and taking into account the several affidavits in which the merits of the defence have been sworn to, and the fact that through some one's mistake or misapprehension, or it may be through some one's neglect, the case was tried as an undefended one, there ought in the interests of justice, to be a new trial. That the Court has power to order a new trial where something has been done inadvertently or by mistake, or where there has been a slip in the proceedings, see *Germ Milling Co. v. Robinson* (1886) 3 T.L.R. 71.; but it is said in that case that it is a discretion which will be exercised with the greatest caution, and the application will only be granted where the justice of the case manifestly requires it.

With respect I do not think on balance that I would have granted the application if I had been the judge of first instance under the circumstances then existing. I do not think, however, that it necessarily follows that, even were I disposed to do so, I should substitute my views in this case for those of the learned District Judge. It is well settled that a Court of Appeal should not interfere

[1] (1880) 19 N.B.R. 506. [2] (1881) 21 N.B.R. 196.
[3] (1912) 41 N.B.R. 217, 220.

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with the discretion of a trial judge acting within his jurisdiction, merely because it would have exercised the discretion in a different way.

Viscount Simon, in the case of *Charles Ossenton & Co. v. Johnston*[1] stated:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

In *Evans v. Bartlam*[2] Lord Wright is reported as saying:

> It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle.

In my opinion, the wider the discretion of the Court below, the less disposed should be the Court of Appeal to reverse the trial judge's order.

Taking into account the peculiar circumstances of the present case and the very wide discretion afforded to the learned District Judge under our Admiralty Rules, I cannot say that he applied a wrong principle, or that there has been a wrongful exercise of his discretionary power. Albeit I might have exercised my discretion differently, if I had been the judge of first instance, I am unable to come to the clear conclusion that the learned District Judge gave too much credence and importance to some phases of the evidence and failed to take into account or give sufficient weight to others.

I am therefore of the opinion that the appeal should be dismissed and taxed costs allowed.

Judgment accordingly.

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[1] [1942] A.C. 130, 138.

[2] [1937] A.C. 473, 486.

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Jun. 18
Jun. 29

BETWEEN:

C. GEORGE McCULLAGH ESTATE .....APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 6(b)—Succession Duty Act, R.S.O. 1950, c. 378, ss. 15, 16 and 20—"Amount received"—Allowance for payment of succession duty in advance of time required by the Succession Duty Act is not an amount received under s. 6(b) of the Income Tax Act—Appeal allowed.

Executors of the will of a deceased person paid the succession duties levied on the estate of such deceased under the *Succession Duty Act*, R.S.O. 1950, c. 378 prior to the expiration of the time limited therefor for payment of duties levied under that Act and claimed and were allowed interest on such sum in accordance with s. 20 of the *Succession Duty Act*. The respondent assessed the estate for income tax on the amount of money thus retained by the executors on payment of the succession duty. The executors appealed from such assessment to this Court.

Held: That the allowance under the *Succession Duty Act* is a statutory reduction of the obligation to pay duty, which when s. 20 of that Act applies, operates in diminution of the amount of the duty which otherwise would be payable and such an allowance is not an "amount received" in any relevant sense within the meaning of s. 6(*b*) of the *Income Tax Act* but is simply an amount which, in the circumstances, the *Succession Duty Act* does not require to be paid.

APPEAL under the *Income Tax Act*.

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

C. H. Walker, Q.C. for appellant.

G. D. Watson, Q.C. and *A. L. DeWolf* for respondent.

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

THURLOW J. now (June 29, 1959) delivered the following judgment:

This is an appeal by the executors of the will of C. George McCullagh, deceased, against an assessment of income tax for the year 1955, by which income tax was levied on an amount of $34,005.71 which had been allowed

pursuant to a provision of the *Succession Duty Act*, R.S.O. 1950, c. 378 on the payment by the executors prior to the expiration of the time limited therefor of duties levied under that Act.

The deceased died on August 5, 1952, and on or about May 28, 1954 the executors of his will received from the Treasurer of the Province of Ontario a statement wherein succession duties totalling $1,352,712.48 were claimed. Of this sum, $983,704.23 was payable, pursuant to provisions of the statute, on February 5, 1953, and the remainder in ten annual instalments commencing on August 5, 1953. Between December 3, 1952 and February 2, 1955, the executors paid several sums on account of the duties and on the latter date made a final payment calculated as the balance of the duties claimed less three per cent per annum on each of the instalments for which the date of payment had not yet arrived from February 2, 1955 to the date when each of them would become payable. The deduction so made amounted to $34,005.71 and was allowed by the Treasurer.

Sections 15 and 16 of the *Succession Duty Act* provided as follows:

15.—(1) Unless otherwise provided, duty shall be due at the death of the deceased and paid within six months thereafter and if the duty or any part thereof is paid within such period no interest shall be chargeable or payable on the amount so paid.

(2) Where any annuity, term of years, life estate or income is created by the will of the deceased or by any disposition, the duty for which any person who benefits by such annuity, term of years, life estate or income is liable with respect thereto shall, unless otherwise provided, be paid in a number of equal annual instalments equal to,

(*a*) the number of years,

(*i*) of expectancy of life of such person, ascertained as provided in subsection 4 of section 2, or

(*ii*) for which such annuity, term of years or income is to run, as the case may be; or

(*b*) ten,

whichever is the lesser, and such instalments shall commence one year after the death of the deceased.

* * *

16.—(1) If the duty mentioned in subsection 1 of section 15, or any part thereof, is not paid within the time provided therein, interest at the rate of five per cent per annum from the date of death of the deceased shall be charged and paid on the amount from time to time unpaid.

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(2) If any instalment of duty mentioned in subsection 2 of section 15, or any part thereof, is not paid within the times provided therein, interest at the rate of five per cent per annum from the date when such instalment became payable shall be charged and paid on the amount of such instalment from time to time unpaid.

* * *

Section 20, pursuant to which the sum in question was allowed, was as follows:

20. Where any duty is paid before the time provided for payment thereof, the Treasurer may allow interest upon the amount so paid at a rate not exceeding three per cent per annum from the time of payment until the time so provided for payment.

The question to be determined is whether or not the sum in question was liable to tax as income under the provisions of the *Income Tax Act*, R.S.C. 1952, c. 148. By s. 3 of that Act, the income of a taxpayer for a taxation year is declared for the purposes of Part I of the Act to be his income from all sources inside or outside Canada and to include income for the year from all businesses, property, and offices and employments. By s. 4 it is provided that, subject to the other provisions of Part I, income for a taxation year from a business or property is the profit therefrom for the year. By s. 6, it is further provided:

6. Without restricting the generality of s. 3, there shall be included in computing the income of a taxpayer for a taxation year

* * *

(*b*) amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest;

In my opinion, it is clear that the sum in question is not income in any ordinary sense, either as profit from a business or property or otherwise, and the question to be determined is at once narrowed down to whether or not it was an amount received as interest or on account or in lieu of payment of or in satisfaction of interest, within the meaning of s. 6(*b*). The submission put forward by counsel for the Minister in support of the assessment was that the sum was interest (it is calculated as interest and is called interest by s. 20 of the *Succession Duty Act*), that it was received by the appellants when it was allowed by the Treasurer, and that accordingly it became subject to tax as income.

It may, I think, be assumed from the use of the word "interest" in s. 20 to describe the allowance thereby permitted, as well as from the nature of the situation in which the allowance may be made, that the purpose of such allowance is to compensate the payer for the loss of the opportunity he would otherwise have of using the money pending arrival of the time for payment of the duties. But even if such is the purpose, I find it impossible to regard the allowance either as a payment for the use of the money or as an amount earned or gained by the prepayment of the duty. There is no element of earning or gain about it. The obligation to pay succession duty is created entirely by the statute, which prescribes, as well, both the amount to be paid and the time or times for payment. If duty is not paid by the time prescribed, the statute imposes a further obligation. But if it is paid before the required date, an allowance may be made. This, when made, is made pursuant to the statute by which the obligation to pay duty is raised, and in my opinion it is allowable simply because the statute so states, without regard for the reasons which may have prompted the legislature to provide for it and regardless, as well, of the executors' purpose in making the payment. In my opinion, the allowance is, in fact and in law, nothing more nor less than a statutory reduction of the obligation which, when s. 20 applies, operates in diminution of the amount of the duty which otherwise would be payable. See *In Re Bronson.*[1] Such an allowance, in my opinion, is not an "amount received" in any relevant sense within the meaning of s. 6(*b*) of the *Income Tax Act* but is simply an amount which, in the circumstances, the *Succession Duty Act* did not require to be paid.

Nor, in my opinion, can it make any difference that the executors, by retaining and investing the money pending arrival of the times for payment of the duties, might have earned income on it. One is not obliged by the *Income Tax Act* to invest his money or to obtain income therefrom, and the argument advanced on this line is sufficiently answered by the fact that no such investment was made. Nor was the

[1] [1958] O.R. 367.

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payment of the duties such an investment. It was nothing but the discharge of an obligation at the amount payable at that time.

In *Tennant v. Smith*[1] Lord Macnaghten said at p. 164:

> No doubt if the appellant had to find lodgings for himself he might have to pay for them. His income goes further because he is relieved from that expense. But a person is chargeable for income tax under Schedule D, as well as under Schedule E, not on what saves his pocket, but on what goes into his pocket.

The principle so expressed does not conflict with s. 6(*b*), and it is, I think, applicable in the present situation. Indeed, for my part, I should have thought this a clear case but for the opinion expressed by the late chairman of the Income Tax Appeal Board in *No. 390 v. M.N.R.*[2], a case where an allowance under the same section of the *Succession Duty Act* was involved. With great respect for the late chairman, I find myself unable to agree with his opinion. It was suggested in argument that that case was distinguishable, since there the allowance under s. 20 was made by way of refund to the taxpayer, rather than by deduction from the duty, as was done in this case, but I regard that difference as quite immaterial, for I am of the opinion that in each case the nature of the allowance is the same and is determined by s. 20 itself, rather than by the procedure by which the allowance is obtained.

The appeal will be allowed and the assessment vacated. The appellants are entitled to their costs.

Judgment accordingly.

1958

June 17

1959

July 3

BETWEEN:

JOHN HYSLOP McCARTER AND DOROTHY JOAN RUSZNYAK . } APPELLANTS;

AND

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

Revenue—Succession Duty—Dominion Succession Duty Act R.S.C. 1952, c. 89, s. 4(1) and R.S.C. 1952, c. 317, s. 2 enacting s. 3(4)—Succession—"General Power" to appoint or dispose of property—"Exclusive of any power exercisable in a fiduciary capacity."

[1] [1892] A.C. 150.

[2] 16 Tax A.B.C. 333.

Margaret Jane McCarter was predeceased by her husband and at the time of her death was the sole executrix and trustee under his will, by which the testator gave the whole of his estate to his trustee from time to time as thereinbefore provided, upon trust, to pay his sister $50 per month from the date of his death for her lifetime and to pay the income from the rest, residue and remainder of the estate to his wife the aforesaid Margaret Jane McCarter for her life. He fixed the period of distribution of the corpus of his estate at the death of the survivor of him or his wife and directed his surviving trustee to thereupon dispose of the rest, residue and remainder of his estate to certain grandchildren. By paragraph 6 the will also authorised the trustees "if in their own control and discretion they deem advisable at any time and from time to time to pay to or use for the benefit of my wife or any issue of mine such part or parts of the capital of the prospective share of such beneficiary or of the share of my estate from which for the time being such beneficiary is entitled to income as in their uncontrolled discretion my trustees deem advisable." Up to the time of her death there had been no exercise of the authority so conferred.

In assessing the estate of Margaret Jane McCarter for succession duty the Minister of National Revenue added to the aggregate value of her assets the value of the whole of the capital of the estate of the husband which remained in her hands at the time of her death and assessed accordingly.

The executors of the will of Margaret Jane McCarter appealed from such assessment to this Court.

Held: That the power given to Margaret Jane McCarter as trustee by paragraph 6 of her husband's will to pay to herself or for her own benefit the capital of the residue of the husband's estate was a general power to dispose of his estate within the meaning of s. 3(4) of the *Dominion Succession Duty Act* as enacted by R.S.C. 1952, c. 317, s. 2 and not a power exercisable in a fiduciary character as provided in s. 4(1) of the Act, and a succession in respect of such residue dutiable under the Act is deemed to have occurred.

2. That the amount of money necessary to pay the annuity to the sister of the deceased husband should not be included in the assessment.

APPEAL under the *Dominion Succession Duty Act.*

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

J. D. Arnup, Q.C. for appellants.

G. D. Watson, Q.C. and *A. L. DeWolf* for respondent.

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

THURLOW J. now (July 3, 1959) delivered the following judgment:

This is an appeal by the executors under the will of Margaret Jane McCarter, deceased, from an assessment of succession duties made by the Minister of National

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Revenue on or about April 10, 1956, and confirmed by him on November 21, 1956, in respect of successions to property arising on the death of the said deceased. The issue raised is whether or not assets which formed part of the estate of her deceased husband and which remained in her hands as trustee under his will, with a power to convert to her own use, were properly included in assessing duties in respect of successions arising upon her death.

The deceased died on January 8, 1955, and at the time of her death was the sole executrix and trustee under the will of her deceased husband, John Baxter McCarter, who had died in January, 1945. In what follows I shall refer to him as the testator and to Mrs. McCarter as the deceased. The paragraph of the testator's will, by which the deceased was appointed, was as follows:

2. I NOMINATE, CONSTITUTE and APPOINT my wife, MARGARET JANE McCARTER, to be the sole Executrix and Trustee of this my Will, but should my said wife predecease me, or depart this life before my estate is completely administered and wound up, thereupon I appoint The Canada Permanent Trust Company to be the Executor and Trustee of this my Will in her place and stead, and, in such event, all reference herein made to my "Executrix" and to my "Trustee" shall apply to the said The Canada Permanent Trust Company as equally and as fully as to the said Margaret Jane McCarter, and each of my Trustees shall have and enjoy from time to time and while Trustee of my estate, all rights, powers, discretions and authority hereinafter conferred upon my "Trustees".

By paragraph 3, the testator gave the whole of his estate "unto my said Trustee from time to time as hereinbefore provided, upon the following trusts, namely. . . ." There followed clauses containing directions relating to conversion and postponement of conversion, investment, payment of debts, funeral and testamentary expenses and succession duties, several specific bequests, and then clauses (*f*), (*g*), and (*h*) provided as follows:

(*f*) To pay to my sister, AGNES McCARTER, presently of Bassano, Alberta, the sum of Fifty Dollars ($50.00) per month from the date of my death and continuing for and during her life.

(*g*) To pay the income derived from the rest, residue and remainder of my estate unto my said wife, MARGARET JANE McCARTER, in at least quarterly payments, for and during her life.

(*h*) I fix the period of distribution of the corpus of my estate (subject as hereinbefore provided) at the death of the survivor of me and my wife and I direct my surviving Trustee to thereupon dispose of the rest, residue and remainder of my estate as follows: . . .

In the sub-clauses that followed, the capital of the residue was given to three grandchildren of the testator, with provisions that, in the event of the death of any of them, leaving issue, prior to the date of distribution, such issue should take his share.

Paragraphs 4 and 5 contained further provisions respecting the administration of shares of the residue to which persons under 21 years of age might become entitled. Paragraph 7 was a direction that the benefits given to the deceased should, if accepted, be in lieu of dower. Paragraphs 6 and 8 were as follows:

6. NOTWITHSTANDING anything in this my Will contained I expressly authorize my said Trustees if in their own control and discretion they deem advisable at any time and from time to time to pay to or use for the benefit of my wife or any issue of mine such part or parts of the capital of the prospective share of such beneficiary or of the share of my estate from which for the time being such beneficiary is entitled to income as in their uncontrolled discretion my Trustees deem advisable.

8. NOTWITHSTANDING anything hereinbefore contained I HEREBY DECLARE that it is my Will that my wife, MARGARET JANE McCARTER, shall not be required to account to any person, persons or Corporation for or in respect to her administration of my Estate as Executrix and Trustee, and my substitutionary Executor and Trustee, The Canada Permanent Trust Company shall not be required to enquire into the said administration of my estate by my wife, but shall be fully protected on taking the assets of my estate which may be in the hands of my wife upon her death.

Up to the time of her death, there had been no exercise by the deceased of the authority conferred by paragraph 6.

In making the assessment under appeal, the Minister added to the aggregate value of the assets of the deceased, as declared in the succession duty return filed by the apellants, the value of the whole of the capital of the estate of the testator which remained in the hands of the deceased at the time of her death and assessed accordingly. His reason for so doing, as set out in his decision confirming the assessment, was

that the said Margaret Jane McCarter was at the time of her death competent to dispose of the property which she was given power to appropriate by the will of the late John Baxter McCarter, and the said property has been properly subjected to duty under the provisions of subsection 4 of section 3 of the Act.

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Section 3(4), as enacted by R.S.C. 1952, c. 317, s. 2, was as follows:

3. (4) When a deceased person had at the time of death a *general power* to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

By s. 4(1) of the Act, it was further provided:

4. (1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee.

The question to be determined in the appeal is whether or not in the circumstances the power given to the deceased as trustee by paragraph 6 of the testator's will was a general power to dispose of the residue of his estate within the meaning of s. 3(4). If so, upon the death of the deceased, a succession in respect of such residue dutiable under the Act is deemed by that subsection to have occurred. The appellant's contention is that the power given by paragraph 6 of the will was not a general power because it was exercisable only by the trustee, that accordingly it was exercisable in a fiduciary capacity and fell within the exception mentioned at the end of the definition of general power contained in s. 4(1).

Section 4(1) has been in the *Dominion Succession Duty Act* without amendment since the enactment of that statute in 1941, and a similarly worded section has been in effect in England since 1894 as s. 22(2) of the *Finance Act*, 1894, but neither in this country nor in England does there appear to be any decided case on what is meant in their context by the words, "but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself." It is, however, stated in *Green's Death Duties*, Fourth Edition, p. 66, that

The statutory exception in regard to fiduciary powers was doubtless inserted *ex cautela*. A fiduciary power would not enable the holder to dispose as he thought fit.

There is, I think, support for this view in the judgment of Luxmoore J. in *Re Penrose*[1], where he said at p. 805:

> It is next said that the form of the power itself suggests that the donee must be excluded from among the objects, first, because the form is that usually employed when conferring what lawyers generally call a special or limited power and such a power is in its nature fiduciary. This argument really begs the question, because the power can only be fiduciary if the donee is not an object.

But whether the view stated in *Green's Death Duties* is the true view of the scope of the exception or not, the question that arises on the definition in this case is: was the power which the deceased had at the time of her death to pay to herself or use for her own benefit the capital of the residue of the testator's estate "a power exercisable in a fiduciary character" within the meaning of the exception? If so, it is not a general power of the kind referred to in s. 3(4). On the other hand, if it was not a power exercisable in a fiduciary capacity, since it was exercisable by the deceased in her own favour it would, I think, fall within the definition and a succession would be deemed by s. 3(4) to have occurred. See *Montreal Trust Co. (Bathgate Estate) v. Minister of National Revenue*[2].

In determining whether or not a power is exercisable in a fiduciary capacity, I am of the opinion that, if the power is such that the holder can dispose of the property to himself, to be used as his own without any restriction as to the circumstances in which he may so exercise it, and without responsibility to any other person, the fiduciary feature contemplated by the exception is lacking, and I think this is so whether or not the power is incident to or derived from the holding of a position or office which under other circumstances would by itself imply a fiduciary relationship. This, I think, is what Simonds J. (as he then was) had in mind when he said in *Re Shuker*[3] at p. 29:

> Accordingly, I must hold that the language of the will in the present case was sufficient to confer a general power of appointment, and not the less so because the widow was the "sole executor and trustee."

[1] [1933] 1 Ch. 793. [2] [1956] S.C.R. 702.
[3] [1937] 3 All E.R. 25.

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In that case, a power to a widow to appoint in her own favour was held to be general, notwithstanding that, under the will which gave her the power, she was the sole trustee and the exercise of the power would divest persons of their rights in property which she held as trustee.

In the present case, paragraph 6 of the will contains a number of powers exercisable by the trustee, and I think it is clear that they are powers annexed to that office, rather than powers given to any particular person or persons. Had the deceased renounced that office or been removed from it, the power conferred by paragraph 6 would, I think, have passed from her. What effect that might have had for the purposes of the *Dominion Succession Duty Act,* it is unnecessary for me to consider, because the fact is that at all material times the deceased was the sole trustee. Of the various powers contained in paragraph 6, the only one which need be considered is that exercisable in favour of the deceased. That power during her lifetime was a power vested in herself, she being the trustee, to take or to use for her own benefit the portion of the capital of the residue of the testator's estate from which she was entitled to the income. If there was any restriction upon her power under this provision to dispose to herself of the whole of such capital, it must, I think, be found in the words, "if in [my trustee's] own control and discretion [she] deems advisable," and in the words, "as in [her] uncontrolled discretion my trustee deems advisable." Now, nowhere in this does there appear to me to be any limitation upon or definition of the sort of reasons which the trustee should have upon which to deem it advisable, nor is there any requirement that she have a reason. There is nothing to require that her judgment be anything but arbitrary, nor that the interests or wishes of anyone else be considered. Nor is there any other person to whom she would have been responsible in exercising the power. Lacking any limitation on the reason or object for which or the circumstances in which, during her lifetime, she might pay to herself or use for her own benefit and having regard to paragraph 8, I do not think the power, while she held it, was subject to any restriction whatever. In this context, the word "discretion" itself is drained of its

usual meaning. Lacking anyone to whom the deceased was answerable in the exercise of the power, the word "trustee" as well is shorn of its ordinary implications. In this situation, there is, in my opinion, no real or practical sense in which the term "fiduciary capacity" could be applied to any exercise she might have made of the power, and I have accordingly come to the conclusion that the power held by the deceased was a general power within the meaning of the statutory definition and that it was not a power exercisable in a fiduciary capacity within the meaning of the exception to the definition. It follows that, on the main point, the appeal fails.

A further point, however, arises in connection with the gift by the testator to his sister in view of the fact that the Minister has included in the assessment the whole value of the assets of the testator's estate, which remained in the hands of the deceased at the time of her death. It was stated on the hearing of the appeal that the testator's sister had survived him and had survived the deceased as well, but there was neither any statement nor evidence as to what amount would be required to pay the annuity. Nor was argument directed to the question, which is open on the pleadings, whether the amount necessary to pay the annuity provided for her by the testator was included in the residue which the deceased had power to take or use for her own benefit. On drawing this point to the attention of counsel since the hearing, I have been advised that the Minister concedes that the amount necessary to pay the annuity should not be included in the assessment and that the parties are in agreement on a valuation of the annuity at $15,000. The appeal will, therefore, be allowed and the assessment referred back to the Minister to be revised accordingly.

In the circumstances, there will be no costs to either party.

Judgment accordingly.

1959
Jun. 1 & 2
Jun. 9

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

MARJORIE MANZ LeVAE, Executrix of the Will of Gray Buxton LeVae, LILIAN ANNIE ILOTT, Executrix of the Will of George William Ilott and MARION ADELAIDE CROOKS, Executrix of the Will of George Goodwin Crooks .....PLAINTIFFS;

AND

THE STEAMSHIP *GIOVANNI AMENDOLA* ..... DEFENDANT.

Shipping—Damages for loss of lives caused by defendant's negligence—Canada Shipping Act, R.S.C. 1952, c. 29, s. 726 and 727(2)—Death "caused" by defendant's "neglect or default"—"Any sum paid or payable on the death of the deceased" in s. 727(2) of the Canada Shipping Act relates and is restricted to insurance—Amount paid by Workmen's Compensation Board for deaths to be a discharge pro tanto and deducted from the award.

Plaintiffs are the widows of three of the crew of a tug who lost their lives after the tug foundered following a collision with the defendant vessel. Negligence on the part of the defendant was admitted. The action is to recover damages for the loss of the men.

Held: That it is sufficient for recovery of damages under the *Canada Shipping Act* R.S.C. 1952, c. 29, s. 726 and 727 that death shall have been caused by the defendant's neglect or default; it is not necessary that the death must have been caused directly by physical impact.

2. That "any sum paid or payable on the death of the deceased" in s. 727(2) of the *Canada Shipping Act* relates and is restricted to insurance and does not apply to Workmen's Compensation which cannot be identified with insurance.

3. That plaintiffs will hold any part of the amount awarded which is equal to the amount paid them by the Workmen's Compensation Board in trust for the Board and that amount should be paid into Court and will be a discharge *pro tanto* and be deducted from the amount of the award.

ACTION to recover damages for loss of three men caused by defendant's negligence.

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

R. M. Hayman for plaintiffs.

J. R. Cunningham for defendant.

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LEVAE *et al.* v. THE STEAMSHIP *Giovanni Amendola*

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

SIDNEY SMITH D.J.A. now (June 9, 1959) delivered the following judgment:

This is an action brought by the widows (also executrices) of three men who formed the crew of a tug and who perished through the foundering of the tug after collision with the defendant vessel. In an earlier action by the owner of the tug I held the defendant vessel to blame and this judgment was upheld by the Supreme Court of Canada. Negligence has been admitted by the owner of the vessel and it remains to fix the damages.

Two points of law have been raised for the owners; the first is that there is no cause of action because it is said the defendant ship did not directly kill the three men; after the collision the two vessels separated, the tug sank and the men were either drowned or perished from exposure after abandoning the tug in a winter gale.

I can see no substance in this argument. This action is founded on Sections 726 and 727 (1952, Cap. 29, R.S.C.) of the *Canada Shipping Act* (which closely follow *Lord Campbell's Act*) and all that is needed for an action to lie by the dependents of a deceased person is that his death shall have been "caused" by the defendant. The argument that this must have been caused *directly,* which would seem to imply physical impact, is quite inconsistent with Sec. 726. Under this section it is not even necessary for the death to be caused by the defendant's "act"; this may even be caused by "neglect or default". The Statement of Claim, paragraph 7, alleges that the three men perished "as a result of the said negligence" that is the defendant's, and this is not denied by the defence. That means that it is admitted that the defendant caused these deaths by negligence; and that seems to me to leave nothing to argue about.

The next point raised by the defendant is that the plaintiffs all received compensation for their husbands' deaths under the *Workmen's Compensation Act,* and it is argued that the payments should be taken off the damages that

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LEVAE *et al.* v. THE STEAMSHIP *Giovanni Amendola*

Sidney Smith D.J.A.

the plaintiffs are otherwise entitled to. The plaintiffs in answer rely partly on Sec. 727 (2) of the *Canada Shipping Act* as being against deduction. This reads:

> 727. (2) In assessing the damages in any action there shall not be taken into account any sum paid or payable on the death of the deceased or any future premiums payable under any contract of assurance or insurance.

Similar sections are to be found in several jurisdictions, including England. I do not see how the section can be applied to Workmen's Compensation; this cannot be identified with insurance. The natural meaning of the section is not to be extended. It has been held for instance not to apply to pensions payable to the dependents of the employees killed, even contributory pensions. I have no doubt that the expression "any sum paid or payable on the death of the deceased" relates and is restricted to insurance, the intention being to refer to both lump sums payable on death and periodic payments like annuities.

However, I have still to consider deductions from damages apart from Sec. 727 (2). A number of cases have been cited on both sides of this question. Any conflict in these is more apparent than real. I think the matter is concluded by the decision in *The Queen v. Snell*[1], which dealt with the very issue that we have here. The case did not arise in Admiralty, but arose from a collision between two trucks. The executor of the deceased driver accepted Workmen's Compensation and then sued under the *Families' Compensation Act*. The same question arose as to how this affected the liability of the defendant. The reasoning does not hold that a dependent's rights are unaffected by her having received compensation from the Compensation Board. For the Board have a statutory right under Sec. 11 of the *Workmen's Compensation Act*, where they have paid a dependent, to be subrogated to the rights. That means that the wrongdoer cannot benefit from the payment. Since the subrogated Board must ordinarily sue in the name of the dependent, that means that judgment for the full damages suffered, including the amount paid by the Board, with or without a further award, must be entered for the plaintiff. But the plaintiff will hold

[1] [1947] S.C.R. 21.

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D.J.A.

this, up to the amount paid by the Board, in trust for the Board; see the judgment of Rand, J. in *The Queen v. Snell* (*supra*).

In that case the Board was a formal party and as a result the Court ordered the amount affected by the trust to be paid directly to the Board. In this case the Board is not a formal party; but I am prepared, if the defendant requests it, to order that that part of the eventual award affected by the trust may be paid into Court, and to direct that no payment out be made without notice to the Board. The payment in will be a discharge *pro tanto*.

The plaintiffs are entitled to their costs.

Judgment accordingly.

1959

May 27

BETWEEN:

NEW ENGLAND FISH COMPANY OF OREGON and LEO A. WOODS — PLAINTIFFS;

AND

BRITAMERICAN LIMITED, Owner of the Ship *BRITAMERICAN* and THE BRITISH AMERICAN OIL COMPANY LIMITED ..... — DEFENDANTS.

Shipping—Collision between two ships—Both ships equally to blame—Form of judgment—Disposition of costs—Appeal from Registrar's form of judgment dismissed.

In an action arising out of a collision between a fishing vessel, of which the plaintiff New England Fish Company is the owner and the plaintiff Leo A. Woods is the charterer, and an oil tanker, of which the defendants are the owner and charterer, the court held the two vessels equally to blame. The plaintiffs had before trial discontinued the action against the owner of the tanker leaving the charterer as the sole defendant. Defendant did not claim for any damage to the tanker, but did claim limited liability under the *Canada Shipping Act*. The fishing vessel being entirely under the control of its charterer, the owner was "innocent". Defendant conceded that the owner is not affected by the charterer's negligence but can recover all its loss, subject to the statutory limitation on defendant's liability. The matter now comes before this Court by way of motion brought by the plaintiffs to vary the minutes of judgment as settled by the Registrar, the issue being the liabilities between Woods, the charterer

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NEW ENGLAND FISH CO. OF OREGON *et al.* *v.* BRITAMERICAN LTD. *et al.*

of the fishing vessel and the defendant, the charterer of the tanker. The judgment as settled by the Registrar orders the defendant to pay Woods half of his damage and requires the defendant to pay the New England Fish Company all its damage, subject to the statutory limitation, and the defendant to recover from Woods half of what it pays the New England Fish Company. Woods objects to this part of the judgment. He contends that his liability to indemnify the defendant "only exists with respect to the excess paid by the defendant . . . to the plaintiff owner . . . over and above one-half of the defendant's libability to the said plaintiff (owner) . . . before the application of limitation of liability, up to the amount actually paid by reason of the limitation of liability".

Held: That the Registrar's form of judgment should be confirmed.

2. That the defendant is not entitled to be indemnified by Woods against the costs paid to the New England Fish Company.

3. That the New England Fish Company is entitled to one-half of the trial costs and all the general costs except so far as increased by joinder of Woods who is entitled to tax all other costs taxable by the plaintiffs and recover half of them against the defendant.

MOTION to vary minutes of judgment.

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

J. A. Cunningham for the motion.

J. I. Bird, contra.

SIDNEY SMITH, D.J.A. now (May 27, 1959) delivered the following judgment:

This is a motion by the plaintiffs to vary the minutes of my judgment as settled by the learned Registrar. The judgment was given in an action *in personam* that arose out of the collision between a fishing vessel and an oil tanker. The plaintiffs are the owner and the charterer of the fishing vessel, and the original defendants the owner and the charterer of the oil tanker. At the trial I held the two vessels equally to blame.

The plaintiffs early discontinued their action as against the owner of the tanker, so the charterer may be considered the only defendant. The tanker apparently suffered no material damage; at all events the defendant claimed for none, though it set up a counterclaim asserting that the plaintiff-charterer was to blame. It also claimed that the defendant's liability should be limited under Section 657

of the *Canada Shipping Act*. The plaintiff-charterer did not make any corresponding claim for limitation of his liability, if any.

The fishing vessel was entirely under the control of its charterer, so that the owner was "innocent". Defendant's counsel concedes that this means that the owner is not affected by the charterer's negligence but can recover all its loss, subject to the statutory limitation on the defendant's liability, which I have held has been established at $30,614.08. The dispute on the form of the judgment therefore is as to the liabilities between Woods, the charterer of the fishing vessel; and the defendant, the charterer of the tanker.

There has been considerable argument on the application of the Provincial *Contributory Negligence Act*. I think this can be disregarded. The provision in the Act as to costs is I think inconsistent with those in the *Admiralty Rules;* these Rules are authorized by Dominion statute, and so cannot be varied by Provincial legislation. The substantive provisions of the Provincial Act do not seem to me to differ in any way material to this case from the *Canada Shipping Act,* so it is unnecessary to decide whether they could otherwise govern the rights of parties in this Court.

Even before Section 648 of the *Canada Shipping Act* (following the *Maritime Conventions Act* 1911) made those jointly liable for a collision share liability for the total damage, according to their degrees of fault, the admiralty rule had held them equally liable to pay the whole. Lord Sumner pointed out in *The Cairnbahn*[1] that such had been the admiralty rule even before *Merryweather v. Nixan*[2], had established the common law rule against contribution by tort-feasors. Here the two ships were held equally to blame, so both Section 648 and the earlier law would produce the same result (apart from costs) as the *Contributory Negligence Act*.

[1] [1914] P. 25. [2] (1798) 8 T.R. 186.

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The paragraph in the formal judgment, as settled by the Registrar, on which the argument has centred, reads:

> AND HE PRONOUNCED in favour of the Counter-claim of the Defendant, The British American Oil Company Limited, against the Plaintiff Leo A. Woods and CONDEMNED the said Plaintiff in one-half of any amount, including costs, which the said Defendant may be required to pay to the Plaintiff, New England Fish Company of Oregon;

The judgment orders the defendant to pay Woods half of his damage, and the defendant does not object to this. Presumably it will be satisfied by set-off. The judgment also requires the defendant to pay the New England Coy. all of its damage though this will be restricted by the limitation of liability to $30,614.08, assuming that the damage found exceeds that figure. The paragraph quoted would enable the defendant to recover back from Woods half of what it pays the New England Coy., including half the costs. For Woods it is said that this goes too far, and he submits an alternative direction fixing quite a different measure for the indemnity payable by him.

The language of his suggested substitute direction I find obscure; however in his notice of motion Woods clarifies what he wants. He there says that his liability to indemnify the defendant

> only exists with respect to the excess paid by the Defendant . . . to the plaintiff (owner) . . . over and above one-half of the Defendant's liability to the said Plaintiff . . . (owner) before the application of limitation of liability, up to the amount actually paid by reason of the limitation of liability.

Right at the outset, I find it almost impossible to reconcile such a contention with Section 648 (1), as interpreted by the decision in *The Cairnbahn,* (*supra.*) That section says:

> (1) Where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

The above language, considered as Section 1 of the *Maritime Conventions Act* 1911, was held in *The Cairnbahn,* (*supra,*) to mean that if A and B by combined negligence have caused injury to C, then if A is compelled to pay C, the amount he must pay is "damage or loss" to A caused partly by C's fault. If A and B have been held equally at fault then A can recover from B half of what

he pays C. Here the defendant and Woods have been held to have injured the New England Coy. by their equal negligence and the effect of Section 648 is that the defendant can recover from Woods half the "damage or loss" the defendant suffers, which is half of what he pays the New England Coy. But Woods seeks to restrict the defendant's indemnity to half, not of what he pays the New England Coy., but a sum arrived at by applying a more elaborate formula. In explanation of this formula Woods asks me to consider several legal principles, which indeed have some relation to the issue but which, to my mind, do not lead to anything like justification of the suggested formula.

At the outset he emphasizes that when two opposed parties are held equally liable for a collision between their respective ships, the proper procedure is not to take the two resultant liabilities, reduce these by the limitations applicable to the respective ships, and then strike a balance; but rather to set off the two initial amounts of damage, which will leave a balance payable in favour of one only; and this balance alone is to be reduced by the limitation section. The decisions in *The Stoomvaart v. P. and O. Navigation Coy*,[1], *The Hector*[2] and *The London S.S. Owners v. The Grampian S.S. Coy.*[3] amply support this proposition. But what follows from this?

The principle laid down is one applying to cross-claims by two tort-feasors. I was at first inclined to think it was entirely excluded here by the fact that we are dealing with the claim of a third party, whose claim is not subject to set-off. But I see now that that is over-simplifying the problem, because our primary concern is with cross-claims between Woods and the defendant, even though one claim is defined by reference to the third party. There is still a set-off between Woods and the defendant. But how far does that fact advance matters?

Woods indeed makes the point that to apply the sections as the Registrar has done produces anomaly. He points out that if the crew of the fishing vessel had been employed by the owner, and the damage had been $50,000.00 (as is

[1] (1882) 7 A.C. 795. [2] (1883) 8 P.D. 218.
[3] (1890) 24 Q.B.D. 663.

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estimated), then the defendant would have been liable to pay $25,000.00 without getting anything back; whereas the judgment as now drawn would result in the defendant's paying $30,614.08 (as limited by Section 657) but with a right to recover back half of this from Woods, so that in the result he is some $10,000.00 better off.

I do not think this result proves much. It was pointed out by Lord Selborne in the *Stoomvaart* case, and I myself have respectfully pointed out (see e.g. *Robertson v. The Maple Prince*[1]) that the limitation section often works arbitrarily. Nevertheless we still have to apply it according to its language. Moreover Woods himself is hardly in a position to complain of this, since he himself benefits largely from the defendant's ability to invoke the limitation.

Without having argument on the point, at one stage I felt a doubt whether Woods could not prove against the fund of $30,614.08 *pari passu* with the New England Coy. Further thought has convinced me that that doubt was unfounded. The *Stoomvaart* case expressly decided that where one of two parties jointly at fault pays in a fund under the limitations section, the other party at fault can only prove against that fund to the extent that his damage exceeds that of the party who paid in. Here Woods can only get compensation by set-off against the defendant's claim upon him. The *Stoomvaart* case deprecates the use of the term "set-off"—these are really cross-claims—but I think the term is apt enough after the claims are made definite by decree and assessment.

The whole of the $30,614.08 therefore goes to the New England Coy., assuming its loss is found to equal or exceed that figure. According to *The Cairnbahn*[2] the result would be that the defendant is entitled to an order for repayment by Woods of half what he pays to the New England Coy. As I have said Woods contends that I should not follow this case, but that to find his liability I should take half of what the defendant would pay the New England Coy. apart from Section 657, then deduct from this figure half of what the defendant actually pays the New England Coy.,

[1] [1955] Ex. C.R. 225. [2] (1914) 30 T.L.R. 309.

the balance left representing all that Woods would owe the defendant—and even that subject to set-off of half of Woods' own damage.

I see nothing in the factors relied on by Woods that justify any such course, or that even give a plausible reason why I should follow it. To me the balance so arrived at has no significance. So far as I can see it is a purely arbitrary figure. Once the defendant's liability is limited, the figure that it would otherwise have paid the New England Coy. has no relevance, and deduction from that of the figure actually paid has no meaning.

There has been considerable discussion of the case of *The Morgengry and The Blackcock*[1] and the defendant distinguished the case on several grounds. I find it unnecessary to examine these, because that case was so different in its facts that I cannot see that it has any bearing.

Apart from costs then I confirm the Registrar's form of judgment.

The plaintiff Woods' second main objection to the Registrar's settlement is that this provided for the defendant's recovering from the plaintiff Woods all costs paid by it to the New England Coy. The plaintiff says this is contrary to the principles laid down in *The Cairnbahn* (*supra*). There in a judgment for an innocent ship against two negligent ships, Evans P., who tried the case, in ordering one negligent ship to pay the other one-half of what the latter had paid to the innocent ship, refused to include the costs paid because he said the ship seeking indemnity should not have defended a well-founded claim and he laid down a general rule that indemnity for costs in such cases should be refused. The Court of Appeal approved the order as to costs in that case, but refused to commit themselves as to whether a general rule should be laid down. At least it seems to me proper to follow the ruling made unless there are reasons for not doing so. However, there are material differences between *The Cairnbahn case* (*supra*) and this; we are not dealing with an action brought by an innocent plaintiff alone, but with one brought jointly by an innocent and by a negligent plaintiff.

[1] [1900] P. 1.

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That does not exclude all application of the principle mentioned. However I think the question whether Woods should indemnify the defendant against costs paid by the latter to the New England Coy. is tied up with the general apportionment of costs which I prefer to deal with first.

Though I have held that the costs provision in the *Contributory Negligence Act* does not govern here, I am in general prepared to follow its principle so far as it is practicable to do so. As against each other plaintiff Woods and the defendant are each entitled to recover against the other half of their taxable costs. But as to the plaintiff Woods' costs, there are some complexities. The two plaintiffs having sued through one solicitor are entitled to only one set of costs between them. The most authoritative English decision *Gort v. Rowney*[1] held that where one of two plaintiffs succeeds and the other fails, the successful plaintiff can tax all of his costs except so far as they have been increased by joinder of the co-plaintiff. In *Keen v. Towler*[2], Lord Darling sitting as a trial Judge criticized this ruling as irrational, refused to follow it, and held instead that *prima facie* the successful plaintiff should recover only half of his taxable costs. The Annual Practice gives some prominence to this view. However in *Duchman v. Oakland Dairy Co. Limited*[3], two Ontario Courts after considering both cases followed *Gort v. Rowney*. Here, even if I do so also, there can be no doubt that the general costs were much increased by Woods being joined as a plaintiff. The New England Coy. was interested in establishing the defendant's negligence, but not the plaintiff Woods' negligence, and much of the trial was devoted to the latter. I think on the whole I shall award the New England Coy. one-half of the trial costs and all the general costs except so far as increased by joinder of Woods. He will tax all other costs taxable by the plaintiffs and recover half of them against the defendant. I will follow *The Cairnbahn case* and hold that the defendant is not entitled to be indemnified by Woods against the costs paid to the New

[1] (1886) 17 Q.B.D. 625. [2] (1924) 41 T.L.R. 86.
[3] (1930) 65 O.L.R. 553; 66 O.L.R. 236.

England Coy. (such as discovery), since the general costs would have been incurred in any event, and the defendant will recover half of these costs against Woods.

The costs of this motion will be divided, two-thirds to the defendant and one-third to the plaintiffs.

Judgment accordingly.

BETWEEN:

HER MAJESTY THE QUEEN ..... PLAINTIFF;

AND

CITY GAS & ELECTRIC CORPORATION LIMITED ..... DEFENDANT.

1958
Dec. 9, 10, 15 16, 17 & 18

1959
July 3

Crown—Loss of hutments and equipment due to negligence of defendant—Art. 1054, Para. 1, Civil Code of Quebec—Damages—Physical deterioration and obsolescence to be considered in establishing damages.

In an action for damages arising out of an explosion followed by a fire caused by propane gas escaping from a tank truck owned by the defendant and operated by one of its employees becoming ignited which resulted in the burning and partial destruction of certain military hutments and their contents, the property of the plaintiff, the Court found the loss was due entirely to the negligence of the defendant.

Held: That defendant failed to discharge the onus on it of disproving negligence in virtue of Para. 1 of Art. 1054 of the *Civil Code* of the Province of Quebec and the fact that a contractual as well as a *quasi* delictual relationship existed between the parties added to the defendant's responsibilities.

2. That in estimating the damages besides taking into account the physical deterioration of the hutment some additional allowance should be made for functional depreciation or obsolescence.

ACTION by the Crown to recover damages through the loss of military hutments and stores due to the alleged negligence of defendant.

The action was tried before the Honourable Mr. Justice Kearney at Quebec.

Marcel Letourneau and *Paul Ollivier* for plaintiff.

Alexandre Labrecque, Q.C., Robert E. Morrow and *W. A. Grant* for defendant.

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

KEARNEY J. now (July 3, 1959) delivered the following judgment:

This is a claim in damages for the sum of $29,531.92 arising out of an explosion of relatively minor violence followed by a fire, which occurred at Valcartier Camp, Que., on July 18, 1953. Propane gas escaping from a tank truck owned by the defendant and operated by one of its employees became ignited, causing the burning and partial destruction of certain military hutments and their contents, the property of the plaintiff.

The defendant, in virtue of a contract with the Department of National Defence, dated June 1, 1953, undertook to furnish the propane gas required for the camp and to install and maintain gas tanks and the equipment necessary for the purpose.

Shortly before noon on the day of the accident, one Robert Rouet, chauffeur of the defendant, after connecting the gas delivery tube of the truck with a kitchen gas storage tank installed by the defendant close to hut No. 411, repaired with one Gaudiose Letarte, an army employee detailed to check camp gas delivery, to a passageway leading to the kitchen. A few minutes later they heard a hissing sound and saw clouds of gas rising in the enclave formed by the kitchen, which connected two elongated wings used as dining rooms and forming together an H-shaped hut. The truck was equipped with two tanks and Rouet ran through the front door into the enclave to stop gas likely escaping from the truck tanks, or the kitchen tank, or all three. In this valiant but futile effort he unfortunately lost his life. I need not elaborate on this regrettable fatality since this action is concerned only with property damage, and I will confine myself to saying that, though Rouet's remains were badly charred, death, according to expert evidence, was due neither to explosive shock nor burns but to asphyxiation. Gaudiose Letarte and others in the kitchen managed to escape safely in the opposite direction through the rear door.

The defendant admitted the ownership of the truck and that it was under the care and control of its employee at the time of the accident but disclaimed responsibility on the grounds that it was not guilty of any fault or negligence and that the accident was due to a hidden defect in a safety valve on the truck, which caused it to break. It was proved that the truck was new and had been purchased from reputable automobile manufacturers and, according to the defendant, it had no way of knowing of the hidden defect and had done everything it could to maintain the truck in perfect running order.

Apart from claiming that the burden of disproving negligence rested on the defendant, as owner or operator of the truck, the plaintiff alleged that the chauffeur of the truck failed to take elementary precautions to prevent the accident which was foreseeable, more particularly when he neglected to remain with his truck during filling operations and to see that the gas burners on the kitchen stove were extinguished. It was also said that shortly before the fire Rouet was aware that his truck was not in good running order.

As to where the burden of proof lies, there can be no doubt. In virtue of the first paragraph of art. 1054 of the *Civil Code* of the Province of Quebec, the defendant became and remained responsible for as long as it failed to exculpate itself in the manner described in the penultimate paragraph of the said article. The relevant paragraphs read as follows:

> 1054 C.C.—"He" (every person capable of discerning right from wrong) "is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care;
>
> * * *
>
> The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage."

In the case of *Quebec Railway, Light, Heat & Power Company v. Vandry*[1], as stated in the succint headnote, it was held that "Upon the true construction of art. 1054 of the *Civil Code of Quebec* a person capable of discerning

[1] [1920] A.C. 662.

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right from wrong is responsible, without proof of negligence, for damage caused by things which he has under his care, unless he establishes that he was unable to prevent the event which caused the damage." It was further held in *City of Montreal v. Watt and Scott, Ltd.*[1] that "unable to prevent the damage complained of means unable by reasonable means."

The defendant accepted the burden of proof and endeavored to establish that he was unable to prevent the event which caused the damage. Roger Potvin, a qualified engineer and a doctor and expert in physical chemistry, who examined the wreckage in July 1953, testified at the instance of the defendant that propane gas had escaped from a tank on the truck by reason of the sudden breaking of a bronze pressure relief valve. He attributed the cause of the breakage to a latent defect in material which, after laboratory examination, he termed material fatigue. He found also that the vibration which occurred when the truck was in motion accelerated the fracture. In his opinion, Rouet had no way of knowing of the hidden defect. I am disposed to accept the foregoing evidence as proof that the basic cause of the breakage was due to a latent defect, but in my opinion this falls far short of establishing that Rouet took all reasonable precautions to prevent the act which caused the damage complained of.

That gas was liable to escape from the equipment used is self-evident because the truck tanks and the one near the kitchen were equipped with safety valves. It was because of this possibility that Rouet was under strict instructions to make certain that no cigarettes or matches were lighted in the vicinity, while gas was being pumped into the storage tanks. The evidence shows that Rouet entered the kitchen to look at the meter and to warn against smoking. He saw or should have seen that the gas jets on the kitchen stove were lighted but he failed to have them extinguished; and Dr. Potvin, the defendant's own witness, gave as his opinion, which I find reasonable and probable, that the fire was caused by the escaping gas moving through the open door of the passageway and coming in contact with the lighted range in the kitchen.

[1] [1922] A.C. 555, 563.

I agree, as stated for the Crown, that, although it was an exceedingly hot day (94° in the shade), this did not justify Rouet's quitting his truck and seeking relief in the shade of the hallway; but I do not think it likely that, had he not done so, he could have prevented the accident. I regret to say that, in my opinion, the brave young man nevertheless failed to take even elementary precautions and was acting contrary to instructions when he left the hall door wide open and allowed the stove to remain lighted during the dangerous operation of refuelling.

There was some evidence to support a reproach made against the defendant for not having placed the hutment storage tank on the opposite side of the road, well removed from the kitchen, where during refuelling operations any escape of gas from any tank could have vanished in an open field instead of being confined in the enclave. One witness, to whom the chauffeur spoke shortly before the accident, testified that Rouet knew his truck was not in good order because he had stated that something had happened to it when he passed over a railway crossing while en route to Valcartier. I do not think it necessary to deal with these further questions of fact because of the negligence which I have already found to exist. The fact that a contractual as well as a *quasi* delictual relationship existed between the parties in this case only adds to the defendant's responsibilities and is another aspect of the case which does not, in my view, require further comment.

To determine the amount of damages for which the defendant is responsible is by no means a simple task because of certain unusual circumstances. The plaintiff's claim for damages in round figures amounts to $29,500 and is made up chiefly of three items: damage to hut, $13,735; loss of ordnance stores, $10,690; engineering stores, $3,400.

The plaintiff claimed that the replacement cost of hut 411 at the time of the fire should govern and it relied on the evidence of F. A. Walker, architect, to justify the sum of $13,735 under this heading. According to the architect, its replacement cost in 1953 was $39,544 from which should be deducted $25,704 for depreciation at five per cent per annum for thirteen years, namely, from its construction in 1940 until the time of the fire in 1953. The same witness

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testified that, on the basis of its cost to the owner, its depreciated value in 1953 was $9,485. F. X. Lamontagne, a contractor called by the plaintiff, was of the opinion that the replacement cost of the hut was $30,181 on which a total depreciation of only $3,589 should be allowed. This is a little less than one per cent per annum for thirteen years.

Hutment 411 was a wood frame building with exterior siding and roof of asphalt treated felt, and lined with "Donnacona" board. It rested on wooden posts and stringers and depended on space heaters for warmth. The defendant did not call any witnesses on the subject of valuation but urged that a ten per cent depreciation be applied as provided in regulation 1101, class 6, schedule B of the federal *Income Tax Regulations*. See *The Income Tax Act*, 11-12 George VI (1948), c. 52, s. 11(1)(*a*). In addition to the foregoing evidence, I had the advantage of a personal visit to the scene of the accident. There I inspected hut 408 which was built to the same dimensions and at the same time as hut 411 and replaced it after the fire.

Leaving aside the basis on which it should be applied, in my opinion a depreciation allowance on hut 411 of one per cent per annum, which means that its utility would extend to one hundred years, is too little, and ten per cent, which would write it off in ten years, is too much. The five per cent suggested by F. A. Walker, while otherwise acceptable, seems to take into account only physical deterioration; and before it could be used as a criterion, I think some additional allowance should be made, particularly in this case, for functional depreciation or obsolescence as it is called.

The evidence shows that the hutments built in 1940 were temporary structures and were being replaced by permanent structures. It is true that at the time of the fire hut 411 had not been declared surplus and was being used as a summer mess-hall for some 400 cadets, but it was proved that over twenty similar huts had already been declared surplus and were sold to the highest bidder at prices varying from $670 to $2,300, and counsel for the defendant was prepared to accept $2,300 as the fair market

value of hut 411. For the plaintiff it was said that resale or market value does not apply in a case of this kind wherein the land cannot be sold with the building and possession of both given to a purchaser. There seems to be no Canadian case reported closely resembling the present one, and the nearest approach thereto is a judgment of Marriott, Master of the High Court of Justice of Ontario, in *Canadian National Railway v. Canada Steamship Lines*[1]. The building destroyed by fire in the above-mentioned case was a freight shed, and with respect to the method of determining the loss, it was stated that—

> Dealing first with the method of determining the loss suffered by the plaintiff as a result of the destruction by fire of the property in question, as a general rule the market price is considered to be the best evidence of value in fixing damages in tort as well as in fixing the value of property expropriated. But where, as here, the property is unusual in character, in that there is practically no market for it, such a yardstick is not available and the fairest way of arriving at its value is to calculate the replacement costs and deduct therefrom the depreciation suffered by the buildings since their erection. . . .

I agree that the circumstances of the above-mentioned case were unusual and that the general rule of applying the market price as the sole criterion of value was inappropriate; but here the circumstances are even more extraordinary and call for special consideration. It was the intention of the Canadian National Railways to rebuild the destroyed freight shed, which it did at a cost of $60,000. This building which had a superstructure of wood and cement floor, resting on concrete pillars, was very serviceable and of a permanent nature. Such circumstances do not exist in the present instance, and the *Canadian National Railway* case is of assistance only to a limited extent.

Taking all the foregoing factors into consideration, I am of the opinion that $3,500, which at first sight may appear low, would be appropriate compensation for the damages suffered by the plaintiff through the loss of hut 411. The amount is something in excess of what the hut would have realized if sold to best advantage; and, conceding that its replacement cost in 1953 was $39,000, a deduction therefrom of seven per cent per annum for physical and functional depreciation would reduce its value, as of that year;

[1] [1949] O.W.N. 583, 585.

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to approximately $3,500. One can also look at the matter from the point of view of the capital expenditure made by the plaintiff on the hut. According to the evidence of Mr. Walker, the plaintiff's out-of-pocket cost was $27,000 and, if seven per cent were substituted for the five per cent advocated by him, the depreciated value of the property would be $24,570, and the difference of $2,430 is more than compensated by the sum of $3,500 which I am disposed to allow.

The loss from ordnance stores is made up of three items $4,847.55 and $276.25 (Ex. P-19) covering mainly loss of furniture and repairs to furniture damaged, respectively; also $5,557.05 (Ex. P-20) for kitchen utensils consisting chiefly of equipment, cutlery and dishware, less salvage amounting to $27.95, making a total combined claim for ordnance stores of $10,652.90. Exhibit P-19 was signed on July 23, 1953, by Lieutenant R. M. Dion who was then quarter-master. Minor amendments to it were made later by Major Lahaye, Lieutenant Dion's Commanding Officer, who also signed the exhibit and certified its accuracy as amended. The amounts claimed for loss of furniture were based on catalogue figures compiled by the Army Ordnance Branch. The catalogue price made no allowance for depreciation. Major Lahaye alone vouched for the accuracy of exhibit P-20, to which his signature was affixed. He testified that he recognized the initials G.B. on the exhibit as those of Sergeant Gaston Bélanger, a subordinate who prepared the details of the exhibit but who was not heard as a witness. Understandably, neither Major Lahaye nor Lieutenant Dion was able to give evidence of the dates of purchase of the articles in question, as no records were available for the purpose. The above witnesses acknowledged that exhibits P-19 and P-20 made no allowance for depreciation, and Major Lahaye admitted that many of the articles claimed in P-20 were fragile and required frequent replacement. Class 12 of schedule B of the *Income Tax Regulations* (*supra*) deals with chinaware, cooking utensils and the like, of a value under $50, and allows one hundred per cent depreciation per annum. As will be seen later, Captain Berry, in speaking of loss of engineering stores, allowed a depreciation of ten per cent per annum,

but I think that the type of articles with which we are now concerned would depreciate much more rapidly. Without firm proof of the date of acquisition of the articles as a starting point from which depreciation would commence, it is difficult to make even an approximate appraisal of their worth. Furthermore, for what it might be worth, there is no evidence of the resale value of the articles in question. On the proof before me I am not disposed to allow more than fifty per cent of the amount claimed and I would accordingly reduce this amount to $5,326.45. The same result would be obtained on the assumption, which I think is reasonable under the circumstances, that the annual average depreciation of the articles was twenty per cent per annum and that they had been in use for two and a half years.

With regard to the claim for lost equipment which came from engineering stores (Ex. P-23), the cost value of it was $4,717 from which the plaintiff deducted depreciation of ten per cent per annum for the years 1951 and 1952, reducing it to $3,884.30 which, after subtraction of the value of materials salvaged amounting to $476.20, leaves a net claim of $3,408.10. This item was supported by the testimony of Captain Berry who stated that, although army accounting practice ordinarily made no allowance for depreciation, in this instance an annual depreciation of ten per cent was conceded. Taking into account the nature of the equipment, I think the above depreciation is sufficient. In his examination in chief he affirmed that the equipment in question was purchased in 1951, but on cross-examination he admitted that some of it could have been purchased in 1950. The purchase orders which would have established the dates of purchase had been destroyed or lost, and again the importance of a datum point arises. Thus, for instance, if the articles were purchased in January 1951, it would mean that a depreciation allowance should be made for two and a half years. What part of the equipment, if any, was purchased in 1950, it is impossible to say. As counsel for the plaintiff observed, it was difficult to produce full and satisfactory proof of the losses incurred owing partly to loss by fire of some documents, destruction of others, in accordance with army regulations,

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every three or five years, and unavailability as witnesses in 1958 of personnel involved in the events in 1951, with which we are concerned.

I think it would be a fair inference to draw from the evidence that practically all the lost equipment from engineering stores, amounting to $3,408.10, was purchased in January 1951 and, allowing for a depreciation of $1,180 representing ten per cent per annum for two and a half years calculated on the cost value of $4,717, and $476.20 for salvaged materials, I would reduce the amount claimed to $3,061.

Of the items concerning which Captain Berry testified, two remain to be dealt with: $400 covering labor and materials for repairs to building 413 and two garbage huts; $389.45 for labor and materials required to repair power lines similarly damaged. Although Captain Berry's evidence could be stronger, I am satisfied that these losses were suffered and I would allow them in full.

A last item requiring consideration is the sum of $874.55 representing R.C.A.S.C. food supplies which were lost. Staff Sergeant F. M. Gauthier testified that there had been delivered to hut 411 rations for at least 400 men, but he was not sure whether they were calculated to last for two or three days. He produced a list of food supplies totalling $573.19. See exhibit P-33. This exhibit was signed in 1953 by Major Chisholm and Captain McIntyre, who were then first and second in command of the R.C.A.S.C. Supply Depot but were not available as witnesses at the hearing. However, Staff Sergeant Gauthier was able to identify their signatures and spoke with first-hand knowledge of the contents of exhibit P-33, and I am satisfied that the plaintiff is entitled to recover the above-mentioned sum of $573.19.

The foregoing amounts of $3,500, $5,326.45, $3,061, $400, $389.45 and $573.10 make a total of $13,250, and this sum I would allow together with taxable costs.

Judgment accordingly.

BETWEEN:

1959

Mar. 25

Jun. 23

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

HADDON HALL REALTY INC. .....RESPONDENT.

Revenue—Income Tax—Income Tax Act R.S.C. 1952, c. 148, s. 12(1)(a)(b)—Expenditure made on account of income or capital—"An outlay or expense . . . for the purpose of gaining or producing income from property or a business of the taxpayer"—Taxpayer in business of renting apartments—Repairs to and replacements of refrigerators, stoves and blinds for an apartment house are expenditures on account of income.

Respondent, a real estate holding company, operates a high class apartment building in Montreal, Quebec, which it purchased in 1948, the property consisting of ten connected buildings each one containing apartments making a total of 210 apartments commanding rentals varying from $115 to $350 per month. The leases of these apartments cover *inter alia* the use of frigidaires, stoves and venetian blinds supplied by the owner in each apartment. Respondent deducted from its income for the taxation year 1955 the money paid for replacements of and repairs to refrigerators, stoves and blinds which deduction was disallowed by the Minister of National Revenue. An appeal to the Income Tax Appeal Board by respondent was allowed and from that decision the appellant now appeals to this Court.

Held: That the amounts expended were properly deducted by respondent in its income tax return since the apartment building was acquired as a unit composed of land, buildings and equipment which comprised *inter alia* refrigerators, stoves and venetian blinds, these items being inseparable portions of a unit, namely, the apartment building; they were materially and functionally component parts of a whole undertaking and though integral parts they were subsidiary parts, a number of many subsidiary parts of a single profit-making undertaking and the replacement of such parts as refrigerators, stoves and blinds falls within the category of repairs to the building as a whole and the cost was maintenance expenditures.

2. That the maintenance of the apartment building and equipment in a good state of repairs is vital to respondent's business and the expenditures were made by it for the purpose of gaining or producing income from its business.

APPEAL from a decision of the Income Tax Appeal Board.

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

Paul Ollivier and *Maurice Regnier* for appellant.
Philip F. Vineberg for respondent.

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

FOURNIER J. now (June 23, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1] dated February 13, 1958, allowing the respondent's appeal from an assessment made and confirmed by the appellant in respect of the income tax assessment for the respondent's taxation year 1955.

In its income tax return for 1955 the respondent claimed as a deduction from income an amount of $11,675.95 as an expenditure to earn income from its business. The amount is made up of the following items of expenses:

Refrigerators	$ 8,817.05
Blinds	1,888.30
Stoves	920.60
Total	$11,675.95

In his re-assessment the Minister disallowed the amount as a deduction and re-assessed accordingly. The respondent objected but the re-assessment was confirmed by the appellant. The respondent appealed to the Income Tax Appeal Board which allowed the appeal.

The appellant submits that the above expenditure was made for the replacement of capital within the meaning of section 12(1)(*b*) of the *Income Tax Act* and does not constitute an expense made or incurred by the respondent for the purpose of gaining or producing income from a business or property within the meaning of section 12(1)(*a*) of the Act. On the other hand, the respondent contends that the appellant's re-assessment is erroneous in fact and in law on the ground that it disallows as a deduction expenses laid out to earn income from a property or business.

The only question to be determined is whether the amount of $11,675.95 claimed by the respondent as a deduction in computing its income and disallowed by the appellant comes within the ambit of sections 12(1)(*a*) and 12(1)(*b*). These sections read as follows:

12 (1) In computing income, no deduction shall be made in respect of

[1] 18 Tax A.B.C. 421.

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

I shall summarize the facts established before the Court and which are relevant to the issue. The respondent is a real-estate holding company which operates a high-class apartment building on Sherbrooke Street West, in the city of Montreal. It purchased the Haddon Hall Apartments in 1948. The property consists of ten buildings connected together, each one containing apartments. Altogether, there are 210 apartment units fitted out with first-class equipment. According to size, the rentals vary from $115 to $350 per month. The leases of the apartments cover, amongst other things and services, the use of frigidaires, stoves and venetian blinds supplied by the owner in each apartment. The city assessment of Haddon Hall Apartments is $2,356,000. They are insured for $2,500,000. The building had been erected a number of years before its acquisition by the respondent and had been occupied continuously by tenants. The building and its equipment, as all similar property, needed maintenance, repairs and replacements to be kept in condition for the purposes it was used, otherwise it would have been very difficult or impossible to attract tenants willing to pay rentals commensurate to the investment, the location of the building, the high class of the apartments and the prices of rents. So gradually the respondent attended to the necessary maintenance, repairs and replacements.

The respondent's income tax returns for the years 1950 to 1954 show the amounts disbursed in each of these years for refrigerators, stoves and venetian blinds, viz.:

	Refrigerators	*Stoves*	*Venetian blinds*
1950	$ 1,955.67	$3,649.59	$1,516.71
1951	6,885.67	6,158.64	3,370.29
1952	1,561.71	787.40	1,212.79
1953	1,135.95	1,735.69	1,398.28
1954	11,208.75	231.00	1,727.86

These expenses were made to keep the apartments in a good state of repairs, to provide necessary replacements and to give the services to which the tenants were entitled

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according to the terms of their leases. In the present dispute, the amounts claimed as deductions, totalling $11,675.15, were for expenditures incurred during the year 1955 for the same purposes as above mentioned.

The evidence is to the effect that the respondent is the owner of a very large apartment building and that its business is the renting of apartments with all necessary equipment, comprising refrigerators, stoves and venetian blinds which it supplies.

The amounts received from the tenants, less the cost of the operations of the business and the expenses for the upkeep of the property and its equipment, was the respondent's income. An important part of the respondent's business is to find tenants for its apartments, keep them satisfied of their homes and obtain a fair return on the leases. It believes that modern services and equipment in good order in each apartment are not only essential but tantamount to the success of its business operations. It is a high-class apartment building, situated in a fashionable district of Montreal and occupied by tenants of means. The prices would indicate that the tenants, in return of the rentals paid, expect services and first-class equipment during their period of occupancy. That is why the respondent repairs or replaces defective equipment in the apartments when needed. The expenses are gradual and recurrent. This is shown by the figures of expenses made by the respondent, every year since 1950, to purchase refrigerators, stoves and blinds. Notwithstanding the fact that the respondent has followed this policy since it became the owner of the apartments, it did not appeal from the assessments disallowing its claims for deduction, because prior to 1955 it did not earn income, and no appeal lies from nil assessments. The policy adhered to by the respondent has resulted in business for it from which income was gained or produced, as is apparent in its income tax returns since operating the business.

These established facts bring me to the consideration of the rules laid down in section 12(1)(*a*). The general principle expressed in section 12(1) is that no deduction is made in respect of an outlay or expense in computing a taxpayer's income. But section 12(1)(*a*) makes an

exception to the general rule and deals with the computation of income from property or the business of a taxpayer. It allows a deduction in computing income when "an outlay or expense is made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer". Section 4 of the Act defines income from a business or property as "the profit therefrom". The principles for the computation of income or profits or gains are not indicated in the Act but are stated in many judicial decisions.

In the case of *Gresham Life Assurance Society v. Styles*[1], Lord Halsbury L.C. said:

> Profits and gains must be ascertained on ordinary principles of commercial trading,

This rule was approved in *Ushers' Wiltshire Brewery, Limited v. Bruce*[2] by Earl Loreburn when he stated:

> profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it,

The President of this Court dealt at length with what he thought should be the right approach to the question whether a disbursement or expense was deductible for income tax purpose under section 6(*a*) of the *Income War Tax Act*, R.S.C. 1927, Chapter 97, in *Imperial Oil Limited v. Minister of National Revenue*[3]; he held

> That if a particular disbursement or expense is not within the express terms of the excluding provisions of section 6(*a*), its deduction ought to be allowed if such deduction would otherwise be in accordance with the ordinary principles of commercial trading or well accepted principles of business and accounting practice.

In another case, but this one dealing with section 12(1)(*a*) of the *Income Tax Act: The Royal Trust Company v. Minister of National Revenue*[4], he said

> that in a case under The Income Tax Act the first matter to be determined in deciding whether an outlay or expense is outside the prohibition of section 12(1)(*a*) of the Act is whether it was made or incurred by the taxpayer in accordance with the ordinary principles of commercial trading or well accepted principles of business practice. If it was not, that is the end of the matter. But if it was, then the outlay or expense is properly deductible unless it falls outside the expressed exception of section 12(1)(*a*) and, therefore, within its prohibition.

[1] [1892] A.C. 309 at 316.
[2] [1915] A.C. 433 at 434.
[3] [1947] Ex.C.R. 527.
[4] [1957] C.T.C. 32.

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The respondent submits that the above test applies to the facts of this case and argues that the expense it claims as a deduction falls within the category of expenditures for maintenance and repairs of the building which it operates as a business, to wit, the renting of apartments.

Before dealing with this point, I shall consider the appellant's contention that the outlay was of the nature of a replacement of capital and comes within the meaning of section 12(1)(*b*) of the Act. The section provides that in computing income no deduction should be made in respect of a replacement of capital and is applicable to all taxpayers. Though it is a general provision, it contains the exception that it will not apply when a deduction is "expressly permitted by this Part of the Act", namely, Part I, Division B, dealing with "Computation of Income". Section 12(1)(*a*), which is a provision of this Part of the Act, provides that an outlay or expense made or incurred by the taxpayer for the purpose of gaining or producing income from a business of the taxpayer is deductible. For convenience, I repeat its wording:

> 12(1)(*a*) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

This section follows immediately the heading "Deductions not allowed in computing income". It lays down the sweeping provision "No deduction shall be made in respect of an outlay or expense". This indicates that it applies to all the subsections and sub-paragraphs of the section and covers (1)(*a*) and (1)(*b*). There are not many general rules of law that do not call for exceptions. Sub-paragraphs (*a*) and (*b*) contain exceptions. In (*a*) the exception applies not only to outlays and expenses made but also to those incurred; and it is stated when and why a taxpayer is entitled to benefit of the exemption. The amount is deductible when it is made or incurred for the purpose of gaining or producing income from his property or his business. As to (*b*), deductibility will be allowed when it is "expressly permitted by this Part". It seems to me that these words open the door to the exemption of

(1)(*a*). If I am right in so believing, then outlays that are of the nature of income producing expenditures in the operation of a business and which are not replacement of capital or disbursement on account of capital are deductible.

The parties seem to agree on certain facts. The Haddon Hall Apartments were purchased by the respondent as a business project. It acquired the whole undertaking, comprising a structure, a building and its equipment. The respondent did not deny that the expenses incurred and claimed as deductions were expenses incurred to earn income but contended that they were capital expense or replacement of capital.

What really took place is that after purchasing the apartment building, basis of its business operations, the respondent, year in and year out, had to replace certain parts of the equipment of the building and the expenditures to do so were made every year. In this dispute, the replacements consisted of refrigerators, stoves and blinds. When the tenants complained that the equipment was out of order, defective and did not furnish the services to which they were entitled in accordance with the provisions of their lease, the respondent had the equipment repaired or replaced.

Certain tests were suggested to the Court to determine whether the expenses for these replacements were capital or income outlays and references were made to judicial decisions on the subject.

In the case of *Lurcott v. Wakely & Wheeler*[1], Buckley L.J., giving his opinion on repairs, said:

> Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. . . . Repair is restoration by renewal or replacement of subsidiary parts of a whole.

In the same judgment, at page 919 Fletcher Moulton L.J. stated:

> For my own part, when the word "repair" is applied to a complex matter like a house, I have no doubt that the repair includes the replacement of parts. . . . Many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old. Therefore you have from time to time as things need repair to put new for old. . . .

[1] [1911] 1 K.B. 905 at 923.

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The test followed in that case was whether the act to be done is one which in substance is the renewal or replacement of defective parts or the renewal or replacement of substantially the whole. The Court was dealing with the restoration of a portion of a wall of 24 feet on the front of a building. The repairing of the wall was made by rebuilding it. They evidently considered that a repair can be a replacement and that the portion of the wall replaced was merely a subsidiary portion of the building.

In the case of *Samuel Jones & Co. (Devonvale) Ltd. v. Commissioners of Inland Revenue*[1], a chimney of a factory was replaced because of its dangerous condition. The cost to do so was claimed as a deduction, which was disallowed. On appeal the Court held "that the whole cost of replacing the chimney was an admissible deduction". The Lord President (Cooper) at page 518 said:

> It is doubtless an indispensable part of the factory, doubtless an integral part; but none the less a subsidiary part, and one of many subsidiary parts, of a single industrial profit-earning undertaking.
>
> So viewing the matter I am unable to see why the expense incurred in relation to this transaction should not be treated as an admissible revenue expenditure on repairs, . . .

Now, can the facts of the present case meet the above test? The Haddon Hall Apartment was acquired as a unit. The whole undertaking was composed of land, buildings and equipment. The equipment, amongst other items, comprised refrigerators, stoves and venetian blinds. It seems clear that these items of equipment were inseparable portions of a unit, to wit, an apartment building. They were materially and functionally component parts of a whole undertaking. Though they were integral parts, they were only subsidiary parts and just a number of many subsidiary parts of a single profit-making undertaking.

Keeping in mind the remarks of the judges in the *Lurcot* case (*supra*) that "repair of a house is restoration by renewal or replacement of parts of the whole and that many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old and that from time to time, as things need repair, to

[1] [1951] 32 T.C. 513.

put new for old becomes necessary", I have come to the conclusion that the replacement of subsidiary parts of equipment of the Haddon Hall Apartments such as refrigerators, stoves and blinds falls within the category of repairs to the building as a whole and that the cost was maintenance expenditures.

I cannot agree with the appellant's contention that pieces of equipment such as refrigerators, stoves and blinds were not parts of the apartment building but were independent and individual units, e.g. capital assets, and that their replacement was a replacement of capital. As stated above, they were inseparable, but subsidiary parts of the building, being materially and functionally portions of a whole undertaking of renting apartments fully equipped to service tenants. The respondent does not rent refrigerators, stoves or blinds—he leases apartments. If the reasoning of counsel were right, it could apply to each and every new item used in the repair of any part of the building or its equipment, whatever small it may be. One can foresee where this would lead us. This, I am sure, is not the meaning of the words of section 12(1)(*b*) that no deduction is made for replacement of capital.

To maintain a building in good condition, replacements, renewals and repairs of parts are needed, and I consider that the amounts thus expended are "maintenance expenditures". The maintenance of the respondent's apartment building and equipment in a good state of repairs is vital to its business. This is according to well accepted principles of business. Without hesitation, I say that the respondent's purpose was to increase its business by maintaining in a good state of repairs its high-class apartment building and to meet its obligations under its leases. I would further add that by doing so it was at times in a position to increase the price of its rentals. It is clear that the expenditures were made by the respondent for the purpose of gaining or producing income from its business. This was the respondent's policy. In my opinion the amounts thus expended were properly deducted in its

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income tax return for the year in question and the Department was in error in disallowing the deduction and adding the amount to the taxable income reported by the respondent.

For the above reasons I find that the respondent, in computing its income for 1955, was entitled to deduct the sum of $11,675.95 and that the Income Tax Appeal Board was correct in deciding that the expenditure should be considered to fall within the exception contained in section 12(1)(*a*) and be held not to come within the provision of section 12(1)(*b*).

Appeal dismissed with costs to respondent following taxation.

Judgment accordingly.

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June 4

July 7

BETWEEN:

THE ASSOCIATION OF PROFESSIONAL ENGINEERS OF THE PROVINCE OF ONTARIO .... APPELLANT;

AND

THE REGISTRAR OF TRADE MARKS ..... RESPONDENT.

Trade Mark—The Trade Marks Act, 1-2 Eliz. II, c. 49, s. 37(2)(d)—Words "Finishing Engineer" not registrable—Words clearly descriptive of wares with which they are used—Appeal from Registrar of Trade Marks allowed.

Held: That the words "Finishing Engineer" used as the title of a periodical by an applicant for registration of the same, are clearly descriptive of the character and quality of the applicant's wares in association with which they are used or proposed to be used and therefore not registrable under the provisions of the *Trade Marks Act*, 1-2 Eliz. II, 1952-53 Statutes of Canada, c. 49, s. 37(2)(*d*).

APPEAL from a decision of the Registrar of Trade Marks.

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

D. Sim for appellant.

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No one for respondent.

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

FOURNIER J. now (July 7, 1959) delivered the following judgment:

This is an appeal from a decision of the Registrar of Trade Marks rejecting an opposition filed on behalf of The Association of Professional Engineers of the Province of Ontario to the registration of a trade mark consisting of the words "Finishing Engineer" to be used as the title of a periodical publication. The application was filed on September 23, 1955 by Metalwash Machinery Company, having its head office and principal place of business in Elizabeth, New Jersey, United States of America. The opposition was dated May 17, 1957. The Registrar, on September 6, 1958, delivered his decision rejecting the opposition and approving the registration of the trade mark.

Notice of this appeal was filed on October 21, 1958. After it having been served, the President of this Court made an order requiring Metalwash Machinery Company, the applicant, and/or the Registrar of Trade Marks to file and serve a reply to the notice of appeal within 28 days from the date of service of the order on each of them. The file shows that on November 21, 1958 the order was served on Fetherstonhaugh & Co., who, for service purpose, are the Canadian representatives of the applicant company, and on the Registrar of Trade Marks. No reply was filed and served by either of the parties. On May 28, 1959 the President made an order setting down this matter for hearing on June 4, 1959. So this is an *ex parte* proceeding. The opponent did not adduce any new evidence but relied on the facts that were on file before the Registrar.

The opponent bases his appeal on the ground

a) that the Registrar erred in holding that the trade mark was not clearly descriptive or deceptively misdescriptive of the character or quality of the wares within the meaning of section 37(2)(*d*) of the *Trade Marks Act,* chapter 49, 1-2 Elizabeth II (1952-53 Statutes of Canada);

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b) that the adoption and use by the applicant of the trade mark would constitute a breach of the provisions of *The Professional Engineers Act,* Chapter 292, Revised Statutes of Ontario, 1950.

The section of *The Trade Marks Act* hereinabove referred to reads:

37. (1) Within one month from the advertisement of an application, any person may, upon payment of the prescribed fee, file a statement of opposition with the Registrar.

(2) Such opposition may be based on any of the following grounds:

(*d*) that the trade mark is not distinctive.

The applicant filed its application for registration of the trade mark "Finishing Engineer" which had been registered in the United States on December 25, 1954 in association with its wares—periodicals. The trade mark had been in use in the United States and in Canada. At the request of the Registrar, it filed a certified copy of the United States registration No. 600,170. As the registration was made on the Supplemental Register, the applicant filed a revised application. The above proceedings were made between the date of the original application of September 23, 1955 and June 29, 1956, when the revised application was filed in the Registrar's office. On July 30, 1956, the application having been processed and examined, the Registrar sent the following letter to the applicant and to its attorneys:

Your file No. 20161-355

The mark for which registration is sought is considered to be clearly descriptive or deceptively misdescriptive of the character or quality of the wares in association with which it is used.

In view of provisions of Section 12 (1)(*b*) of *The Trade Marks Act,* this mark does not appear to be registrable.

Any comments you may wish to make will receive consideration.

The section referred to in the letter reads as follows:

12. (1) Subject to section 13, a trade mark is registrable if it is not

(*b*) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French languages of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;

On October 5, 1956 the attorneys for the applicant sent several issues of its periodical to the Registrar and a letter which in substance states that the periodical deals with its

products with the result that it refers to many featured articles not restricted to a discussion of finishing but of general interest in the field of multistage conveyors and washing machines. It concludes with the submission that the words "Finishing Engineer" while suggestive are not clearly descriptive or deceptively misdescriptive.

After finding that the applicant had complied with the provisions of section 16 of the Act, the Registrar advertised the application in the *Trade Marks Journal*. Then the opponent filed its opposition to the registration of the trade mark on the grounds stated *supra*. In a counter-statement, the applicant denied that these grounds were applicable in the present instance. As evidence, both parties submitted affidavits and then filed written argument pursuant to Rule 48(3). No further hearing before the Registrar was requested. Later the Registrar delivered his decision.

The decision repeats the grounds of opposition to the registration of the trade mark as set out by the opponent and concludes with the words,

> I have considered the evidence on file and have arrived at the decision that the grounds of opposition as filed by the opponent are not well founded. Accordingly the opposition is rejected pursuant to section 37 of *The Trade Marks Act*.

The evidence to which the Registrar refers consists of affidavits, several issues of the periodical, a copy of the registration of the trade mark "Finishing Engineer" in the United States Patent Office No. 644,046, filed January 14, 1954, the application itself and the opponent's opposition.

The applicant filed with the Registrar the affidavits of Robert K. Nolte, Andrew B. K. Anderson, John William McCarthy and Donald E. Moody, and the opponent supported his opposition with the affidavit of T. M. Medland of the city of Toronto.

The president of Metalwash Machinery Company states that the magazine "Finishing Engineer" was never intended to suggest that any one connected with its publication was practising professional engineering in Ontario or anywhere else; it was merely intended to indicate that the publication contains material of interest to people in the finishing business, for example, finishing engineers. It contains, in

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many instances, information provided by professional engineers qualified in their local jurisdiction and obtained from other sources.

Mr. Andrew B. K. Anderson declares that he has been familiar for approximately two years with the publication "Finishing Engineer". He knows that the publication gives a general description of some of the most recent developments in the cleaning of metal parts and the phosphate coating of metal parts. The title of the magazine correctly indicates the nature of the publication. It never occurred to him that the title of the magazine indicated that those connected with it were entitled to practise professional engineering in Canada or elsewhere.

As to Mr. McCarthy he knows that the periodical "Finishing Engineer" is a publication purporting to inform professional engineers and their associates of developments beng made in the finishing business. The title indicates the nature of the contents of the publication but does not indicate that those connected with the magazine are practising or are entitled to practise as professional engineers in Ontario or elsewhere.

Mr. Moody, president and general manager of Canefco Limited, Toronto, states that his company has a licence and technical service agreement with Metalwash Machinery Corporation for the manufacture of its equipment in Canada. The name of the publication "Finishing Engineer" indicates to him that it is directed to the heads of departments of companies responsible for the finishing of fabricated or manufactured parts within their company. To his knowledge, no one in the employ of the publisher of the magazine practises professional engineering in Ontario. He does not believe that the title indicates that those connected with it are professional engineers.

On behalf of the opponent, Mr. T. M. Medland, executive director of The Association of Professional Engineers of the Province of Ontario, made a statutory declaration. He says that one of the duties of the Association is to protect the profession and the public from unauthorized practices in the field of engineering and from the unauthorized use of the words "Professional Engineer" or any abbreviation thereof which would be likely to deceive or mislead the

public. The Association has prosecuted several individuals and companies who have made use of the above words. The actions were taken under the provisions of Section 30 of *The Professional Engineers Act,* R.S.O. 1950, Chapter 292.

As to the issues of the periodical filed with the Registrar and which I have perused, they deal with the applicant's products and the products of other firms to which they have made contributions. They contain technical information, articles and engineering data of interest to those who are engaged in finishing materials and in the finishing business. It is stated in the affidavits that the title correctly indicates the nature of the publication and its contents and is directed to the heads of departments of companies responsible for the finishing of fabricated parts.

Copies of the periodical being part of the evidence on file, I shall cite how the applicant describes its magazine in its issue of January 1953 (reverse side of the front cover):

> The Finishing Engineer is a medium for the exchange of ideas and information of interest to men who are concerned with the cleaning, pickling and drying of metal parts.
>
> The Finishing Engineer has been received enthusiastically by executives and engineers to whom new methods and new materials for finishing are subjects of daily concern or discussion.
>
> We invite your comments and suggestions. If there is any specific subject you would like to see discussed in a future issue of Finishing Engineer we shall be delighted to hear from you.

For convenience, I repeat, the opponent contends that the trade mark is clearly descriptive or deceptively misdescriptive of the character or quality of the wares and that its adoption would constitute a breach of the *Professional Engineers Act of Ontario.* The applicant denies the last-stated ground to be in accordance with the provisions of the Act and alleges that his wares are distinctive.

The wares, in this instance, are a periodical publication bearing the title "Finishing Engineer". The question to be determined here is whether the words "Finishing Engineer" are capable of being distinctive of the applicant's ware.

The purpose of a trade mark is to distinguish the goods of a trader. It has been recognized and held by the courts that descriptive words are the property of all and cannot

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be appropriated by one person for his exclusive use; so descriptive words are not proper subjects for the granting of a trade mark monopoly. In order to obtain the benefit of the provisions of the *Trade Marks Act* its requirements have to be met. To be registrable the trade mark must be distinctive. It is not registrable under the Act if it is either clearly descriptive or deceptively misdescriptive of the character of the wares or services of the applicant. Distinctiveness is the essence of a trade mark. The trade mark is a symbol not to describe but to distinguish particular wares within a general category from other wares in the same category.

The title of the applicant's publication is composed of two common English words. In ordinary language and used as the title of a periodical, in my opinion they would mean that the publication deals with information, data and details of interest to engineers trained in the finishing arts, to wit, those who are charged to complete or finish works of things or undertakings, such as finishing engineers. It appears to me that those who are familiar with the publication and who have signed the affidavits on file agree that the title indicates or describes the contents and the nature of the publication. To complete the picture, the publication, as said above, was well received by executives and engineers to whom new methods and new materials for finishing are subjects of daily concern or discussion.

There is no doubt that the title "Finishing Engineer" is clearly descriptive of the character or quality of the wares in connection with which it is proposed to be used.

In the *Standard Ideal Company v. Standard Sanitary Manufacturing Company* case[1] Lord Macnaghten dealt with the essentials necessary to constitute a trade mark in the following words:

> . . . Without attempting to define "the essentials necessary to constitute a trade mark properly speaking" it seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a trade mark. The plaintiff company was therefore not entitled to register the word "standard" as

[1] [1911] A.C. 78, 85.

a trade mark. The result is, in accordance with the decision of the Supreme Court in *Partlo v. Todd,* 17 S.C.R. 196, that the word though registered is not a valid trade mark. . . .

Before the coming into force of the present *Trade Marks Act,* 1953, titles of publications were not registrable as such but there were a number of judicial decisions in which the owners of publications having certain titles brought action against others for passing off. In those cases the court maintained the action for passing off if the trade mark was distinctive but refused it if the title was descriptive. Now the law relating to registrability of trade marks is the same as the law relating to infringement or passing off. So the following decisions are relevant to this dispute.

In the case of *International Press Limited v. Tunnell*[1] the title "Who's Who" in Canada was held to be a descriptive title and did not entitle the publisher to restrain publication of a rival work of the same type given a most similar title.

In *McIndoo v. Musson Book Company*[2], "Canadian Bird Book" was considered a descriptive title and not entitled to protection. In 1897, a similar decision was rendered in *Rose v. McLean Publishing Company*[3] concerning the title "The Canadian Bookseller". In the *Fawcett v. Valentine* case[4], Cameron J. of this Court held that "True Confessions" was a descriptive title and not entitled to protection; the claim for an injunction and passing off was not successful.

Counsel for the opponent referred the Court to a number of English decisions in which owners of publications brought action against others for passing off by using the same title or one having similarity with their own. I shall mention the *Ridgway v. Hutchinson* case[5], in which it was held that the title "Adventure" for a periodical was descriptive of the contents of the publication and—that the plaintiffs were seeking to establish to an unreasonable extent a monopoly in a common English word.

[1] [1938] 1 D.L.R. 393.
[2] (1916) 35 O.L.R. 342.
[3] (1897) 27 O.R. 325.
[4] (1949-50) 10 Fox's Patent Cases, 203.
[5] (1923) 40 R.P.C. 335.

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ASSOCIATION OF PROFESSIONAL ENGINEERS OF THE PROVINCE OF ONTARIO v. REGISTRAR OF TRADE MARKS

Fournier J.

There is a rule which is followed in granting or denying registration of a word or a combination of two words: *Lightning Fastener Co. Ltd. v. Canadian Goodrich Co. Ltd.*[1]; at page 197 it is stated:

> But, in order to deny registration of a word on the ground that it is descriptive, it must be shown that, at the date of the application (which is the date to be taken into consideration), the word was a descriptive name in current use, descriptive of the article itself as distinguished from a name exclusively distinctive of the merchandise of a particular dealer or manufacturer.

In the present instance the trade mark "Finishing Engineer", at the date of the application for registration, comprised two English words used to describe persons who were trained and engaged in the engineering field and specialized in the finishing arts. The use of these two words as the title of a publication is sufficient to impart the knowledge that it will contain ideas, data, information to executives and engineers to whom new methods and new materials for finishing are of interest. In other words, "Finishing Engineer" describes clearly one who deals with the science of engineering and the finishing arts. That is exactly what the publication does. It is not distinctive of the applicant's publication but a clear description of its contents. Grammatically and in ordinary language, the use of these two words as the title of a periodical call immediately to my mind (and, I believe, to the mind of those who read them) the quality or character of the publication. I do not see any other purpose for which the words could be used or any other significance which could be attached to them.

In deciding whether or not words ought to be registered I believe the right approach to the problem is that expressed by Eversheed J. in *La Marquise Footwear, Inc.*[2] in the following words:

> I think that, in approaching a problem of this kind, one has to bear in mind that the Court must consider, as the Legislature considered, whether the use of particular marks in reference to particular goods would embarrass or harass other traders, and it seems to me that, where you take an ordinary word in common use properly applicable in its ordinary meaning to the class of goods to which it is sought to be applied by the applicant, the Court must be slow to give to the applicant in effect a monopoly of that epithet.

[1] [1932] S.C.R. 189.

[2] (1947) 64 R.P.C. 27, 32.

In my view, the registration of the trade mark "Finishing Engineer" would give the applicant a monopoly on these words to be used as the title of its periodical. This would certainly embarrass and harass any one who would endeavour to publish writings, books or publications under a title, the first word of which would be "Finishing", followed by another word related to engineering, such as "Finishing Engineering", "Finishing Engineers' Handbook" or "Finishing Engineers' Information". All these publications would deal with the finishing arts and would indicate the nature of their contents. The word "nature" being defined in English dictionaries as "character", the above publications would be characterized by their titles.

For the reasons given *supra,* I find that the words "Finishing Engineer" used as the title of the applicant's periodical are clearly descriptive of the character and quality of the applicant's wares in association with which they are used or proposed to be used and therefore not registrable under the provisions of the *Trade Marks Act.* Having arrived at that decision, I shall not deal nor express an opinion on the second ground invoked in the notice of appeal.

The judgment of the Court is that the appeal be allowed and the decision of the Registrar of Trade Marks set aside. The trade mark is not registrable; and if it has been registered, it should be expunged from the Registry of Trade Marks.

Under the circumstances, there will be no costs.

Judgment accordingly.

BETWEEN:

HERSCH FOGEL ..... APPELLANT;

AND

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

1958

June 24

1959

May 26

Revenue—Income—Income tax—Income Tax Act, R.S.C. 1952, c. 148, c. 139(1)(e)—Income or capital gains—Appellant member of a partnership engaged in the business of buying lots, erecting buildings

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thereon and selling same or selling the vacant lots—Profits from sale of lots not built on due to certain conditions are income—Appeal dismissed.

Appellant was a member of a partnership the business of which was to purchase land suitable for building, build on it for sale if that were possible, and sell the land with the building on it, and if for any reason the building could not be built, sell the vacant land at a profit if possible. If there were good reasons for disposing of land at a loss the course was to sell it and in such cases the loss became a deduction against revenue. The appeal is from an assessment for income tax on the sale of some lots at a profit. These lots had been acquired by the partnership along with others some of which had been built upon and sold and others of which had been sold as vacant lots. Appellant gave evidence that these particular lots had been acquired to erect apartment buildings on with a view to making profit through renting them to tenants, rather than by selling them. Due to certain by-law requirements which came into effect after the land was acquired apartment buildings of the kind desired could not be erected by the partnership and the lots were thereupon sold at a profit.

Held: That the lots in question were never at any time solely a capital investment as distinct from a revenue asset; the intention at the time of purchase and the course to be followed were precisely the same as applied in the case of any other parcels of land which the partnership had, namely, to turn them to account for profit by building on them for sale or by sale of the vacant land itself, as might appear expedient, if for any reason the proposed building could not be built; they were not an investment at the time they were acquired nor did they acquire that character from anything that occurred thereafter, any expenditures of money or effort made to carry out that purpose were quite insufficient to give them such a character to the exclusion of any other.

2. That the partnership business included dealing in building lots, that the two properties were bought generally for the purpose of that business and were sold at a profit in the course of carrying it on and as an incident of it, and the profits were from that business and properly assessed for income tax.

APPEAL under the *Income Tax Act.*

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

P. N. Thorsteinsson for appellant.

W. R. Latimer and *G. W. Ainslie* for respondent.

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

THURLOW J. now (May 26, 1959) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board[1] dismissing an appeal by the appellant from income tax reassessments for the years 1953 and 1954. The matter in issue is whether sums of $19,662.46 and $12,907.48, respectively realized on the sale of two parcels of land by a partnership of which the appellant was a member, were income for the purposes of the *Income Tax Act,* R.S.C. 1952, c. 148, or capital gains.

Under ss. 3 and 4 of the *Income Tax Act,* the sums in question are to be regarded as income if they are profit for a taxation year from a business, and the term "business" is defined by s. 139(1)(*e*) as including a profession, calling, trade, manufacture, or undertaking of any kind whatsoever and an adventure or concern in the nature of trade. The question to be determined is one of fact, the onus being on the appellant to satisfy the Court that the sums in question were not profits from a business as so defined.

The partnership was known as Enterprising Developments. It was formed in February, 1951 and continued to the end of 1954, its partners being the appellant, a young man who had been educated as a chemical engineer, and Dr. Allan Sharp, a physician. There was no written partnership agreement setting forth its objects, but these were described by the appellant as "basically building and *perhaps* acquiring apartment buildings for investment purposes." The activities carried on in partnership are summarized as follows in paragraph 3 of the notice of appeal, which was admitted in the Minister's reply:

3. During the taxation years 1951 to 1954 inclusive, the partnership engaged in the business of buying land suitable for residential housing, building houses and selling the land and houses so purchased and built. Approximately 15 parcels of land or blocks of residential housing lots were purchased by the partnership in that period. A total of 19 houses were built and sold, and on 8 occasions the land purchased in order to build houses was sold without the houses having been built, by reason of the fact that on those occasions the partnership found itself unable to secure the mortgage loans necessary to finance the intended construction. The profits earned on these transactions were included in the income of the partnership for the relevant taxation years and income tax was paid thereon by the Taxpayer and the said Sharp, with the exception of two transactions upon which a loss was incurred and the same was in each case deducted from the otherwise taxable income of the partnership.

[1] 18 Tax A.B.C. 381

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The evidence further indicates that no dwelling houses were constructed after July, 1953, though some parcels of land suitable for dwellings were acquired and sold at a profit after that time. In July, 1953, the partners undertook the construction of a 47-suite apartment building which they completed in March, 1954. When it was completed, the partners had a one-third interest in it, which they held until the end of 1954, when they transferred their interest to Enterprising Developments Limited, a company incorporated to assume the undertaking of the partnership. The shares of this company are held by the appellant and Dr. Sharp. The remaining two-thirds of the apartment building were owned by David Hecht and Sam Rosen. In March, 1954, the partners commenced construction of another large apartment building, this one having 51 suites. The building was completed in September, 1954 and was held by the partners until transferred by them to Enterprising Developments Limited. The cost of these buildings was approximately $380,000 each, most of which was financed on mortgages, the equity capital being remarkably small. In each case, the builder was the partnership, and after completion the partnership obtained rental revenue from the property.

In January, 1951, prior to or at the time of the formation of the partnership, Dr. Sharp had entered into an agreement to purchase for $40,000 four parcels of land in the Township of North York containing a total of 25 building lots, as shown on a subdivision plan. One of these parcels contained five lots numbered 6 to 10 inclusive, and another similar parcel contained five lots numbered 84 to 88 inclusive. In the contract of sale, the vendor had warranted to Dr. Sharp that building permits would be issued for the erection of apartment buildings on these ten lots and for the erection of dwelling houses on the others, and it was further provided that the vendor should refund the purchase moneys paid in respect of any of the lots for which such building permits could not be obtained. The 25 lots so acquired by Dr. Sharp apparently became or were assets of the partnership and were subsequently sold by it, and no question arises as to the proceeds of sale of any of them (other than 6 to 10 and 84 to 88) having been receipts of

a revenue nature. Lots 84 to 88 were held until December 4, 1953, when they were sold to a single purchaser at a profit of $19,662.46, this being one of the sums in issue in the appeal. On November 4, 1953, prior to that sale, the partners had sold an undivided two-thirds interest in lots 6 to 10 to David Hecht and Sam Rosen for a sum in excess of the cost of the lots, and on or about December 23, 1953, they accepted an offer and sold these lots, including their remaining interest in them, to another purchaser. This sale was completed in February, 1954, and in it they realized a further profit. The total profit realized by the partners from these lots was $12,907.48, and this is the other sum in issue in the appeal.

On these facts, it seems clear that the business of the partnership was not limited to that of constructing buildings for sale but included, as well, at least as an incident of that process, dealing in vacant land suitable for buildings. *Prima facie,* therefore, it would seem that the profits from the sales of lots 6 to 10 and 84 to 88 were profits of the partnership's business and liable to be taxed accordingly. The appellant, however, maintains that lots 6 to 10 and lots 84 to 88 were acquired with the sole intention of constructing on them apartment buildings to be held by the partnership as investments, that the sales in question were made simply to realize the partnership investment in those lots, the intention with which they were acquired having been frustrated by the passage of a by-law which rendered impossible the construction thereon of apartment buildings of the kind desired, and that the profits realized therefrom were accordingly capital and not income.

In support of this contention, evidence given by the appellant before the Income Tax Appeal Board was read by consent on the trial of the appeal to this Court. In it, the appellant stated that the sole purpose for which the lots in question were purchased was to erect apartment buildings thereon for investment and to derive rental income therefrom, and that in April, 1952, an architect was employed to prepare plans for them. Blueprints of several drawings made by the architect, some dated 3/4/52 and others dated 3/6/52, were put in evidence. The buildings so planned did not, however, comply with By-law 7625 of

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the Township of North York, which required that there be provision for certain minimum parking space and certain minimum garage space on the premises and that the building be situate at least 25 feet from the curb. This by-law had been read a first and second time on January 30, 1952 and finally passed on June 25, 1952 after the plans had been completed. The partners had known as early as January, 1951 that it was likely that certain restrictions as to minimum parking space and distance of the buildings from the curb line would be imposed but not that there would be a minimum garage space requirement as well. They became aware at some stage that the proposed construction would not comply with the by-law as finally passed but, even after that, they proceeded for a time with their scheme in the hope and expectation that the by-law would be waived in their favour. During the summer of 1953, they approached a number of financial institutions with a view to borrowing the funds necessary to put up the building or buildings but were turned down. It was said that the reason for selling the two-third interest in lots 6 to 10 to Messrs. Hecht and Rosen was to enlist their financial resources in the project and that the sale to them was made below the market price in order to get them interested in it. On December 2, 1953, however, a public meeting of the Committee of Adjustments of the Township of North York was held, when some thirty citizens appeared to oppose any waiver of the by-law, and it then became apparent that the scheme to build the particular buildings as planned could not succeed. Both parcels of land were accordingly sold, the sale of one of them being made two days later and the sale of the other three weeks after the meeting.

It may be noted in passing that permits for one or more larger apartment buildings might have been obtained, but in that case fireproofing would have been required and would have substantially increased the cost of the buildings. Permits might also have been obtained for smaller apartment buildings, but the partners did not regard the probable return from such buildings as satisfactory.

Assuming that the lots in question were purchased with the possible erection and holding of apartment buildings thereon in mind, the evidence leaves me far from satisfied that that ever was the partners' sole intention with respect to them. This land was but part, though no doubt a part with its own characteristics, of the whole group of lots purchased at or before the commencement of the partnership. Some lots of this same group were sold as vacant land, and some may have been used as sites for dwellings and then sold. There is no reason to doubt that the returns from such other lots were revenue receipts, just as were the receipts from other lands subsequently acquired, which were dealt with in the same way. The pattern of the partnership's business was to purchase land suitable for building, build on it for sale if that was feasible, and sell the land with the building on it; and if, for any reason, the building could not be built, sell the vacant land at a profit, if possible. When there were good reasons for disposing of land, even though at a loss, the course was to sell it, and in such cases the loss became a deduction against revenue. Here the only difference from the other lands acquired by the partnership was one of a conditional intention; that is, that if the proposed buildings could be built they were to be held with a view to making profit through renting them to tenants, rather than by selling them. But if the proposed buildings could not be built, whether for lack of funds or for failure to obtain permits for the buildings desired, a contingency of which the partners must have been aware, the intention, as I see it, and the course to be followed were precisely the same as applied in the case of any other parcels of land which the partnership had, namely, to turn them to account for profit by building on them for sale or by sale of the vacant land itself, as might appear expedient.

On the evidence, I do not think that the lots in question were at any time solely a capital investment in the sense urged by the appellant, as distinct from a revenue asset. When purchased, they were not producing rental revenue and, while the partners held them, they never produced revenue of that kind. Moreover, while the appellant says

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that they were acquired for a particular purpose, that purpose was conditional on the partners' obtaining both building permits and money and was hemmed in, as well, by limitations imposed by the partners as to the kind of buildings to be built on them. In my view, the utmost that can be said in favour of the appellant's position is that these lots were acquired generally for the purposes of the partnership business, with an intention to turn them into an income-producing investment if that could be done in the way the partners desired, and otherwise to deal with them in the same way as other lands acquired in the same and other transactions were to be dealt with in the course of the partnership business. In this view, they were not an investment in the sense urged at the time they were acquired, nor did they acquire that character from anything that occurred thereafter, for such expenditures of money and effort as were made in seeking to carry out that purpose were, in my opinion, quite insufficient to give them such a character to the exclusion of any other, and it was always open to the partners to carry out the alternative plan for obtaining profit from these properties by selling them in the course of their business. Even if the buildings had been erected by the partnership, let for a time, and subsequently sold, I should have regarded it as unlikely, so long as the business was being carried on and no unequivocal event had occurred to deprive the properties of their revenue character, that they could be treated as having been solely investments in the sense urged or that any gain made on the sale of them should be treated otherwise than as income from the partnership business.

The test applicable in a matter of this kind is that stated as follows by the Lord Justice Clerk in *Californian Copper Syndicate v. Harris*[1] at p. 165:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of

[1] (1904) 5 T.C. 159.

a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

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

In *Ducker v. Rees Roturbo Development Syndicate*[1] Lord Buckmaster, at p. 141, after referring to the test stated in *Californian Copper Syndicate v. Harris (supra),* applied it to the case then before the House as follows:

These reports show that the directors were contemplating from the beginning the possibility of the sale of some of these patents. It is quite true that they preferred not to sell them if a sale could be avoided, but the statement in para. 11 of the case is quite plain, that "the possibility of the sale of the foreign patents or rights has always been contemplated by the appellant company in respect of such interest as it possessed in the foreign patents." It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property, but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake.

In the present case, it may well be that the partners preferred, as the course by which profit should be made from these particular lots, to carry out their scheme for building apartments on them and that, with this in mind, they held them, preferring not to sell them even at a profit so long as any hope for the success of that scheme remained. But that is far from saying that the erection of apartment buildings to be held as income-producing investments was the sole purpose for which the lots in question were acquired. Sale of the other lots included in the same purchase, as well as of lands acquired in other transactions, whether such lands had been built on or not, was, from the commencement of the partnership, one of the means by which profits from their business were to be realized, and, since the scheme for apartments on the lots in question was

[1] [1928] A.C 132.

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both contingent and limited, I see no reason to think that sale of these lots, as well, was not also contemplated as one of the alternative ways in which they would be turned to account for profit if the scheme for building apartments thereon should fail. In my opinion, it makes no difference for the present purpose that, if the apartment buildings had been built as planned, profit might have been obtained from them in the form of rentals. The material facts are simply that the partnership business included dealing in building lots and that two properties, bought generally for the purposes of that business, were sold at a profit in the course of carrying it on and as an incident of it. The profits in question, in my opinion, were accordingly profits from that business and were properly assessed.

The appeal will be dismissed with costs.

Judgment accordingly.

1959

Jan. 8 & 9

May 6

BETWEEN:

OWNER, MASTER AND CREW OF M/V *KETA* AND IRON ORE COMPANY OF CANADA LIMITED ..... (*Plaintiffs*) — APPELLANTS;

AND

THE SHIP *IRENE M* AND HER CARGO AND FREIGHT ..... (*Defendants*) — RESPONDENTS.

Shipping—Salvage—Principles on which salvage is awarded—Value of property saved—Perils of salving ship.

In an action for the salvage of the SS. *Irene M* by the M/V *Keta* from an icefield in the lower St. Lawrence River, the value of the salved steamer and her cargo was $576,228 and that of the salving motor vessel $150,000. The trial court awarded $6,000 for the salving services rendered which included a reasonable allowance for expenses incurred and such damages, if any, the salving ship may have sustained due to the extraordinary strain on her engines. On an appeal from this decision:

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Held: That in addition to the factors upon which the trial court based its award, a consideration of the evidence as a whole led to the conclusion that the *Keta's* master by the use of his ship as an improvised ice-breaker had imperilled both his ship and a highly profitable charterparty; that the fact that it was found necessary within two weeks thereafter to replace two of her clutches must be attributed, at least in part, to the heavy and continuous strain placed upon the *Keta's* engines during her manoeuvres to free the *Irene M* from the ice. The appeal was therefore allowed and the award raised to $12,000.

APPEAL in a salvage action by the owners, master and crew and the charterers of the salving ship from the decision of the Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Quebec.

Léopold Langlois for appellant.

J. P. A. Gravel, Q.C. for respondent.

DUMOULIN J. now (May 6, 1959) delivered the following judgment:

This is an appeal from a judgment, rendered June 5, 1958, by the Quebec District Judge in Admiralty, the Honourable Mr. Justice Arthur I. Smith.

The owners, master and crew of Motor Vessel *Keta,* and nominally at least, her charterers, the Iron Ore Company of Canada Ltd., instituted an action for salvage in an amount of $31,150 against the ship *Irene M,* her cargo and freight.

The learned trial judge allowed this claim, on a salvage basis, to the extent of $6,000. From this decision, plaintiffs asserted an appeal for the whole reward prayed for.

I conceive of the case and its ensuing problems as raising mainly factual questions which, if accurately solved, would leave but little room for any serious dissent as to the applicable law. I must therefore relate those facts at some length.

Salvor ship *Keta* is a steel screw motor vessel of 456 gross registered tonnage and 368.22 net registered tonnage; measuring 153 feet in length and 27.6 in breadth, equipped with a Diesel engine of 530 h.p. and having a cruising speed of 9 knots per hour. She usually carried a crew of eight.

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S.S. *Irene M*, the allegedly salvaged vessel, is a steamer of 804 net tons register and at all material times, i.e. December 25, 26 and 27, 1956, was freighted with approximately 466 tons of heavy mining machinery, partially stowed on deck, and general cargo. On December 13, she weighed anchor in Montreal Harbour bound for Tilt Cove, Newfoundland.

On December 17, the *Irene M* reached Lauzon, a few miles below Quebec, where a persistent run of unfortunate incidents began. Her master and several of the ship's hands deserted; engine trouble broke out, bunkers were allowed to remain depleted due to a shortage of funds, so that she resumed her course down-river at 0630 hours, December 23, in precarious conditions, poorly manned by a makeshift, insufficient crew.

A reference to exhibits P-6 (Survey Report of the London Salvage Association) and particularly P-6A, a Survey Report emanating from Messrs. Hayes, Stuart & Co. Ltd., Montreal Marine Surveyors, dated December 31, 1956, bears out these deficiencies. The above experts, at page 4, para. 5, write:

> 5. Vessel grossly undermanned—crew on board:—4 in engine room, 3 on deck, Master and two Mates, Stewart and Mess boy, a total of 12 men instead of a minimum of at least 17 and a maximum of 21 crew members.

Doubly hampered by a lack of hands and of motor fuel, the *Irene M* was in a sorry condition indeed to weather the severe buffetings of oncoming winter.

With the assistance of an ice-breaker, the *Irene M* reached the neighbourhood of Cape Salmon, east of Rimouski, dropped her pilot, and proceeded on her own power. This attempt, however, was short-lived; by December 24, at 1420 hours, she encountered ice packs of considerable size, that brought her to a standstill. A temporary let-up facilitated additional headway until the vessel again meeting with ice, early on Christmas morning at 0220 hours, became jammed and developed a bad list of 25 to 30 degrees.

In the afternoon of December 24, her master radioed the first of five messages:

TO SEALAKES SHIPPING CORPORATION, MONTREAL. JAM IN ICE. UNABLE TO PROCEED FURTHER WITHOUT ASSISTANCE. LONG. 68-29 W; LAT. 48-40 N. MASTER—IRENE M.

In the forenoon of the 25th, four other calls for help issued, of which the last amounted to an urgent distress request worded thus:

SITUATION MORE SERIOUS. SHIP LEAKING AND LISTING. NOW IMPOSSBLE TO PROCEED THROUGH ICE WITHOUT AID OF ICE-BREAKER. KETA STANDING BY ALONGSIDE TO TAKE OFF CREW IF NECESSARY. MASTER—IRENE M.

At midday, December 25, the *Keta* was moored alongside Rimouski wharf, while her owner, Captain Borromée Verreault, was spending the Christmas holiday at his home in Méchins, some 60 miles further down, where these rescue signals were relayed to him. Verreault communicated directly with the *Irene M,* boarded his ship at 1615 hours, December 25, setting out immediately for the disabled vessel which was reached at 1720 hours. The entry in the *Keta's* log book (ex. P-9), as she stood by reads:

Stand-by. Leaving Rimouski to assist Irene M in distress outside of Ste-Luce. 4 miles.

Though not built for ice breaking purposes, the *Keta* managed to ply through a sheet of ice, 4½ inches thick, opened up a furrow of clear water, gradually relieving the *Irene M* from the possibility of drifting against the Ste-Luce shoals. On this point, I would again quote from exhibit P-9, the *Keta's* log book, December 26, at 0115 hours:

Commençons à transporter et installer une pompe à gasoline sur le Irene M. avec l'équipage du Keta. Commençons à travailler encore et avancer vers le nord; le vent est 15 m. nord *et nous drivons à terre très vite. Nous ne sommes qu'à un mille trois quarts de terre* mais progressons lentement pour élargir. Irene M. est toujours à court de steam et prend plus de liste.

Two hours later, at 0305:

Travaillons toujours pour s'éloigner de terre, mais le *Irene M.* manque souvent de steam et prend plus de bande. Devons retourner souvent pour déprendre le Irene M.

The Montreal Marine Surveyors' Report, previously mentioned, at page 4, states that the *Irene M* ". . . had listed due to approximately 150 tons of slack water in

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double bottom tanks and . . . had encountered difficulty in ice due to failing boiler pressure and resulting in vessel's speed being as low as $2\frac{1}{2}$ knots per hour; the steam pressure could not be maintained due to vessel being grossly undermanned."

I am satisfied the weight of evidence shows that the *Keta's* repeated efforts resulted initially in safeguarding the *Irene M* against a likely contingency of being driven ashore. At 2032, on December 26, when the Government ice-breaker *N. B. MacLean* arrived, in response to emergency calls, both other vessels lay seven miles off-shore well beyond that danger zone.

Such is also the finding of the learned trial judge who, at page 3 of his written opinion says: ". . . the *Keta* remained with the *Irene M* from the time she arrived alongside at 1720 hours on December 25th until 1245 hours on December the 26th, when she left for Father Point due to the illness of her captain, and I am satisfied that, at least during a substantial portion of this time, the *Keta* did her utmost to free the *Irene M* from the ice. *In fact, the proof is that during this period the Irene M was able, due to the efforts of the Keta, to progress some four miles in a North-Easterly direction.*"

During the *Keta's* emergency stop at Father Point wharf, December 26, the *Irene M* flashed this urgent request:

IRENE M IN DANGER. TAKING HEAVY LIST, CALLING FOR KETA RIGHT AWAY. SAYS MAKING WATER IN ENGINE ROOM IN EVERYWHERE. KETA AT THIS WHARF NOW TAKING FUEL.

The salvor ship complied and by 2030 hours, again cruised alongside the disabled *Irene M,* both vessels resuming their route towards Rimouski with the added assistance of the *N. B. MacLean.*

Quoting anew from the decision below: "At 2150 hours, the (three) vessels were abeam of Rimouski, but the draft of the *N. B. MacLean* prevented her from entering the harbour, so that the *Irene M* remained outside the harbour's entrance, with the *MacLean* standing by, until the following morning. The *Keta,* however, proceeded to Father Point where she spent the night, returning to Rimouski at about 0700 hours on December the 27th to

break the ice in the harbour and assist the *Irene M* to enter and tie up at the wharf which was eventually accomplished at 1048."

Opening an access to the shelter of Rimouski, an all important task which required more than four hours, extended another needed assistance to respondents' ship, and strongly enhances the effectiveness of the *Keta's* endeavours two days previous. Captain B. Verreault testified the ice surrounding Rimouski Harbour, December 27, was ". . . very hard, maybe 18 inches thick." Since his ship succeeded in making headway through it she surely achieved some helpful result on the 25th and 26th while contending against floes no thicker than four or five inches. As for the time devoted to these combined salvage operations, it amounted to exactly thirty-nine and one half hours (39½).

Such are the facts, which led the trial judge to find that:

(*a*) . . . the *Irene M* was in a position of some danger at the time of, prior to and subsequent to the arrival alongside of the *Keta*.

(*b*) *There was some evidence as to the alleged danger that the Irene M might be carried ashore in her helpless condition by the wind and shifting ice.* While this development in the circumstances would appear to have been unlikely unless there had been a considerable change in the force and direction of the wind, it was nevertheless a remote possibility.

(*c*) . . . moreover . . . the *Keta* rendered services of a beneficial nature. Arriving alongside the crippled vessel at 1720 hours, on December 25th, the *Keta* remained with the *Irene M* continuously until she left to go to Father Point on the following day at 1245 hours. During that time the *Keta, by breaking the ice around and ahead of the Irene M made it possible for the latter to progress under her own power for a distance of approximately four miles in a North-Easterly direction and away* from ashore.

(*d*) That . . . *the Keta transferred a pump to the Irene M and assisted her in getting it into operation and when she was not actually attempting to break ice around the crippled vessel, she stood by ready to render all possible assistance and take off the crew should it become necessary to do so, as indeed it might have done.*

And, lastly:

(*e*) However the following day, December the 27th, *the Keta returned to the Irene M and spent about four hours breaking the ice in Rimouski harbour, so that the Irene M was able to dock* . . .

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With this, I fully agree; the essential elements of salvaging: danger, voluntariness, success, all concur in this instant case.

A theoretical definition of salvage is one thing, but another and more complex inquisition alone can afford a practical appreciation of its worth.

Kennedy in his classical treatise on *Civil Salvage,* 4 Ed. 1958, at pages 173 and 174, classifies as follows these material circumstances ". . . which Dr. Lushington, in his judgment in *The Charlotte,* calls 'the many and diverse ingredients of a salvage service' . . .

A. As regards the salved property:

(1) The degree of danger, if any, to human life.

(2) The degree of danger to the property.

(3) *The value of the property as salved.*

B. As regards the salvors:

* * *

(3) *The degree of danger,* if any, *to property employed in the salvage service and its value.*

(4) The time occupied and work done in the performance of the salvage service.

(5) Responsibilities incurred in the performance of the salvage service, *such, e.g., as . . . liability to . . . freighters through deviation or delay. . . .*"

* * *

The conclusion, at page 174, reads:

Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or they are present only in a low degree, the salvage remuneration awarded is comparatively small.

Adverting once more to the decision below, we note a dual statement of facts which, apparently, suggested the measure of salvage reward granted, i.e. $6,000.

These highly significant paragraphs are quoted in an inverted sequence with especial emphasis on the second.

(*a*) There is evidence that some weeks after the services were rendered it was found necessary to replace one of the *Keta's* clutches and it was suggested that this was the result of the heavy strain placed upon the vessel's engines during her manoeuvres to free the *Irene M* from the ice. The Master

of the *Keta* admitted however that between the time at which the services were rendered to the *Irene M* and the replacement of the damaged clutch, the *Keta* had navigated in ice and I find that the proof is insufficient to justify the conclusion that the *Keta* sustained damage in the course of her efforts on behalf of the *Irene M*.

(b) *The Master of the Keta admitted in the course of his testimony that the assistance rendered to the Irene M did not involve risk or danger to his vessel or crew.*

Actually, this appeal wholly depends upon the accurateness of the latter assertion.

With utmost deference and after lengthy consideration, I am unable to reconcile my interpretation of Borromée Verreault's evidence on this matter with that of the learned trial judge.

The salvor boat may have incurred merely a secondary risk of destruction, but, on the other hand, Verreault's testimony stresses another and likely kind of jeopardy to his vessel, a contingency which we shall see, apart from its ever present potential threat, probably materialized to some extent.

Leading up to this point is exhibit P-8, dated October 18, 1956, at Montreal, the *M/V Keta's* charterparty with Iron Ore Company of Canada, for a three-month period ". . . commencing first half December, 1956, which, as testified to, was continued until April 21, 1957, at a hire price of $525 . . . per day commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire to continue until the hour of the day of her redelivery . . . to the Owners (unless lost) at Seven Islands, P.Q."

The 1956-57 season was the second one during which the *Keta* successfully met the rigorous requirements of wintry navigation between Rimouski and the north shore port of Seven Islands. A duration of 127 days, from December 15, 1956, to April 21, 1957, at a daily rate of $525 would, and did, assure her owner gross returns of $66,675, with, it is reasonable to infer, quite an appreciable margin of net profits. It should be said this vessel, albeit earning her stipulated hire, was not under sailing orders but momentarily idle, when she set out to assist the *Irene M*.

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And now, a close scrutiny of Captain Verreault's examination before the Court of first instance must be resorted to.

Q. Now, Captain, when you first saw the *Irene M*, do you consider that she was in a position of danger?

A. Yes, according to the wind. The ship was stuck in the ice and she can't move at all. She can't go astern or go ahead; she can't do nothing and on account of the winds we had that night [Dec. 25 to 26], I suppose she were in a very bad position.

On page 68, second line from top:

Q. Now, Captain, what dangers did your vessel encounter during the salvage operation? Do you understand my question? Was your vessel in danger at the time?

A. Oh, well, *with the Keta alone in that ice,* she was not in very big danger unless we had stronger winds.

The *Keta,* however, was not alone in that shifting ice pack, but unceasingly exerting the utmost power to release the *Irene M* and therefore in constant proximity to her, as explained by this witness.

Q. What risk did you take when you went out to get the *Irene M* out of the ice—what risk?

A. I took the risk in breaking my ship that I could be stuck and lose my charter for the winter. If I break my ship in the ice *or come into collision with the Irene M.,* I could break the *Keta* and lose my charter because at that time of the year it is pretty near impossible to reach a place where we could get repaired because Quebec was closed.

Verreault adds that due to heavy ice in the Gulf, he would also have been precluded from bringing his ship into Halifax harbour.

He then goes on to say:

A. . . . we were ahead of the ice and we stopped and that is where there was very great danger for the *Irene M* to break our stern. We had to be very careful. We had to take the radio telephone and take care of it.

Q. You said that there was danger of the *Irene M* breaking your stern?

A. Well, we go ahead and we are stuck and the other ship is coming slowly behind and if we don't capsize and if she doesn't stop very quickly, she could break our stern; and that is where a very great danger for that.

A peril of this kind cannot be dismissed as unreal, and on the evidence it is impossible to construe it as an admission that, at no time, was the *Keta* imperilled.

We next read, on page 80:

Q. Apart from that risk incurred, was there any other risk that you encountered? Was your ship a light ship or was she loaded?

A. With that ship when she is light, *there is always danger to work in the ice on account of the rudder and the propeller* because the rudder is about level with the water. Now every time we go astern, we are taking a risk to break it.

This possibility of a crushed rudder or a fouled propeller or both in the course of protracted assaults against hardening floes should not be overlooked. It did not escape Verreault's expert consideration, still he nonetheless shouldered the responsibility of jeopardizing a charterparty whose lapse might well have spelled ruination.

A few lines above I alluded to an eventuating damage sustained by the *Keta* in consequence of her unwonted labours as an improvised ice-breaker.

The transcript of evidence, at pages 27 and 28, ascribes these explanatory precisions to the salvor's chief engineer, Valère Verreault.

Q. Lorsque vous êtes sorti de Rimouski, est-ce que le capitaine du KETA ou son propriétaire vous a donné des ordres spéciaux quant à la manoeuvre?

R. Quand on a sorti de Rimouski, j'ai eu les ordres de faire virer le moteur à pleine révolution, tout ce qu'il y avait moyen de le faire tourner.

Q. Est-ce que c'est plus que normal, ça?

R. Oui, certainement que c'est plus que normal.

Q. Est-ce que vos moteurs ont viré très longtemps?

R. Ah oui, tout le temps qu'on a été là.

Q. A quelle force à peu près ont-ils viré durant ce temps-là, normale ou moins que normale?

R. Ils ont viré plus que normal . . . parce que la première fois, on tournait 1,600,—on a tourné à 1,800.

Q. 1,800 tours?

R. Oui.

Q. Vous souvenez-vous, à peu près combien de temps par 24 heures vos moteurs ont tourné durant les 25, 26 et 27 décembre . . . quand vous étiez en mer?

R. Quand on était en mer ils ont tourné continuellement.

Q. Ca veut dire ça, 60 minutes dans l'heure?

R. Oui.

Q. A peu près quel était l'état de vos moteurs le 27 décembre lorsque vous êtes revenu au quai avec le *Irene M,* après que le *Irene M* a été attaché là?

R. Le moteur, il a fallu qu'il soit "re-settlé" par rapport qu'il avait trop viré; le "reduction gear" [embrayage de réduction, to which Borromée Verreault will later on refer] avait chauffé par rapport au surplus d'ouvrage qui n'était pas normal.

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And lower down that same page 28:

Q. . . . Alors vos moteurs ont fourni des efforts considérables?
R. Oui.
Q. Est-ce qu'ils ont été ébranlés vos moteurs?
R. Oui.

To this should be joined the chief engineer's assertion on pages 29 and 30, that a pathway was opened up for the *Irene M.*

A sequence to overtaxing the *Keta's* engines and clutching apparatus is described in Borromée Verreault's own words at page 81 of his testimony.

A. . . . the engines had damage into the clutch on account of working all the time back and forth. Those engines are not able to stand for a very long period like that because of the oil that is coming too hot.
Q. Now was there extensive damage?
A. We had to change the clutches [note the plural number] on the ship two (2) weeks afterwards at Baie Comeau.
Q. Do you think it could have been due to this working of the engines when you were off Father Point?
A. Part of it was due to that, but we had to work after, for ourselves, after that; but part of it is due to that heavy work we did without any stops at times.
Q. And how much is a clutch worth?
A. One complete clutch costs two thousand three hundred dollars ($2,300.00).

It would seem the Court of first instance readily enough foresaw the wasting effects of a comparable experience a fortnight later. How then an initial and probably more severe trial could avoid wearing out, partially, the self-same machinery, two weeks before, is not apparent to my mind. No specified damages are sought on this account, yet I believe a reasonable point has been made which strengthens my determination to increase the salvage reward.

The evidence clearly points to manifold and beneficial succour extended the *Irene M,* as she lay under some impending danger; it now remains to apply norms and criterions of civil salvage germane to this instant set of facts.

In the *Traveller* case[1], Sir John Nicholl expressed the following view: *"The primary object is the danger of the property saved and its value,* and the assistance actually

[1] (1837) 3 Hagg 370, 371.

received; *the secondary, the risk to the salvors and their property;* the skill, the time employed, and other collateral circumstances."

In the *Werra*[1] the President, Sir James Hannen, said: *"The first thing to be considered is the value of the property saved;* by that I do not mean that it is to be taken as absolutely the most important element, but that it is the subject-matter in respect of which the action arises. *It is the fund which has to be dealt with . . ."*

Lindley L.J. in his speech in *The City of Chester*[2] said: "The first matter for consideration is the nature of the service rendered, the danger from which the one ship has been saved *and the danger to which the other ship has been exposed.*" At page 203, Mr. Justice Lindley continues thus: "Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress . . . The salving vessel is often herself exposed to imminent peril; the risk of loss or damage to her is often very great; . . ."

The Privy Council, in *The "De Bay"*[3], held that an allowance given by the Court below for the loss of a profitable charterparty was right in point of principle, but that the salvors had failed to prove such a loss.

True, the *Keta's* highly "profitable" charterparty was not lost, but it undeniably ran into a very real hazard of becoming void through injury to the salving vessel's manoeuvring parts, rudder or propeller. The precedents above are at one in appraising risks to the salvors. Such chances may remain pecuniarily unspecified but they nevertheless serve as basic ingredients of the aggregate award. To a more actual peril corresponds a greater recompense.

Kennedy, *supra,* at page 205, writes that: *"Just as danger to the property used in effecting a salvage service is considered, according to its degree, in the assessment of the reward, whether damage to the property has, or has not, in fact resulted, so, also, is the hazard or responsibility which the salvor incurs in regard either to pecuniary interests affecting his own property, or to his obligations of*

[1] (1886) 12 P.D. 52, 53. [2] (1884) 9 P.D. 182 at 202, 203.
[3] (1883) 8 App. Cas. 559.

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contract or duty to other persons, although fortunately the hazard, or the responsibility, has not eventuated in an actual loss to him."

Two unmarked affidavits of value regarding the *Irene M's* cargo and her own mercantile worth appear in the record.

The first was sworn to by Gordon Lennox Moore of Toronto, in his capacity as Treasurer of Maritimes Mining Corporation Limited, shipper ". . . of certain cargo laden on board the Steamship *Irene M,* at the time of the alleged salvage service". Paragraph 4 is as follows:

> 4. That in my opinion the outside value of the said cargo was $476,228.84 of which sum $402,610.00 represented the value of general cargo purchased by Maritimes Mining Corporation Limited and $73,618.84 represented the value of general cargo purchased by its Agent, Foundation Maritime Limited, and no more, and that if the same were compulsorily sold at that time or at the present time, I believe that it would not realize more than the said sum of $476,228.84.

In the second affidavit dealing with the ship's value, one W. A. Shaw, Ship-Owner and Operator, Halifax County, is the deponent. He states that:

> 5. In my opinion the value of the said ship at the time she was arrested in this action was about $100,000.00, and if she were compulsorily sold at that time or at the present time, I believe she would not realize more than the said sum of $100,000.00.

It can be properly assumed that the *Irene M,* and her freight represented an aggregate amount of $576,228.84, when she sent the distress calls with which the salvor vessel complied.

The *Keta,* when purchased for $8,000 (cf. Transcript, p. 91) at a sheriff's sale, lay in Halifax harbour. But, from then on, her owner's uncontradicted statement shows that she underwent extensive repairs, was equipped and provided with up-to-date navigating machines and appliances costing more than $100,000, a breakdown of which will be found in the transcript at pages 88, 89, 90, 91, 92, 93 and 115, this latter concerning a $10,000 reinforcement job at Vickers' Montreal Marine yards in 1955. Whatever the *Keta's* plight may have been, when bought in Halifax by Captain Verreault, it can't be gainsaid that, from 1954 on, she attained seaworthiness commensurate with the rigours, extremely severe at times, of winter navigation in the Lower St. Lawrence, and this affords a sure test.

In December, 1955, the *Keta* carried insurance coverage in a sum of $150,000. I would be inclined to hold that her mercantile worth at least, when this issue arose, was something like $150,000, rather than $100,000 as considered by the learned trial judge. The over-all values at stake would therefore average $726,000.

Among several precedents, four Canadian decisions were cited, of which two have some points in common with the case at bar. In re: *Humphreys et al and The M/V Florence N° 2*[1], the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, held that:

> 3. . . . the factors which go to the making of a salvage award are the degree of the danger to the property salved, its value, the effect of the services rendered and whether other services were available; *the risks run by the salvors,* the length and severity of their efforts, the enterprise and skill displayed, *the value and the efficiency of the vessel they used and the risks to which they have been exposed.*

Such are the governing tenets which the present decision strove to apply throughout.

Lastly, and in the guise of a rebuttal to respondents' contention that the Government ice-breaker, *N. B. MacLean,* performed most of the necessary work, a view unsubstantiated by the evidence, I would quote the Supreme Court's finding in the matter of: *Gulf and Lake Navigation Co. Ltd. and M/V Woodford*[2], more frequently called *The Birchton* case. The proposition set forth in *The Dart*[3] was applied:

> If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to salvage award.

The Supreme Court of Canada concluded:

> If the trial judge had not considered himself bound by what he wrongly conceived to be the applicable principle he would have allowed more than the $12,000 fixed by him.

The *Birchton* appeal was allowed and the amount increased to $20,000.

It will be remembered, of course, that not only did the *Keta* "complete the salvage" permitting of an entry and safe mooring in Rimouski Harbour, but that she initiated

[1] [1948] Ex. C.R. 426, 434.
[2] [1955] S.C.R. 829.
[3] (1899) 8 Asp. M.L.C. 481 at 483.

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salvage operations on December 25, stood alongside the disabled *Irene M* to extend further assistance as circumstances might require, beneficially contributing to extricate the badly crippled vessel out of her predicament. And during the entire span of 39½ hours, the salvor laboured under a constant risk of damage which, had it accrued, would have entailed for her owners dire consequences indeed.

For the above reasons the salvage award should be raised from $6,000 to $12,000.

Therefore, this appeal will be allowed with costs, and in lieu of the decree below, judgment should go for the appellants in the sum of $12,000, and costs.

Judgment accordingly.

Smith, D.J.A.:

This is an action for salvage by the owners, master and crew of the M/V *Keta* against the ship *Irene M,* her cargo and freight.

The alleged salvage services were rendered in the month of December 1956, in the St. Lawrence River, near St. Luce and Rimouski.

The proof is that the *Irene M,* a steamship of 804 net tons register with about 466 tons of general cargo, including heavy mining machinery, some of which was stowed on deck, left Montreal on December 13, bound for Tilt Cove, Newfoundland.

The *Irene M* proceeded to Lauzon where she arrived on December 17 and where certain engine repairs or adjustments were effected. She left Lauzon at 0630 hours on December 23, and with the assistance of an ice-breaker proceeded down-river almost as far as Cape Salmon, where her pilot and the ice-breaker left her, it being considered that the channel was sufficiently free of ice to permit the vessel to proceed without further assistance.

On December 24, however, the *Irene M* encountered considerable ice which became so heavy at about 1420 hours as to make it impossible for the vessel to proceed. Conditions appear to have later improved so that at 0008 hours on December 25, the *Irene M* was steaming full ahead. Later however (around 0220 hours) the vessel became jammed in heavy ice and developed a bad list at about 0772 hours, she then being four miles off shore from St. Luce. A radio message was sent advising that the ship was leaking and required the services of an ice-breaker. The proof shows that thereafter during the forenoon of the 25th the *Irene M* radioed various appeals for assistance amongst which were the following addressed to the Department of Transport, at Quebec; at 1317 hours "Ship leaking badly and taking heavy list, need assistance immediately" and at 1420 hours "We are stuck in ice and unable to do anything without assistance". At 1601 hours the following message

was sent to Sealakes Shipping Corporation, Montreal, as follows:— "Ship leaking badly and taking heavy list, need assistance immediately".

It appears that the *Irene's* requests for assistance were relayed to those in charge of the *Keta,* which at that time was tied up at Rimouski, and that the *Keta,* after conferring direct with the *Irene M,* left Rimouski at 1615 hours on December 25 and proceeded to the *Irene M* arriving alongside at 1720 hours.

The *Keta* is a steel screw motor-vessel of 456 GRT tons and 368 NRT; 153 feet in length and 27.6 feet in breadth. She is proved by Diesel engine of about 530 horse-power and carried a crew of eight; her value appears to have been approximately $100,000.00.

The evidence is that when the *Keta* came alongside the *Irene M,* the latter had a list of from 22° to 25° and was completely surrounded by ice and unable to move. The two masters conferred after which the *Keta* proceeded to break the ice around the *Irene M.* There is some conflict in the testimony as to whether the *Keta* continued her efforts to break ice throughout the ensuing night or whether she merely stood by.

The proof shows that at one stage a line was put aboard the *Irene M* and that the *Keta* transferred a gasoline pump to the *Irene M* and assisted her in installing it and getting it into operation.

The weight of the evidence indicates moreover that the *Keta* remained with the *Irene M* from the time she arrived alongside at 1720 hours on December 25 until 1245 hours on December 26, when she left for Father Point due to the illness of her Captain, and I am satisfied that, at least during a substantial portion of this time, the *Keta* did her utmost to free the *Irene M* from the ice. In fact, the proof is that during this period the *Irene M* was able, due to the efforts of the *Keta,* to progress of some four miles in a north-easterly direction.

At 1240 hours on December 26 (the *Keta* at that time being at Father Point) the *Irene M* sent the following message to Sealakes Shipping Corporation:—"Situation more serious, ship leaking and listing more, impossible to proceed through ice without aid of an ice-breaker. The *Keta* standing by alongside to take off crew, if necessary".

It appears that during the absence of the *Keta* at Father Point those on board the *Irene M* became alarmed at her position as a result of an increase in her list and her crew accordingly were put to work shifting her deck cargo. Efforts were also made to launch the life-boats, but it was found impossible to do so due to the fact that everything was frozen and the following message was sent to the *Keta,* at Father Point: "*Irene M* in danger, taking heavy list, calling for *Keta* right away. Says making water in engine-room in everywhere. *Keta* at this wharf now taking fuel".

At 2032 on December 26, the ice-breaker *N. B. MacLean* arrived alongside the *Irene M* and proceeded to break the ice around and ahead of the crippled vessel, with the result that she was able to follow the ice-breaker at slow speed with the *Keta* trailing. At 2150 hours, the vessels were abeam of Rimouski, but the draft of the *N. B. MacLean* prevented her from entering the harbour, so that the *Irene M* remained outside the harbour's entrance, with the *MacLean* standing by, until the following morning. The *Keta* however proceeded to Father Point where she spent the night, returning to Rimouski at about 0700 hours on December 27 to break the ice in the harbour and assist the *Irene M*

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to enter and tie up at the wharf which was eventually accomplished at 1048.

It appears that, contrary to what those in charge of the *Irene M* apprehended, she was not leaking, her list being due rather to the fact that she had 150 tons of slack water in her bilges and on her tank tops.

I am convinced nevertheless that the *Irene M* was in a position of some danger at the time of, prior to and subsequent to the arrival alongside of the *Keta*. Not only was she incapable of freeing herself from the ice that surrounded her, but her heavy list, particularly having regard to the nature and quantity of her deck cargo, consisting in part of heavy machinery, justified the fears of her Master that she might capsize. Moreover, the *Irene M* was considerably undermanned and for some reason could not maintain sufficient steam to enable her to make more than a fraction of her normal speed. There was some evidence as to the alleged danger that the *Irene M* might be carried ashore in her helpless condition by the wind and shifting ice while this development in the circumstances would appear to have been unlikely unless there had been a considerable change in the force and direction of the wind, it was nevertheless a remote possibility. The conclusion therefore is that having regard to all of the circumstances the *Irene M* was in a position of some danger prior to and subsequent to the arrival alongside of the *Keta*.

I am satisfied, moreover, that the *Keta* rendered services of a beneficial nature. Arriving alongside the crippled vessel at 1720 hours on December 25, the *Keta* remained with the *Irene M* continuously until she left to go to Father Point on the following day at 1245 hours. During that time the *Keta* by breaking the ice around and ahead of the *Irene M* made it possible for the latter to progress under her own power for a distance of approximately four miles in a north-easterly direction and away from shore. Moreover, the *Keta* transferred a pump to the *Irene M* and assisted her in getting it into operation and when she was not actually attempting to break ice around the crippled vessel she stood by ready to render all possible assistance and take off the crew should it become necessary to do so, as indeed it might have done.

It is true that on December 26, when heavier ice was encountered, the *Keta* was unable to make much, if any, progress and that from 1245 hours when she left to go to Father Point until the following morning, she rendered no assistance, the *N. B. MacLean* having taken over. However the following day, December 27, the *Keta* returned to the *Irene M* and spent about four hours breaking the ice in Rimouski Harbour, so that the *Irene M* was able to dock at Rimouski wharf at 1048.

I am of the opinion that the services rendered by the *Keta*, at the request of those in charge of the *Irene M*, were in the nature of salvage services and that the *Keta* is entitled to be rewarded on that basis.

It is always a matter of some difficulty to determine the amount which, in the particular circumstances of each case of this nature, should be awarded. It is unnecessary to set out here the various elements, which the courts have long recognized, should be considered in determining the amount to be granted in such cases. (*Kennedy—The Law of Civil Salvage*, 2nd Edit. pages 129, 130 and 133).

The Master of the *Keta* admitted in the course of his testimony that the assistance rendered to the *Irene M* did not involve risk or danger to his vessel or crew.

There is evidence that some weeks after the services were rendered it was found necessary to replace one of the *Keta's* clutches and it was suggested that this was the result of the heavy strain placed upon the vessel's engines during her manoeuvres to free the *Irene M* from the ice. The Master of the *Keta* admitted however that between the time at which the services were rendered to the *Irene M* and the replacement of the damaged clutch, the *Keta* had navigated in ice and I find that the proof is insufficient to justify the conclusion that the *Keta* sustained damage in the course of her efforts on behalf of the *Irene M*.

Of the numerous decisions which were cited I propose to mention only two which, in particular, were relied upon by counsel for the plaintiffs in support of his argument that the award should be generous having regard to the comparatively high value of the *Irene M* and her cargo. The first of these is the case of the *Woodford*[1], in which the salvors were awarded the sum of $20,000.00 plus damage to the salving vessel and expenses amounting to $2,199.82. It is necessary to point out however that the *Woodford,* which had been dangerously holed as the result of a collision and was taking water badly, was held to have been in a position of considerable danger and that the salvage services rendered involved risk to the salving vessel and danger to her cargo. Moreover, the combined value of the *Woodford* and her cargo amounted to more than $2,000,000.00, so that the award represented one percent of salved value, plus expenses. In the case of the *Seneca,* whose value was $20,000.00, the court awarded the sum of $2,000.00, plus expenses for services, comprising towing and standing-by in circumstances somewhat similar to those of the present case, but extending over a period of more than 10 days. Moreover, the salving vessel in that case was specially equipped to render salvage services and it is well recognized that in such circumstances salvage is granted at a higher rate than would be the case of a vessel not so equipped.

It is well established that, although the value of the salvaged property is an element to be considered in determining the amount of salvage to be awarded, this value should not be accorded such importance as to result in the award of salvage disproportionate to the services actually rendered.

Amerique[2]

Although the quantum of remuneration to salvors is to some extent to be affected by the value of the property salved, it must not be raised to an amount altogether out of proportion to the services actually rendered.

No proof was made in regard to the out-of-pocket expenses incurred by the *Keta* in rendering the said services. However, after a review of the cases and careful consideration of all of the circumstances, I have reached the conclusion that the sum of $6,000.00 constitutes a fair and just reward for the salvage services rendered, including a reasonable allowance for expenses incurred and such damages, if any, as the *Keta* may have sustained due to extraordinary strain upon her engines.

Judgment for $6,000.00 plus interest and costs.

Judgment accordingly.

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[1] [1955] S.C.R. 829.

[2] 21 L.R. 6 P.C. 465.

1958
Mar. 17
1959
Mar. 10

BETWEEN:

TUXEDO HOLDING COMPANY LIMITED ..... APPELLANT;

AND

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

Revenue—Income—Value of real estate acquired by company for issue of its capital stock—Lots held in capacity of trustee not to be considered in fixing value of other lots—Total par value of shares issued deemed to be cost of lots—Appeal allowed in part.

Messrs. H and F entered into an agreement on their own behalf and that of others to donate 160 acres of land as a site for a university in Winnipeg, Manitoba. It was expected that if the university were built the value of other lands held by them in the vicinity of the site would greatly increase in value. These land holders obtained the incorporation of the appellant real estate company in 1914, the authorized capital of which was 2,000 shares of $100 par value. The 160 acre university site was transferred to the company to be held by it for the university. One thousand shares of the company's stock were issued by it to the group who had transferred the university site to the company and later other lots valued at $355,000 were transferred by the group to the company which issued to them the remaining 1,000 shares of its capital stock. In 1951 some of the lots were sold and in determining the profits on such sale for income tax purposes the Minister of National Revenue assessed them on the basis that the cost at which they had been acquired in 1914 was $100,000. An appeal to the Income Tax Appeal Board was dismissed. The company appealed to this Court contending that the lots had been purchased at a cost of $355,000.

Held: That the lots were acquired for the issue of all the company's shares after the university site had been acquired, such site having been received by the company as a trustee for the purpose of transferring it to the university authorities and could not be considered part of the company's trading stock.

2. That the issue of all the appellant's shares for the lots was referable only to those lots and no part of such issue was attributable to the university site.

3. That the price paid by appellant for the lots was the par value of the 2,000 shares of capital stock, namely $200,000 which sum correctly represents the cost of the lots to appellant.

4. That stock acquired by a trader must be brought in at the price paid for it in order to calculate the profit made on its sale.

APPEAL from a decision of the Income Tax Appeal Board.

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

Sir Charles Tupper, Q.C. and *J. J. Robinette, Q.C.* for appellant.

A. W. Scarth and *A. J. Irving* for respondent.

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

CAMERON J. now (March 10, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated May 8, 1957 (17 Tax A.B.C. 166) dismissing the appellant's appeals from re-assessments made upon it for the taxation years ending November 30, 1951, and 1952. The appellant company was incorporated on August 20, 1914, under the *Companies Act* of the Province of Manitoba with an authorized capital of $200,000.00 divided into 2,000 shares of a value of $100.00 each. Included in the purposes and objects of the company was that of acquiring, dealing in, and selling lands in the Province of Manitoba. It is conceded—and rightly so—that profits realized from the acquisition and sale of such property constitute taxable income of the appellant.

In 1951, the appellant sold 1½ lots. The question for determination is the amount of the profit so realized, the single item in dispute being the cost to the appellant of the lots so sold. As I understand the evidence, no lots were sold in 1952, but an appeal was taken from the re-assessment made in that year merely because the respondent had credited part of the overpayment of $424.53 in that year on the outstanding balance claimed in the re-assessment for 1951.

Before considering the various submissions as to the proper method of computing the cost of the lots sold in 1951, I shall set out as concisely as I can the manner in which the appellant acquired title to the property. The story commences nearly fifty years ago. In 1910, certain individuals and companies, owning lands in Tuxedo, adjacent to the boundary of the City of Winnipeg, decided to negotiate with the University of Manitoba (hereinafter

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called the "University") for the location of the University in the said area. An agreement dated October 6, 1910, forming part of Exhibit 4, was entered into between Messrs. Heubach and Finkelstein and the University, by the terms of which the former agreed to provide the University with a free site of 160 acres conditional on the University spending certain amounts in laying out and improving the lands and expending certain amounts in erecting University buildings thereon. The lands intended to be conveyed to the University were owned by Heubach and Finkelstein and Tuxedo Estates Ltd., but it is common ground that in executing that agreement, Messrs. Heubach and Finkelstein were acting not only on their own behalf, but also on behalf of Tuxedo Estates Ltd. and other land companies. The purpose of the owners in agreeing to provide a site for the University was the expectation that if the University were built on that site, the values of the remaining lands would be greatly enhanced. It is recited in that agreement that the University had accepted the offer so made on the terms and conditions therein stated. Clause 7 gave the University the option to acquire further lands at a fixed price, but that option was never exercised.

In furtherance of the plan, an agreement was entered into by all the owners of the land in 1911 (Exhibit 3). Tuxedo Estates Ltd. was the party of the first part and Messrs. Heubach and Finkelstein parties of the second part, these three being the owners of the 160 acres selected as a site for the University. Three corporate land-owning bodies were the parties of the third, fourth and fifth parts, and the owners in certain proportions of lands adjoining the University lands.

It is recited in that agreement that Messrs. Heubach and Finkelstein had entered into the agreement with the University with the approval and at the request of the other parties and that it was understood that such lands as might be chosen for the University were to be conveyed by the respective owners and that all the parties thereto "should be assessed therefor in land" and further that it was desirable to execute a formal contract embodying the said agreement and the manner of carrying it into effect.

Provision was made for the incorporation of a "new

company" with an authorized capital of $200,000.00 with power to deal in real estate. The parties of the first and second parts agreed to convey to the new company the 160 acres representing "the University lands" in consideration of receiving one-half of the fully paid up shares in the new company. In clause 3 it is stated:

> The estimated value of said lands except the Chiswell property, is $354,977.70 of which $223,946.80 is made up of lands to be transferred by the First Party and the balance of the lands to be transferred by the Second Party. The said estimated value is arrived at by taking the retail prices for said property as shown in that part of the first schedule relating to the property of the first and second parties, and deducting therefrom forty-five per centum.

These agreed values are further explained by the opening recital which refers to all the lands in question:

> Whereas the parties hereto are respectively the owners of properties set forth in the first schedule hereto, which properties are for the purposes of this agreement taken to be of the values set forth opposite same in said schedule, and being the values at which said properties have been held for sale and as shown on the retail price lists prepared by the owners thereof respectively, less forty-five per centum which is taken to be a fair and reasonable amount to cover the cost of converting such property into cash in the usual course of business.

It was further agreed that the parties of the third, fourth and fifth parts in consideration of the issue to them of the remaining fifty per cent of the stock in the new company and in proportion to their respective contributions of land should, out of the lands owned by them, convey to the new company property to the like value of $354,977.70 to be made up in proportion to the value of their respective holdings in the first schedule. Then clause 9 provided:

> In the event of the University of Manitoba carrying out the said agreement, the new Company will transfer the property in accordance with the terms of such agreement, and shall pay off the aforesaid mortgage upon a portion of same as said mortgage matures using therefor funds obtained from the sales provided for in paragraph numbered 8 hereof or such other funds as to the directors may seem advisable; but in the event of the University of Manitoba not carrying out such agreement and the said property becoming freed from the terms thereof the directors of the new company will sell and dispose of such property in such manner as they may think best.

Attached to the agreement were various schedules showing the properties owned by each party, with the frontages, price per foot of frontage and the value of each parcel. For example, the values of the University land set aside

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by Tuxedo Estates Ltd. is given as $407,176.00. It was after allowing forty-five per cent thereof as "a fair and reasonable amount to cover the cost of converting such property into cash in the usual course of business," as above referred to that the contribution of Tuxedo Estates Ltd. was valued at $223,946.80.

The proposed "new company" was incorporated in 1914 as Tuxedo Holding Co. Ltd.—the appellant herein. By agreement dated December 14, 1914 (Exhibit 4) attached to and forming part of which are the earlier agreements of 1910 and 1911, the appellant agreed to carry out the provisions of the agreements of 1910 and 1911 upon receiving transfers of the University lands comprising 160 acres for which 1000 fully paid-up and non assessible shares would be issued to the owners thereof in proportion to the agreed value of their holdings therein; and, upon receiving a transfer of the remaining property comprising 905 lots, a similar number of like shares would be issued to the then owners in proportion to the agreed value of their holdings therein. The parties to that agreement were not precisely the same as those in the 1911 agreement due to death and transfers of interest in the lands but that matter is of no importance in this case. Pursuant to that agreement the lands comprising the University site of 160 acres, and 905 lots were transferred to the appellant and the appellant issued the whole of its capital in fully paid up and non assessible shares to the parties in the proportions set out in the agreement Exhibit 4.

In November 1919, the appellant with the consent of the University of Manitoba transferred to His Majesty the King in the right of the Province of Manitoba 37.98 acres, being a portion of the University site, to be used for educational purposes. On the same date the appellant company transferred to the University of Manitoba the balance of the University site, subject to the terms and conditions therein provided. In 1930 following certain litigation, an agreement was entered into between the appellant company, the University of Manitoba and the Province of Manitoba by which it was agreed that the University should be relieved of its responsibility to establish the University on the University site in Tuxedo

and the appellant would be relieved of its responsibility to provide lands therefor; the University would re-convey to the appellant the lands conveyed to it in 1919 and the appellant would be paid $65,000.00. These provisions were duly carried out.

In 1951 the appellant sold one and one-half lots for $1875.00. In re-assessing the appellant the Minister fixed the cost thereof at $305.90 and added to the declared income of the appellant the difference of $1569.10 as profit on the sales. The amount involved in the re-assessment for 1951 is relatively small but the principle involved is of importance to the appellant because of the very large number of lots remaining unsold. It should be stated here that a few lots were sold in earlier years and a very substantial number were lost through tax sales.

The method by which the Minister arrived at the cost of $305.90 for the one and one-half lots sold is shown on the statement attached to the re-assessment entitled "Evaluation of land costs." It was first assumed that the cost of the University site of 160 acres was the face value of the 1000 shares having a par value of $100.00 each issued in payment therefor—a total of $100,000.00. Of the total acreage 118.53 remained in the possession of the appellant on November 30, 1950, the end of its previous taxation year, representing on a percentage basis, $74,080.00 of the original cost; to that amount was added $4671.97, an adjustment made to bring the land account in line with the balance sheet at November 30, 1950, a total of $78,751.97.

Similarly it was assumed that the 905 lots were acquired at a cost equivalent to the face value of the 1000 shares having a par value of $100.00 each issued in payment therefor—a total of $100,000.00. As of November 30, 1948, only 185 lots remained or 39.22 per cent of the total number, the cost of such lots being, therefore, $39,220.00. This amount was reduced by $1,900.00 representing the proceeds of the sale of two lots thereafter but before 1951, leaving a total cost of $37,320.00 for the lots on hand at November 30, 1950, or an average of $203.93 per lot for each of the 183 lots then unsold. The one and one-half lots sold in 1951 were from these lots and accordingly the cost thereof

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was fixed at $305.90. The computation also shows that on this basis the revised cost of all the land retained by the appellant on November 30, 1951—whether of acreage or lots—was $114,196.97, a figure which corresponds precisely with the value of "unsold property" listed in the balance sheet attached to the appellant's 1951 tax return and approved by its directors and auditor.

It will be seen therefore that the Minister's assessment was based on the assumption that the cost of all land to the company was an amount equal to the par value of all its shares which it had issued to the vendors in payment, namely $200,000.00. The Income Tax Appeal Board agreed that such was the case and dismissed the appellant's appeal.

For the appellant it is submitted that the cost of the lands to the appellant is not fixed or ascertained by the face value of the shares issued in consideration of the transfer of the land. It is contended that while the cost of the lands cannot be fixed at less than such face value ($200,000.00), such cost may be in excess of the face value of the shares. It is first submitted that the cost here is fixed by the agreement of November 14, 1914 (the only agreement in which the appellant is a party) by which it agreed to "abide by, carry out and perform" the agreement of 1911 between the various landowners, and the 1910 agreement with the University. In the 1911 agreement, it was provided that the land to be contributed by the owners of the University site had an estimated value of $354,977.70, which was arrived at by taking the retail prices for such property as shown in the schedules thereto and deducting therefrom forty-five per cent, said to be the normal cost of selling. It is also provided that the property to be conveyed by the other landowners to a total value of $354,977.70 should be made up by them in proportion to the value of their respective holdings as set out in the schedule. In the result, these other landowners contributed 905 lots. It is contended, therefore, that the cost of all the property to the appellant should be taken as $709,955.40, being the sum of the estimated value of the University sites and of the 905 lots as fixed by the 1911 agreement.

Evidence was given by Mr. George Donaldson, a chartered accountant and resident partner in Vancouver of the well-known accounting firm of Clarkson, Gordon and Company. He says that he was consulted by the directors of the appellant in January 1952, that he reconstituted the accounts of the appellant on a proper accounting basis (prior to that date the accounts had not been prepared by a chartered accountant) from the books and records of the appellant since its formation, and, after considering the various agreements to which I have referred, he reconstituted the accounts from 1914 and set up annual balance sheets commencing with 1948, all as shown in Exhibit 8. These accounts and statements, he stated, were prepared in accordance with sound accounting practice. In his opinion, it was proper to take $354,187.00 as the cost of the University site, and a like amount for the 905 lots—a total of $708,374.00. (In his statement, the University site is referred to as "the golf course property" as apparently it has been operated as such by the appellant for many years since it was returned by the University to the appellant in 1930.) No explanation was given as to why the values were put at $354,187.00 in each case instead of $354,977.70—the estimated values stated in the 1911 agreement.

An examination of Exhibit 8 will assist in explaining Mr. Donaldson's evidence. His first balance sheet is for November 30, 1948. Under "Liabilities", he lists the shareholders' equity as follows:

Capital stock—authorized and issued—	
2,000 shares of $85 each	$170,000.00
Contributed surplus	508,374.00
Capital surplus	65,000.00

The capital surplus refers to the payment of $65,000.00 received by the appellant in 1930 at the time of the settlement with the University and when the University site was reconveyed. The "Contributed surplus" he defines as the excess of the consideration paid ($708,374.00) over the par value of the shares issued ($200,000.00). The stock is put at $85 per share, as $15 per share appears to have been distributed to the shareholders at an earlier date. In his view, it is in accordance with sound accounting practice

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to call the difference between the par value of the shares and the value of what the appellant received, a "Contributed surplus", and show it as a liability to the shareholders.

His opinion was corroborated by the evidence of Mr. J. C. Thompson, a chartered accountant of Montreal and senior partner in Canada of another well-known accounting firm, Peat, Marwick & Company. In his view, also, it would be proper for a company issuing shares in payment of property to show the difference between the par value of the stock issued and the larger value of the assets received as a premium or as a "Contributed surplus".

The accountants' evidence is uncontradicted, but in the circumstances of this case I am unable to accept the principle which they have stated as applicable to the facts before me. It seems to me that they have treated the matter as if the landowners who conveyed the lands to the appellant were in fact selling it at an agreed figure and that the purchaser of the land—the appellant—had become the owner of the lands free to dispose of it as it wished and without any conditions being attached thereto. The situation here, however, is quite otherwise.

While it is true that the appellant upon receiving the transfer of all the property became the registered owner of lands which the transferors for purposes of their own had valued at $709,955.40, I think that it cannot be said from any practical point of view that that amount represented the cost of the lands to the appellant. The agreement of 1914 which was the only relevant agreement in which the appellant was a party, is not, in my opinion, an agreement of sale and purchase for that consideration. It speaks only of "transferring" the lands and the same term was used in the 1911 agreement. As I understand the various agreements, the real purposes in forming the "new company" were (1) to vest the ownership of the University site in one company; (2) to also vest in the same company lands of an equivalent value and which lands it would hope would be enhanced in value by the construction of the University; and (3) that all those who contributed lands either for the University site or as part of the 905

lots should have apportioned to them, in proportion to their contributions in land,. all the shares of the new company.

Further, it seems to me that it was never in the contemplation of the parties that the appellant, in issuing all its shares, should attribute any portion thereof as the *cost* of the University site. In the absence of any evidence to the contrary—and none of the original parties or their officers gave evidence—it seems reasonable to suppose that the appellant company in accepting the transfer of the University site, did so as a trustee and merely for the purpose of carrying out the agreement of 1910. By that agreement, which the University had accepted, it was entitled to a transfer upon performing the conditions laid down and without payment of any sort. There was, of course, a possibility—and nothing more than a bare possibility—that the University might not comply with the conditions, in which case the University site would remain the property of the appellant which would then have full ownership free of any trust and with powers of disposal. There is no evidence as to what value was attributed to the possibility that such a right might be acquired and the actions of the appellant's directors seem to indicate that they regarded it as of no value, and that they merely held such lands in trust.

The very great disparity between the par value of the shares and the accrued value of all the lands affords some indication that such was the case. Moreover, it is in evidence that in the opening entry in the appellant's journal, dated January 1, 1915, the property account was shown as a debit of $354,187.00, capital account being credited with $200,000.00, and $154,187.00 being shown as a reserve. The entry in the ledger account under the heading "Property" is to the same effect. The University site, while subject to the trust, could not in any sense be considered as part of the trading stock of the company, as the 905 lots undoubtedly were. The mere fact that 1,000 shares of the appellant company were allotted to and distributed among the original owners of the University site, does not mean that the appellant was purchasing the land from them or that it intended to issue one-half of its

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shares in payment of the cost thereof. A trustee normally does not pay the value of the property to be held in trust to the donors of the trust. In my opinion, the cost of the acquisition of the property—and by "cost" I mean the issue of all its shares—was referable only to the acquisition of the 905 lots. That was the view adopted by the company itself and I think in the circumstances it was the correct one.

In reaching this conclusion, I have not overlooked the submission of Mr. Robinette, counsel for the appellant, that to some extent the probability that the appellant would be required to convey the University site to the University without cash compensation was balanced out by the possibility that the remaining lands might thereafter be enhanced in value by the construction of the University in Tuxedo. I am, however, unable to attach any importance to this matter for, while it was reasonably certain that the University would take over the site—as it actually did in 1919—any resulting benefit to the rest of the property was entirely uncertain and problematical. In any event, while any such enhancement in value of the 905 lots might increase the value of the shares in the appellant company in the future, the possibility that it might do so could not affect the question as to the cost of the lots to the appellant company which was fixed by the agreements of 1910 and 1914.

The remaining question is that of determining the principle on which the opening figures for the 905 lots acquired by the appellant company as its trading stock ought to be ascertained. I think it is well established, as a general rule, that stock acquired by a trader must be brought in at the price which he paid for it in order to calculate the profit which he made by its sale. In view of my finding that the price paid by the appellant was referable only to the 905 lots, the question now is whether such cost was $200,000.00, the par value of the issued shares, or $354,977.70, the value of the lots as agreed upon by the incorporators of the appellant company.

In support of his contention that the costs should be fixed at the larger figure, Mr. Robinette submits two propositions. He says first that the price paid by the company for the assets must be taken to be at least the par value

of the shares. Reference is made to *Osborne v. Steel Barrel Co. Ltd.*[1], where Lord Greene, M. R., delivering the judgment for the Court, said: "Accordingly, when fully-paid shares are properly issued for a consideration other than cash, the consideration moving from the company must be at the least equal in value to the par value of the shares and must be based on an honest estimate by the directors of the value of the assets acquired."

The second submission is that the cost in this case is the full amount of the liability to the shareholders as a result of the transaction and that that liability is the par value of the shares ($200,000.00), plus the amount of the contributed surplus, which is the amount by which the estimated value of the 905 lots exceeds the par value of the shares—or $154,977.70. This submission is founded on a decision of the House of Lords in 1946 in *Craddock (H. M. Inspector of Taxes) v. Zevo Finance Co. Ltd.*[2]. In that case the respondent company was formed for the purpose of taking over certain speculative investments forming part of the holdings of another company. These investments originally cost £1,029,958, but at the time of acquisition by the respondent had greatly depreciated in value, being worth on the market about one-third of the original cost. In consideration of receiving the shares, the company agreed to discharge the liability of the former company in respect to its debentures of £409,928 and to issue fully paid shares to the nominal value of £620,030. It was held that the cost of investments to the company was £1,029,958, being the total amount of the debenture liability assumed, plus the nominal value of the shares issued, and that this amount had been properly entered in the books of the company. The contention of the Crown that the cost to the company was the market value of the shares at the time of acquisition by the respondent was rejected.

Mr. Robinette further says that as each shareholder would be entitled on the winding up of the company to an *aliquot* portion of all the assets, the liability of the appellant to its shareholders is measured by the total value of all its assets, including the "Contributed surplus".

[1] [1942] All E.R. 634 at 638. [2] 27 T.C. 267 at 284.

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Now it seems to me that there is a clear distinction between the *Zevo* case and the instant case on this point. In the former, the liability assumed by the company and which was found to be part of the consideration paid, was the liability to indemnify the former company in respect of its debentures and interest thereon. That liability was in the nature of a debt assumed and had nothing to do with any liability of the company to its shareholders for a "Contributed surplus" as in the instant case. Whatever the liability of the appellant company to its shareholders may be in respect of a "Contributed surplus", that liability, in my opinion, forms no part of the consideration paid in respect of the acquisition of the lands. That consideration, which is the cost to the appellant, was the issue of the $200,000.00 par value of the shares.

In the *Steel Barrel* case (*supra*), the Master of the Rolls considered an argument on behalf of the Crown that if a company acquired stock in consideration of the issue of fully paid up shares to the vendor, such stock for the purpose of ascertaining the company's profits should be treated as having been acquired for nothing, with the result that when the stock is sold the Revenue is entitled to treat the whole of the purchase money obtained on the sale as a profit. After rejecting this argument, which he referred to as a "remarkable contention", he stated at p. 306:

> The primary liability of an allottee of shares is to pay for them in cash; but when shares are alloted credited as fully paid, this primary liability is satisfied by a consideration other than cash passing from the allottee. A company, therefore, when in pursuance of such a transaction it agrees to credit the shares as fully paid, is giving up what it would otherwise have had, namely, the right to call on the allottee for payment of the par value in cash a company cannot issue £1,000 nominal worth of shares for stock of the market value of £500, since shares cannot be issued at a discount. Accordingly, when fully paid shares are properly issued for a consideration other than cash, the consideration moving from the company must be at the least equal in value to the par value of the shares and must be based on an honest estimate by the directors of the value of the assets acquired.

It should be noted that in that case the company had paid a substantial amount in cash as well as issuing a large number of fully paid shares to the vendor for all the assets, including stock in trade. The court found that the Special Commissioners, in fixing the value of the stock in trade as a proportion of both the cash payment and of the par value of the shares issued, had evidence to support their conclusions of fact and had made no error in law.

The principles to be followed in determining the cost of the stock in trade of a trader was discussed in the *Zevo Finance* case (*supra*), Viscount Simon stating at p. 287:

> To put the matter in its simplest form, the profit or loss to a trader in dealing with his stock-in-trade is arrived at for Income Tax purposes by comparing what his stock in fact cost him with what he in fact realised on resale. It is unsound to substitute alleged market values for what it in fact cost him. The deduction from gross receipts, which is not prohibited by Rule 3 of Cases I and II of Schedule D, is that of expenses "wholly and exclusively" laid out for the purposes of the trade, even though the outlay is unnecessarily large. The further test of necessity is, by contrast, imposed under Schedule E, Rules 9 and 10. See also Lord Chancellor Cave's observation on expenditure which goes beyond necessity in *British Insulated and Helsby Cables, Ltd. v. Atherton,* [1926] A.C. 205, at page 212 (10 T.C. 155, at page 191). The test is what was in fact the cost of the stock.
>
> I am well aware that this view makes it possible to attribute a different figure of cost to the same stock, according to the form which the reconstruction takes. In the present instance, for example, a different figure of profit or loss would be reached if the fully paid shares allotted under the agreement were halved, or doubled. But that is only because the cost of the investments would correspondingly vary. Leaving aside cases where the scheme is what the Master of the Rolls calls a "mere device"—and such cases are difficult to define—I can find nothing in our present Income Tax code which requires Commissioners to examine the price paid for assets acquired by a trading company merely because the price takes the form, in whole or in part, of fully paid shares allotted in a reconstruction. If such a duty is to be imposed on them it must be imposed by the Legislature.

In my opinion, the consideration paid by the appellant for the 905 lots was the par value of the shares issued and nothing more. What it gave up was the right to call upon

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the allottees of the shares for payment of the par value of each share. The sum of $200,000.00, therefore, correctly represents the cost of such lots to the appellant.

I was advised by counsel at the hearing that it was unnecessary for me to determine any matter other than the cost of the property acquired. I understood counsel to agree that once that matter was determined all subsidiary questions, such as the proper amount to be fixed as the cost of 1½ lots sold in 1951, would be arranged between the parties. If that cannot be done, the matter may be spoken to at any time.

In the result, the appeal for the taxation year 1951 will be allowed, the re-assessment made upon the appellant set aside and the matter referred back to the Minister for the purpose of re-assessing the appellant in accordance with my findings. The appeal in respect of the 1952 taxation year will also be allowed and the matter referred back to the Minister for the purpose only of making such corrections in the re-assessment for that year as relate to the application of the overpayment in that year to the outstanding balance claimed in the re-assessment for 1951.

The lots sold in 1951 formed a portion of the 905 lots above referred to. Inasmuch as the cost to be attributed to those lots has been substantially increased beyond that allowed in the 1951 re-assessment, the appellant has had substantial success in its appeal and will be entitled to costs after taxation.

Judgment accordingly.

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Apr. 15

Nov. 2

BETWEEN:

JOHN JAMES FITZPATRICK .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—National Defence Act R.S.C. 1952, c. 184, ss. 24, 36, 48(1)(2) and Regulations—Civil courts without jurisdiction to hear actions brought by enlisted men to recover pay and allowances.

Suppliant, a member of the Regular Forces of the Canadian Army, was held in civil custody on a criminal charge upon which he was convicted and sentenced to a term of imprisonment. For the period of time dating from his arrest to that of his conviction suppliant's pay account was credited with the sum of $510.30 but he did not receive that sum. Suppliant now brings his Petition of Right asking for a declaration that he is entitled to have payment made to him of that sum of $510.30, and also a declaration that the purported forfeiture of such pay and allowances by the Adjutant General of the Canadian Army is null and void.

Held: That the Court is without jurisdiction to grant the relief claimed.

2. That neither the *National Defence Act* R.S.C. 1952, c. 184 nor the Regulations passed thereunder relating to pay and allowances provide an enlisted man with the right to bring to the civil courts any dispute relating to such matters.

PETITION OF RIGHT brought by suppliant to recover from the Crown certain pay and allowances allegedly wrongfully withheld from him.

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

C. R. J. Skatfield for suppliant.

G. W. Ainslie for respondent.

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

CAMERON J. now (November 2, 1959) delivered the following judgment:

In this Petition of Right the suppliant, a former member of the Canadian Army, seeks to recover (*inter alia*) the sum of $510.30, said to be the amount of pay and allowances to which he was entitled for the period commencing September 8, 1955, and ending on November 29, 1955. The facts, for the purpose of the trial only, were set out in the document entitled "Admission of Parties", filed as Exhibit 1, and no oral evidence was tendered.

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From the admissions so made, it appears that the suppliant was enrolled in the Regular Forces of the Canadian Army on September 29, 1950 for a term of three years and served continuously from that date to September 28, 1953, when he was re-engaged for a further term of three years, and served continuously from that date until he was released on the 22nd day of February, 1956 at Vancouver, B.C. From September 8, 1955, to the date of his release, he was a member of No. 1 Field Squadron, Royal Canadian Engineers.

On September 8, 1955, the suppliant was arrested on a charge of rape and it is admitted that he was continuously held in civil custody from that date until November 29, 1955, when he was found guilty of indecent assault and sentenced to five years' imprisonment. The trial I infer was on an indictment preferred by the Attorney General of British Columbia, charging the suppliant with rape on September 8, 1955.

It is further admitted that between September 8 (the date of his arrest), and November 29 (the date of his conviction), the suppliant's pay account was credited with the sum of $510.30, and that he did not receive that sum. The admissions also refer to certain steps taken by the Army officers by which they purported to impose a forfeiture of pay and allowances for the period mentioned, the validity of such forfeitures being challenged by the suppliant. I find it unnecessary to say anything further about these forfeitures because of the Crown's plea that this Court is without jurisdiction to deal with the claim for pay and allowances, or with matters relating thereto.

By para. (*b*) of the prayer in the Petition of Right, the suppliant asked for "(*b*) a declaration or order that the suppliant is entitled to have payment to him of the aforesaid sum of $510.30".

Then paras. 7 and 8 of the Statement of Defence read:

7. In answer to the Petition of Right as a whole, he says that the Suppliant served in the Canadian Army on the implied condition that he had no right to pay or remuneration which can be enforced in a civil court of justice.

8. In further answer to the Petition of Right he says that this Honourable Court has no jurisdiction to grant the relief sought in paragraph (*a*) of the prayer for relief.

It is conceded by counsel for the suppliant that prior to the coming into force of the *National Defence Act,* Statutes of Canada 1950, c. 43 (now R.S.C. 1952, c. 184), no Petition of Right or any other proceeding against the Crown would lie in law for the recovery of military pay by an officer or soldier. The *National Defence Act* repealed the former *Militia Act,* R.S.C. 1927, c. 132, as amended, and in a number of decisions of this Court while the *Militia Act* was in force, the principle I have just stated was clearly established. Reference may be made to *Cooke v. The King*[1], which was cited with approval by the President of this Court in *McArthur v. The King*[2]; *Bacon v. The King*[3].

In the United Kingdom, the same principle applied at least until the coming into effect of the *Crown Proceedings Act,* c. 44, Statutes of 1947. I have not been referred to any case on this point in the United Kingdom since that statute was enacted.

In Halsbury's *Laws of England,* 2nd Ed., Vol. 28, at p. 599, it is stated:

> 1229. Officers and soldiers, being servants of the Crown, hold their positions at and during the pleasure of the Queen, and consequently the civil courts have no power to intervene in any dispute relating to military pay or pensions.

In Vol. 9 of Halsbury, 2nd Ed., under the heading of Petition of Right, the principle is stated thus at p. 692:

> Military, naval and civil officers of the Crown are dismissible at will, and no Petition of Right can be brought by them to recover pay, pension or other sums to which they claim to be entitled for their services, or damages in respect of their dismissal, even if contrary to the terms of an express contract of service.

Counsel for the suppliant submitted, however, that the former common law principle may be changed by statute, and no doubt that is so. He says that the *National Defence Act* 1950 effected such a change in regard to enlisted men, though not in regard to officers whose commissions are granted by Her Majesty during pleasure. His submission is that enlisted men in the Services are now enrolled under the Regulations for definite terms of service; that the Regulations confer on them a positive right to pay and allowances; that they cannot be dismissed at will but only for

[1] [1929] Ex. C.R. 20. [2] [1943] Ex. C.R. 77 at 118.
[3] (1921) 21 Ex. C.R. 25.

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the specific reasons stated in the Regulations; that consequently they have a contract with the Crown in regard to pay and allowances which they are entitled to enforce by a Petition of Right.

In reaching my conclusions in this case, I have specifically limited my consideration to the question of pay and allowances of men in military service and matters relating thereto. I have not considered the broader question of service pensions or of matters relating to other servants and employees of the Crown, such as civil servants, these matters not being before me.

The principle which I have stated above has been embedded in the law of the United Kingdom and of Canada for many generations and no case was cited to me in which that principle was not upheld. It follows, I think, that in construing the provisions of the *National Defence Act* I must apply the presumption that Parliament, when enacting that Act, did not intend to alter such a well established principle unless there be found therein language which in express terms or by clear implication leads to the conclusion that such an alteration was intended. An examination of the Act satisfies me that it contains no such express terms or any language which clearly implies that such an alteration was intended.

I have carefully considered those sections of the *National Defence Act* which counsel for the suppliant submits are sufficient to lead to the implication that Parliament intended to alter the law in this regard, and have compared them with similar provisions of the *Militia Act*.

His first point is that the suppliant, like all men, enlisted in the Regular Forces pursuant to Regulation 6.22 (passed under the *National Defence Act*), namely, for a term of one to seven years, "as the Chief of the General Staff may direct". In the case of the suppliant, his term of re-enlistment was for a period of three years. In the *Militia Act*, the enlistment of a man was also for a specified period, s. 15(1) being as follows:

> 15. (1) Men may be enlisted for continuous service in the Active Force for such period as the Governor in Council may prescribe but not exceeding a period of five years and may be enlisted for service in the Canadian Army other than for service in the Active Force for such period as the Governor in Council may prescribe but not exceeding a period of three years.

Then by Regulation it was provided:

290. (*a*) The period of first engagement for service in the Active Force pursuant to enlistment therein and attestation in consequence thereof shall be one of three years. The period of service required to be performed in respect of any re-engagement on such original enlistment and attestation shall be five years.

(*b*) The period of service required to be performed by men enlisted in the Canadian Army, other than for service in the Active Force, shall be three years.

In each case, therefore, enlistment was for a specified period so that there is no difference in this regard between the members of the former Active Militia and the members of the present Permanent Forces.

Secondly, it is submitted that under the *National Defence Act* an enlisted man has a positive right to pay and allowances at fixed rates. Again, I can find no substantial change effected by the provisions of the *National Defence Act* and the Regulations passed thereunder. Under the *Militia Act,* the following sections relate to pay and allowances:

48. (1) Officers, warrant officers and non-commissioned officers of the Active Force shall be entitled to daily pay and allowances at rates to be prescribed by the Governor in Council.

(2) The Governor in Council may, from time to time, fix the sums to be paid to privates of the Active Force, regard being had to length of service, good conduct and efficiency.

Then under the Regulations (Army) relating to pay and allowances, it was provided:

109. A soldier shall be entitled to pay at the rate prescribed for his rank or classification, group and service, in the table to this paragraph.

In the *National Defence Act,* provision is made for pay and allowances as follows:

36. (1) The pay and allowances of officers and men shall be at such rates and issued under such conditions as are prescribed in regulations made by the Governor in Council.

(2) The pay and allowances of officers and men shall be subject to such forfeitures and deductions as are prescribed in regulations made by the Governor in Council.

(3) Unless made in accordance with regulations prescribed by the Governor in Council, an assignment of pay and allowances is void.

In the Regulations passed therein it is provided:

204.30. The rate of pay for a man shall be as prescribed for his rank or classification, group, and service, in the table to this Article.

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It will be seen at once that there is no essential difference between the right to pay and allowances conferred by the two Acts and the Regulations.

Then it is said that under the *National Defence Act* and the Regulations thereunder, an enlisted man cannot be dismissed from the Service at will, but only for the reasons and under the conditions named.

The *National Defence Act* provides as follows:

24. The enrolment of a person binds that person to serve in the Canadian Forces until he is, in accordance with Regulations, lawfully released.

Then by the Regulations, it is provided:

15.01. (2) Except as provided in (3) of this article, an officer or man may be released, during his service, only for the reasons and under the conditions prescribed in the table to this article.

The table referred to consists of several pages, gives the reasons, some of which are applicable to officers, others to men and still others to both classes, and states the authority whose approval is required.

Under the *Militia Act*, s. 21 provides for the oath of allegiance to be taken upon enlistment and its effect.

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

Then, by the Regulations established thereunder and relating to discharge of members of the Permanent Forces, it is provided:

372. (*a*) The various causes of discharge, and the competent officers to authorize, carry out and confirm discharges are given in the following table . . .

Then follows the table referred to which, while it may vary in details, is of the same nature as the table referred to in Regulation 15.01 passed under the *National Defence Act*.

I am quite satisfied, after considering the provisions of the *National Defence Act* and the Regulations passed thereunder relating to pay and allowances, that they contain nothing which leads to the conclusion that an enlisted man now has a right to bring to the civil courts any dispute relating to such matters.

In my view, the law on this point is now the same as it was under the *Militia Act* and as stated in the cases in this Court to which I have referred above. The leading case on this point is *Mitchell v. The Queen*[1]. At p. 122, Lord Esher M.R., said:

> I agree with Mathew J. that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all engagement between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract.

At p. 123 he continued:

> It has been decided over and over again that, whatever means of redress an officer may have in respect of a supposed grievance, he cannot as between himself and the Crown take proceedings in the courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier.

And in the same case Fry L.J., said at p. 123:

> I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either present, past, or future can be enforced in any court of law.

While that case speaks of military or naval officers, it was made clear in *Leaman v. The King*[2] that the principle applies also to enlisted men.

The principle stated by Lord Esher M.R., is now somewhat limited by those provisions of our *National Defence Act* relating to appeals of servicemen and officers to the Court Martial Appeal Court from convictions at a Court Martial, but those provisions have no bearing on this case.

For these reasons, I have come to the conclusion that the Court is without jurisdiction to grant the relief claimed in para. (*b*) of the suppliant's Information.

The suppliant also prays that he may be granted "(a) a declaration that the purported forfeiture or cancellation by the Adjutant General of the Canadian Army, referred to in paras. 4 and 5 of this Petition, is null and void".

The relief so claimed is in respect of alleged forfeiture of pay which has been duly credited to the suppliant for the same period as referred to above. It is a matter which has arisen between the suppliant and the Crown in consequence

[1] [1896] 1 Q.B.D. 121. [2] [1920] 3 K.B.D. 663.

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of the former being an enlisted man. It is clear from the opinion of Lord Esher M.R., in the *Mitchell* case above referred to, that the suppliant cannot seek redress for such an alleged grievance in the civil courts. I must therefore find that the Court is without jurisdiction to grant the relief so claimed.

Reference may also be made to *Mulvenna v. The Admiralty*[1]. There, Lord Blackburn said at p. 575:

> These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant no matter whether they have been referred to when the engagement was made or not.
>
> If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based upon public policy which has been enforced against militant servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant. . . .

Then, after citing a number of authorities, he continued:

> It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a civil Court of Justice, and that their only remedy under their contract lies "in an appeal of an official or political kind".

As this Court is without jurisdiction to grant any of the relief claimed, the Petition of Right will be dismissed with costs.

Judgment accordingly.

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[1] [1926] Scots Law Times Reports 568.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1959

Sept. 21, 22, 23, 24

Oct. 16

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

THE SHIP *M.V. ISLAND CHALLENGER*, THE BARGE *LORD TEMPLETOWN* AND THE SHIP *M.V. SWAN* ..... DEFENDANTS.

Shipping—Tug and tow—Collision with bridge—Negligent operation of tug—Inevitable accident no defence.

The action is brought by the Crown to recover for damage to the railway bridge at New Westminster caused by the barge *Lord Templetown* in tow of the tug *Island Challenger*. The Court found that the tow line was too long and that no instructions were given to the master of a following tug to assist.

Held: That the collision resulted from the negligent operation of the tug and tow in not anticipating a possible sheer and being late on the ebb.

2. That the defence of inevitable accident is not applicable.

ACTION by the Crown to recover damages to a bridge allegedly caused by the negligence of defendant tug and tow.

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

C. K. Guild, Q.C. and *F. U. Collier* for plaintiff.

C. C. I. Merritt and *J. I. Bird* for defendants *M.V. Island Challenger* and *Lord Templetown.*

Glen McDonald for defendant *M.V. Swan.*

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

SIDNEY SMITH D.J.A. now (October 16, 1959) delivered the following judgment:

In this case the Crown claims damages for damage done to the railway bridge at New Westminster in the following circumstances. The bridge is described in the Statement of Claim as follows:

The said bridge was and is a swing bridge with a swing span of approximately 190 feet from pivot to point, or a total of 380 feet long, point to point, with a protection pier below, which extends approximately

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a further 20 feet beyond the end of the swing span when open. With the swing span in the open position there are two channels formed for River traffic each approximately 180 feet in width, a Northerly Channel for upstream traffic and the Southerly channel for downstream traffic.

The damage was done by the barge *Lord Templetown* (formerly a sailing ship of 2,000-odd gross tonnage and 283′ x 40′ x 24′) deeply laden with sawdust. This barge was in tow of the powerful tug *Island Challenger* (166 gross tons x 91′ x 25′). There was a very much smaller tug, the *Swan* "hovering" astern of the barge. The visibility was good.

The defence was "inevitable accident". This was fully dealt with by Mr. Merritt and is to be found at pages 37 to 45 of Marsden's *Collisions at Sea,* 10th edition. It need not be further mentioned by me.

The barge had laden her load in a position approximately one mile upstream from the bridge and proceeded downstream without incident except at one point when the *Swan* went astern to slacken her speed. On board the tug were the Master and the owner of the *Swan* whom I shall refer to as the Pilot. The Pilot's duties were purely in an advisory capacity. This was made abundantly clear. He and his small tug the *Swan* were there to give service to the barge should it be needed in the loading, the passage down the river and through the span of the bridge.

Shortly before the south span was reached the barge took a sheer to starboard and with her bow struck the protection doing a great deal of damage. I have concluded that the collision was due to the faulty navigation of the tug.

I find the tide was ebbing and that she was late on the ebb. This caused the sheer. Even if this were not so a possible sheer might have been anticipated and proper precautions taken. To break the sheer the tug and barge both ported but it was too late to prevent collision in the narrow quarters in which they then were. This was because the tow line was too long. It was given as possibly 150 feet but it may have been longer. I was not quite satisfied with the evidence given either by the Master or the Pilot. They contradicted their discovery in some respects and seemed rather anxious to state their case much in their own favour.

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I think the tow line should have been not more than 75 feet, as stated by the evidence of Captain Kinney which I accept. I am also of opinion that no instructions were given to the following *Swan*. Her Master was a youngish man, clearly ill at ease. He gave his evidence in a very hesitant and inconclusive manner. His plea that the tug and barge failed "to give any instructions or directions . . . to the tug M/V *Swan* or to anyone" was nevertheless fully made out by his own and other testimony. I have no hesitation in finding that the *Swan* was unattached to the barge and not in a position to render any assistance; that neither the Master nor the Pilot at the critical time knew at all accurately where she was.

I therefore find in favour of the plaintiff as against the *Island Challenger* and the barge and direct the Registrar to assess the damages. I dismiss the action against the tug *Swan*. I make no present finding as to costs. Counsel may speak to this later if they desire.

Judgment accordingly.

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Mar. 16

May 15

BETWEEN:

DONALD HART LIMITED ..... APPELLANT;

AND

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

Revenue—Taxation—Income tax—Damages for infringement of trade mark—Capital or income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4.

The appellant, a manufacturer of women's apparel, in an action for infringement of trade mark and other relief, recovered judgment in the sum of $20,000 and credited the net proceeds of the judgment, namely $15,000, to its surplus account. In reassessing the appellant, the Minister ruled that that sum constituted income and added it to the appellant's declared income. An appeal to the Income Tax Appeal Board was dismissed. In a further appeal to this Court, the appellant contended that the sum in question was not "income" within the meaning of ss. 3 and 4 of the *Income Tax Act* because (1) the amount recovered was damages for infringement of the appellant's trade mark, said to be a capital asset; (2) the amount awarded was for diminution

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of the appellant's good will, also said to be a capital asset; (3) the award was for punitive damages, and such damages are in the nature of a punishment for the benefit of the community and as a restraint against the defendant as a transgressor. In support of its contention, the appellant relied entirely on the admissions made by the respondent in his reply to the notice of appeal and on certified copies of the amended statement of claim in the proceedings brought in the Manitoba Court of Queen's Bench, in which court the damages were recovered, and also upon the formal judgment of that Court, the reasons of Maybank J., the trial judge, and the reasons of the Court of Appeal, affirming the judgment of Maybank J.

Held: That there was nothing in the formal judgment of the trial court, nor in the reasons of the trial judge, nor in the reasons of the Court of Appeal, from which it could be concluded that any part of the award was in the nature of punitive damages.

2. That the appellant failed to establish that the award was based on a loss or diminution in value of capital assets, such as it's trade mark or good will, and the sum paid in the name of damages must be treated as a payment in place of loss of trading profits.

Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd. [1936] Ex. C.R. 1; *A. G. Spalding & Bros. v. A. W. Gamage Ltd.*, 35 R.P.C. 101 at 117; *Burmah Steam Co. Ltd. v. C.I.R.*, 16 T.C. 67, referred to.

APPEAL from a decision of the Income Tax Appeal Board.

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

H. Buchwald for appellant.

A. L. DeWolf and *G. W. Ainslie* for respondent.

CAMERON J. now (May 15, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated May 23, 1958[1], dismissing the appellant's appeal from a re-assessment dated October 25, 1956, and made upon it for its taxation year ending May 31, 1955. In re-assessing the appellant, the Minister added to its declared income the sum of $15,000, said to be "Proceeds re Court Award credited to surplus and deemed to be income", and the sole question for consideration is whether that amount is taxable income of the appellant.

In an appeal such as this, the onus is on the taxpayer to establish the existence of facts or law showing an error in relation to the taxation imposed upon him (*Johnston v.*

[1] 19 Tax A.B.C. 373; 58 D.T.C. 385.

M. N. R.[1]). In support of the appeal, counsel for the appellant relied entirely on the admissions made by the respondent in his Reply to the Notice of Appeal and on copies of four documents, the admissibility of all of which was disputed by counsel for the Minister.

The admissions made in the Reply established the following: the appellant was at all material times a body corporate with its head office at Winnipeg; that it was engaged in the manufacture and sale of women's apparel; that it owned the trade mark "a Kilroy Original" used in connection with its products; that in September, 1951, it took proceedings against Frank Kilroy Ltd. for infringement of the said trade mark and for passing off, claiming (1) an injunction in respect of the use of the said trade mark and of the word "Kilroy"; (2) destruction of offending labels, wrappers, etc.; (3) an account of profits earned by the defendant by such improper use of the plaintiff's trade mark and by passing off; and (4) damages of $50,000. Further, it was admitted that that case came on for trial before Maybank J. in March 1953 and that by his judgment, dated January 19, 1954 an injunction was granted and the appellant was awarded damages in the sum of $20,000, the reasons of the learned Trial Judge being reported in [2]; and that the said judgment was affirmed on appeal by the Manitoba Court of Appeal, whose reasons for judgment appeared in [3]. It also appears from the pleadings that in re-assessing the appellant, the respondent added to its declared income, not the full amount of the award, but $15,000, an amount said to represent the net receipts therefrom. This evidence may be conveniently referred to as "the Admissions".

Counsel for the appellant tendered in evidence the following:

Ex. 1 A certified copy of the amended Statement of Claim in the proceedings above referred to.

Ex. 2 A certified copy of the formal judgment therein dated January 19, 1954.

Ex. 3 The Reasons for Judgment of Maybank J. as reported in [1954] 11 W.W.R. (N.S.) 350.

Ex. 4 The Reasons for Judgment in the Court of Appeal as reported in [1955] 14 W.W.R. (N.S.) 70.

[1] [1948] S.C.R. 486. [2] (1954) 11 W.W.R. (N.S.) 337.
[3] (1955) 14 W.W.R. (N.S.) 49.

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No objection was taken as to the form in which this documentary evidence was tendered, but counsel for the Minister took the position that as these documents had to do with an action *in personam* in which the respondent herein was neither a party nor privy, they were therefore inadmissible on the ground that they were *res inter alios acta*. He relied on *Dokuchia v. St. Paul Fire & Marine Insurance Co.*[1] (a decision of the Court of Appeal of Ontario); *Hollington v. F. Hewthorn & Co. Ltd.*[2] (a decision of the Court of Appeal in England); and Halsbury's *Laws of England*, 3rd Ed., Vol. 15, p. 396, where it is stated:

> 708. A judgment *in personam* or *inter partes* operates as an estoppel or conclusive evidence against parties and privies of the truth of the facts upon which such judgment is based; but except to prove its existence, date and consequences, it is inadmissible in evidence for or against strangers.

Counsel for the appellant intimated at the hearing that whether or not the documentary evidence was admitted, he intended to lead no further evidence. Accordingly, I stated that I would reserve my finding on what I considered to be a difficult point and, if necessary, would dispose of it in my judgment.

The appeal of the taxpayer is substantially based on the fact that the award resulting in the receipt of $15,000 is one for "damages" and counsel concedes that if it had been an award for loss of profit resulting from infringement of trade mark and passing off, the amount received would have been taxable income. It seems to me that if the documents tendered as Exhibits 1 to 4 are rejected as inadmissible, the appellant could not succeed in the appeal since the only evidence of importance in the "Admissions" as to the nature of the award is that it was an award of "damages". In income tax matters, the receipt of compensation by way of "damages" is neutral, without further evidence as to the nature and quality of the award. It is trite law to say that the receipt of an award of "damages" may or may not result in the receipt being taxable income.

In an ordinary case I would, of course, have followed the principles which I have referred to and would have rejected the documentary evidence as inadmissible as being *res inter alios acta*. In such a case as the instant one—a tax case in

[1] [1947] O.R. 417. [2] [1943] 2 All E.R. 35.

which the amount in question was added to the declared income of the appellant as being "Proceeds re Court Award" —there is much to be said for permitting the tendered documents to be put in evidence on the ground that the Minister has adopted the "Court Award" as the basis of the re-assessment and may possibly, therefore, be considered as having become privy to the original action, as well as on the further ground that an appellant who has received an award for "damages" would in some cases find it difficult, if not impossible, to show the real nature and quality of the amount received without recourse to the best evidence available, namely, the Court records. The point is an interesting and difficult one, but in the present case I do not find it necessary to reach a concluded opinion thereon inasmuch as the appellant, in my view, must fail even if the documents are admitted. I shall therefore dispose of the matter on the basis that the documents have been admitted in evidence.

For the Minister it is submitted that the sum of $15,000 was received as damages for loss of profits suffered by the appellant in carrying on its business; that therefore it is profit from a business and is income by virtue of ss. 3 and 4 of *The Income Tax Act,* which are as follows:

> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
>
> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employments.
>
> 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

For the appellant it is submitted that the sum in question is not "income" within the meaning of ss. 3 and 4 because (1) the amount recovered was damages for infringement of the appellant's trade mark said to be a capital asset; (2) that the amount awarded was for diminution of the appellant's goodwill, also said to be a capital asset; and (3) that the award was for punitive damages, that such damages are in the nature of a punishment for the benefit of the community and as a restraint against the defendant as a transgressor.

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The third ground mentioned may be disposed of at once. A careful reading of Exhibits 2, 3 and 4 satisfies me that there is nothing therein which enables me to come to the conclusion that any part of the award was in the nature of punitive damages and therefore I do not need to explore the question as to whether or not such damages constitute taxable income.

The first and second grounds may be considered together. At p. 349 of his reasons for judgment (Exhibit 3), Maybank J. stated:

> I consider that the plaintiff should succeed against the defendant company in its claim for trade-mark infringement and its passing off claim.

Then, after considering and rejecting a further claim of the appellant in respect of an alleged infringement of its patent, he granted the injunction asked for in respect of infringement of trade mark and passing off and continued at pp. 350-351:

> The plaintiff is entitled to an accounting of profits from the defendant company or to damages, and may choose which. Plaintiff's counsel has indicated that the plaintiff would prefer to have compensation by way of damages and I proceed to assess them.
>
> It seems to me that some of the loss suffered by the plaintiff is due not to the infringement and passing-off activities of the defendant company but is due merely to the fact that Shuckett and Kilroy separated from each other. Immediately they formed their association the plaintiff company successfully forged ahead in its business enterprises. Both, it seems to me, were capable, aggressive business managers and Kilroy certainly contributed to the building-up of the business. Hence his withdrawal would be injurious to the business. But, of course, he had a right to withdraw. It was also brought out in evidence that carrying on business in 1951 was made difficult by reason of certain bank restrictions effected by Canadian government regulations or regulations of the Bank of Canada. Not all of the difference between a $300,000 gross, with a $4,000 profit and a $200,000 gross with a $10,000 loss can be attributed to the improper competitive actions of the defendant company. I consider that damages in the amount of $20,000 would meet the requirements of the case and judgment will go for that amount against the defendant company, with costs and fiat for discovery.

Counsel for the appellant stressed the fact that at the trial the appellant had elected to ask for an award for "damages" rather than an accounting of profits from the defendant company therein. He submits, therefore, that this constituted an abandonment of the appellant's claim to loss of profits and that since the learned trial judge assessed the appellant's damages for infringement of trade

mark and for passing off, such damages must have been for diminution in value of the appellant's trade mark and of its goodwill, both of which it is said, are here capital assets. I must reject the first part of this submission, based as I think it is on a misunderstanding of what occurred when the appellant abandoned its claim to "an accounting of profits". The amended Statement of Claim (Exhibit 1) shows that the appellant claimed either (*a*) an account of the *profits made by the defendant company* by the use of the appellant's trade mark or by passing off; or, (*b*) damages—and in doing so it was following the usual practice in such cases. But in a large number of infringement cases the measure of the defendant's profit by no means represents the loss of the plaintiff. Such a profit is often difficult to establish and in a great number of cases the plaintiff, as here, elects to take an award of damages more truly representing its loss rather than the defendant's gain. As stated in *Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd. et al.*[1], the quantum of damages to be awarded is the actual loss suffered by the plaintiff which is the natural and direct result of the unlawful acts of the defendant. Then, as stated in *A. G. Spalding & Bros. v. A. W. Gamage Ltd.*[2], the damages will include any loss of trade actually suffered by the plaintiff, either directly from the acts complained of, or any damage properly attributable to injury to the plaintiff's reputation, business, goodwill, and trade and business connections caused by the acts complained of.

It is clear, therefore, that an award of damages in such a case may include damages for loss of trade suffered by the plaintiff. An examination of the reasons for judgment of Maybank J. indicates that the only evidence which he referred to as a basis for awarding damages was that relating to the appellant's loss of profits. I have already set out the only passage of the judgment in which the amount of the award is considered and it appears that the only loss for which damages were awarded was the loss of profits, nothing whatever being said in the judgment as to any part of the award being attributable to diminution in value of the trade mark or of the appellant's goodwill. Indeed, the only other evidence referred to in the entire judgment

[1] [1936] Ex. C.R. 1.
[2] (1918) 35 R.P.C. 101 at 117.

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which relates to the appellant's loss is the paragraph on p. 341 which compares the difference in profits of the appellant company in the first year in which infringement and passing off occurred with that of the preceding year.

In my opinion, therefore, the appellant has failed to establish that the award was based on a loss or diminution in value of capital assets such as its trade mark or goodwill. Indeed, the only reasonable inference is that it was based solely on the loss of profits due to infringement and passing off.

Interpreting the judgment as best I can to ascertain the true nature and quality of the award for the purposes of income tax, I have reached the conclusion that it was made for the purpose of filling the hole in the appellant's profit which it could normally have expected to make, but which had been lost to it by reason of the tortious acts of the defendant therein. Such acts constitute an injury to the appellant's trading. A case in point, although one arising out of a breach of contract, is *Burmah Steamship Co. Ltd. v. C. I. R.*[1], a decision of the First Division of the Court of Sessions, in which the Lord President (Clyde) said at p. 71:

> Suppose some one who chartered one of the Appellant's vessels breached the charter and exposed himself to a claim of damages at the Appellant's instance, there could, I imagine, be no doubt that the damages recovered would properly enter the Appellant's profit and loss account for the year. The reason would be that the breach of the charter was an injury inflicted on the Appellant's trading, making (so to speak) a hole in the Appellant's profits, and the damages recovered could not therefore be reasonably or appropriately put by the Appellant—in accordance with the principles of sound commercial accounting—to any other purpose than to fill that hole. Suppose, on the other hand, that one of the Appellant's vessels was negligently run down and sunk by a vessel belonging to some other shipowner, and the Appellant recovered as damages the value of the sunken vessel, I imagine that there could be no doubt that the damages so recovered could not enter the Appellant's profit and loss account because the destruction of the vessel would be an injury inflicted, not on the Appellant's trading, but on the capital assets of the Appellant's trade, making (so to speak) a hole in *them*, and the damages could therefore on the same principles as before—only be used to fill *that* hole.

[1] [1931] S.C. 156; 16 T.C. 67.

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My conclusion, therefore, is that the sum of $15,000 paid in the name of damages must be treated as a payment in place of loss of trading profits and not a payment for any loss in value of any capital assets. Accordingly, the appeal fails and will be dismissed with costs to be taxed.

Judgment accordingly.

1958

Sept. 8

1959

May 7

BETWEEN:

DOMINION MOTORS LIMITED .....PLAINTIFF;

AND

MAURICE HERBERT GILLMAN and ALEK MORLEY GILLMAN carrying on business under the firm name of DOMINION AUTO WRECKING and DOMINION AUTO PARTS AND SUPPLIES .....DEFENDANTS.

Trade Mark—Trade name—Injunction—Direction of public to a business in a way to cause confusion or be likely to cause confusion between such business and that of another—Trade Marks Act, R.S.C. 1952, c. 49, ss. 7(b) and 54.

The plaintiff, incorporated in 1933 under the name of "Dominion Motors Limited", carried on the business of buying and selling new and used automobiles and trucks and their parts and the repairing thereof.

The defendants in 1957 filed declarations of partnership that they were carrying on the business of buying and selling automobile parts and accessories under the firm name of "Dominion Auto Parts and Supplies" and of buying and selling automobile parts and dismantling automobiles under the firm name of "Dominion Auto Wrecking". They also used the name "Dominion Auto Wrecking and Supplies". In an action brought by the plaintiff to restrain the defendants from doing business under the name "Dominion Auto Wrecking", "Dominion Auto Parts and Supplies" or any other name the use of which would be likely to cause confusion between the defendants' business and that of the plaintiff, it alleged that it had spent substantial sums in advertising its name and the service and products it sold. At the trial it was admitted in the defence that the widespread favour and good will which the name of the plaintiff had acquired, the automobile parts, and the service it sold, had been the products of its constant effort to maintain the superior quality of its products and the service it sold and the integrity of its management.

Held: that s. 7(b) of the Trade Marks Act, R.S.C. 1952, c. 49, applies to each new kind of act or practice by which public attention is directed to a business and in respect to each poses the question—"Was that act or practice likely to cause confusion?"

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2. That the situation in which the use of a trade name may be "calculated to lead to the belief that one business is that of another" are not limited to those in which, from the close similarity, a customer may mistake the one for the other, but include, as well, situations in which the names, though somewhat different from each other, have in the circumstances enough similarity to each other to constitute a representation that the businesses are connected with one another either through having the same owner or through being in some way allied or mixed up with one another. *Joseph Rodgers & Sons Ltd. v. W. N. Rodgers & Co.*, 41 R.P.C. 277 at 291; 34 R.P.C. 232 at 237 and 238; *Office Cleaning Services Ld. v. Westminster Window and General Cleaners Ld.*, 61 R.P.C. 133 and 63 R.P.C. 39, distinguished.

3. That the field in which the defendants' business is carried on overlaps to a considerable extent that in which the plaintiff operates and, where it does not, constitutes an operation which can reasonably be regarded as one to which it might be extended.

4. That the defendants in using the names "Dominion Auto Wrecking" or "Dominion Auto Wrecking and Supplies", directed public attention to their business in such a way as to be likely to cause confusion between their business and that of the plaintiff, and damage to the plaintiff and to its good-will may be reasonably anticipated and the plaintiff is entitled to have the use by the defendants of such names restrained.

ACTION for infringement of the plaintiff's trade name and for unfair competition.

The action was tried before the Honourable Mr. Justice Thurlow at Winnipeg.

The Honourable W. S. Garson, Q.C. for plaintiff.

W. E. Bowman for defendant.

THURLOW J. now (May 7, 1959) delivered the following judgment:

This is an action in which the plaintiff, Dominion Motors Limited, seeks an injunction to restrain the defendants from doing business under the name "Dominion Auto Wrecking" or "Dominion Auto Parts and Supplies" or under any other name the use of which would be likely to cause confusion in Canada between their business and that of the plaintiff. Both the plaintiff and the defendants in the course of their businesses deal in used automobiles and trucks and in new automobile and truck parts, and the injunction is sought on the ground that the use by the defendants of the names "Dominion Auto Parts and Supplies" and "Dominion Auto Wrecking", as well as of a third name, "Dominion Auto

Wrecking and Supplies", in carrying on their business, is likely to cause confusion between that business and the business of the plaintiff.

When the action came on for trial an agreed statement of facts was filed, and this statement, together with two exhibits thereto and the facts alleged in two paragraphs of the statement of claim which were admitted in the defence makes up the whole of the factual material on which the claim is to be determined.

The plaintiff was incorporated in 1933 and since that time has carried on from its premises at the corner of Graham Avenue and Fort Street in Winnipeg the business of buying and selling both new and used automobiles and motor trucks and new automobile and motor truck parts and of repairing automobiles and motor trucks. Upon its incorporation, the plaintiff had purchased and taken over a similar business which its predecessor company, Dominion Motor Company Limited, had carried on throughout Manitoba from the same premises, and since its incorporation the plaintiff has carried on the business under its own name. In the five years prior to September, 1958, the plaintiff spent over $600,000 in advertising its name and the service and products which it sells. Of this amount, $113,984.73 was spent in the period from July 1, 1957 to March 31, 1958. Included in this was advertising in newspapers, by radio, and by television.

In one of the plaintiff's advertisements, which appeared in the *Free Press Prairie Farmer,* a weekly newspaper published at Winnipeg, on March 12, 1958, and which is agreed to be representative of the plaintiff's advertising, it appears that the plaintiff offered for sale used Ford and other makes of trucks and both new and used Ford automobiles and genuine Ford parts. It is not stated whether the Ford parts were new or used. The advertisement is in an enclosed block, and at the beginning, as well as near the end of the advertisement, the name "Dominion Motors" and the words "Canada's Largest Ford Dealer" appear. Elsewhere in the advertisement, the word "Dominion" alone appears in one place as referring to the plaintiff. The advertisement contains a list of trucks and automobiles with prices for them and refers to the fast service and complete stock of Ford

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parts available and invites the public to buy them at wholesale prices at "Dominion" and to write for prices. It also contains the words "Satisfaction or Money Refunded."

A later advertisement which appeared in the same newspaper on June 11, 1958 was also referred to in the agreed statement of facts. It has the same general features but goes somewhat further in inviting the public to buy from the plaintiff and uses the word "Dominion" alone in four places as referring to the plaintiff and the words "Dominion Motors" as well, both at the beginning and end.

In each of the years 1953 to 1958 the plaintiff's total sales ranged between eight and ten millions of dollars. Sales of new cars and trucks accounted for from 49 to 59 per cent of such sales, and sales of used cars and trucks accounted for from 23 to 28 per cent of total sales. Sales of parts and miscellaneous items such as gas, oil and repairs made up from 15 to 23 per cent of total sales.

It is agreed that the plaintiff has carried on its business under the name "Dominion Motors Limited" continuously since 1933 and that the plaintiff has been "*well and favourably known* in the City of Winnipeg, and in the adjoining village of Brooklands, and throughout the Province of Manitoba continuously from 1933" until September, 1958. This statement is amplified by paragraph 4 of the statement of claim, which was admitted in the defence. It is as follows:

> 4. The widespread favour and goodwill which the name of the Plaintiff and the automobile parts and the service which it sells, had acquired by January, 1957, had been the product of the Plaintiff's constant effort to maintain the high quality and value throughout this period of over twenty years. *This good name of the Plaintiff had reflected and continues to reflect, the superior quality of the products and the service which the Plaintiff sells, and the integrity of its management.* By January, 1957, the Plaintiff had thus acquired and it enjoys throughout the area of Manitoba in which its products are sold, valuable goodwill; and the Plaintiff's name is a most valuable asset of the Plaintiff.

In January, 1957, the defendants adopted the word "Dominion" as part of the names under which they carried on their business. Their business had been started on or about May 1, 1956 and had been carried on from a private residence at Brooklands, a village adjoining Winnipeg. It consisted of dealing in used automobiles and trucks, the buying and dismantling of used automobiles and trucks to

recover usable parts, and dealing in both used and new parts for automobiles and trucks. On January 22, 1957, the defendants entered into and filed two declarations of partnership, in the first of which it was declared that they were carrying on the business of buying and selling automobile parts and accessories in the village of Brooklands, Manitoba under the firm name of "Dominion Auto Parts and Supplies" and in the second of which they declared that they were carrying on the business of buying and selling automobile parts and dismantling automobiles at Brooklands, Manitoba under the firm name "Dominion Auto Wrecking". Early in July, 1957, the defendants acquired a new place of business at Brooklands, some four to five miles from the plaintiff's place of business, and on this new site the defendants erected a large sign, bearing the name "Dominion Auto Wrecking". At that time the premises consisted of a yard and a small office building. A garage and warehouse have since been added. Soon after the sign was erected, the defendants were warned by an officer of the plaintiff company to remove it, and on July 16 the plaintiff's solicitors wrote to the defendants, demanding that they drop the use of the names "Dominion Auto Wrecking", and "Dominion Auto Parts and Supplies", as well as the further name "Dominion Auto Wrecking and Supplies", which the defendants were also using.

The defendants did not comply with the plaintiff's demands. After acquiring their new place of business, and during the period from July 10, 1957 to July 10, 1958, the defendants published some 45 weekly advertisements in the *Free Press Prairie Farmer,* some of which advertisements were in the name of "Dominion Auto Wrecking" but most of which were in the name "Dominion Auto Wrecking and Supplies". In fact, the defendants have but one business. As buyers of new automotive merchandise, they use the name "Dominion Auto Parts and Supplies". This name has not been used in the defendants' advertising. As buyers of used automotive merchandise and of used cars and trucks, whether for resale or for dismantling, and as sellers of both new and used automotive merchandise, used cars

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and used trucks, they sometimes use the name "Dominion Auto Wrecking", and at other times they use the name "Dominion Auto Wrecking and Supplies".

What is referred to in the agreed statement of facts as a representative advertisement of the defendants' appears as a classified advertisement in the following form in the *Free Press Prairie Farmer* of March 12, 1958, on the same page as the plaintiff's block advertisement already described:

> WE ARE WRECKING 2,000 LATE model cars and trucks including Chevs., Fords, Dodges, Hillmans, Austins, Morris, etc. etc. All parts are checked and guaranteed. We also carry a complete stock of new parts and rebuilt transmissions, generators etc. Our prices are the most reasonable and our mail order service the best! Good used 600x16 tires $5.00 and up, tubes $1.25 up. Phone—Write—wire: Dominion Auto Wrecking and Supplies, S. E. Rosser Rd and Vopni, Winnipeg 3.

In substantially similar, though somewhat enlarged form, and with the same name, the defendants' advertisement also appears in the *Free Press Prairie Farmer* for June 11, 1958 on the same page with the plaintiff's advertisement of that date already mentioned.

For the two-year period from May 1, 1956 to April 30, 1958, the defendants sold automobile merchandise to the total extent of $44,290.55, of which 22.9 per cent was accounted for by sales of used automobiles and trucks and 18.7 per cent by sales of new automobile and truck parts. The remaining 58.4 per cent represented sales of used automobile and truck parts.

The law applicable in this Court in a case of this kind is the *Trade Marks Act*, R.S.C. 1952, c. 49, by s. 54 of which jurisdiction is conferred on this Court to entertain any action or proceeding for the enforcement of any of the provisions of the Act or "of any right or remedy conferred or defined thereby."

Section 7 of the *Trade Marks Act* is as follows:

> 7. No person shall
>
> (*a*) make a false or misleading statement tending to discredit the business, wares or services of a competitor;
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

(c) pass off other wares or services as and for those ordered or requested;

(d) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to

(i) the character, quality, quantity or composition,

(ii) the geographical origin, or

(iii) the mode of the manufacture, production or performance of such wares or services; or

(e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

This section differs in some respects from s. 11 of the *Unfair Competition Act*, which the *Trade Marks Act* replaced. The new section is obviously broader than s. 11 in a number of respects, but it may be somewhat narrower in others, notably in eliminating from clause (*b*) the reference to what might be "reasonably apprehended" as to a course of conduct being likely to cause confusion. In *Kitchen Overall & Shirt Co. Ltd. v. Elmira Shirt & Overall Co. Ltd.*[1] Maclean P. at p. 233 referred to s. 11 of the *Unfair Competition Act* as follows:

In this case, however, we are governed by the Unfair Competition Act, enacted in 1932, which by *s. 11 gives a statutory right of action for the same wrongs for which a remedy was given at common law in passing off cases.* The plaintiff's action is founded upon that statutory provision, which is as follows:—

"No person shall, in the course of his business, (*a*) make any false statement tending to discredit the wares of a competitor; (*b*) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor; (*c*) adopt any other business practice contrary to honest industrial and commercial usage."

Then, after referring to the *International Convention for the Protection of Industrial Property*, made at The Hague on November 6, 1925, the learned judge proceeded at p. 234:

If therefore the acts or conduct of the defendant here complained of fall within the ambit of s. 11 of the Unfair Competition Act, the plaintiff then as of right would be entitled to restrain the defendant against the continuance of such acts or conduct, as it would at common law prior to the enactment of s. 11 of the Unfair Competition Act; and *that statutory provision seems to express substantially the common law in such cases* while at the same time implementing Canada's obligations, in part at least, under the Convention. The decision of courts in passing off cases may therefore

[1] [1937] Ex. C.R. 230.

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be of assistance in this case. No question was raised as to the jurisdiction of this court to entertain actions of the nature contemplated by s. 11 of the Unfair Competition Act.

In *Coca-Cola Company v. Bernard Beverages Limited*[1], Thorson P., referring to the same section, said at p. 135:

> The cause of action under s. 11 is the statutory substitute for the former cause of action for passing off. Everything that would amount to a passing off in England would fall within the prohibitions of the section. It may even be wider in scope.

In the present case it is unnecessary, in my opinion, to consider whether or not s. 7 of the *Trade Marks Act* covers all of the situations in which an action for passing off would lie at common law, for while the case is one of a kind in which, apart from statute, an action for an injunction would lie if the Court considered the use of the names complained of was likely to cause confusion, the subject matter of the action appears to me to be specifically dealt with in clause (*b*) of s. 7, the material words of which are, "No person shall . . . direct public attention to his . . . business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to [it] . . . between his . . . business and the . . . business of another."

The broad question that arises under this provision is, did the defendants direct public attention to their business in such a way as to cause or be likely to cause confusion, at the time they commenced so to direct attention to their business, between their business and that of the plaintiff? It will be recalled that the defendants in July, 1957 erected on their new premises a sign with the name "Dominion Auto Wrecking" on it and commenced publishing advertisements in which the name "Dominion Auto Wrecking" or "Dominion Auto Wrecking and Supplies" was used. These, I think, were clearly acts calculated to direct public attention to their business. But I am also of the opinion that the carrying on of business itself under a trade name, whether in the buying or in the selling phase of it, is a way of directing public attention to the business carried on under that name. Moreover, as I interpret it, s. 7(*b*) applies to each new kind of act or practice by which public

[1] [1949] Ex. C.R. 119.

attention is directed to a business and in respect to each poses the question, was that act or practice likely at that time to cause confusion? Accordingly, in my opinion, the questions that arise in this case under s. 7(*b*) are: Was the use by the defendants of the name "Dominion Auto Parts and Supplies", in making purchases of new automobile parts or supplies, likely (at the time when the defendants commenced using it in making such purchases) to cause confusion between their business and that of the plaintiff? Was the use by the defendants of the names "Dominion Auto Wrecking" and "Dominion Auto Wrecking and Supplies" likely (at the time when the defendants commenced using them as names under which they made purchases or sales, or at the time in July, 1957 when they put up their sign and commenced publishing advertisements) to cause confusion between their business and that of the plaintiff?

The general principle on which relief is granted against conduct likely to cause confusion was stated as follows by Luxmoore L.J. in *Office Cleaning Services, Ld. v. Westminster Window and General Cleaners, Ld.*[1] at p. 135:

> The foundation of the right to restrain the user of a similar name is the principle that no one is entitled to represent his business or goods as being the business or goods of another by whatever means that result may be achieved, and it makes no difference whether the representation be intentional or otherwise;

In the same case, on appeal to the House of Lords[2] Lord Simonds put the question to be determined thus at p. 42:

> The real question is the simple and familiar one. Have the Appellants proved that the use by the Respondents of the trading style *"Office Cleaning Association"* is calculated to lead to the belief that their business is the business of the Appellants? It is in these words "calculated to lead to the belief" that the issue lies. It is a calculation often difficult to make, as the different estimates in the Court below in this case indicate. The nature of the words which are used in the trade name, the circumstances and peculiarities of the trade, the motives, proved or presumed, of the trader who would use the words, all these and many other factors must be considered by the judge in determining whether a Plaintiff can succeed in his claim. It is a question upon which the judge who has to decide the case has to bring his own mind to bear and which he has to decide for himself.

It should, I think, be noted, however, that the situations in which the use of a trade name may be "calculated to lead to the belief that one business is that of another" are

[1] 61 R.P.C. 133. [2] 63 R.P.C. 39.

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not limited to those in which, from the close similarity of names, a customer may mistake the one for the other, but include, as well, situations in which the names, though somewhat different from each other, have in the circumstances enough similarity to each other to constitute a representation that the businesses are connected with one another either through having the same owner or through being in some way allied or mixed up with one another. In *Joseph Rodgers & Sons Ld. v. W. N. Rodgers & Co.*[1] Romer J. stated the rule at p. 291 as follows:

> It is the law of this land that no man is entitled to carry on his business in such a way as to represent that it is the business of another, or is in any way connected with the business of another;

In *Ewing (trading as the Buttercup Dairy Company) v. Buttercup Margarine Company Ld.*[2] Lord Cozens-Hardy M.R. said at p. 237:

> I can see no principle for holding that a trader may not be injured, and seriously injured, in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected with the plaintiffs or a branch of the plaintiff's business, or in some way mixed up, with them.

Warrington L.J. said at p. 238:

> I am of the same opinion. The Plaintiff carried on a large retail general provision business under the title of the *Buttercup Dairy Company*. The Defendants were incorporated in November 1916, and they have a cash capital of £12 10s.—250 preference shares of 1s. each—and have adopted as their registered name the title of *"The Buttercup Margarine Company Limited."* Now, look at the two names. It seems to me obvious that a trader or a customer who had been in the habit of dealing with the Plaintiff might well think that the Plaintiff had adopted the name of *Buttercup Margarine Company Limited* for the purpose of the margarine branch of his business, or for the purposes, if you like, of doing what it is said the Defendants are going to do—making margarine instead of buying it in the market. Once you get that, then it seems to me that the Plaintiff has proved enough. He has proved that the Defendants have adopted such a name as may lead people who have dealings with the Plaintiff to believe that the Defendants' business is a branch of or associated with the Plaintiff's business. To induce the belief that my business is a branch of another man's business may do that other man damage in all kinds of ways. The quality of the goods I sell; the kind of business I do; the credit or otherwise which I might enjoy—all those things may immensely injure the other man who is assumed wrongly to be associated with me. It is just that kind of injury which what the Defendants have done here is likely to occasion, and I think the learned Judge is perfectly right.

[1] 41 R.P.C. 277. [2] 34 R.P.C. 232.

In the present case, it is admitted that in the area in which the plaintiff's business was carried on its name, "Dominion Motors Limited", had come to reflect the superior quality of the products and service which the plaintiff sells and the integrity of its management and that valuable good-will was attached to the plaintiff's name. The essential distinguishing feature of that name is the word "Dominion", which, as used in the name, is of no descriptive significance. The case is thus not one of the kind determined in *Office Cleaning Services, Ld. v. Westminster Window and General Cleaners, Ld. (supra)*, where the issue was between names containing nothing but ordinary descriptive words; that is to say, "Office Cleaning Services, Ld." and "Office Cleaning Association." The defendants have adopted the same distinguishing feature for the names which they have used to carry on their business. The field in which their business is carried on overlaps to a considerable extent with that in which the plaintiff operates. Both the plaintiff and the defendants deal in used motor cars and motor trucks. Both deal in new car parts. Both are retailers. Both sell their goods in Winnipeg and in the same general area. And where the activities of the defendants do not overlap with those of the plaintiff, that is, in the used parts field and the dismantling of cars and trucks to recover such parts, they constitute an operation which I think can reasonably be regarded as one to which the plaintiff's operation might well be extended or which might be allied in some way with that operation. Had a business been started in Winnipeg under the name "Dominion Motors Parts and Supplies", I think the use of such name in transacting business would, in the situation described, have suggested to almost anyone who had heard of the plaintiff that this was a branch of the plaintiff's business. Similarly, had a business been started in Winnipeg under the name "Dominion Motors Wrecking", I think it would, in the situation described, have suggested to almost anyone who had heard of the plaintiff that the plaintiff had entered the salvaging and used parts field or that the plaintiff was operating or connected with an allied business in that field. Here the questions are not so readily answered, and the case, in my opinion, is very close to the

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line. Was the use made by the defendants of the name "Dominion Auto Parts and Supplies" likely, in the circumstances prevailing at the time when they began using it in making purchases, to lead a person of ordinary intelligence and alertness, who knew of the plaintiff and its reputation, to think that this was a branch of the plaintiff's business or was in some way allied or associated with that business? Was the use made by the defendants of the name "Dominion Auto Wrecking" or "Dominion Auto Wrecking and Supplies", in the circumstances prevailing at the time when they began using such names in making purchases or in making sales or at the time in July, 1957 when they put up their sign and began publishing advertisements, likely to lead a person of ordinary intelligence and alertness, who knew of the plaintiff and of its reputation, to think that the plaintiff was engaged in the used parts field and that this business was a branch or part of the plaintiff's business or was in one way or another associated or connected with it? The case appears to me to be indistinguishable in principle from the *Buttercup Dairy* case, though there the facts were somewhat stronger because the word "Buttercup", which was the distinguishing word in both names, was, I fancy, not quite so extensively used in business names as is the word "Dominion" in this country. Cozens-Hardy M.R., however, regarded that as "a perfectly plain and clear case, not very near the line, but well over the line." While the present is a much closer case, in my opinion, having regard to the circumstances as a whole, the answer to each of the above questions is in the affirmative, and consequently, I have come to the conclusion that, in using such names in carrying on their business, as well as in such advertising as they have done, the defendants have directed public attention to their business in such a way as to be likely to cause confusion between their business and that of the plaintiff. From this conclusion, it follows, I think, that damage to the plaintiff and to its good-will may reasonably be anticipated and that the plaintiff is entitled to have the use by the defendants of such names restrained.

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An injunction will accordingly issue, restraining the defendants from directing public attention to their business of dealing in automobiles and motor trucks and automobile and truck parts by the use of or under the names "Dominion Auto Parts and Supplies", "Dominion Auto Wrecking", or "Dominion Auto Wrecking and Supplies", or by the use of or under any other name so similar to the plaintiff's name as to be likely to cause confusion between their business and that of the plaintiff. The injunction will be limited to the business of the defendants carried on in Winnipeg or elsewhere in the province of Manitoba and will be stayed for one month to enable the defendants to make the necessary changes.

The plaintiff will have the costs of the action.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1958

Nov. 12 & 13

1959

May 28

BETWEEN:

IWAI & COMPANY LIMITED AND THE GOSHO COMPANY LIMITED ..... PLAINTIFFS;

AND

THE SHIP *PANAGHIA*, COMPANIA DE NAVIERA SAPPHO S.A. AND ANGLO CANADIAN SHIPPING COMPANY LIMITED DEFENDANTS.

Shipping—Practice—Order to rectify name of defendant company—Default judgment set aside.

Held: That an order will go rectifying an error in the name of defendant company and setting aside a default judgment when the plaintiffs have not been prejudiced except as to some loss of time and when to allow the judgment to stand would deprive the shipowners of a hearing as to liability and, if so found, as to quantum.

MOTION for an order rectifying a mistake in the name of defendant company.

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

J. R. Cunningham for the motion.

C. C. I. Merritt contra.

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

SIDNEY SMITH D.J.A. now (May 28, 1959) delivered the following judgment:

In the unusual circumstances here outlined I grant the plaintiffs' motion to rectify the slip in the naming of the defendant company Sappho. The correct name is *Compania De Navegacion Sappho S.A.* The words *Naviera* and *Navegacion* are substantially synonymous in the Spanish language. This company is the owner of the defendant Panamanian ship *Panaghia* and at all material times the Anglo Canadian Shipping Company Limited was the charterer. I am satisfied that service of notice of the concurrent writ of summons was correctly made in Panama on the shipowners; but I set aside the default personal judgment and all subsequent proceedings against them.

The difficulty arose in consequence of the curious wording of a letter from the shipowners' attorneys in New York to their solicitors here. Their reading of the letter caused the local solicitors to believe, in error, that the notice of the concurrent writ had been served by mail. This was not so. A search of the documents on file did not dispel their error which persisted to the end. This mistaken belief is all the more remarkable since the most ordinary enquiries would have unmasked the true position.

The writ of summons was issued on March 2, 1955 and was served without delay on the defendant Anglo Canadian Company, whose solicitors duly entered an appearance. The claim was for damage to certain shipments of wood pulp carried on the defendant vessel from ports in British Columbia to Japan. No appearance having been entered, counsel for plaintiffs moved on March 14, 1957 for personal judgment against the shipowners, and on

July 4, 1957 obtained judgment by default. Copy of this judgment was later forwarded by plaintiffs' solicitors to the shipowners' solicitors here.

Meanwhile the defendant ship had been in British Columbian ports from September 2 to September 26, 1956. This was not disclosed to me. Had it been so, and apart from all other circumstances pressed upon me by shipowners' counsel, I should not have let the personal judgment go by default. No attempt was made to arrest the vessel. The Court would have granted all proper indulgence to that end. (The ship was again in these waters from January 27 to February 15, 1958—and again without interference.)

Meanwhile, too, the usual course of proceedings *vis-a-vis* the plaintiffs and the defendant Anglo Canadian Company had been followed—defence, discovery of documents, and a commission to examine witnesses in Japan. Upon this examination plaintiffs and the Anglo Canadian Company were respectively represented by counsel and a number of witnesses were examined and cross-examined.

Upon the return of the Commission the Deputy Registrar on June 11 and 19, 1958, at the instance of the plaintiffs, entered upon a reference to assess damages. This was *ex parte*. The Anglo Canadian Company, though notified on June 6, did not appear on the reference. The plaintiffs alone were represented. The learned Registrar heard evidence on June 11 and again on June 19, 1958, and on that day assessed the damages at $31,259.33 plus interest at 4 per cent. On the same day plaintiffs' solicitors moved before me and obtained an order to the effect that the June 6 notice of appointment for the reference be proper notice to the shipowners and to the Anglo Canadian Company; that the final hearing take place on June 23; and that notice of the final hearing be sent to the shipowners on or before June 20. On the same day they filed a "consent" to the same effect signed by both the solicitors for the shipowners and the solicitors for the Anglo Canadian Company. The aforesaid order was made *ex parte* and *per incuriam*. Had the situation been made more manifest I should not have approved for hearing an assessment of damages which was completed that same day. I should also

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Sidney Smith D.J.A.

have sought enlightenment on why the Anglo Canadian solicitors "consented" to this notice when they had not even appeared on the reference; and what instructions they had to give any consent on behalf of the shipowners in Panama.

It remains to add that on June 23, 1958 the shipowners, by their solicitor, appeared before the Deputy Registrar. He stated that his firm expected instructions to set aside all proceedings against their clients.

The initial mistake of the shipowners' solicitors was deplorable. But it would be more deplorable were I, in these circumstances, to allow the default judgment to stand, and thus deprive the shipowners of a hearing both as to liability and, if so found, as to quantum, especially as the plaintiffs have not been prejudiced except as to some loss of time.

I therefore in my discretion make the order above mentioned and shall deal with all costs on the trial when matters have become clarified.

Order accordingly.

BETWEEN:

1958
May 5, 6 & 7
1959
Oct. 21

JAVEX COMPANY LIMITED, CONSUMERS GLASS COMPANY, LTD., DOMINION GLASS COMPANY, LTD. .....APPELLANTS;

AND

MRS. AMY OPPENHEIMER, MISS RUTH OPPENHEIMER, MRS. EDITH KRIEGER, DAVID OPPENHEIMER, ERNEST KRIEGER AND LESLIE McDONALD, carrying on business together in partnership at Vancouver, British Columbia, under the style of OPPENHEIMER BROS. & COMPANY,

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .....RESPONDENTS.

Revenue—Appeal from decision of Tariff Board—The Customs Act R.S.C. 1952, c. 58, s. 46(1)(2)—Tariff Item 219a—Essential requirements to support plea of estoppel per res judicatam lacking—"Clorox"—Imported product used as a bleach and as a disinfectant—Appeal dismissed.

The Tariff Board found that Clorox, a product consisting of sodium hypochlorite in solution and imported into Canada by the respondents, Oppenheimer Brothers & Company, was properly classifiable under Tariff Item 219*a*. Leave to appeal from this decision was granted by this Court on the question of law whether the Tariff Board erred in holding that the product known under the trade name of Clorox imported into Canada is properly classifiable for tariff purposes under Tariff Item No. 219*a*.

Appellants contend that the Tariff Board was estopped from so finding on the ground that the matter was *res judicata* under a former decision of the Board in Appeal No. 363, by which the Board stated its opinion that Clorox was not properly classifiable under Tariff Item 219*a*.

Held: That the plea of estoppel cannot be supported and that the "Opinion" of the Board in Appeal No. 363 was not a judicial decision *in rem*; that everything that is in controversy in this Appeal No. 398 was not in controversy in the former Appeal No. 363 and in order to support the plea of estoppel *per rem judicatam* it is essential that there be identity of question or issue in both cases; this appeal raises the question as to whether the Deputy Minister was right in classifying the entries under Tariff Item 711, which was not before the Board in the earlier matter, the finding there being merely that "Clorox" was not properly classifiable under Tariff Item 219*a*.

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2. That the earlier finding of the Board did not operate upon the thing known by the trade-mark "Clorox" but merely upon the personal rights, liabilities or interests of the parties thereto in relation to "Clorox", namely the determination of the tariff item properly applicable thereto, and, as a result, the determination of the Customs duty thus payable.

3. That Tariff Item 219*a* means if a product named is "for disinfecting"—which the Board finds as a fact—the product is properly classified under that item; and in the absence of any limitations imposed by Parliament and in virtue of the Board's finding that "Clorox" is ordinarily and regularly used as a disinfectant, the conclusion of the Board that it is *inter alia* for disinfecting and therefore within Tariff Item 219*a* is confirmed.

APPEAL from a decision of the Tariff Board.

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

André Forget, Q.C. and *Paul F. Renault* for appellants Javex Company Limited and Dominion Glass Company, Ltd.

A. S. Hyndman for appellant Consumers Glass Company, Ltd.

G. F. Henderson, Q.C. and *R. H. McKercher* for respondents Oppenheimer Bros. & Company.

R. W. McKimm for Deputy Minister of National Revenue for Customs and Excise.

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

CAMERON J. now (October 21, 1959) delivered the following judgment:

This is an appeal from a decision of the Tariff Board dated June 7, 1957 (Appeal No. 398). By a majority, the Tariff Board found that "Clorox", a product consisting of sodium hypochlorite in solution and imported into Canada by the respondents, Oppenheimer Brothers & Company, was properly classifiable under Tariff Item 219*a*. By Order of the President, leave to appeal was granted on July 9, 1957, upon the following question of law.

Did the Tariff Board err, as a matter of law, in holding that the product known under the trade mark "Clorox", imported under Vancouver Entries Nos. 68405 of January 12th, 1956, 67200 of January 6th, 1956, 71357 and 71295 of January 26th, 1956, 70238, 70264 and 70292 of January 23rd, 1956, is properly classifiable for tariff purposes under Tariff Item No. 219*a*?

The appellant Javex Company Limited, manufactures in Canada a similar product, namely "Javex". The appellants, Consumers Glass Co. Ltd. and Dominion Glass Co. Ltd., are manufacturers of glass bottles and their interest is affected because the Javex Company is allowed under the ruling (and pursuant to Tariff Item 791) to import free of Customs duty "materials of all kinds" for use in producing or manufacturing their products in Canada, including glass bottles.

Two grounds of appeal are raised. The first is that the Tariff Board was estopped from so finding on the ground that the matter was *res judicata* under a former decision of the Board in Appeal No. 363, by which the Board stated its opinion that "Clorox" was not properly classifiable under Tariff Item 219*a*. It becomes necessary, therefore, to set out the circumstances of Appeal No. 363, dated December 19, 1955.

Under the provisions of s. 46(1) of the *Customs Act*, R.S.C. 1952, c. 58, the Deputy Minister of National Revenue may refer to the Tariff Board for its opinion any question relating to the valuation or tariff classification of any goods or classes of goods. The section further states:

(2). For the purposes of s. 44 a reference pursuant to this section shall be deemed to be an appeal.

Pursuant to that section, the Deputy Minister by letter dated July 29, 1955, wrote the Board as follows:

The Department has had for consideration a number of materials sold under different trade marked names, consisting of Sodium Hypochlorite in Solution. These products are generally described as bleaches, deodorizers, disinfectants and stain removers. They all have had an available chlorine strength of over 5% and they have been uniformly classified as non-alcoholic disinfectants under tariff item 219*a*.

This practice enables the manufacturers of similar products in Canada to import free of Customs duty under tariff item 791 "materials of all kinds" for use in producing or manufacturing their products in Canada. In this connection, a ruling has been made allowing empty glass bottles for use as containers for "Javex", a product manufactured in Canada by Javex Company Limited, under this tariff item.

The Canadian manufacturers of glass bottles who are affected by these rulings are disturbed thereby . . .

I have reviewed the Department's rulings and I concur with them, but I am placing the issue before the Tariff Board as an appeal under Section 46 of the Customs Act.

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In accordance with the requirements of s. 44(2), the Board gave notice of the hearing of the "Appeal" in the *Canada Gazette*, but unfortunately the notice did not come to the attention of Oppenheimer Brothers and they were given no specific notice of the hearing of the "Appeal" by the Board and were not present or represented at the hearing. Section 44 relates to appeals to the Board by a person who deems himself aggrieved by a decision of the Deputy Minister in matters relating to tariff classification (*inter alia*), and by s-s. (3) the Board is empowered on any such "Appeal" to make such order or finding as the nature of the case may require and, "an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in s. 45". No appeal was taken from the Board's "Opinion" in Appeal No. 363, and, indeed, Oppenheimer Brothers could not have appealed to this Court since they were neither parties to the appeal to the Board, nor had they entered an appearance with the Secretary of the Board (see s. 45).

When the "Opinion" of the Board did come to the attention of Oppenheimer Brothers, their counsel wrote the Board requesting a re-hearing of the case in regard to "Clorox" (other materials had also been considered) on a number of grounds, including lack of notice of the hearing or notice that "Clorox" was to be considered by the Board and that there was material evidence available in regard to "Clorox" which had not been before the Board.

The Board apparently declined to re-open Appeal No. 363 but the Chairman, in a letter to Mr. Henderson on February 27, 1956, stated in part:

> The Tariff Board does not accept, in the ordinary sense of the word, any responsibility whatsoever regarding the notifying of all who may be interested in an Appeal for the simple reason that such responsibility, if accepted, could not possibly be discharged. We simply have no way of knowing who may or may not be concerned about or interested in any given appeal. In the case under consideration, the evidence was presented by witnesses who appeared voluntarily.
>
> Following our telephone conversation this morning, I understand that you are making an importation in respect of which you will, in due course, lodge with the Board a new Appeal on the ground of new information or new facts. This is quite in order so far as the Board is concerned.

In the majority decision in Appeal No. 398, it is stated:

> In the circumstances, the Board consented to a hearing in respect of the particular sodium-hypochlorite solution sold under the trade-mark clorox, provided an importation were made and the resulting decision of the Deputy Minister thereon were such as to lead Oppenheimer Brothers and Company to proceed to appeal.

In January 1956, Oppenheimer Brothers had imported a quantity of "Clorox" from Clorox Chemical Co. of Seattle, Washington, and these importations were accepted by the parties as suitable for the purpose of launching a new appeal. Mr. Forget, counsel for Javex Company Limited, stated that Tariff Item 220(*a*) was applied to the goods at the port of entry, although the exhibits themselves seem to indicate that the classification was under Item 219*a*2— and free of Customs duty. In any event, the Deputy Minister under s. 43 ruled that the goods should have been classified under Tariff Item 711, presumably following the opinion of the Board in Appeal No. 363 that they were not properly classifiable under Item 219*a*. Then, under s. 44, Oppenheimer Brothers launched an appeal to the Board and it is from the Board's decision in Appeal No. 398 that this appeal is now taken.

Put briefly, the submission of the appellants on this point is that the finding or "Opinion" of the Board in Appeal No. 363, that "Clorox" is not properly classifiable under Tariff Item 219*a*, is a judicial decision *in rem* by a Court of Record (s. 5(6) of the *Tariff Board Act*, R.S.C. 1952, c. 261, states that the Board is a Court of Record) and that such judgment, from which no appeal was taken, is not only "final and conclusive" (s. 44(3)) between the parties thereto, but as a judgment *in rem*, is binding upon the whole world, including the respondents, Oppenheimer Brothers.

The distinction between judgments *in rem* and judgments *inter partes* is stated in Halsbury's *Laws of England*, 2nd Ed., Vol. 13, p. 420:

> 473. The most important distinction between judgments *in rem* and judgments *inter partes* is that whereas the latter are only binding as between the parties thereto and those who are privy to them, the judgment *in rem* of a Court of competent jurisdiction is, as regards persons domiciled and property situated within the jurisdiction of the Court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of the persons or property, or as to the right or title to the latter, and as to whatever disposition it makes of the property itself, or of the

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proceeds of its sale. In other words, all persons, whether party to the proceedings or not, are estopped from averring that the status of persons or things, or the right or title to property, is other than the Court has by such a judgment declared or made it to be. But a judgment *in rem* can have no effect as such beyond the limits of the State within which the Court delivering the judgment exercises jurisdiction, unless the thing affected is situate, or the person affected is domiciled, within those limits.

In Spencer Bower on *The Doctrine of Res Judicata,* (1924 Ed.), a judicial decision *in rem* is defined at p. 132 as follows:

209. A judicial decision *in rem* is one which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally, and, therefore is conclusive for, or against, everybody, as distinct from those decisions which only purport to determine the jural relation of the parties to one another, and their personal rights and equities *inter se,* and which, therefore, are commonly termed decisions *in personam.*

After full consideration of the matter and having reviewed the cases cited as well as others, I have come to the conclusion that the plea of estoppel here raised cannot be supported and that the "Opinion" of the Board in Appeal No. 363 was not a judicial decision *in rem.* I do not find it necessary in this case to reach any conclusion on the submission of counsel for Oppenheimer Brothers that that "Opinion" was not a decision, but merely an opinion of the Board which could be accepted or rejected by the Deputy Minister who had made the reference.

One of the essential requirements to support the plea of estoppel *per rem judicatam* is that there must be identity of question or issue in both cases. The principle is stated in Spencer Bower's text at p. 119:

184. There is no estoppel *per rem judicatam,* unless the case put forward by the party sought to be estopped, not only relates to the same matter (in the physical sense) as that which was the subject of the judicial decision in the former proceedings, but also raises the identical question of law, or issue of fact, which either expressly, or by necessary implication, in accordance with canons of construction already expounded, was in substance determined by such decision.

And at p. 121 the author states:

And, generally, there can be no *eadem quaestio,* and, therefore, no estoppel by *res judicata,* unless everything in controversy in the proceedings where the question of estoppel is raised was also in controversy in the litigation which resulted in the judicial decision relied upon as an estoppel. (See *Moss v. Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108 (per Lord Cranworth L.C., at pp. 114-116).

From the facts which I have set out above, it is apparent that everything which is in controversy in this appeal (No. 398) was not in controversy in the former Appeal No. 363. The present appeal raises the question as to whether the Deputy Minister was right in classifying the entries under Tariff Item 711. That question was not before the Board in the earlier matter and the finding there was merely that "Clorox" was *not* properly classifiable under Tariff Item 219*a*.

There is a further and perhaps a stronger reason for rejecting the appellants' submission. It is argued that the "Opinion" of the Board in the earlier case determined the status of "Clorox" and that, therefore, the "Opinion" or finding is conclusive *in rem*. It seems to me, however, that the earlier finding did not operate upon the thing known by the trade-mark "Clorox", but merely upon the personal rights, liabilities or interests of the parties thereto in relation to "Clorox", namely, the determination of the tariff item properly applicable thereto, and, as a result, the determination of the Customs duty thus payable. In Spencer Bower's text (*supra*), the principle is stated thus at p. 145:

> 237. Any English judicial decision which operates upon a thing (in the physical sense) by effecting a disposition of it, is said to determine the status of the thing, and such decision accordingly may be set up by, or against, any member of the English public, as conclusive *in rem*, whereas any decision which determines, not the disposition of the thing, but solely the personal rights, liabilities, equities, and interests of the parties *inter se* in relation to the thing, concludes those parties only, or their privies. It must be remembered, however, that, in order to establish that a decision operates *in rem*, whether it be one which determines the status of a person, or that of a thing, all other conditions of a valid estoppel *per rem judicatam* must be satisfied, no less than where the decision is *inter partes*.

For the reasons so stated, I find that the plea of estoppel raised by the appellants cannot be supported.

I find it unnecessary, therefore, to consider a further submission made on behalf of Oppenheimer Brothers that the provisions of ss. 43, 44 and 45 confer a statutory right upon an importer of goods to appeal from the tariff classification made at the time of entry, or by a Dominion Customs appraiser, and from a decision by the Deputy Minister in respect of each entry.

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I must now consider the second ground of appeal, namely, that the Board erred as a matter of law in holding that the product known under the trade-mark "Clorox", imported in the manner described, was properly classifiable under Tariff Item 219*a*. That item is as follows:

219*a*. Non-alcoholic preparations or chemicals for disinfecting, or for preventing, destroying, repelling, or mitigating fungi, weeds, insects, rodents, or other plant or animal pests, n.o.p.:—

(i) When in packages not exceeding three pounds each, gross weight .....

(ii) Otherwise .....

"Clorox" (like "Javex") is sodium hypochlorite in solution and it is agreed that it is a non-alcoholic preparation or chemical within the opening words of Tariff Item 219*a*. The dispute is upon the interpretation to be placed upon such a preparation "for disinfecting". The Board decided unanimously that Tariff Item 219*a* was a use-item, and I think that view of the matter was clearly correct. If the non-alcoholic preparations or chemicals imported were not "*for* disinfecting", or *for* the other uses named such as for destroying fungi, etc., such importations would not fall within Item 219*a*.

The Board found as a fact that "Clorox"—like many other solutions of sodium hypochlorite—possessed disinfecting properties and is, therefore, a disinfectant. If that were its only use, then undoubtedly it would be classifiable under Item 219*a*. It has other properties, however, the other major one being that of its capacity to bleach.

The classification problem before the Board is clearly set out in the two opinions rendered. In the majority decision rendered by the Chairman (Mr. McKinnon) and the Vice-Chairman (Mr. W. W. Buchanan), after referring to the conflicting evidence, it is stated:

Both products, Clorox and Javex, are Sodium hypochlorite in solution. Both have disinfecting properties; both have bleaching properties. As to exactly what is in the mind of the housewife—who is by far the largest user of either—when she contemplates the purchase of Clorox, such evidence as was offered was not conclusive. As to what is attempted to be implanted in her mind by the Clorox advertising, by the labels on the containers, and by the numerous directions as to its use, the evidence of the witness Parks withstood cross-examination: that she is purchasing and using, consciously a product that is "for disinfecting", even when the use to which such product is to be put is in doing the family wash. The numerous physical exhibits entered by the appellant attested to that effect.

There is no room for doubt that Clorox—like so many solutions of sodium hypochlorite—is a disinfectant, in that it possesses disinfecting properties. Its efficiency as a disinfectant, or the extent or degree to which it so serves, in, for example, the family wash, is not material, provided that the housewife—in resorting to its application in respect of the family wash—is doing so in full knowledge and understanding of the directions as to use, is following the said directions, and, in consequence, is to be deemed as consciously using it "for disinfecting".

But, since the particular product at issue, Clorox, is an imported one, the matter of its classification for customs purposes must be made at time of importation. How is the appraiser to determine whether or not in his opinion the product is in fact going to be used, by the ultimate consumer, "for disinfecting"?

In respect of an item such as 219*a* it is, we believe, virtually impossible to follow each individual importation to its ultimate consumer. This is particularly apparent when the tariff item is read as a whole. It is not contemplated that the appraiser should satisfy himself in each individual case that the use provision is precisely complied with, so long as it is evident that the imported product is one which is ordinarily and regularly used for the purposes indicated in the tariff item.

In the matter of the product "Clorox", which is at issue here, we believe the evidence establishes that it is ordinarily and regularly used in the family wash primarily as a bleach and, secondarily, as a disinfectant. Hence the appraiser must conclude that Clorox is, *inter alia*, "for disinfecting". Does the fact that it also bleaches have a bearing on its right to admissibility under tariff item 219*a*? There are no words in tariff item 219*a* which would warrant its exclusion on that ground. If it is a "non-alcoholic preparation for disinfecting", Clorox is admissible under tariff item 219*a* even though it may perform an additional function at the same time and—unless more specifically provided for elsewhere in the tariff—is classifiable under tariff item 219*a*. There being no more specific provision for the product Clorox than under tariff item 219*a*, it is properly classifiable thereunder.

Accordingly, the Appeal is allowed.

The opinion of the dissenting member (Mr. Leduc), Vice-Chairman, is found in the concluding paragraphs:

It is evident that this product Clorox is a multiple-property product and the weight of the evidence shows that disinfecting, although an important feature, is secondary to the main use of this product, which is laundering.

To sum up, the principle enunciated by counsel for the Crown—that one must look for the primary use to classify a multiple-purpose material—must remain the guiding principle for the appraiser at the border, who must classify the material imported. He has to draw from the common knowledge and such common knowledge among appraisers is more reliable than in the case of the ordinary man.

In the present appeal, the classification made should be maintained and the appeal should be dismissed.

After the most careful consideration, I have come to the conclusion that the appellants have not discharged the onus lying on them to establish that there is error in law

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in the decision under appeal. The majority of the Board have found as a fact that "Clorox" is ordinarily and regularly used in the family wash primarily as a bleach, and secondarily as a disinfectant, and that finding cannot be questioned in this appeal. I agree also with their conclusion that the appraiser must therefore conclude that "Clorox" is, *inter alia*, "for disinfecting".

In enacting Tariff Item 219*a*, Parliament made specific provisions for non-alcoholic preparations or chemicals "for disinfecting" and for the other uses set out in the item. Counsel for all parties agreed that there was no other item in the tariff relating to preparations "for bleaching". Had there been any such specific item, the Board might have had to consider whether "Clorox" being "primarily used as a bleach" should be classified under such an item or under Item 219*a*, but no such problem arises here. Tariff Item 711, in which "Clorox" was classified by the Deputy Minister, is a basket item which is in part as follows:

> All goods not enumerated in this schedule as subject to any other rate of duty, and not otherwise declared free of duty, and not being goods the importation whereof is by law prohibited . . . British Preferential Tariff 15 p.c. Most-Favoured-Nation Tariff 25 p.c. General Tariff 25 p.c.

It is patent, therefore, that as there is no tariff item for such products "for bleaching", and as Item 711 contains no reference whatever to "for disinfecting", the only tariff item referring specifically to such products "for disinfecting" is Tariff Item 219*a*.

The meaning to be placed on Item 219*a* is clear. If the product named is "for disinfecting"—and this has been found as a fact—the product is properly classified under that item. If Parliament had intended that such products should be classified under that item only if the sole or primary use were "for disinfecting", it would have been a simple matter to have so provided. In the absence of any such limitations and in view of the Board's finding that "Clorox" is ordinarily and regularly used as a disinfectant, the conclusion of the Board that it is *inter alia* for disinfecting, and therefore within Tariff Item 219*a*, should not be disturbed.

For these reasons, the appeal will be dismissed and the decision of the majority of the members of the Tariff Board affirmed.

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The appellants will pay the costs of the respondents, Oppenheimer Brothers. In the circumstances, there will be no order as to the costs of the respondent, the Deputy Minister of National Revenue for Customs and Excise, his counsel having stated that his instructions were "to take no position before this Court".

Judgment accordingly.

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Apr. 16

May 25

BETWEEN:

SETTLED ESTATES LIMITED .....APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 68(1), 139(1)(u)(ac)—Personal corporation must be controlled by a family group—Legal representatives controlling corporation disqualify it for exemption as personal corporation—Appeal dismissed.

Appellant incorporated as a private company under the *Companies Act* of British Columbia, was controlled by one Fiddes, a resident of Canada, for a number of years and at the time of his death on April 25, 1954. Letters probate of his last will and testament and codicil were granted to Montreal Trust Company and an individual, both residents of Canada for the appellant's taxation years 1955 and 1956.

By his will Fiddes bequeathed his estate to certain brothers and sisters, nephews and nieces and to various organizations. The executors of his will continued to operate the affairs of appellant company with the same assets and in the same manner as Fiddes had done until, under the terms of the will and codicil, they were able to sell or realise his shares therein in the 1957 taxation year.

Appellant, originally assessed as a personal corporation for the years 1955 and 1956, was re-assessed by respondent as an ordinary corporation. An appeal from this re-assessment to the Income Tax Appeal Board was dismissed, and appellant appealed to this Court.

Held: That the "individual" referred to in s.-s. 1(*a*) of s. 68 of the *Income Tax Act* must be a natural living person resident in Canada, capable of having a family, and the expression "family" is limited by s.-s. (2) of s. 68 to a spouse, sons and daughters, legal representatives not being included in the word "individual" as used in such section.

2. That the Act contemplates personal control by a member or members of one family group, which does not extend beyond spouses, sons and daughters, and when control is in the hands of that limited group the corporation may truly be regarded as a "personal corporation".

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3. That the control of a personal corporation must be in the members of a family group or by others on their behalf and on the death of Fiddes there was no such family group and after his death the affairs of appellant were administered on behalf of a large number of persons not falling within any such category.

APPEAL under the *Income Tax Act*.

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

K. E. Meredith for appellant.

E. S. MacLatchy and *T. E. Jackson* for respondent.

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

CAMERON J. now (May 25, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated July 23, 1958[1] dismissing the appellant's appeal for its taxation years 1955 and 1956. The question raised involves the interpretation to be placed on s. 68(1) of *The Income Tax Act,* defining a "personal corporation" and in particular whether, in the circumstances of this case, the appellant ceased to be a "personal corporation" upon the death of the individual who had held the controlling interest therein.

There is no dispute whatever as to the facts, which were admitted either in the pleadings or by counsel at the trial. The appellant was incorporated as a private company under *The Companies Act* of British Columbia, with its registered office at Vancouver. For a number of years prior to April 25, 1954, it was controlled by one Robert William Fiddes (hereinafter called "Fiddes"), a resident of Canada, who was the owner of 1,699 shares of a total of 1,700 issued ordinary shares. It is admitted that for those years the appellant qualified in every respect as a "personal corporation" under s. 68 of the Act and was assessed as such.

Fiddes died on April 25, 1954 (that date being also the end of the appellant's fiscal year) and Letters Probate of his last will and testament and codicil thereto were granted by the Supreme Court of British Columbia to Montreal

[1] 20 Tax A.B.C. 41.

Trust Company and Elmore Meredith of Vancouver (the executors named in the said will), both being admittedly resident in Canada for the appellant's taxation years 1955 and 1956. While the appellant was originally assessed in both years as a "personal corporation", the respondent by re-assessments dated June 6, 1957, assessed the appellant as an ordinary corporation. As a result, the appellant lost the benefit of s. 67(2) of the Act which provides that

> No tax is payable under this Part on the taxable income of a corporation for a taxation year during which it was a personal corporation.

The taxes levied by the re-assessments were $47,472.50 and $18,871.42 (and interest) for the years 1955 and 1956 respectively, and no question arises as to the amount of such tax.

At the trial, counsel for the Minister admitted the allegations in clauses 5, 6 and 7 of the Notice of Appeal. These are

> 5. Under the will of Fiddes the said shares held by Fiddes devolved upon the Executors and were for the whole of the taxation years 1955 and 1956, held by the Executors as such, and by persons on their behalf, pursuant to the directions contained in the said will.
>
> 6. Sale or realization of the shares was deferred by the said Executors, under directions contained in the said will, until the taxation year 1957, by reason of a limitation contained in the codicil of the deceased in respect of the disposal of assets owned by the appellant, and
>
> 7. The Appellant was, for the taxation years 1955 and 1956, controlled solely by the executors of Fiddes and the income of the Company continued to be derived wholly from rents, interest or dividends.

Exhibit I is a copy of the probate of Fiddes' will and codicil and it indicates that his estate had a value in excess of $3,000,000. No provision is made therein for a wife or children and I think I may assume that the testator had neither at his death. After providing for certain obligations and payment of a small annuity and legacies, the residue (which comprised the greatest part of the estate) was to be divided into 100 shares, 10 of such shares passing to each of five brothers and sisters; 40 shares were left to eight individuals who were his or his deceased wife's nephews or nieces; the remaining 10 shares were left in varying proportions to a symphony society, a foundation, a church and a hospital. There is no evidence as to whether any of the individual beneficiaries resided in Canada in the 1955 and 1956 taxation years.

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The definition of a "personal corporation" is found in s. 68 of the Act, which reads in part as follows:

68(1) In this Act, a "personal corporation" means a corporation that, during the whole of the taxation year in respect of which the expression is being applied,

(*a*) was controlled, whether through holding a majority of the shares of the corporation or in any other manner whatsoever, by an individual resident in Canada, by such an individual and one or more members of his family who were resident in Canada or by any other person on his or their behalf;

(*b*) derived at least one-quarter of its income from

(i) ownership of or trading or dealing in bonds, shares, debentures, mortgages, hypothecs, bills, notes or other similar property or an interest therein,

(ii) lending money with or without securities,

(iii) rents, hire of chattels, charterparty fees or remunerations, annuities, royalties, interest or dividends, or

(iv) estates or trusts; and

(*c*) did not carry on an active financial, commercial or industrial business.

(2) For the purpose of paragraph (*a*) of subsection (1), the members of an individual's family are his spouse, sons and daughters whether or not they live together.

It is agreed that the appellant in each year complied fully with the requirements of paras. (*b*) and (*c*). As I understand the situation, the executors of Fiddes' will continued to operate the affairs of the appellant company with the same assets and in the same manner as Fiddes had done until, under the terms of the will and codicil, they were able to sell or realize his shares therein in the 1957 taxation year.

The submission of counsel for the appellant may be put very briefly. He says that the requirements of s-s. (*a*) of s. 68(1) are fully met if it is shown that the appellant company was for these years controlled by "an individual resident in Canada". He refers to the admissions that both executors of the Fiddes estate were resident in Canada and had control during both years. He relies on the following definitions of "individual" and "person":

139(1)(*u*) "Individual" means a person other than a corporation;

139(1)(*ac*) "person", or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

It is argued that inasmuch as an individual means a *person* (other than a corporation) and as the definition of "person" includes executors and legal representatives, it follows that the executors of the Fiddes Estate are "individuals" and that, having had the requisite control and all other requirements having been met, the appellant company was in each year a "personal corporation". In his argument, counsel for the appellant expressly stated that he did not rely in any manner on the concluding words of para. (*a*) "or by any other person on his or their behalf".

It is clear from the provisions of s-s. (1)(2) of s. 68 that the status of a "personal corporation" is contingent on full compliance with all the requirements stated. For example, if it carries on an active financial, commercial or industrial business, or does not derive one-quarter of its income from the sources mentioned, or if the individuals in control are not resident in Canada, it ceases to be a "personal corporation" and for taxation purposes becomes an ordinary corporation. The question here is whether a similar result follows when, upon the death of the individual who had the requisite control, such control passes to his executors, keeping in mind, the particular facts of this case.

Now as I read s-s. (*a*), the control required in order to be a "personal corporation" must be the control of either

(1) an individual resident in Canada;

(2) an individual resident in Canada and one or more members of his family resident in Canada; or

(3) any other person on his or their behalf.

It is clear, I think, that the "individual" referred to in the first two alternatives, by reason of the definition of "individual" (which excludes a corporation), and particularly because of the language of s-s. (1)(*a*), must be a natural living person resident in Canada, capable of having a family, the expression "family" being also limited by s-s. (2) to a spouse, sons and daughters. Legal representatives are therefore not included in the word "individual" as used there.

In my view, what is envisaged here by the first two alternatives is personal control by a member or members of one family group, which does not extend beyond spouses, sons

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and daughters. When control is in the hands of that limited group, the corporation may truly be regarded as a "*personal* corporation" in the sense that it is personal to members of the family.

The third permissible method of control, it seems to me, is the only possible alternative to the first two which I have just mentioned. Presumably, it might include executors and legal representatives by reason of the definition of "person" (*supra*). But, read in its context, it would not necessarily or in every case include the executors of a deceased person who in his lifetime had had the requisite control. The control "by any other person", by the very words of the subsection, must be "on his or their behalf". "His" necessarily refers to "an individual resident in Canada" which, of course, could not apply to a deceased person; and "their" likewise refers to "one or more members of his family" limited by s-s. (2) to a spouse, sons and daughters, all members of one family.

In the instant case, while the executors did have complete control of the appellant company during 1955 and 1956, they did not have such control on behalf of any individual resident in Canada or on behalf of any members of his family, limited as that term is to a spouse, sons and daughters. They did have control on behalf of a large number of individuals and others, none of whom were members of a single family group as so limited. Whether they were residents of Canada does not appear.

The provisions relating to a "personal corporation" constitute an exception to the general rule that corporations are taxed. There is therefore a special onus on the appellant when invoking the provisions of s. 68 to establish that it comes clearly within all the requirements of the section, and in my opinion, for the reasons stated, it has failed to do so. (See *Lumbers v. M.N.R.*[1]).

It seems to me that one of the main purposes in providing special legislation for a "personal corporation" was to facilitate the management of the assets of a single family group, subject to the requirement that the control of the corporation must be in the members of that family group (as

[1] [1943] Ex. C.R. 202; [1944] S.C.R. 167.

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limited by s. 68(1)(2)), or by others on their behalf. In the instant case, and upon the death of Fiddes, there was no such family group and thereafter, affairs of the appellant company were administered on behalf of a large number of persons not falling within any such category.

I have specifically limited my decision to the particular facts of this case. I must not be understood as deciding that in every case a "personal corporation" ceases to be such during the period when executors of a deceased controlling shareholder are administering his estate, or the trusts created thereby. In *Port Credit Realty Ltd.*[1], my late brother, Angers J., reached the conclusion under the then provisions of certain sections of the *Income War Tax Act,* relating to "personal corporations", that Port Credit Realty Ltd. did not cease to be a "personal corporation" following the death of James Harris who had had the controlling interest therein, the executors of the Harris will administering that company on behalf of his widow and children. It will be seen, of course, that in that case those on whose behalf the executors exercised the control, were within the family group.

Accordingly, the appeal will be dismissed and the reassessments made upon the appellant for the taxation years 1955 and 1956 will be affirmed, the whole with costs.

Judgment accordingly.

BETWEEN:

SISCOE VERMICULITE MINES LIMITED, ... PETITIONER.

1958

Apr. 8, 9, 10

1959

Mar. 2

AND

MUNN & STEELE INCORPORATED, ...RESPONDENT.

Trade Mark—Word mark—Petition to expunge—Use of word mark prior to registration essential—Proof of distribution in Canada of wares bearing word mark must satisfy statutory requirements—A party engaged in trading in products of kind described in the registration is a "person interested" under s. 52(1)—Unfair Competition Act, R.S.C. 1952, c. 274, ss. 2(h) and (m), 3, 4, 6, 22, 30, 37, 38, 39 and 52—Trade Mark Act, S. of C. 1952-53, c. 49, s. 56.

[1] [1937] Ex. C.R. 88.

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The respondent, a New Jersey corporation, had since 1939 made use of the word "MICAFIL" in the United States as a trade mark to distinguish wares made by it from vermiculite ore. By a contract entered into May 5, 1950, it licensed the petitioner to use the trade name "MICAFIL" in connection with vermiculite ore purchased from it together with a right to use its processes and methods for exfoliation of vermiculite ore in any territory serviced by the licensee. On January 27, 1954 the respondent obtained registration of the word mark "MICAFIL" under the *Unfair Competition Act* for use in association with wares described as "expanded vermiculite, vermiculite concrete aggregate, vermiculite plaster aggregate, vermiculite insulating plaster, and vermiculite insulation". (The registration was not based on a foreign registration). On April 25, 1954 the petitioner moved to have the name "MICAFIL" expunged from the Register on the ground that the registration was invalid by reason of the word having become *publici juris* and because the respondent had never used the word mark in Canada. The respondent answered that the petitioner did not, while the licensing agreement remained in force, possess the status of "a person interested".

Held: That what was being attacked was a registration made after the agreement between the parties was made and which was not referred to therein. Prior to the registration of the mark it was open to the petitioner to terminate the agreement and thereupon only such legal rights as the respondent then had would have restricted the petitioner from making such use of the mark as it saw fit. The existence of the registration affects and restricts the rights that the petitioner, as a person engaged in trading in products of the kind described in the registration, might well wish to exercise upon termination of the agreement, and such affection and restriction is sufficient to make the petitioner a "person interested" within the meaning of s. 52(1) of the *Unfair Competition Act*. *Standard Brands v. Staley* [1946] Ex. C.R. 615; *Feingold v. Demoiselle Junior Ltd.* [1948] Ex. C.R. 150; *Barton Inc. et al. v. Mary Lee Candy Shoppes et al.* [1950] Ex. C.R. 386; *Richfield Oil Corporation v. Richfield Oil Corporation of Canada Ltd.* [1955] Ex. C.R. 17 referred to.

2. That the respondent failed to establish that it had made such distribution of wares bearing its mark in Canada as to satisfy the statutory requirement. *King Features Syndicate Inc. et al. v. Benjamin H. Lechter* [1950] Ex. C.R. 297.

3. That the respondent had failed to establish any use of its mark in Canada other than the delivery to the petitioner of samples of its products in connection with negotiations for the supply of crude vermiculite ore to the petitioner. Such a use was not of the kind contemplated by the statute and accordingly was insufficient to support its claim for registration of the mark under the *Unfair Competition Act*.

ACTION to expunge a trademark.

The action was tried before the Honourable Mr. Justice Thurlow at Ottawa.

Redmond Quain, Q.C. for petitioner.

Gordon F. Henderson, Q.C. and *R. H. McKercher* for respondent.

THURLOW J. now (March 2, 1959) delivered the following judgment:

This is a motion for an order expunging the registration made on January 27, 1954 under the *Unfair Competition Act*, R.S.C. 1952, c. 274, of the word mark MICAFIL, which was registered as of September 30, 1952 on the respondent's application for use in association with wares described as

expanded vermiculite, vermiculite concrete aggregate, vermiculite plaster aggregate, vermiculite insulating plaster, and vermiculite insulation.

The motion for expungement was commenced by a notice of motion filed in this Court on April 26, 1954, at which time the *Unfair Competition Act* was still in force. By s. 52 it provided as follows:

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

This provision, with the addition of the words "exclusive original" between the words "has" and "jurisdiction" in the first line, appears as s. 56 of the *Trade Mark Act*. S. of C. 1952-53, c. 49, by which the *Unfair Competition Act* was repealed, effective July 1, 1954.

The validity of the registration is attacked on two grounds, the first being that the respondent had not used the mark in Canada before applying to have it registered and the second being that the mark had become *publici juris* by reason of a licence granted by the respondent to the petitioner to use the mark in association with its own goods. The respondent, in turn, challenges the status of the petitioner as a "person interested" to attack the registration while the licensing agreement remains in force.

The respondent is a New Jersey corporation and carries on business in the United States, where since 1939 it has used the word MICAFIL as a trade mark in connection with the sale of home insulation, plaster aggregate, and concrete aggregate, consisting of or containing expanded vermiculite. In its application for registration of MICAFIL under the *Unfair Competition Act*, the respondent stated

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that it was commercially concerned with wares concisely described as insulating materials and construction materials, that the mark had been used by it in Canada since June, 1950, and that it has been used since that date to indicate that the wares in respect of which registration of the mark was sought had been manufactured or sold by it. The application was not based on a foreign registration.

The evidence of use made by the respondent of the mark in Canada prior to the application for its registration is limited to two occasions. In 1948, in response to an inquiry from Siscoe Gold Mines Limited, a Canadian company which was interested in arranging for a supply of crude vermiculite ore for processing, the respondent forwarded to it at Siscoe, P.Q., a number of plastic tubes containing samples of vermiculite in its crude state and in its exfoliated form in various sizes according to the purpose for which it was useful; that is to say, for home insulation, plaster aggregate, or concrete aggregate. Each of these tubes was marked with the word MICAFIL. No sales were made, and, in fact, the sale by the respondent of processed vermiculite in Canada was neither contemplated nor referred to in this correspondence. Nothing came of the correspondence.

On March 3, 1950 the respondent wrote to Siscoe Gold Mines Limited, suggesting that it was anxious to expand in Canada, and correspondence ensued which led to an agreement between the respondent and the petitioner, the latter being a subsidiary of Siscoe Gold Mines Limited. The letter heads used by the respondent in this correspondence bore at the foot the words

Palabora MICAFIL Vermiculite
Reg. U.S. Trade Mark

In this, the words "Palabora" and "Vermiculite" appear in script. The word MICAFIL is in block letters and is enclosed in an oblong dark background, with the words "Reg. U.S. Trade Mark" in fine print immediately below the background. In the course of the negotiations leading to the agreement, several officials of the respondent came to Canada, bringing with them a number of plastic tubes bearing the mark MICAFIL and containing samples of

both crude and expanded vermiculite. They also brought a four-cubic-foot bag of expanded vermiculite with the mark MICAFIL on it and a quantity of descriptive advertising material. In one piece of the advertising material which was offered in evidence, the word MICAFIL was used in numerous places to refer to expanded vermiculite suitable for home insulation. These samples and literature were left at the petitioner's office in Montreal or Cornwall.

There is no evidence of any further or other use by the respondent of the mark in Canada in association with expanded vermiculite or any of the other kinds of wares mentioned in the registration either before or after the filing of the application for registration of the mark. Nor is there anything further in the evidence indicating that the respondent had made the mark known in Canada either by distribution in Canada of its expanded vermiculite products or by their advertisement in Canada in any printed publication.

The petitioner was incorporated in 1949 and is engaged in Canada in the business of supplying and manufacturing insulating materials and building supplies. On May 5, 1950, as a result of the negotiations already mentioned, it executed an agreement with the respondent under which, in consideration of a royalty to be paid by the petitioner, the respondent agreed to arrange for the supply to it by another company of vermiculite ore mined in South Africa and granted the petitioner a licence to use certain processes owned or controlled by the respondent for the exfoliation of vermiculite. In the agreement, it is recited that the respondent is desirous of marketing South African vermiculite through licensees, that it "has a copyright of the trade name MICAFIL, which name is duly registered with the United States," and that it is desirous of granting to the applicant a licence "to exfoliate and distribute MICAFIL and other products." The licence, as set out in paragraph 4, was as follows:

4. The Company grants to the Licensee, during the period of this agreement, and within the territorial limitations hereinafter described:

(*a*) A right, license and privilege to use the copyrighted trade name "MICAFIL", U.S. Registry No. 377379, provided such use of said copyrighted trade name shall be limited to a use connected with or related to ore purchased by the Licensee from the Company.

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(b) A right, license and privilege to use certain processes and methods relating to the processing and exfoliation of vermiculite ore known to the Company and concerning which the Company shall assist and advise the Licensee; provided, however, that this use or employment of said processes and methods shall be limited to use or employment in connection with or related to ore purchased by the Licensee from the Company and none other.

The only reference to a territorial limitation following paragraph 4 is that contained in paragraph 8, which refers to "any territory serviced by the Licensee." Paragraphs 8, 9, 10, 11 and 12 of the agreement were as follows:

8. The Company agrees that all enquiries concerning "MICAFIL" that may come to it from any territory serviced by the Licensee shall be turned over to the said Licensee.

9. The Licensee agrees that the privilege granted hereunder gives the Licensee only the right to package said "MICAFIL" from Vermiculite ore purchased from the Company and sell the said "MICAFIL" when packaged in packages approved by the Company and sold under said trade mark and trade name for so long as this franchise agreement remains in force. Nothing herein gives to the Licensee any interest in any of the Company's trade marks or trade names except the right to use them in connection with said "MICAFIL" when made from vermiculite ore purchased from the Company and packaged in packages approved by the Company.

10. The Licensee agrees to comply strictly with all instructions and formulae furnished from time to time by the Company for the preparation and manufacture of "MICAFIL" and to comply with all national, state and municipal laws, and regulations pertaining to the operation of said manufacture, packaging and sale of said "MICAFIL" and to maintain its plant in a clean, wholesome and sanitary condition at all times. In order to ascertain whether the Licensee is complying with all of the requirements set forth in this agreement, the Company shall have the privilege of entering the premises of the Licensee at any reasonable time to satisfy itself that such requirements are being kept.

11. The Licensee agrees not to manufacture "MICAFIL" from any material or compound other than from vermiculite ore furnished by the Company.

12. The Licensee agrees that it will not sell "MICAFIL" under any other name than that given by the Company and not to manufacture, deal in, sell, handle, either directly or indirectly, any vermiculite ore or other products made from vermiculite ore, which because of similarity in name, appearance, contents, manner of handling, or for any other reasons, may result in unfair competition with the company.

By paragraph 16, it was provided that the agreement should be in force for twelve months and be renewed automatically annually unless notification by registered letter were given by either party six months in advance of the renewal date, but by paragraph 18 it was further provided that, in the event of an increase in the price of ore as

set by the contract, the licensee might refuse to pay it, in which event the contract might be cancelled. In this case, there was no specification of the length of notice required for termination. Up to the time of the hearing of the motion, no notice had been given, and the agreement was still in effect.

In paragraph 4 of the petitioner's notice of motion, which is verified by affidavit, it is stated that, pursuant to the agreement, the petitioner began production of insulating material under the name MICAFIL and commenced sale of the same under its own name in the month of June, 1950, and in paragraph 8 of the petitioner's reply, which is also verified by affidavit, it is stated that

> the wares sold by the Petitioner were not wares of the Respondent but wares of the Petitioner processed by the Petitioner (which expanded crude vermiculite ore) and sold under Respondent's trade mark by the Petitioner pursuant to a license in that behalf granted by the Respondent.

I shall deal first with the respondent's objection that the petitioner was not a "person interested" within the meaning of s. 52 of the *Unfair Competition Act*. The expression is defined in s. 2(*h*) of the Act, and it has been considered in this Court in a number of cases, among which are *Standard Brands Limited v. Staley*[1], *Feingold v. Demoiselle Junior Limited*[2], *Barton Inc. et al. v. Mary Lee Candy Shoppes et al.*[3], and *Richfield Oil Corporation v. Richfield Oil Corporation of Canada Limited*[4].

By the definition above mentioned, "person interested" is declared to include

> *any person who, by reason of the nature of the business carried on by him and the ordinary mode of carrying on such business, may reasonably apprehend that the goodwill of such business may be adversely affected by any entry in the register of trade marks . . .*

In *Barton Inc. et al. v. Mary Lee Candy Shoppes et al.* Cameron J., after referring to *Kerly on Trade Marks* and several cases cited therein and to *Crothers v. Williamson Candy Company*[5], where the expression "any person aggrieved," which appeared in the *Trade Mark and Design Act* was considered, expressed the view that there is no

[1] [1946] Ex. C.R. 615.
[2] [1948] Ex. C.R. 150.
[3] [1950] Ex. C.R. 386.
[4] [1955] Ex. C.R. 17.
[5] [1925] S.C.R. 377.

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material difference between that expression and "any person interested" as defined in the *Unfair Competition Act*. In applying the principles cited from Kerly and from the judgment in the *Williamson* case, he said at p. 394:

> By the registration of "Bartons" as its trade mark, Mary Lee Candy Shoppes Ltd. has narrowed the area of business open to its rivals, such as the applicants. The possession of that registered trade mark excludes, or with reasonable probability would exclude, the applicants from a portion of that trade into which they desire to enter. By reason of the registration and the existence of that mark, the applicants cannot lawfully do that which, but for the existence of the trade mark upon the register, they could lawfully do; and therefore, in my opinion, they have a *locus standi* to be heard as "persons interested".

In the present case, the petitioner at the time when this motion was launched was engaged in the supply and manufacture of insulating materials and builders' supplies, including the manufacture and sale of expanded vermiculite as an insulating material, and it had also made use of the word MICAFIL in association with such expanded vermiculite insulating material. From this I think it is clear that, *prima facie*, the petitioner is a person interested within the meaning of the statute as interpreted and applied in the cases mentioned. But the contention is made that, because of the agreement existing between the parties, the right of the petitioner both to use the name MICAFIL in association with its products and to produce and deal in vermiculite products is governed by the agreement and that the petitioner cannot be adversely affected by the existence of the registration so long as the agreement is in force. A similar contention was advanced and rejected in *Re Ainslie & Co.'s Trade Mark*[1], where Chitty J. said, at p. 214:

> More particularly the argument is founded on this, that the Applicants are not persons aggrieved within the 90th Section; but the Applicants are persons who carry on a business in whiskey, and are therefore *prima facie* persons aggrieved; and after having heard the facts, so far as material to the point stated to me, there is no ground for displacing that *prima facie* case. Then the argument is made turn more particularly upon this agreement. I have not heard the evidence read, but the parties, I understand, are in contest as to whether there is any subsisting agreement at all, and if so, what that agreement is. I am about to decide this case on the assumption that the Respondents' Counsel have rightly stated the agreement, and the agreement as stated by Mr. *Whitehorne* is to this effect—an agreement on the part of the Applicants not to sell under the trade

[1] (1887) 4 R.P.C. 212.

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mark, "Ben Ledi", any whiskey except what the Applicants obtain from the Respondents, with a cross agreement on the part of the Respondents by which they contract not to sell any whiskey in England except through the agency of the Applicants. I am at a loss to discover how any such agreement as this can displace the Applicants' right to have the Register of Trade Marks disencumbered of that which is not a trade mark at all. There are some proceedings in an action, I understand, between the Respondents, who are the Plaintiffs, and the Applicants, who are the Defendants, whereby the Respondents seek to restrain the Applicants from dealing in whiskey under this name, and in these proceedings, so long as the registration stands, the Respondents will have two grounds upon which they will base their case. The first is, "We have a registered trade mark", and the second is, "There is an agreement between us which precludes your doing what you are about to do or what you are threatening to do." It appears to me that by removing the trade mark from the register I shall leave the question of contract, and the relation of parties under the contract exactly where it is on the contract, and so far I shall not prejudice the Respondents by anything I am doing to-day; but with regard to the ground that they allege against the Applicants that they have got a valid trade mark, I think I am bound now to say, the question being directly raised under the Act, that the Respondents have no valid trade mark, and to make an order to remove it from the register. This is not a question of equity; this is a question of right under the Statute, and the defence, which I find really a difficulty in appreciating, appears to me to fail altogether.

See also *In Re Appollinaris Company's Trade Marks*[1] at p. 160, where Fry L. J. makes it clear that the reasonable probability of restriction of rights in the future, as well as immediate restriction of them, will suffice to qualify an applicant as a person aggrieved.

In the present case, what is being attacked pursuant to the statute is a registration made after the agreement was made and which is not referred to in the agreement. If the registration is expunged, the parties will be in the same legal relationship to one another under the contract as they were before the registration was made. Prior to the registration, it was open to the petitioner to terminate the agreement pursuant to its terms which, in some contemplated situations which might develop, would not necessarily require a six months' notice. Upon termination of the agreement, only such legal rights, if any, as the respondent then had in the mark would have restricted the petitioner from making such use of it as it saw fit. In exercising its rights, the petitioner would not have been restricted by the fact or legal effects of registration of the mark standing

[1] (1890) 8 R.P.C. 137.

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in the respondent's name. In this situation, the existence of the registration, in my opinion, affects and restricts the rights which the petitioner, as a person engaged in trading in products of the kind described in the registration, might well wish to exercise immediately upon termination of the agreement by either party, and I think that such affection and restriction of the petitioner's rights is sufficient to make the petitioner a "person interested" within the meaning of s. 52(1) of the *Unfair Competition Act*.

I turn now to the first of the grounds upon which registration of the mark is attacked, namely that the registration was invalid because the mark had not been used in Canada prior to the application for its registration. The right to registration of a trade mark is a purely statutory right, and the applicable statute at the time of the registration in question was the *Unfair Competition Act*. By s. 22 of that Act, it was provided:

> 22. (1) There shall be kept under the supervision of the Registrar a register of trade marks in which, subject as hereinafter provided, *any person* may cause to be recorded *any trade mark he has adopted*, and notifications of any assignments, transmissions, disclaimers and judgments relating to such trade mark.

Then followed various provisions relating to the register to be so kept and the kinds of marks which might be registered in it, and in ss. 30 to 34 the requirements for obtaining registration of a trade mark were set out. Omitting wording not material to this case, s. 30 provided:

> 30. (1) Any person who desires to register a trade mark under this Act . . . shall make an application in writing to the Registrar in duplicate containing
>
> (*a*) a statement of the date from which the applicant . . . has . . . used the mark for the purposes defined in the application and of the countries in which the mark has been principally used since the said date;
>
> (*b*) a statement that the applicant considers that, having regard to the provisions of this Act, he was and is entitled to adopt and use the mark in Canada in connection with the wares described; and
>
> (*c*) the address of the applicant's principal office or place of business in Canada, if any, and if the applicant has no office or place of business in Canada, the address of his principal office or place of business abroad and the name and address in Canada of some person, firm or corporation to whom any notice in respect of the registration may be sent, and upon whom service of any proceedings in respect of the registration may be made with the same effect as if they had been served upon the applicant himself.

(2) If the mark is intended to indicate that the wares in association with which it is used have been manufactured, sold, leased or hired by the owner thereof the application shall so indicate and shall contain

(*a*) a concise description, expressed in such terms as are ordinarily and commercially used by the applicant, of the wares with which the applicant is commercially concerned; and

(*b*) a concise description in like terms of the specific wares in association with which the applicant has used the mark.

In ss. 37 and 38 power was given to the Registrar to refuse any application which, in his opinion, could not be allowed under the Act or which was objected to on valid grounds by the owners of previously registered marks, and s. 39 then provided:

39. If there is no objection to the registration of a trade mark for the registration of which a sufficient and complete application has been made, the Registrar shall, subject as hereinafter provided, forthwith cause such trade mark to be entered in the register as of the date upon which such application was received by him.

It will be observed that, subject to the provisions as to the registrability of particular kinds of trade marks and the power of the Registrar to refuse an application in the cases stated, the effect of these provisions was to give to *any person* the right to cause to be registered in the register *any trade mark he* (*had*) *adopted,* and if his application was in compliance with the statutory requirements and there was no objection the Registrar was required to "forthwith cause such trade mark to be entered in the register."

The right so given was, however, subject to and limited by the later provisions of s. 30, clause (*a*) of s-s. (1) of which required the applicant to state the date on which and the countries in which the trade mark had been used, and s-s. (2) of which required him to give a concise description of the wares with which he was commercially concerned, as well as of the wares in association with which he had used the mark. The right was, I think, subject to other limitations as well. The word "adopted" was not defined in the Act, but it obviously meant "lawfully adopted" and, when so interpreted, s. 22 would clearly confer no right to register a mark adopted in violation of the prohibitions of s. 3 or s. 14. Moreover, the expression "trade mark", as defined in s. 2(*m*), was limited to

a symbol that . . . is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, or users of such wares that they have been manufactured, sold, leased or hired by him,

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which suggests that the symbol must have been in use for the purpose of distinguishing goods before the adoption of it contemplated by s. 22 could be complete. But nowhere in the Act do I find any provision or expression which would limit the use contemplated by the word "used" in the definition of "Trade mark" in s. 2(*m*) either to use in Canada or to use in association with wares entering into the trade or commerce of Canada. Indeed, the prohibition in s. 3 against adopting for use in Canada a trade mark already in use in a foreign country suggests the contrary. Accordingly, I think that the expression "trade mark", as defined in s. 2(*m*) and as used in the Act, included a symbol that has been used in association with wares anywhere in the world, whether any of such wares had ever entered into trade and commerce in Canada or not. Nor is there in the Act any expression or provision which appears to me to require either that the adoption contemplated by s. 22 be limited to adoption in Canada or that, for the purposes of s. 22, the person adopting a trade mark need have a business or trade in Canada in which the trade mark was used or was to be used, though, no doubt, in order to satisfy the requirement of s. 30(2) it would have been necessary for him to have a business or trade somewhere in the world in connection with which the mark was being used. In this respect, the *Unfair Competition Act* differed materially from the earlier *Trade Marks and Design Act,* which made no reference to use of a mark in countries other than Canada and which conferred a right to registration on the proprietor of a trade mark and defined "trade marks" as

> all marks, names, labels, brands, etc., which are adopted for use by any person in his trade, business, occupation, or calling.

The judgment of the Supreme Court of Canada in *Robert Crean and Co. Ltd. v. Dobbs and Co.*,[1] where the word "adopted" was considered, is accordingly inapplicable to the present situation.

What the *Unfair Competition Act* did require, however, as a preliminary to registration in Canada, in addition to adoption and use of the trade mark in another country of the Union for the Protection of Industrial Property as defined in the Act, in connection with a trade or business carried on in that country but not in Canada, was, I think,

[1] [1930] S.C.R. 307.

to be gathered from ss. 4 and 5. Section 5 prohibited the use in Canada by anyone but the registered owner of a mark that had been *adopted and registered*. Inferentially, this would afford exclusive use to a person who had adopted a mark elsewhere than in Canada and had secured registration of it in Canada. This, however, was to be reconciled with s. 4, by which the right to exclusive use of the mark in Canada was conferred on the person who first used it or made it known in Canada, as provided in s. 3, (that is "by reason either of the distribution of the wares in Canada or of their advertisement therein in any printed publication circulated in the ordinary course among potential dealers in or users of such wares in Canada"), if he obtained registration. The prohibition of s. 5 would thus be wider than the corresponding right conferred by s. 4 if mere adoption elsewhere without use or making known in Canada were sufficient to found a right to registration in Canada. For this reason, I think that the right to registration in a case of this kind, as conferred by s. 22, must have been intended to be limited to the person to whom the exclusive right of use in Canada was given on registration, for otherwise the register would be likely to exhibit a quite inaccurate expression or definition of his rights. It follows that, in the present case, the facts must be examined to see if the respondent who, at the time of its application for registration in Canada, had the mark MICAFIL in use in the United States in association with its expanded vermiculite products, had either (a) used the mark in Canada in association with such wares or (b) made it known in Canada by reason of either (i) the distribution of such wares in Canada or (ii) their advertisement therein in any printed publication circulated in the ordinary course among potential dealers in or users of such wares in Canada. Now, it is not suggested, nor is there any evidence, that the respondent's expanded vermiculite products had ever been advertised in any such publication, and, accordingly, the question whether or not the mark had been made known in Canada is immediately narrowed down to whether or not it had been made known by reason of distribution of such wares in

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Canada. What I think was a somewhat stronger case on this point was considered in *King Features Syndicate Inc. et al. v. Benjamin H. Lechter*,[1] where Cameron J. said at p. 306:

> The plaintiffs have led evidence intended to establish that about 1935 a watch made by Montgomery Ward & Co. under license from the Hearst Corporation was distributed in Canada and was therefore known in Canada within section 3(*b*). W. J. O'Neil, Secretary-Treasurer of Paramount Film Services, Ltd., states that about that year his firm received from the parent company—Paramount Pictures Inc. of New York—a small number of watches similar to Exhibit 22 for distribution gratis among his firm's employees in Toronto for advertising purposes in connection with "Popeye" film cartoons, and that he or his family received two or three of them, one of which was still in his possession but was not produced. That watch has but one character, that of "Popeye", and the dial bears the name "Popeye" in red ink adjacent to the figure. There is no evidence that that "Popeye" watch was ever advertised or sold in Canada. I am of the opinion that the very limited use of that dial in that way does not constitute such distribution of the wares in Canada as to bring the name "Popeye", used in connection therewith, within the ambit of section 3(*b*).

In my opinion, the mere sending to one company in Canada in 1948 and the bringing to it or to its subsidiary in 1950 of samples of the respondent's products was neither a distribution of wares as contemplated by the Act nor was it sufficient to establish that, by reason thereof, the mark was known in Canada. What I think was contemplated by the statute was such distribution of the wares bearing the mark and in such quantities as would serve to make the mark known by persons engaged in trading in such wares in Canada or their customers, and what was done in this case was, I think, quite insufficient to satisfy the statutory requirement.

There remains the question whether what was done constituted use of the mark in Canada within the meaning of s. 4. In this connection, s. 6 provided as follows:

> 6. For the purposes of this Act a trade mark shall be deemed to have been or to be used in association with wares if, by its being marked on the wares themselves or on the packages in which they are distributed, or by its being in any other manner so associated with the wares at the time of the transfer of the property therein, or of the possession thereof, in the ordinary course of trade and commerce, notice of the association is then given to the persons to whom the property or possession is transferred.

In the present case, the respondent was not engaged in selling expanded vermiculite products in Canada nor, so far as appears, was any sale of such products made or even

[1] [1950] Ex. C.R. 297.

proposed, in the ordinary course of trade, to the petitioner or to anyone else in Canada. Nor was sale of the respondent's expanded vermiculite products in Canada in the ordinary course of trade or commerce the purpose for which the samples were sent or brought to Canada or delivered to the petitioner or its parent company. All that occurred was a delivery of samples of the respondent's products in connection with negotiations for the supply of crude vermiculite ore to the petitioner, from which the petitioner might manufacture similar products of its own. This, in my opinion, was not use of the kind contemplated by the statute and, accordingly, I think it was insufficient to support the respondent's claim for registration of the mark under the *Unfair Competition Act*. No other use by the respondent of the mark in Canada, in association with its expanded vermiculite products, either prior or subsequent to the making of its application for registration, was established. It follows, in my opinion, that the registration was not made in accordance with or authorized by the statute and that it should accordingly be expunged.

The foregoing is sufficient to dispose of the matter but, before parting with it, I think I should add that, had I come to the contrary conclusion on the question of use, I would not have held the mark invalid by reason of the licensing of the petitioner by the respondent to use the mark. Assuming that the respondent was the first to use the mark in Canada and that, prior to the making of the licensing agreement, it was entitled to obtain registration of the mark under the *Unfair Competition Act*, it would, in my opinion, have been necessary for the petitioner to show that the mark, by reason of the license and what was done pursuant to it, no longer satisfied the requirements of the definition of "trade mark" in s. 2(*m*). It is established that there was a licence and that the mark was used by the petitioner pursuant thereto, but the material before the Court does not show either where or to whom the products in association with which the mark was used by the licensee were sold, nor the extent of the use so made

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of the mark. In this situation, I would be unable to conclude on the evidence that the mark had ceased to satisfy the requirements of the definition of "trade mark" in s. 2(*m*) of the Act.

There will be judgment ordering the expungement from the register of trade marks of the word mark MICAFIL, registered by the respondent as of September 30, 1952, under No. NS 46651/183. The petitioner is entitled to the costs of the application.

Judgment accordingly.

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Apr. 2

May 25

BETWEEN:

ABE LEE BARRON, ... APPELLANT,

AND

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

Revenue—Income tax—Appeal from Income Tax Appeal Board—Failure of appellant to discharge onus of proving assessment erroneous—Appeal dismissed.

Appellant, a practising solicitor, was actively interested in the promotion, incorporation and financing of a company called Renfrew Petroleums Ltd. and in a report to its president and directors he stated that $10,000 worth of stock of the company was allowed to himself for organization etc. that having been agreed upon at the first meeting. It was agreed that the stock was always worth $10,000 in money. In reassessing the appellant for income tax purposes the Minister added the sum of $10,000 to his taxable income and an appeal to the Income Tax Appeal Board was allowed in part. He now appeals to this Court from that decision, contending that he received the stock as a trustee and had no beneficial interest therein. The Minister cross-appeals.

Held: That the appellant not having discharged the onus on him to establish error in the re-assessment the appeal must be dismissed and the re-assessment affirmed.

APPEAL from a decision of the Income Tax Appeal Board.

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

The appellant in person.

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Miles H. Patterson and *T. E. Jackson* for respondent.

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

CAMERON J. now (May 25, 1959) delivered the following judgment:

In this case, the appellant appeals from a decision of the Income Tax Appeal Board dated April 2, 1958 which allowed in part his appeal from a re-assessment dated December 21, 1956 for the taxation year 1950. In re-assessing the appellant, the Minister added to his declared income the sum of $10,000, described as "$10,000 worth of Renfrew shares received for services rendered". The Board allowed his appeal as to one-third of that amount, namely, $3,333.33. The Minister cross-appeals and asks that the re-assessment be restored. It is well settled that both as to the appeal and the cross-appeal, the onus is on the taxpayer to prove that the re-assessment was incorrect (*M.N.R. v. Simpson's Ltd.* (1)).

The appellant is a barrister who has practiced his profession in Calgary for many years. He has also been interested in the activities of a number of companies having to do with petroleum and natural gas in Alberta. The "Renfrew shares" above referred to are shares in Renfrew Petroleums Ltd. and it is not disputed that they had value at all relevant times of $10,000. The sole question for determination is whether, if he received them, the appellant did so in his personal capacity or whether, as he alleges, he received them in the capacity of a trustee and had himself no beneficial interest therein.

Renfrew Petroleums Ltd. (which I shall refer to as "Renfrew") was incorporated in the fall of 1950. The appellant was its solicitor and actively interested in its promotion, incorporation and financing as shown by a mimeographed letter (Exhibit A) dated December 19, 1950, signed by him and addressed to its president and directors and, presumably, sent also to its shareholders. Three paragraphs therefrom are informative as to the part he played and as to the $10,000 in stock in question.

> I am submitting herewith a report on the affairs of your company insofar as I am concerned to date.

[1] [1953] Ex. C.R. 93.

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This company actually was started at a meeting of a few of us some time during the latter part of October at which time it intended to make a bid on the South West Quarter of Section 19, in Township 58, Range 23, West of the 4th Meridian. At the meeting the sum of $73,000.00 was raised. This, however, included the sum of $15,000.00 which was contributed by Share Oils Limited which company was anxious to participate in the purchase of this Quarter Section. The land was purchased on the 2nd of November at the price of $42,280.00 of which sum we were contributing $35,938.00 for 85% interest and Share Oils Limited was contributing $6,342.00 for 15% interest. After the land was purchased I received innumerable applications by friends and friends of friends wanting to join with us, with the result that at the time the subscription list was closed I had received altogether the sum of $158,575.00.

Having regard to the payment made by myself of the sum of $35,938.00 above mentioned there was still in my hands to the credit of the subscribers the sum of $122,637.00 which I transferred to the credit of your company at the Canadian Bank of Commerce, Main Branch, where it is now on deposit. I then proceeded to have allotted, with your approval, shares of stock for monies received and have caused to be allotted 2,360,050 shares being computed at the rate of 14 shares for each dollar actually subscribed. (Excepting $10,000.00 worth of stock allowed to myself for organization, etc. and which was agreed upon at the first meeting).

It seems that the last sentence in brackets came to the attention of the taxing authorities and formed the basis of the re-assessment. It is a clear statement in writing by the appellant that $10,000 worth of Renfrew stock was allowed to him for organization, etc., and that that amount was agreed upon at the first meeting.

Now the only oral evidence at the hearing of this appeal was that of the appellant who acted also as his own counsel. (I emphasize this matter because of the fact that before the Income Tax Appeal Board other witnesses were heard and apparently were of assistance to the Board in reaching its conclusion.) In cross-examination, the appellant readily admitted that he had prepared and sent out the report (Exhibit A). Further, he said that at the meeting referred to, he had demanded that $15,000 worth of Renfrew stock be issued to him as his fees for the organization and promotion of the company, that he was then offered and accepted $10,000 worth of stock for such services, and that there was no doubt that all others at the meeting understood that such shares (on the basis of 14 shares per dollar) were being allotted to him for his services. He added that the statement in Exhibit A relating thereto "is not particularly untrue".

Earlier, in direct evidence, the appellant stated that he had received no part of the shares beneficially, that the $10,000 in stock of Renfrew was not a payment for his services at all (although everyone at the meeting had understood it to be so), but that it was in fact a "promotion fee" which was to be divided equally between Legion Oils Ltd., Harold Bowman, and Louis Diamond. Legion Oils Ltd. (hereinafter to be called "Legion") was incorporated in 1950 and the appellant was its president and the main, if not the sole, shareholder. Bowman, an employee of a drilling company, was to try to secure "farm-outs" which Legion would finance, the profits to be divided equally. To the west of the Legion property in Redwater there was another property which might be acquired. Diamond, a successful promoter, was brought in and it was agreed to incorporate Renfrew. A substantial number of applications for shares were received and title to the property was acquired in the name of the appellant who also held all the money subscribed in trust in his own name. He says that Diamond demanded a "promotion fee" for his services in bringing in shareholders and called the meeting referred to in Exhibit A. At that meeting, the appellant said in direct examination that he represented Legion, Diamond and Bowman, who had agreed to split the "promotion fee" equally and that it was a "promotion fee" that was asked for and granted at the meeting to the extent of $10,000 in Renfrew stock.

Exhibit 1, dated December 15, 1950, is the first annual return of Renfrew under *The Companies Act* of Alberta showing 2,360,050 shares issued, some 300 being held by three individuals (said to be qualifying shares), and the balance of 2,359,750 having been allotted to the appellant. The appellant says that he gave Diamond shares in Renfrew in payment of his agreed one-third of the "promotion fee" on the basis of 14 shares for each of the $3,333.33 to which he was entitled. There is no evidence other than the statement of the appellant that Diamond received these shares and the appellant was unable to say when the shares were transferred.

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I must admit to a considerable degree of difficulty in following the appellant's statement as to the manner in which the one-third interest of both Legion and Bowman in the "promotion fee" came into his hands as it actually did. He put in evidence Exhibit 3, a one-page document signed by the three parties. It reads as follows:

Settlement between Bowman Barron & Diamond.

1. Legion belongs to Barron alone
2. Savanah Creek belongs to Bowman alone
3. Renfrew belongs to Barron & Diamond alone
4. Octave in 3 equal shares
5. Ft. Sask. If it goes through will be a 3 way and Bowman and Diamond will owe Barron $625.00 each.

Barron for Legion will sign all documents necessary to complete above division.

The appellant says that by reason of that settlement, Bowman transferred his right to one-third of the "promotion fee" to Legion and that Legion assigned to Bowman all its interest in Savannah Creek. In the result Legion, being already entitled to one-third of the "promotion fee", became the owner of two-thirds thereof. That right, the appellant says, was transferred to him in part settlement of Legion's obligation to him under a loan of $7,018.81 shown in the balance sheet of Legion for the year ending August 31, 1951 (Exhibit 2).

Now the settlement (Exhibit 3) was undated and the appellant was unable to state even the year in which it was signed or put into effect. Moreover, it says nothing whatever about the so-called "promotion fee" or that Bowman or Legion ever had any interest therein. It is significant, also, that in Exhibit 2—the balance sheet of Legion for the year ending August 31, 1951, a date long after Legion became entitled to a share of the "promotion fee"—the detailed statement of assets includes no reference to any interest in Renfrew stock or any interest in any "promotion fee".

In cross-examination, the appellant was also invited to explain the Notice of Objection filed by him following the re-assessment, and dated February 1, 1957 (Exhibit B). It is in part as follows:

I was the Secretary of Legion Oils Limited which had property in the North West part of Redwater. Adjoining land to the west was being offered for sale by the Provincial Government. As Secretary of the Company I endeavored to induce Parties to purchase these lands because it would be favorable to Legion Oils Limited, and if they did not make an offer to purchase Legion Oils would do so. In the result Renfrew Petroleums Limited was formed and they purchased adjoining lands. I insisted on behalf of Legion Oils Limited that they give the Company shares to the value of $10,000.00 which was done.

However, one Howard Bowman was interested for various reasons and so he became entitled to receive one-third of these shares of stock amounting to $3333.33. The said Howard Bowman transferred his shares of stock to Legion Oils Limited in consideration of a transfer by Legion Oils Limited of its interest in Savannah Creek property with the result that in any event he should be charged with the said sum of $3333.33 and Legion charged with $6666.67.

It will be noted at once that this statement over the signature of the appellant differs very widely, not only from his report to the officers of Renfrew (Exhibit A), but also from his evidence at the hearing of the appeal. The Notice of Objection does not refer to any interest of Diamond in the $10,000 stock of Renfrew here in issue, or that Diamond ever received any part thereof. It states expressly that the appellant on behalf of Legion insisted on that company being given all the shares. That statement is, of course, in direct conflict with his own admission that he asked for and was allowed the $10,000 in Renfrew stock in payment of his own services. Notwithstanding his direct evidence, he asserted that the Notice of Objection was correct but suggested that if there were any inaccuracies, they were occasioned by the fact that he had signed it "in blank" and that it had been filled in by his secretary on his telephoned instruction while he was absent on vacation.

In view of the appellant's own admission that the full amount of $10,000 in stock was awarded to him by the meeting of shareholders of Renfrew in payment for his own

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services, I am quite unable to disregard the serious discrepancies in the various statements made by the appellant to which I have referred, and on which he bases his claim that in fact he was a trustee for others as to the entire amount. The appellant had been the president of Legion which is still in existence, and been the solicitor for Renfrew, and had held practically all its stock in his own name, and had given instructions to the Prudential Trust Company, the transfer agent or registrar for Renfrew, as to the manner and dates of the various allotments of stock. Presumably, if the appellant's contention is sound, the books, documents and records of Legion, Renfrew and the Prudential Trust would have been of assistance in so proving and would have constituted the best evidence as to what actually took place. While Diamond has died, Bowman is still living and was not called. None of this readily available evidence was introduced and without it I am quite unable to reach the conclusion that the appellant has satisfied the onus put upon him to establish error in the re-assessment.

If, as submitted by the appellant, he received two-thirds of the $10,000 in Renfrew stock from Legion in part payment of his loan to that company, it would have been a very easy matter for him to have produced evidence from the records of Legion as to the times, amounts and manner in which the loan was paid off, but nothing of that sort was attempted. The appellant himself gave no evidence as to when that loan was repaid. It is significant to note also that according to Legion's balance sheet (Exhibit 2) the loan was still unpaid on August 31, 1951, whereas the appellant in the report of December 19, 1950 (Exhibit A) stated that the full $10,000 in Renfrew stock had been "allowed" to him prior to the latter date. Similarly, the records of Renfrew and Prudential Trust would have furnished the best evidence as to whether Diamond, Bowman or Legion ever received any Renfrew stock as part of a "promotion fee". There is no documentary evidence before me to establish that they ever received any stock in Renfrew.

At the trial, I intimated to the appellant that I thought he could have called further evidence such as I have mentioned, and stated that I was prepared to grant a reasonable adjournment to enable him to do so, if he so desired.

I rejected his suggestion that the hearing be adjourned until I was again sitting in Calgary as I was unlikely to do so for some years; whereupon he rejected the offer of a reasonably short adjournment and closed his case.

The appeal was heard in Calgary on April 2, 1959, and subsequently during the sittings of this Court at Vancouver I received a letter from the appellant dated April 8, enclosing certain documents and asking for leave to introduce them, as well as other material, in evidence. On my instructions, the Deputy Registrar on April 16 advised the appellant by letter that under the circumstances I declined to look at the documents forwarded, but intimated that should the appellant desire to introduce further evidence, he should do so on motion to a Judge in Chambers at Ottawa after giving notice of the application to the respondent. The Registrar further stated, "It will be necessary for you to do so without delay, otherwise your case will be determined on the material now before the Court".

More than a month has now elapsed since that letter was forwarded, and since no application has been made for an order permitting further evidence to be adduced, I have reached the conclusion that the appellant has now abandoned any such intention and accordingly I have decided to dispose of the appeal on the evidence given at the trial.

The re-assessment was based on the assumption that stock to the admitted value was secured by the appellant either as professional fees or as remuneration for services rendered, in either of which cases it constitutes income in the hands of the appellant. For the reasons stated above, I have come to the conclusion that the appellant has failed to establish error in the re-assessment or any part thereof. Without further proof, I am unable to accept the conflicting statements of the appellant as sufficient to overcome his own written statement in Exhibit A that he was awarded $10,000 in stock for his own services.

Accordingly, the appellant's appeal will be dismissed, the cross-appeal will be allowed and the re-assessment affirmed, the whole with costs to be paid by the appellant after taxation.

Judgment accordingly.

1959
June 25
Oct. 2

BETWEEN:

PARKE, DAVIS & COMPANY, ...APPELLANT,

AND

FINE CHEMICALS OF CANADA, LIMITED, ... } RESPONDENT.

Patents—Patent Act, R.S.C. 1952, c. 41, ss. 41, 105, 106 and 107—Appeal from decision of Commissioner of Patents granting a licence under the provisions of the Patent Act—Proper procedure followed by Commissioner—No denial of natural justice—Appeal dismissed.

The appellant owns certain patents for inventions intended for the preparation of medicines. By a decision of the Commissioner of Patents a licence was granted to the respondent under the provisions of s. 41(3) of the *Patent Act* R.S.C. 1952, c. 41, in respect of those patents. Appellant now asks this Court to set aside the decision of the Commissioner of Patents on the ground that it was rendered before the appellant was given any opportunity of submitting evidence or making submissions to the Commissioner to establish reasons why a licence should not be granted to the respondent. Appellant contends that this is a denial of natural justice.

The respondent had filed an application requesting the grant to it of a licence under the patents and the Commissioner in a letter to respondent's solicitor outlined the practice to be followed and also advised the appointed representative of the patentee that an application for licence had been filed by respondent who had been requested to serve upon the representative the application and verifying affidavit and that the patentee would have two months within which to file with the Commissioner a counter-statement. All these steps were taken and later the Commissioner advised appellant's solicitor that "in view of the knowledge acquired during previous hearings in which the applicant for licence was concerned he had come to the conclusion that a licence is to be granted in this case". After protesting that the licence had been granted without a hearing, the appellant, who did not request a formal hearing or an opportunity of presenting further evidence or argument, though six months had elapsed after the date the appellant had filed its counter-statement before the Commissioner made his decision, launched this appeal.

Held: That Parliament in enacting s. 41 of the Act has conferred on the Commissioner the power to decide the question and he is required to grant the licence "unless he sees good reasons to the contrary" and in the absence of any requirement or direction as to how he should proceed the law will imply no more than that the substantial requirements of justice shall not be violated.

2. That the appellant had had ample opportunity of stating its case and did so, and by the material filed with the Commissioner the issues were clearly defined and the facts attested to by affidavit and the Commissioner would need nothing more to resolve the simple issue which was before him, namely whether the appellant had established good cause why the licence should not issue.

3. That the Commissioner was fully entitled to use knowledge acquired in other proceedings as to the ability of the respondent to manufacture the product concerned and in the absence of any requirement as to how he should proceed in such applications, he was entitled to use information so acquired by him by reason of his office and to do so does not constitute a denial of natural justice to the appellant.

APPEAL from a decision of the Commissioner of Patents.

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

Christopher Robinson, Q.C. and *J. M. Godfrey, Q.C.* for appellant.

Harold G. Fox, Q.C. for respondent.

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

CAMERON J. now (October 2, 1959) delivered the following judgment:

This is an appeal from a decision of the Commissioner of Patents dated April 1, 1959, that a licence is to be granted to the respondent under the provisions of s. 41 (3) of *The Patent Act* R.S.C. 1952, c. 41 in respect of the above named patents, the property of the appellant. The Court is asked to set aside the said decision on the ground "that it was rendered before the appellant was given any opportunity of submitting evidence or making submissions to the Commissioner to establish reasons why a licence should not be granted to the respondent". This, it is said, is a denial of "natural justice".

Section 41 of the Act relates to chemical products and substances intended for food or medicine and it is admitted that the patents in question were for inventions intended for the preparation of medicines. The section in part is as follows:

(3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

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(4) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

The various steps taken, as disclosed by the Patent Office file, are not in dispute. The respondent on June 21, 1958, filed an application requesting the grant to it of a licence under the above-mentioned patents for the use of the patented inventions for the purpose of the preparation or production and sale of the patented products. Certain facts which will be referred to later were set out and the application was supported by the affidavit of the secretary-treasurer of the respondent company, in which he stated that he had knowledge of the facts stated and that such facts were true to the best of his knowledge and belief.

Neither the Act nor the Rules established thereunder contain any provisions as to the procedure in applications under that section. By letter dated July 15, 1958, addressed to the respondent's solicitor, the Commissioner outlined the practice to be followed, including advertising in the Canada Gazette and the Canadian Patent Office Record; service of the application and affidavit upon the patentee's representative; the right of the patentee to file and serve a Counter-statement, verified by affidavit, the respondent to have thirty days to file and serve a Reply in the manner set out above.

On the same date, the Commissioner wrote to the appointed representatives of the patentee as follows:

An application for licence under the provisions of section 41(3) of *The Patent Act* has been filed by Fine Chemicals of Canada Ltd. of Toronto. The applicant has been requested to serve upon you the application and the verifying affidavit within two months of the date of this letter.

You will have two months within which to file a counter-statement supported by affidavit with me and serve a true copy thereof upon the applicants.

That procedure was followed and on October 10, 1958, the appellant filed its Counter-statement, alleging certain facts which will be later referred to, and supported by the affidavit of Mr. K. D. McGregor, a vice-president and secretary of the appellant company, certifying that the facts stated therein were true. On November 4, 1958, the respondent filed its Reply to Counter-statement.

The next step taken by the Commissioner was to inform the solicitors for the parties by letter dated April 1, 1959, that a licence would be granted. The letter to the appellant's solicitors reads in part as follows:

I have reviewed the file in connection with this application. In view of the knowledge acquired during previous hearings in which the applicant was concerned I have come to the conclusion that a licence is to be granted in this case.

I therefore set Thursday April 30, 1959, for a hearing at which the parties will have an opportunity to discuss the rate of royalty under the licence. No other argument will be heard. The patentees are requested to be ready to substantiate with figures their claim for royalty.

By letter dated April 22, the solicitors for the appellant took strong objection to the licence having been granted "without a hearing", alleging also that their clients had certain evidence which they wished to present as to why the licence should not be granted. The Commissioner replied on April 27 as follows:

This is to acknowledge your letter of April 22nd, in which you object to the ruling that a licence should be granted without hearing and in which you suggest that my decision was taken upon representations of Dr. Fox without your knowledge.

I beg to advise that Section 41(3) does not provide for a hearing. Hearings have been held in the past in such cases when I felt that I needed informations which were necessary for me to arrive at a decision.

In the present case I had arrived at the conclusion that a licence was in order before the communication of Dr. Fox. I am familiar with the business and qualifications of the applicant and also with the possible arguments of the patentee.

For these reasons I cannot alter my ruling, but in view of the absence of Mr. McGregor I agree to postpone the hearing for the purpose of fixing a royalty to May 25th at ten o'clock a.m. in my office.

Subsequently on June 1, 1959, the appellant launched its appeal from the Commissioner's decision. By mutual consent, the hearing to determine the amount of the royalty has been adjourned pending the result of this appeal.

It is to be noted that the appellant, at any time prior to receiving the Commissioner's advice that the licence would be granted, did not request a formal hearing or an opportunity of presenting further evidence or argument. Six months had elapsed after the date the appellant had filed its Counter-statement before the Commissioner made his decision, and in that time nothing was done by the appellant.

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In these circumstances, the Court is asked to set aside the decision of the Commissioner on the sole ground that he should have had a formal hearing at which the appellant could have submitted further evidence as to why the application should not be granted, and argument thereon. By reason of his failure to do so, it is said that he acted in such a way as to deprive the appellant of "natural justice". It is apparent that in reaching his decision to grant the licence, the Commissioner did not "see good reason to the contrary", to use the words of the statute. No appeal is taken on the merits of the Commissioner's decision, and I shall refrain, therefore, so far as possible, from commenting thereon.

It is of considerable importance to note that while Parliament, in enacting s. 41, conferred on the Commissioner the duty of granting the licence applied for "unless he sees good reason to the contrary", it made no provision for the procedure to be followed by him in reaching a conclusion as to whether the application should be granted or refused. The sole reason for refusing the application is that the Commissioner does see good grounds for so doing. While wide rule-making powers are conferred by s. 12 on the Governor-in-Council, those established under P.C. 1954-1955 contain no provision relating to the procedure to be followed in applications under s. 41. It is of interest to note, however, that by s. 71 of *The Patent Act,* full provision is made for the procedure to be followed by the Commissioner in disposing of applications for compulsory licences where there has been an abuse of the exclusive rights granted under patents. Thereby, anyone opposing the application may file "a Counter-statement verified by a statutory declaration fully setting out the grounds on which the application is to be opposed". Then by s-s. (2), the Commissioner is given power to dismiss the application without a hearing after considering it and the Counter-statement, unless one of the parties has demanded a hearing or the Commissioner himself appoints a hearing. Then, by the above-mentioned rules (which by the Act have the same effect as if they had been embodied in the Act), ss. 96 to 109, further provision is made for the procedure to be followed in applications under ss. 67 to 73 of the Act,

relating to compulsory licences. Section 97 authorizes the Commissioner to dismiss an application unless he is satisfied that an applicant has a *bona fide* interest and that a *prima facie* case for relief has been made out from the matters alleged in the application and the accompanying declaration. It is clear from ss. 105 to 107 that, unless a hearing has been requested, the Commissioner has power to decide the issues upon the materials filed.

105. The Commissioner may, and if requested to do so by the Attorney General of Canada or any party to the proceedings in Form 21, shall, by notice in writing to all parties to the proceedings, fix a date of hearing not less than one month from the date of such notice.

106. If any party to the proceedings has, within two weeks after the date of the notice fixing the date of the hearing, filed with the Commissioner and served upon all parties to the proceedings a notice of intention to adduce evidence at the hearing referred to in section 105, the Commissioner shall entertain oral evidence adduced at the hearing.

107. If no date of hearing has been fixed under section 105, the Commissioner shall decide the issues upon the material filed.

It is apparent, therefore, that the Commissioner in the absence of any requirement in the Statute or Rules as to the procedure to be followed in applications under s. 41 of the Act, adopted the procedure which he thought suitable to the circumstances and in substance followed that which was applicable in applications for compulsory licences. He required public advertisement of the application, service upon the patentee's representatives, filing of a Counter-statement, and that the allegations in the application and Counter-statement should be supported by affidavit.

Counsel for both parties referred me to a number of cases in which the Courts had discussed the term "natural justice" in relation to the proceedings of a great variety of bodies. In my view, the proper principle to be applied here is that stated in *Spackman v. Plumstead Board of Works*[1]. That was a case where an architect had been given power to fix the general line of buildings on a road. There the Earl of Selborne at p. 240 said:

No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other

[1] (1885) 10 A.C. 229.

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person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

In the instant case, Parliament has conferred on the Commissioner power to decide the question, but his decision is of a very limited nature. He is required to grant the licence "unless he sees good reason to the contrary". In the absence of any requirement or direction as to how he should proceed "the law will imply no more than that the substantial requirements of justice shall not be violated."

I am unable to find in this case that there was any such violation. True it is that the Commissioner did not have an oral hearing on the issue which he had to decide. But by following the procedure which I have outlined above, he gave full opportunity to the appellant to state its case in writing and to meet the statements set out in the application of the respondent.

The term "Counter-statement" is well known to agents and attorneys dealing with patent matters. It must have been apparent to the agents of the appellant that the Commissioner, in requiring proof by a supporting affidavit of the allegations in the application and the Counter-statement (his letters to the parties' agents makes this clear), was not merely requesting something in the nature of pleadings, but rather was asking for all material facts on which the parties would rely and proof thereof by affidavit, so that, if he thought proper to do so, he could determine the issue on the materials so filed, including the Reply, and without a formal oral hearing if he so decided.

I do not doubt that it was within the power of the Commissioner—had he deemed it necessary to do so—to direct an oral hearing at which a further opportunity would have been afforded the appellant to adduce evidence, to cross-examine the witnesses of the respondent and to present argument. The record shows that he had done so on some occasions but it does not follow that he must do so in all cases. In this case, and particularly because of the failure of the appellant to request the further opportunity of presenting its case in an oral hearing, I think he was entitled

to come to the conclusion that the appellant had fully stated its case and that he had sufficient material before him to reach a decision on the issue.

Counsel for the appellant stressed the point that the Statute provides a right of appeal from the Commissioner's decision to this Court and that therefore, without the full hearing now requested by the appellant, this Court sitting in appeal would not have sufficient material to determine whether or not the appeal should be allowed. He referred me to *In re General Accident Assurance Co. of Canada*[1], a decision of the Court of Appeal for Ontario. The facts and findings are stated in the headnote as follows:

A complaint was made to the Superintendent of Insurance, pursuant to the provisions of sec. 262 of the Ontario Insurance Act, 1924, as amended, that there was discrimination in the automobile insurance rates charged by an insurance company. The Superintendent made an investigation of the business of the company, and evidence on oath was taken before him, but he himself examined the witnesses summoned by him and refused to allow counsel for the accused company to cross-examine them or to produce evidence on behalf of the company. He found that there was discrimination, and made an order under subsec. 3 of sec. 262 directing that the discrimination be removed.

The Court allowed an appeal by the company under sec. 13 of the Act, and remitted the case to the Superintendent for trial according to law.

Held, per Latchford, C.J., and Riddell, J.A., that the Superintendent was acting judicially and his actions might be called in question on appeal: his conduct violated every principle of fairplay and natural justice.

Per Middleton and Masten, JJ.A., that where the Superintendent is called upon to act and proceeds under sec. 262, he must afford both to the complainants and the accused company the opportunity of presenting their respective contentions and the evidence in support of them.

In that case there was a hearing by the Superintendent of Insurance and oral evidence was heard by him, but counsel for the accused company was denied the right of cross-examination or of calling its own witnesses. All four Judges were of the opinion that the hearing in this respect had been unfair and that the case should be remitted to the Superintendent for re-trial according to law. But the reasons for judgment of Masten, J. A. (with which Middleton, J. A., agreed) indicate that he was not prepared to go as far as Riddell, J. A. (with whose opinion Latchford, C. J., agreed) in considering the procedure followed by the Superintendent. At p. 481, Masten, J. A., said:

[1] 58 O.L.R. 470.

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Further, as this is an appeal proper and not a rehearing, such evidence must in the first instance be adduced before the Superintendent.

This leads me to the conclusion that where the Superintendent is called upon to act and proceeds under sec. 262, he must afford both to the complainants and to the defendant company the opportunity of presenting their respective contentions and the evidence in support of them.

I deliberately express my opinion in those general terms, deeming it unnecessary and undesirable on this appeal to attempt to define more precisely the procedure to be adopted or the exact limits of the administrative and executive functions of the Superintendent. It suffices for the disposition of this appeal to say that this Court must have before it for the exercise of its functions whatever in the way of relevant evidence the appellant desires to present.

In this case, this Court sitting in appeal would have before it the same material as was before the Commissioner, namely, the Application and Counter-statement, both supported by affidavit and the Reply of the appellant as well. If Parliament, by providing a right of appeal to this Court from such a decision of the Commissioner, intended to confer on the Court the same power of determining the issue as the Commissioner possessed—and this perhaps would seem to be the case—this Court would have the same material before it as the Commissioner had and that material, in my view, would in this case be adequate for the hearing of the appeal.

The issues raised in the application and Counter-statement are very simple. In the application, after a formal request to the Commissioner for a licence, the facts upon which the petition is based are set out. First it is stated that the patents are for inventions intended for or being capable of being used for the preparation or production of medicine and are patents covering stages in a required procedure for one medicinal compound, namely, chloramphenicol and its derivatives. That allegation is admitted in the Counter-statement. Then para. (*b*) states that the petitioner by correspondence and interview with the appellant, requested a licence and that it was refused. The Counter-statement does not deny this allegation, but states merely "that the correspondence speaks for itself". Then para. (*c*) of the petition alleges that so far as it knows, the product is not being fully manufactured in Canada, the demand being supplied by importation. In the Counter-statement, it is alleged that this statement is irrelevant and

that without prejudice it denies that the demand for chloramphenicol is being supplied by importation and that, in fact, the demand is being supplied by Parke Davis and Co. Ltd., a duly licenced subsidiary of the appellant, the manufacture of which is completed at the plant of the latter company in Brockville.

Then by para. (*d*) of the petition, the applicant states that it has an established business and plant for the manufacture of pharmaceuticals and pharmaceutical chemicals and that it is prepared to make the product of the patent for sale in Canada and that if granted a licence, it intends to use it for the purpose of the preparation and production of medicine. In the Counter-statement, the appellant says that the respondent's plant lacks proper facilities for the manufacture of chloramphenicol and that so far as it knows, the respondent is not competent, qualified, equipped or capable of manufacturing the product and does not intend to use the patents for the purpose of the production and preparation of medicine. In its Reply, the respondent in para. 1 states that the manufacture of the product as supplied in Canada by the appellant is merely completed in Canada, the main steps in its preparation apparently being carried on in the United States. In para. 2 it repeats the statement contained in its petition and states that it has the facilities for such manufacture and is competent, qualified, equipped and capable of undertaking the manufacture of the product.

I have set out these particulars, not because I wish to review the Commissioner's decision in relation thereto (that matter not being before me), but rather to indicate that the appellant had ample opportunity of stating its case, and did so. By the Petition, Counter-Statement and Reply, the issues were clearly defined and the facts attested to by affidavit. In this case, the Commissioner would need nothing more to resolve the simple issue which was before him, namely whether the appellant had established good cause why the licence should not issue. As he stated himself, the Commissioner needed nothing further before making his decision.

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A further objection is also raised by the appellant. Attention is drawn to a portion of the Commissioner's letter to the appellant's solicitor dated April 1, 1959 (*supra*) as follows:

> I have reviewed the file in connection with this application. In view of the knowledge acquired during previous hearings in which the applicant was concerned, I have come to the conclusion that a licence was to be granted in this case.

Counsel for the appellant submits that the Commissioner had no right to use any information acquired by him in any matter other than in the present application and that to do so was again a denial of "natural justice". No particulars are given as to what knowledge he so acquired and the Commissioner was not before me at the hearing of the appeal. I think the statement probably referred to knowledge acquired in a similar matter between the same parties regarding a licence under s. 41(1) (see *Parke Davis & Co. v. Fine Chemicals of Canada Ltd.*[1], a decision of the Supreme Court of Canada). I have examined the file of that case in this Court and it is apparent therefrom that the same question as is raised here, namely, the ability and competency of the respondent to manufacture the product there in question, was raised, and inasmuch as the Commissioner then decided to grant the application for a licence, he must have decided that point in favour of the respondent, or possibly he may have considered it of no importance. In any event, if he considered it to be of any importance in this case, I think he was fully entitled to use the knowledge so acquired as to the ability of the respondent to manufacture this product. In the absence of any requirement as to how he should proceed in such applications, I think the Commissioner was entitled to use information so acquired by him by reason of his office.

For these reasons, I have come to the conclusion that the appeal fails and it will be dismissed with costs.

Judgment accordingly.

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[1] 30 C.P.R. 59.

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REVENUE—*Income tax—Profits—Sale of business—Specific sum for inventory included in the purchase price—Whether profit on inventory taxable—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 2(1)(3), 3, 4, 127(1)(e).* The respondent's business comprised the smelting of non-ferrous metals and dealing in non-ferrous scrap; the smelting of copper from scrap; the wrecking of buildings and the salvage and sale of the material therefrom; the fabrication and erection of structural steel. On January 2, 1952 it sold the non-ferrous metals part of its business comprising machinery and equipment, metals inventory, supplies, accounts receivable, prepaid items, goodwill, patents, trade marks, etc. under an agreement that provided that out of the aggregate price paid for all the assets the purchase price of the metals inventory should be the market price at the time of closing. Pursuant to the agreement the aggregate amount paid by the purchaser included some $822,611 for the inventory carried on respondent's books at the end of 1951 at a cost of some $744,515. In assessing the respondent for 1952 the Minister added to the income reported the difference between the two amounts, some $78,095, as "profit on inventory". *Held:* That the Minister was right in adding this difference and in assessing accordingly. 2. That although the *Income Tax Act* taxes actual, and not potential profits, a realization of potential profit occurs when a taxpayer so deals with goods as to appropriate to himself whatever enhancement has resulted from a partially completed operation. 3. That the metals inventory was acquired for the purpose of gaining a profit in the non-ferrous metals business but when, to effect a sale of that business, it was diverted from its original purpose such diversion must be treated as a disposition of trading stock, the result of which for income tax purposes must be recorded as a receipt in the trading account for the period in which it occurred, namely 1952, and the amount to be so recorded must be the

realizable value of the inventory at the time it was diverted and not its cost. *Sharkey v. Werner* [1955] 3 All E.R. 493 applied, *Doughty v. Commissioner of Taxes* [1927] A.C. 327, distinguished. THE MINISTER OF NATIONAL REVENUE v. FRANKEL CORPORATION LTD..... 10

2.—*Income tax—Refrigerators sold on instalment plan subject to conditional sales contracts—Contracts assigned finance company to secure payment of unpaid balances—Reserve allowable on unpaid balance due more than two years after sale—The Income Tax Act, R.S.C. 1952, c. 148, s. 85B(1) as amended by S. of C. 1952-53, c. 40, s. 73.* The appellant company sold household deep-freeze refrigerators subject to conditional sales agreements which provided for a down payment of 10 per cent of the purchase price and the balance plus financing charges in 24 monthly instalments secured by purchaser's promissory note and his agreement title should not pass until all payments were completed. To finance its business the appellant assigned the conditional sales contracts to a finance company under an agreement whereby the latter advanced it 90 per cent of the unpaid purchase price forthwith and the balance on completion of payment by the purchaser, but reserved the right to withhold payment of the 10 per cent and credit it to a holdback account from which the appellant was entitled to receive from time to time the amount by which the balance in the account exceeded 10 per cent of the monies owing on the assigned contracts. In each case the appellant was required to guarantee payment by the purchaser. In reporting its income for its 1954 fiscal year the appellant showed a gross revenue from sales of some $571,677 and a gross profit of some $248,375 from which it deducted some $99,677 as "deferred gross profit on instalment contracts." In its balance sheet it showed among its assets an item of some $23,926 as "Holdbacks on Lien Notes discounted with Finance Cos." The Minister in assessing the appellant disallowed the whole of the deduction claimed but allowed a reserve of some $10,395 pursuant to s. 85B(1)(*d*) of *The Income Tax Act*. This figure was the proportion of $23,926—representing sums which the appellant had not received from the finance companies—which appellant's gross trading profit amounting to some $248,375 bore to gross revenue amounting to some $571,667. In its appeal from the decision of the Income Tax Appeal Board which affirmed the Minister's assessment, the appellant contended that the monies advanced by the finance company were loans for which it assigned the conditional sales contracts as security, that the amounts paid by purchasers continued its property, and that it was entitled to have the reserve to which it was entitled under s. 85B(1)(*d*), based on the total of such unpaid amounts. Alternatively, that if the reserve was to be based on the $23,926 which appellant had not received from the finance company, the whole and not merely a portion of it, should be allowed as a reserve under s. 85B(1)(*d*). *Held:* That the transactions with the finance company were not loans on the security of the conditional sales contracts but outright sales since the appellant had no right to repay the finance company and demand the return of the property assigned. *Re George Inglefield Limited*, [1933] 1 Ch. 1, followed. 2. That since the appellant was not the owner of the unpaid purchasers' accounts totalling some $344,665 it was not entitled to a reserve in respect of any portion of that amount. 3. That, assuming that the whole of $23,926 which the appellant had not received from either the purchaser or the finance company was profit from sales of refrigerators, on the evidence no basis was established for calculating the reserve in respect of such sum at any higher figure than that which had been allowed, and that it had not been established that the amount allowed was not a reasonable reserve in the circumstances. HOME PROVISIONERS (MANITOBA) LTD. v. THE MINISTER OF NATIONAL REVENUE..... 34

3.—*Income tax—Deductions—Expense of "travelling in the course of his employment"—"Supplies"—"Consumed in the performance of the duties of employment"—The Income Tax Act, R.S.C. 1952, c. 148, ss. 5, 11(9), (10)(c), (11).* The appellant, an electrician, in his 1954 income tax return deducted from the wages of his employment expenses incurred in travelling and carrying his tools in his motor car to and from his home and place of employment, including operating, maintenance and capital cost allowance with respect to the car. He also deducted the cost of replacing tools he was required to provide for use in his work. The deductions were disallowed by the Minister and the assessment in that regard affirmed by the Income Tax Appeal Board. Upon appeal to this Court *Held:* That neither the appellant's travelling nor the carrying of his tools was "travelling in the course of his employment" within the meaning of s. 11(9) of *The Income Tax Act* and the claim for deduction for travelling expenses was properly disallowed. *Ricketts v. Colquhoun* [1926] A.C.1; *Mahaffy v. Minister of National Revenue* [1946] S.C.R. 450, followed. 2. That the articles which the appellant under his contract was required to provide were all tools falling within the general category of equipment and none of them could properly be regarded as "supplies" within the meaning of that term as used in s. 11(10)(*c*) of the Act, and even assuming that they could be so regarded, the claim for deduction was defeated by appellant's failure to show that the tools were consumed in performing the duties of employment. HERMAN LUKS v. THE MINISTER OF NATIONAL REVENUE..... 45

7.—*Income tax—Income Tax Act 1948, S. of C. 1948, c. 52, s. 12(1)(a)—"An outlay or expense . . . made . . . for the purpose of gaining or producing income from property or a business of the taxpayer"—Money paid to obtain cancellation of charter-parties in order to enter into new lucrative ones is properly deductible from income—Appeal allowed.* Appellant, engaged in the business of chartering ships for hire, entered into agreements with charterers covering some of its ships. By paying to the charterers a certain sum of money appellant procured cancellation of the charter-parties in order that appellant might enter into new charter-parties with other charterers at greatly enhanced prices per ton with consequent greater profits to appellant. Appellant deducted the sum paid to the original charterers from its income for 1952. This deduction was disallowed by the Minister of National Revenue and an appeal from that decision to the Income Tax Appeal Board was dismissed. Appellant now appeals to this Court. *Held:* That the sum paid for cancellation of the charter-parties was "for the purpose of gaining or producing income from the property or a business of the taxpayer" within s. 12(1)(*a*) of the *Income Tax Act.* 2. That appellant in taking advantage of the possibility of buying its way to greater profits acted within the scope of ordinary business activities and the amount paid by it to obtain cancellation of the charter-parties is properly deductible from its income for 1952. HALIFAX OVERSEAS FREIGHTERS LTD. v. THE MINISTER OF NATIONAL REVENUE..... 80

8.—*Income tax—Income Tax Act 1948, S. of C. 1948, c. 52, s. 12(1)(a)—"An outlay or expense . . . made . . . for the purpose of gaining or producing income from property or a business of the taxpayer"—Money paid to obtain cancellation of a charter-party in order to enter into a more lucrative one and money paid as commission to an agent for procuring business held deductible from income—Appeal allowed and cross-appeal dismissed.* Appellant, engaged in the business of chartering ships for hire, entered into a charter-party for a term charter of one of its ships and after some months of the term had elapsed paid to the charterer a sum of money to obtain cancellation of the agreement in order that it might enter into better paying charter-parties. Appellant deducted this sum from its income for 1952 and also deducted a further sum paid as commission on all freights to a service agency for ferreting out prospective charterers. Both of these deductions were disallowed by the Minister of National Revenue and on appeal to the Income Tax Appeal Board the appeal from refusal to allow as a deduction the amount paid to the charterer was dismissed while that from the refusal to allow the amount paid for commission was allowed. The appellant and the Minister appealed to this Court. *Held:* That both amounts paid by appellant were expenses made "for the purpose of gaining or producing income from the property or a business of the taxpayer" within s. 12(1)(*a*) of the *Income Tax Act.* FALAISE STEAMSHIP CO. LTD. v. THE MINISTER OF NATIONAL REVENUE.... 86

9.—*Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3 and 4—"Income . . . includes income from all (a) businesses . . ."—Money received in nature of a voluntary gift and not a business operation—Money received from a public relief fund to alleviate loss sustained through a hurricane is not income—Appeal allowed.* Appellant carries on business as a grower, packer and shipper of vegetables. In 1954 at the harvesting season a storm and hurricane destroyed and rendered valueless large quantities of vegetables in the ground and also damaged extensively its farm and field and main ditches. A company was incorporated by certain persons for the purpose of receiving voluntary contributions and distributing the same to sufferers from the hurricane in order to alleviate the losses sustained by them. The funds available were not adequate to meet the full costs of all vegetables lost and "Unit Prices" were established for each vegetable, such being somewhat lower than the total cost of production of the vegetables. The appellant received from the corporation the sum of $40,144.08 for crop losses at the fixed unit prices and also a certain percentage of the value of containers and supplies lost. This money was spent by appellant in rehabilitating the farm, clearing up the debris, repairing equipment, in payment of accounts and for new supplies and seed purchased, and in getting the farm back into production for the following year. This sum was added to appellant's taxable income for the year 1955 and appellant appeals from such assessment for income tax. *Held:* That the money received by appellant was in the nature of a voluntary gift and not in any sense a business operation and did not arise out of the taxpayer's business, and the fact that the amount of payment was related to and to some extent measured by the amount of loss cannot affect the nature or the quality of the payment. 2. That the amount in question is not income or a revenue receipt which must be brought into account in computing income. FEDERAL FARMS LTD. v. THE MINISTER OF NATIONAL REVENUE..... 91

10.—*Income—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3 and 4 and 139(1)(e)—"Business"—Profits from houses built speculatively and sold at a profit are income in seller's hands—Appeal from decision of Income Tax Appeal Board allowed.* Respondent has for many years been engaged in a large way and on his own account in business as an excavating contractor and in heavy hauling. He purchased houses and also lots on which he said that houses were erected for the purpose of providing housing accommodation for his

The Minister included this amount in his assessment of the appellant's 1953 income. In an appeal from a judgment of the Income Tax Appeal Board upholding the assessment the appellant contended that the land in question was not purchased by it in the course of dealing in real estate but for the sole purpose of constructing and operating thereon a motel and service station. That it was only when such purpose failed because it was unable to borrow the money required to carry out that purpose that it accepted an offer for the property and, that in these circumstances, the profit realized was a capital gain and not income. *Held:* That the sale of the property for profit was one of the several alternative purposes for which the property was acquired, and it was in the carrying out of that alternative purpose, when it became clear that the preferred purpose was unattainable, that the profit in question was made. It was, accordingly, a profit made in an operation of business in carrying out a scheme for profit-making and was properly assessable. BAYRIDGE ESTATES LTD. v. THE MINISTER OF NATIONAL REVENUE..... 248

17.— *Income — Income tax — Purchase of shares of subsidiary—Whether interest deductible on loan made to repay money previously borrowed to purchase such shares—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 11(1)(c) and 12(1)(c).* The respondent loan company in 1945 subscribed for shares in a wholly-owned subsidiary loan company at a cost of $500,000 and paid for the shares by instalments in 1945, 1946 and 1947 out of moneys borrowed for that purpose. In 1949 it borrowed $1,900,000 and in 1951 a further $400,000 and in its income tax return for the latter year claimed a deduction of $85,372.93 as interest in respect of monies borrowed for the purposes of its business. The Minister disallowed $20,704.15 of the claim as being an expense for the acquisition of the shares of its subsidiary, the income from which would be exempt under the *Income Tax Act.* The respondent appealed from the assessment to the Income Tax Appeal Board contending that the interest payments were deductible in full as having been made pursuant to its legal obligation to pay interest on borrowed money used for the purpose of earning income from its business. The appeal having been allowed, the Minister in his appeal to this Court submitted that the money he had disallowed was in respect of the purchase of property the income from which would be exempt under ss. 11(1)(*c*) and 12(1)(*c*) of the Act and that the said amount was not interest on borrowed money used for the purpose of earning income from the respondent's business within the meaning of s. 11(1)(*c*). *Held:* That it was established that the sums borrowed by the respondent in 1949 and 1951 were not used to pay for stock of the respondent's subsidiary but, to a certain extent, to repay previously borrowed sums which were used to buy the subsidiary's stock and since ss. 11(1)(*c*) and 12(1)(*c*) do not expressly apply to a taxpayer who borrows money to repay borrowed money used to acquire property the income from which would be exempt, the respondent was entitled to the deduction claimed. THE MINISTER OF NATIONAL REVENUE v. THE PEOPLES' THRIFT AND INVESTMENT CO..... 262

18.—*Income—Income Tax—Sale of oil and gas leases by syndicate for lump sum—Capital or income—Whether profit from sale of leases income from a "business"—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(c)(j) and 139(1)(e).* The appellant was a member of a syndicate which by the merger in 1952 of two syndicates formed in 1950, acquired a number of Alberta petroleum and natural gas leases. Prior to the merger the original syndicates had entered into an agreement with a company which provided that the company was to carry out a seismic survey of the lands with an option to drill. If producing wells were brought in certain payments were to be made and all leases were to be assigned to the company. The survey was made and the option dropped. The new syndicate subsequently granted an option to an oil operator which was followed by formal agreements whereby he agreed to drill the lands at his own expense, to pay $200,000 for the first producing well and $25,000 for each other well brought into production plus certain royalties. The syndicate agreed to assign all its leases to him. One well was brought in in 1952 and ten in 1953 and payment made the syndicate as agreed which in turn paid the appellant his proportion of the payments. The Minister added to the latter's declared income for 1952 and 1953, the amounts so received and re-assessed him accordingly. An appeal from the assessment to the Income Tax Appeal Board was dismissed. On an appeal from the Board's decision to this court appellant contended that the syndicate was not an adventure in the nature of a trade and alternatively, if it could be so described, the leases were capital assets acquired for the purpose of development and in fact so developed; that neither the syndicate nor its members were traders in leases and the isolated sale by the syndicate was the sale of a capital asset. *Held:* That on the evidence the conclusion is inescapable that there never was a firm and fixed intention on the part of the members of the Syndicate to regard the leases as an investment to retain and develop on its own account. 2. That the Syndicates were formed for the purpose of carrying on business for profit and the acquisition and sale of leases was one of the contemplated modes of carrying on business in the scheme for profit-making and the profits realized were acquired in the operation of such business and are therefore income from a business within the meaning of s. 3(*a*) of the *Income Tax Act*, or at least within the extended meaning of "business" as found in s.

of the site would greatly increase in value. These land holders obtained the incorporation of the appellant real estate company in 1914, the authorized capital of which was 2,000 shares of $100 par value. The 160 acre university site was transferred to the company to be held by it for the university. One thousand shares of the company's stock were issued by it to the group who had transferred the university site to the company and later other lots valued at $355,000 were transferred by the group to the company which issued to them the remaining 1,000 shares of its capital stock. In 1951 some of the lots were sold and in determining the profits on such sale for income tax purposes the Minister of National Revenue assessed them on the basis that the cost at which they had been acquired in 1914 was $100,000. An appeal to the Income Tax Appeal Board was dismissed. The company appealed to this Court contending that the lots had been purchased at a cost of $355,000. *Held:* That the lots were acquired for the issue of all the company's shares after the university site had been acquired, such site having been received by the company as a trustee for the purpose of transferring it to the university authorities and could not be considered part of the company's trading stock. 2. That the issue of all the appellant's shares for the lots was referable only to those lots and no part of such issue was attributable to the university site. 3. That the price paid by appellant for the lots was the par value of the 2,000 shares of capital stock, namely $200,000 which sum correctly represents the cost of the lots to appellant. 4. That stock acquired by a trader must be brought in at the price paid for it in order to calculate the profit made on its sale. TUXEDO HOLDING CO. LTD. v. THE MINISTER OF NATIONAL REVENUE..... 390

25.—*Taxation—Income tax—Damages for infringement of trade mark—Capital or income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4.* The appellant, a manufacturer of women's apparel, in an action for infringement of trade mark and other relief, recovered judgment in the sum of $20,000 and credited the net proceeds of the judgment, namely $15,000, to its surplus account. In reassessing the appellant, the Minister ruled that that sum constituted income and added it to the appellant's declared income. An appeal to the Income Tax Appeal Board was dismissed. In a further appeal to this Court, the appellant contended that the sum in question was not "income" within the meaning of ss. 3 and 4 of the *Income Tax Act* because (1) the amount recovered was damages for infringement of the appellant's trade mark, said to be a capital asset; (2) the amount awarded was for diminution of the appellant's good will, also said to be a capital asset; (3) the award was for punitive damages, and such damages are in the nature of a punishment for the benefit of the community and as a restraint against the defendant as a transgressor. In support of its contention, the appellant relied entirely on the admissions made by the respondent in his reply to the notice of appeal and on certified copies of the amended statement of claim in the proceedings brought in the Manitoba Court of Queen's Bench, in which court the damages were recovered, and also upon the formal judgment of that Court, the reasons of Maybank J., the trial judge, and the reasons of the Court of Appeal, affirming the judgment of Maybank J. *Held:* That there was nothing in the formal judgment of the trial court nor in the reasons of the trial judge, nor in the reasons of the Court of Appeal, from which it could be concluded that any part of the award was in the nature of punitive damages. 2. That the appellant failed to establish that the award was based on a loss or diminution in value of capital assets, such as it's trade mark or good will, and the sum paid in the name of damages must be treated as a payment in place of loss of trading profits. *Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd.* [1936) Ex. C.R. 1; *A. G. Spalding & Bros. v. A. W. Gamage Ltd.*, 35 R.P.C. 101 at 117; *Burmah Steam Co. Ltd., v. C.I.R.*, 16 T.C. 67, referred to. DONALD HART LTD. v. THE MINISTER OF NATIONAL REVENUE..... 415

26.—*Appeal from decision of Tariff Board—The Customs Act R.S.C. 1952, c. 58, s. 46(1)(2)—Tariff Item 219a—Essential requirements to support plea of estoppel per res judicatam lacking—"Clorox"—Imported product used as a bleach and as a disinfectant — Appeal dismissed.* The Tariff Board found that Clorox, a product consisting of sodium hypochlorite in solution and imported into Canada by the respondents, Oppenheimer Brothers & Company, was properly classifiable under Tariff Item 219*a*. Leave to appeal from this decision was granted by this Court on the question of law whether the Tariff Board erred in holding that the product known under the trade name of Clorox imported into Canada is properly classifiable for tariff purposes under Tariff Item No. 219*a*. Appellants contend that the Tariff Board was estopped from so finding on the ground that the matter was *res judicata* under a former decision of the Board in Appeal No. 363, by which the Board stated its opinion that Clorox was not properly classifiable under Tariff Item 219*a*. *Held:* That the plea of estoppel cannot be supported and that the "Opinion" of the Board in Appeal No. 363 was not a judicial decision *in rem;* that everything that is in controversy in this Appeal No. 398 was not in controversy in the former Appeal No. 363 and in order to support the plea of estoppel *per rem judicatam* it is essential that there be identity of question or issue in both cases; this appeal raises the question as to whether the Deputy Minister was right in classifying

SHIPPING — *Collision — Assessment of damages—Hire of substituted ship an element in assessing value of loss.* In an action arising from the loss of a tug boat the District Judge in Admiralty found that the loss was occasioned solely by the negligent operation of appellant's ship and awarded respondent the full amount claimed as the tug's value plus a further amount claimed for loss of user. On an appeal from the

4.—*Damage at berth—Vessel invitee of wharfinger—Duty to warn.* The plaintiff's motor barge while docked alongside the defendant's wharf received damage by taking the ground at low tide so as to render her a total loss. In an action in damages brought by the plaintiff against the defendant in the Quebec Admiralty District, Smith, D.J.A., held that the barge was rendered a total loss due to the fact that the berth at which she docked was defective and unsafe. That the berth was owned and controlled by the defendant and the plaintiff's vessel was there as an invitee, and on business relating to that of the defendant. That the defendant had not established it had taken reasonable measures to make the berth safe for vessels docking at the wharf, or for the plaintiff's vessel in particular, nor had the defendant warned or notified the plaintiff of the unsafe condition of the berth and in the circumstances must be held liable for the loss and damage sustained as a consequence. *Held:* (Affirming the judgment appealed from) that where the Court below had ample evidence on the matters of fact and good reasons on the question of law to justify its decision, an appellate tribunal ought not to disturb the decree. *Fraser v. S. S. Aztec* 20 (Can.) Ex.C.R. 450 at 452, followed. DONNACONA PAPER CO. LTD. v. JOSEPH DESGAGNE..... 215

5.—*Collision between two ships—Narrow channel—Ships equally to blame—Negligent navigation.* In an action arising out of a collision between the *Ocean Cape* owned by the plaintiff company and the *Britamerican* owned by the defendant company the Court found the two vessels equally to blame. *Held:* That that part of Johnstone Strait between Pender Island and Ripple Point where the collision occurred is a narrow channel within the Collision Regulations. 2. That at all material times the *Britamerican* was on the wrong side of the channel, and also carried on at full speed, when it should have reduced speed, until collision was inevitable. 3. That the *Ocean Cape* though on the right side of the channel was navigated negligently; a proper lookout was not kept and the deckhand in charge at the time of the collision should have called the Master, who was only a few yards away from him, when he sighted the *Britamerican*. NEW ENGLAND FISH CO. OF OREGON *et al* v. BRITAMERICAN LTD. *et al*..... 256

6.—*Interest payable under a judgment dates from date judgment is rendered unless otherwise ordered—Discretion of Court to vary date.* In an action for damages judgment was delivered in favour of the plaintiff on March 19, 1959, in the sum of $2,810.83 with interest and costs. The sum of $2,810.83 represented repair bills paid by the plaintiff in the month of May 1953. Plaintiff now moves for an order fixing the date from which interest is payable as the date or dates on which the various repair bills were paid. *Held:* That the judgment carries interest from the date of the judgment or from such other date as the judge or judgment directs. N. M. PATERSON & SONS LTD. v. CANADIAN VICKERS LTD.. 289

7.—*Action for damages in form of demurrage—Jurisdiction of Admiralty Court—Failure to prove custom or usage governing stevedoring at point of unloading—Time to unload unreasonable and excessive—Party properly added as defendant though he did not sign charter party as intended—Damages based on expenses of maintaining ship and crew—Claim for loss of profits not established.* In an action for damages in the form of demurrage alleged to have resulted from undue delay in unloading plaintiff vessel M/V *Savoy* the Court found that the defendant Blouin was properly added as a defendant and that the time taken to unload the *Savoy* was unreasonable and exceeded the time it should have taken to discharge her. *Held:* That the Admiralty Court has jurisdiction to hear the action since s. 18, s-s. 3 of the *Admiralty Act* gives that Court jurisdiction to hear and determine "any claims arising out of an agreement relating to the use or hire of a ship". 2. That the defendant Blouin was properly added as a defendant since he did not act solely as agent of the defendant commission because although the charter party was not signed by him he is named therein as charterer and the document, prepared by the plaintiff, was handed to Blouin on the understanding that he would sign and return it to the plaintiff which he had failed to do. 3. That neither does the plea in the defence justify the admission of evidence as to the custom or usage governing stevedoring at the port of unloading nor does the evidence heard establish the existence of any such custom or usage. 4. That taking into consideration and making reasonable allowance for prevailing weather conditions and the difficulty of obtaining personnel at the port of unloading the time taken to unload the *Savoy* was unreasonable and exceeded the time that it would have taken to unload her if reasonable diligence had been exercised. 5. That the plaintiff is entitled to recover the expenses of maintaining ship and crew at that time of year but that its claim for compensation for alleged loss of profit has not been established. SAVOY SHIPPING LTD. v. QUEBEC HYDRO-ELECTRIC COMMISSION *et al*.... 292

8.—*Practice—Appeal from order of District Judge in Admiralty—Appeal Court will not interfere with discretion of trial judge unless exercised on wrong principle or there had been a wrongful exercise of the discretionary power—Appeal from District Judge in Admiralty dismissed. Held:* That an Appeal Court should not interfere with the discretion of a Judge acting within his jurisdiction unless the Appeal Court is clearly satisfied that he was wrong and the wider the discretion of the Court below, the less disposed should be the Court of Appeal to reverse the trial judge's order. 2. That the