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Exchequer Court of Canada

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50887—1a

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISNE JUDGES:

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

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

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

DONALD MCKINNON, Esquire, K.C., Prince Edward Island Admiralty District—appointed, July 20, 1935.

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

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

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

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

W. ARTHUR I. ANGLIN, Esquire, K.C., New Brunswick Admiralty District—appointed, June 9, 1945.

DEPUTY DISTRICT JUDGES:

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

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

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

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CORRIGENDUM

P. 211. Line 24—The words "except on certain grounds" should read "on other than such grounds".

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

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

AND

CITY OF VERDUN, a body politic and corporate having its principal place of business in the City of Verdun, District of Montreal..... DEFENDANT.

1944
Dec. 14
1945
Jan. 13

Practice—Motion to have plaintiff's action dismissed—Cities and Towns Act, S.R.Q. 1941, c. 233 requiring notice of action is not applicable to the Crown.

Held: That a provision in a Municipal Charter or in the Cities and Towns Act, S.R.Q. 1941, c. 233 barring an action against a city or town unless notice has been given pursuant to such provision does not apply to the Crown in the right of the Dominion of Canada.

MOTION to have plaintiff's action dismissed.

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

Francis Fauteux, K.C. for the motion.

Fabio Monet, K.C. contra.

ANGERS J. now (January 13, 1945) delivered the following judgment:

Il s'agit d'une motion de la part de la défenderesse demandant que l'assignation de la défenderesse soit déclarée illégale, irrégulière et nulle et l'action du demandeur rejetée avec dépens, sauf à se pourvoir.

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La défenderesse, dans sa motion, allègue que le demandeur a poursuivi la défenderesse en réclamation de dommages subis à la suite d'une chute sur le trottoir d'un nommé Livingstone; que l'accident serait arrivé le 14 mars 1943; que cette réclamation en dommages résulte d'un accident au cours duquel le nommé Livingstone se serait infligé des blessures corporelles; que toute personne prétendant s'être infligée par suite d'un accident, des blessures corporelles pour lesquelles elle se propose de réclamer d'une municipalité des dommages, doit, dans les quinze jours de cet accident, donner ou faire donner un avis écrit au greffier de la municipalité de son intention d'intenter une poursuite, en indiquant les détails de sa réclamation et l'endroit où elle demeure, faute de quoi la municipalité n'est pas tenue à des dommages en raison de tel accident, nonobstant toute disposition de la loi à ce contraire; qu'aucun avis n'a été donné à la défenderesse; que l'assignation est en conséquence insuffisante, irrégulière et illégale et que la défenderesse en souffre préjudice.

L'information du Procureur Général du Canada, pour le compte de Sa Majesté le Roi, déclare en substance ce qui suit:

le 14 mars 1943, vers une heure et trente de l'après-midi, le soldat F. W. Livingstone était au service du demandeur comme attaché au ministère de la Défense nationale et a fait, dans l'exercice de ses fonctions, une chute sur le trottoir, côté ouest de la Quatrième avenue, dans la cité de Verdun, à environ trois cents pieds du coin nord-ouest de l'avenue Verdun, et, comme conséquence, il s'est fracturé le tibia de la jambe droite;

le trottoir où ledit Livingstone est tombé est la propriété de la défenderesse qui en a la garde et la surveillance;

l'accident subit par ledit Livingstone est dû à la faute, négligence, imprudence et incurie de la défenderesse et de ses employés en ce que:

(*a*) au moment de l'accident, le trottoir où est tombé ledit Livingstone était glacé, glissant et dans un état dangereux pour les piétons;

(*b*) la défenderesse avait omis de prendre les moyens nécessaires pour remédier à l'état dangereux du trottoir, sa propriété, bien que ce dernier ait été en mauvais état durant plusieurs jours avant l'accident;

immédiatement après l'accident, l'accidenté s'est présenté à l'Hôpital Général Western, à Montréal, où les premiers soins lui furent prodigués;

après un stage de quelques heures à l'hôpital, l'accidenté a été transporté au camp Borden où il fut hospitalisé durant cinquante-sept jours, soit du 16 mars 1943 au 20 mai 1943, souffrant d'une fracture du tibia de la jambe droite;

comme conséquence dudit accident, le demandeur a souffert des dommages se chiffrant à la somme de $306.66, comme suit:

pour hospitalisation de l'accidenté du 16 mars au 20 mai 1943	$ 171.00
solde et allocation à l'accidenté	85.50
allocation pour les dépendants de l'accidenté	50.16;

le demandeur, en droit, est tenu de payer les frais d'hospitalisation, la solde et l'allocation de l'accidenté et l'allocation pour les dépendants de celui-ci;

le montant de $306.66, tel que détaillé ci-dessus, a été payé par le demandeur;

bien que dûment requise la défenderesse refuse et néglige de payer au demandeur la somme de $306.66.

Le procureur de la défenderesse a soutenu qu'il ne peut être intenté d'action contre une ville ou cité de la province de Québec à moins qu'un avis n'ait été donné par le réclamant à la ville ou cité qu'il entend poursuivre, conformément à l'article 622 de la Loi des Cités et Villes, S.R.Q. 1941, chap. 233.

La partie pertinente de l'article 622 se lit comme suit:

1. Si une personne prétend s'être infligé, par suite d'un accident, des blessures corporelles, pour lesquelles elle se propose de réclamer de la municipalité des dommages-intérêts, elle doit, dans les quinze jours de la date de tel accident, donner ou faire donner un avis écrit au greffier de la municipalité de son intention d'intenter une poursuite, en indiquant en même temps les détails de sa réclamation et l'endroit où elle demeure, faute de quoi la municipalité n'est pas tenue à des dommages-intérêts à raison de tel accident, nonobstant toute disposition de la loi à ce contraire.

2. .....

3. .....

4. Le défaut de donner l'avis ci-dessus ne prive pas cependant la personne victime d'un accident de son droit d'action, si elle prouve qu'elle a été empêchée de donner cet avis pour des raisons jugées suffisantes par le juge ou par le tribunal.

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C'est par exception à la forme et non pas un plaidoyer au mérite, que doit être plaidée l'absence d'avis ou de son irrégularité, parce que tardif, insuffisant ou autrement défectueux. Le défaut d'invoquer ce moyen par exception à la forme dans les délais et suivant les règles établies par le Code de procédure civile, couvre cette irrégularité.

Nulle contestation en fait ne peut être inscrite avant que jugement ne soit rendu sur ladite exception à la forme et ce jugement doit en disposer sans la réserver au mérite.

5. Aucune action en réclamation de dommages n'est recevable à moins qu'elle ne soit intentée dans les six mois qui suivent le jour où l'accident est arrivé, ou le jour où le droit d'action a pris naissance.

A l'appui de sa prétention le procureur de la défenderesse a cité quelques décisions que je crois utile d'analyser sommairement.

The Strathcona Fire Insurance Company v. *La Cité de Sorel* (1).

Le sommaire du jugement, rédigé par l'honorable juge Bruneau, contient, entre autres, les dispositions suivantes:

Jugé: — 1. L'article 5864 de la "loi des cités et villes", reproduit par la charte de la défenderesse (2. Geo. V, ch. 59), exige, préalablement à l'institution d'une action en dommages-intérêts pour blessures corporelles par suite d'un accident, ou pour dommages à la propriété mobilière et immobilière, qu'un avis par écrit soit donné dans les soixante jours de la date à laquelle le droit d'action a pris naissance, au greffier de la défenderesse, en indiquant l'intention de poursuivre, les détails de la réclamation, et la résidence du réclamant, faute de quoi, ladite défenderesse n'est pas tenue des dommages-intérêts, nonobstant toute disposition de la loi à ce contraire.

2. Cette disposition impérative, prohibitive, et non-comminatoire, fait de l'avis qu'elle requiert, préalablement à l'assignation, une formalité substantielle, dont l'omission entraîne la nullité de l'action.

3. L'action ne peut remplacer cet avis, et la défenderesse elle-même ne peut y renoncer.

4 La connaissance que la défenderesse pourrait avoir de l'accident ou des dommages à la propriété mobilière ou immobilière, ne peut justifier l'inaccomplissement d'une formalité de cette nature.

5. .....

6. L'avis est soumis aux conditions suivantes: Il faut qu'il soit par écrit, préalable à l'action, et qu'il particularise, dans le délai fixé, la nature, le caractère, le montant des dommages-intérêts, l'endroit où les dommages ont été subis, la date, — sinon précise, au moins approximative, — à laquelle ils ont eu lieu, l'intention de poursuivre, faute de paiement ou d'un règlement à l'amiable, la résidence du réclamant, tous les faits, circonstances et dépendances, en un mot, qui engendrent, en loi, la responsabilité de la défenderesse.

A la page 617 du rapport le juge Bruneau fait les remarques suivantes:

Considérant que l'avis requis par l'article précité est une formalité substantielle, préalablement à l'assignation de la défenderesse;

(1) (1918) 24 R. de J. 609.

Considérant que l'omission de cette formalité constitue une impossibilité juridique d'exercer une action contre la défenderesse, non seulement lorsqu'il s'agit de réclamation en dommages-intérêts par suite d'un accident, mais encore de réclamation pour dommages à la propriété mobilière ou immobilière, vu qu'il n'existe dans les deux cas, aucune réclamation contre la défenderesse et par conséquent, aucune dette exigible, avant de leur donner l'avis prescrit par la loi;

Considérant que le législateur, en décrétant une semblable formalité, a eu pour but, dans l'intérêt public, de prévenir des procès, des dépenses et des frais inutiles, (Dillon. Municip. Corp. ed. de 1890. Boston, t. 2, §937, p. 1142; Howell v. Buffalo, 15 N. Y. 512; Taylor v. New-York, 82 N. Y. 10; Kelly v. Madison, 43 Wis. 688; Alden v. Alamenda County, 43 Calif. 270 (1872); Hines v. Fond du Lac, 71 Wis. 74; Tiedman. Municp. Corpor. éd. 1900. New-York §350*b* p. 350*b*);

Vu l'article 15 du code civil;

Considérant que la disposition du susdit article 9*a* de la charte de la défenderesse est inopérative, et, par conséquent, obligatoire;

Vu l'article 1067 du Code civil;

Considérant que l'avis préalable que la défenderesse a droit de recevoir avant toute poursuite, dans les cas ci-dessus prévus, constitue encore une véritable mise en demeure qui ne peut être que par écrit, aux termes mêmes du susdit article 9*a* de la charte de ladite défenderesse;

Considérant que l'omission d'une formalité de cette nature entraîne la nullité de l'action;

Fee v. *The City of Montreal* (1).

Il s'agit en l'espèce d'un jugement de la Cour de Revision, composée des juges Archibald, Martineau et Lane, confirmant sur le point qui nous occupe le jugement rendu par l'honorable juge Tellier de la Cour Supérieure.

Le jugé, qui me paraît suffisamment substantiel, contient, entre autres, les considérations suivantes:

1. The default to give notice of action, under article 534 of Charter of the city of Montreal, is an absolute bar to the right of action, but the plaintiff is not deprived of his right, if he proves that he was prevented to give the notice by irresistible force or by other reasons such as if, after the accident, he was taken to the hospital which he was unable to leave during thirty days, had no relatives, had no money, remained unconscious, or was unable to write.

Guay v. *La Cité de Lévis* (2).

Dans cette cause l'honorable juge Tessier a décidé que les prescriptions de la loi des cités et villes fixant le délai dans lequel l'avis de l'accident doit être donné par le réclamant à une cité ou ville avant d'intenter une poursuite doivent être strictement suivies, que l'accomplissement de ces formalités est indispensable et que, sans cet avis, l'action ne peut être accueillie.

(1) (1917) R.J.Q. 52 C.S. 336. (2) (1931) 37 R. de J. 126.

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Dans la cause de la *Cité de Verdun et al.* v. *Harris* (1), la Cour du Banc du Roi, siégeant en appel, infirmant le jugement de l'honorable juge Philippe Demers, a décidé qu'une action dirigée contre une cité ou une ville pour dommages-intérêts résultant d'un accident doit être rejetée lorsque l'avis de l'action n'a pas été signifié dans le délai de quinze jours prévu par la Loi des Cités et Villes.

Lebel v. *La Cité de la Rivière-du-Loup* (2).

Je crois à propos de citer une partie du jugé qui me paraît bien au point:

1. An action for damages sustained in a sidewalk accident in a city, on the 24th of February, 1935, cannot be entertained if notice was served more than fifteen days after the accident and without an excuse for the delay deemed sufficient by the Court, in disregard of the requirements of the section 622 of the Cities and Towns' Act, R.S.Q., 1925, c. 102, as it stood at the date of the accident. The plaintiff could not rely on an amendment made by 25-26 Geo. V, c. 48 which came into force on May 18th, 1935, prescribing that failure to invoke want of notice by exception to the form constitutes a waiver of such irregularity. If such amendment does not deal merely with a matter of procedure, it cannot be considered retroactive unless declared to be so, which is not the case; if on the other hand it is to be looked upon as dealing with procedure only, it cannot be invoked to revive a right of action which was lost long before this legislation came into effect and before the present suit was instituted (August 1935).

Le jugement de la Cour du Banc du Roi, confirmant le jugement du juge Gibsone, a rejeté l'action du demandeur.

Blair v. *Cité de Montréal* (3).

Dans cette cause, l'honorable juge Rhéaume a décidé que l'article 536 de la charte de la cité de Montréal décrétant que, nonobstant toute loi à ce contraire, nul droit d'action pour dommages résultant d'un accident n'existe contre la cité à moins que dans les dix jours de cet accident un avis n'ait été donné à la cité, n'est pas un article de procédure mais un article de droit.

Il me semble à propos de citer un passage du jugement (p. 301):

Considérant que l'article 536 de la charte de la cité n'est pas un article de procédure, mais un article de droit décrétant que, nonobstant toute loi à ce contraire, nul droit d'action n'existe contre la cité à moins que, dans dix jours d'un accident de trottoir, un avis n'ait été reçu par elle; *M.S.R.* v. *Patenaude,* 16 B.R. 541; *Cité de Québec et Baribeau,* Cour Suprême, 1934 (Hon. juge Rinfret, Canada Reports, p. 624);

(1) (1935) R.J.Q. 59 B.R. 23.
(2) (1936) R.J.Q. 61 B.R. 337. (3) (1937) 43 R. de J. 295.

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Considérant que le paragraphe 52 du chapitre 1 des Statuts refondus de la Province, 1925, invoqué par la demanderesse est interprété par la doctrine et la jurisprudence comme une disposition statutaire s'appliquant à la procédure et non au droit d'action;

Considérant que dans une cause de *Lemay* v. *Francœur*, 70 C.S. 422 Sir François Lemieux appelé à se prononcer sur l'interprétation d'une clause statutaire identique à celle qu'invoque la demanderesse, dit, entre autres choses, ce qui suit:

"Il est de doctrine et de jurisprudence qu'il faut distinguer le droit d'avec la procédure. Le droit doit s'exercer dans les délais fixés par la loi. Il n'appartient pas aux tribunaux de proroger les délais pour l'exercice de ce droit.

"Le mode d'exercer un droit d'action ou de pétition peut être "affecté par des lois de procédure, mais le droit d'action lui-même ne "peut l'être. Cette doctrine est consacrée par notre Cour d'Appel et par "la Cour de Cassation. Voir jugement remarquable de M. le juge Sir "H. Archambault, juge eu chef, re: *Cie de Chemin de fer de Québec et "Lac Saint-Jean*, appelante et *Georges Vallières*, intimé, 15 R.P. 537;"

Voir aussi *Blier* v. *Cité de Québec* (1), où le juge Marchand a décidé que le défaut d'avis requis par l'article 535 de la charte de la cité de Québec (19 Geo. V, ch. 95) peut être invoqué par exception à la forme.

Il est maintenant bien établi que l'avis d'action prévu par la Loi des Cités et Villes est une formalité essentielle et qu'à défaut de tel avis, si ce n'est pour cause d'impossibilité jugée suffisante par le tribunal, l'action ne peut être accueillie. Cette doctrine s'applique-t-elle à Sa Majesté le Roi au droit du Canada?

Le procureur du demandeur a soutenu qu'aucune loi provinciale ne peut affecter les droits de la Couronne fédérale à moins que la loi ne contienne une stipulation explicite dans ce sens; au soutien de sa prétention il a cité le jugement de la Cour Suprême du Canada dans la cause de *Gauthier* v. *Sa Majesté le Roi* (2).

Le sommaire du jugement se lit ainsi:

A reference to the Crown, without more, in a provincial statute means the Crown in right of the province only.

Sec. 5 of the "Ontario Arbitration Act" making a submission to arbitration irrevocable except by leave of the court does not apply to a submission by the Crown in right of the Dominion notwithstanding sec. 3 provides that the Act shall apply to an arbitration to which His Majesty is a party.

Per Fitzpatrick C.J., where a liability is imposed on the Crown in right of the Dominion it must be ascertained according to the laws of the province in which the cause of action arose in force at the time it was so imposed and cannot be added to by subsequent provincial legislation.

(1) (1939) 43 R.P.Q. 372. (2) (1917) 56 R.S. 176.

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Judgment of the Exchequer Court of Canada (15 Ex. C.R. 444) affirmed.

Le jugement de la Cour Suprême du Canada confirme le jugement de l'honorable juge Cassels de la Cour de l'Echiquier.

Les notes du juge en chef, Sir Charles Fitzpatrick, contiennent, entre autres, les observations suivantes (p. 178):

The only question that falls to be decided on this appeal is the contention of the appellant that the Crown in right of the Dominion of Canada is bound by the Ontario statute, "The Arbitration Act", R.S.O. (1914) ch. 65.

The learned judge of the Exchequer Court holds against the view that in dealing with rights arising in any province regard must be had to the laws of the province as they were in force at the time of the passing of the "Exchequer Court Act", 50 and 51 Vict. 1887. He quotes section 10 of the "Interpretation Act", R.S.C. (1906) ch. 1.

> The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meanings.

And continues:

> I do not think the view put forward can be upheld. If such a construction were placed on the "Exchequer Court Act" innumerable absurdities might arise, as the statute laws of the various provinces are from time to time repealed or varied.

So that but for other reasons which I shall presently discuss the learned judge would apparently hold that the Dominion Crown would be bound by the "Ontario Arbitration Act".

It may be well to clear up at once an obvious error in the suggestion that it is always the laws in force at the time of the passing of the "Exchequer Court Act" to which regard must be had. The error has probably arisen from judicial decisions upon clause (*c*) of section 16 (now sec. 20) of that Act, by which it was determined that it imposed a liability upon the Crown which did not previously exist. The Crown, however, was of course liable in many cases, as of contract for instance, before the passing of the "Exchequer Court Act". *Thomas* v. *The Queen* (L.R. 10 Q.B. 31). The principle is the same however, viz., that the liability is such as existed under the laws in force in the province at the time when the Crown became liable.

The learned judge's holding seems rather inconsistent with his subsequent statement that

> the local Legislature could not enact laws making the Crown, represented by the Dominion, liable.

I think too that difficulties, not to say absurdities, may arise whether the view is taken that the liability of the Dominion Crown is to be ascertained with reference to the laws of each province as they were in force when the Crown first came under liability, or as they may be from time to time varied by the statutes of the province. The question, however, has already been settled so far as this court is concerned by judicial decision.

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Après avoir commenté le jugement du juge Burbidge dans la cause de *Armstrong* v. *The King* (1), dans lequel celui-ci passe en revue les arrêts suivants: *City of Quebec* v. *The Queen* (2), *The Queen* v. *Filion* (3), *Ryder* v. *The King* (4) et *Paul* v. *The King* (5), et cité un extrait du jugement du juge Davies, le juge en chef, Sir Charles Fitzpatrick, s'exprime ainsi (p. 180):

> Although this was a case under section 16 (*c*) of the "Exchequer Court Act" by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the province at the time when the Crown first became liable in respect of such cause of action as is sued on. In other words, the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

Plus loin le savant juge ajoute (p. 181):

> I do not derive any assistance from the authorities referred to in the judgment. The case of *Burrard Power Co.* v. *The King* (43 Can. S.C.R. 27), involved a question of Dominion property and the "B.N.A. Act, 1867," reserves to the Dominion Parliament the exclusive legislative authority over such property. The quotation from M. Chitty's book on "The Prerogatives of the Crown" to the effect that:—
>
> > Acts of Parliament which divert or abridge the King of his prerogatives, his interests or his remedies in the slightest degree, do not in general extend to, or bind the King, unless there are express words to that effect,
>
> seems rather pointless, since the statute now in question does expressly purport to bind the King.

Puis le juge en chef conclut (p. 182):

> And, in any event, the provinces have, in my opinion, neither executive, legislative nor judicial power to bind the Dominion Government. Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government. That this may occasionally be productive of inconvenient results is one of the inevitable consequences of a divided authority inherent in every federal system such as provided by the constitution of this country.

Aux causes précitées il y a lieu d'ajouter les suivantes, qui traitent également de la non-sujétion de Sa Majesté le Roi au droit du Canada aux lois des provinces, qui ne

(1) (1907) 11 Ex. C.R. 119; (1908) 40 R.C.S. 229.
(2) (1891) 2 Ex. C.R. 252, 269; (1894) 24 R.C.S. 420.
(3) (1894) 24 R.C.S. 482.
(4) (1905) 9 Ex. C.R. 330; (1905) 36 R.C.S. 462.
(5) (1906) 38 R.C.S. 126.

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stipulent pas catégoriquement telle sujétion: *The Queen* v. *Bank of Nova Scotia* (1); *North Pacific Lumber Company* v. *Minister of National Revenue* (2).

En Angleterre la doctrine que la Couronne n'est pas soumise aux lois à moins qu'elle ne soit nommée, sinon expressément du moins implicitement, est généralement reconnue et elle est adoptée, entre autres, par les auteurs et les arrêts suivants: *Chitty, Prerogatives of the Crown,* p. 383; *Bacon's Abridgment of the Law,* Prerogative (E) 5, pp. 92 et sep.; *Maxwell, Interpretation of Statutes,* 8e édition, p. 120; *Craies on Statutes Law,* 4e édition, p. 358; *Halsbury's Laws of England,* 2e édition, vol. 6, p. 482, n° 590; *Mersey Dock and Harbour Board* v. *Lucas* (3); *Hornsey Urban District Council and Hennell* (4); *Stewart* v. *Conservators of the River Thames* (5); *Attorney-General* v. *Allgood* (6); *In re Henley & Co.* (7); *In re Oriental Bank Corporation* (8); *Ex parte Postmaster General; In re Bonham* (9); *Perry* v. *Eames* (10); *The Liquidators of the Maritime Bank* v. *The Queen* (11).

Après avoir pesé avec soin les prétentions respectives des parties, étudié la doctrine et la jurisprudence et sur le tout mûrement délibéré, j'en suis venu à la conclusion que la motion de la défenderesse doit être rejetée, avec dépens, lesquels je crois opportun de fixer par les présentes à la somme de $30.

Order accordingly.

(1) (1885) 11 R.C.S. 1.
(2) (1928) Ex. C. R. 68.
(3) (1881) 1 Tax Cases 385, 460.
(4) (1902) 2 K.B. 73.
(5) (1908) 5 Tax Cases 297, 302.
(6) (1743) Parker 1, 3.
(7) (1878) L.R. 9 Ch. D. 469, 481
(8) (1885) L.R. 28 Ch. D. 634, 647.
(9) (1878-79) L.R. 10 Ch. D. 595, 600.
(10) (1891) 1 Ch. 658; (1891) L.J. 60 Ch. D. 345, 349.
(11) (1888) 17 R.C.S. 657, 660 and 668.

1945
Feb. 28
Mar. 2

BETWEEN:

BAYMOND CORPORATION LIMITED ..... APPELLANT;

AND

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

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, Sec. 5 (b)—Exemption provisions of a taxing Act must be construed strictly—Claim for deduction of interest on borrowed capital—Meaning of capital—Difference between borrowed and other capital—Restricting effect of expression "used in the business to earn the income" on taxpayer's right to deduct interest on borrowed capital—Appeal from assessment dismissed.

In 1936 the appellant purchased property on which there was an uncompleted building, finished the building and then, having tried unsuccessfully to borrow on a second mortgage money with which to discharge liabilities incurred in connection with completion of the building, decided to obtain the necessary funds by the issue of second mortgage bonds. It was unable to dispose of them except at a discount. On October 15, 1937, it issued second mortgage bonds of the face value of $600,000 bearing interest at 6 per cent per annum and maturing on October 15, 1952, but all that it realized on the sale of the bonds was $157,500. In 1938 the appellant sold the property and acquired for cancellation the outstanding bonds for the sum of $341,000 but was required to pay and did pay interest on $600,000 at 6 per cent per annum from the date of issue to September 15, 1938. In its income tax return for 1938 it claimed a deduction of $25,545.50 being interest at 6 per cent per annum from January 1, 1938, to September 15, 1938, on $600,000, but on the assessment only a deduction of $6,679.73, being interest at 6 per cent per annum for the period claimed, on $157,500 was allowed. On appeal to the Minister the assessment was affirmed and an appeal to this Court was then brought.

Held, That section (*f*) of the Income War Tax Act does not necessarily allow the deduction of interest at the contract rate. The rate is restricted to such reasonable rate as the Minister in his discretion may allow.

2. That the discretion of the Minister relates only to the allowance of a reasonable rate of interest.

3. That the exemption provision of a taxing Act must be construed strictly. *Lumbers* v. *Minister of National Revenue* (1943) Ex. C.R. 202 at 211 referred to.

4. That it is inherent in the idea of capital, whether of a company or of an individual, that there is an asset in the form of money or a fund or other property capable of being or becoming a source of income to its owner. Its amount must be distinguished from the obligation or liability incidental to it.

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5. That the expression "used in the business to earn the income" contained in Section 5 (*b*) of the Income War Tax Act shows in clear and explicit terms that the right of a taxpayer to deduct from what would otherwise be his taxable income interest on borrowed capital is not to be measured by the extent of his obligation in respect thereof but is restricted to only such borrowed capital as has actually been used in his business to earn the income.

APPEAL under the provisions of the Income War Tax Act.

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

D. M. Fleming K.C. for the appellant.

R. Forsyth K.C. and H. M. Lehrer K.C. for the respondent.

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

THE PRESIDENT now (March 2, 1945) delivered the following judgment:

The issue in this appeal depends upon the construction of section 5 (*b*) of the Income War Tax Act, R.S.C. 1927, chap. 97. In September, 1936, the appellant purchased property in the City of Toronto on which there was an uncompleted building known as the Victory Building. It finished the building in 1937 and started to lease office space in it. Then, having tried unsuccessfully to borrow on a second mortage money with which to discharge liabilities incurred in connection with completion of the building, it decided to obtain the necessary funds by the issue of second mortgage bonds. Because the bonds were the issue of a new company with no previous operating experience it was found impossible to dispose of them except at a discount. A purchaser was finally found and on October 15, 1937, the appellant issued second mortgage bonds of the face value of $600,000, bearing interest at the rate of six per cent per annum and maturing on October 15, 1952, but all that it realized on the sale of the whole issue was the sum of $157,500. In September, 1938, the appellant sold the Victory Building and at the same time acquired for cancellation the

outstanding bonds for the sum of $341,000, but was required to pay and did pay interest at six per cent per annum on $600,000 from the date of issue to September 15, 1938.

In its income tax return for 1938 the appellant claimed as a deduction the sum of $25,405.50, being interest at six per cent per annum from January 1, 1938, to September 15, 1938, on $600,000. The income tax assessment for 1938, as appears from the notice, dated May 5, 1943, allowed a deduction of only $6,679.73, being interest at six per cent per annum for the period claimed, on $157,500 and disallowed the claim in respect of the remainder. An appeal was taken to the Minister who affirmed the assessment, and an appeal to this Court was then brought. No question arises with respect to the interest paid for the period from the date of issue to December 31, 1937, since the operations of the appellant during 1937 did not result in taxable income.

The issue in the appeal is a narrow one. The appellant bases its right to deduct interest on section 5 (*b*) of the Income War Tax Act, which provides as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*b*) 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;

The section does not necessarily allow the deduction of interest at the contract rate. The rate is restricted to such reasonable rate as the Minister in his discretion may allow. There is, therefore, no substance in the appellant's argument in its notice of appeal that if it had not been able to discount the bonds it might have been forced to borrow on a second mortgage at an interest rate substantially higher than that actually paid on the net amount received from the sale of the bonds.

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It is, I think, clear that the discretion of the Minister relates only to the allowance of a reasonable rate of interest. The rate has been allowed at six per cent per annum and in allowing such rate the Minister has fully exercised the discretion vested in him. This leaves the amount to which the rate should be applied to be determined quite apart from any exercise of ministerial discretion. The question to be answered is whether the expression "borrowed capital used in the business to earn the income" means $600,000, the face value of the bonds or $157,500, the sum realized on their sale.

The appellant claims a deduction from what would otherwise be its taxable income. It is well established that the exception provisions of a taxing Act must be construed strictly, since "taxation is the rule and exemption the exception". *Wylie* v. *City of Montreal* (1). In *Lumbers* v. *Minister of National Revenue* (2), I expressed the rule with reference to the exemption provisions of the Income War Tax Act as follows:

> in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

There are, in my opinion, two reasons why the appellant cannot succeed in its claim to deduct interest except to the extent allowed on the assessment. One relates to the word "capital" as used in the section and the other to the expression "used in the business to earn the income".

Lindley's Law of Companies, 6th Edition, points out, at p. 543, that the word "capital" is used in many senses and, after specifying a number of them, states:

> The idea underlying the various meanings of the word capital in connection with a company is that of money obtained or to be obtained for the purpose of commencing or extending a company's business as distinguished from money earned in carrying on its business.

A similar idea is involved in the meaning of the capital of an individual in his business. Wharton's Law Lexicon, 14th Edition, defines, capital as:

(1) (1885) 12 Can. S.C.R. 384 at 386.

(2) (1943) Ex. C.R. 202 at 211.

The corpus of property of any description which may or may not be the source of a periodical or other return (fructus, produce or income).

and also states:

In commerce, and as applied to individuals, it is understood to mean the sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership.

This latter definition appears also in Bouvier's Law Dictionary.

A company may raise capital either by the sale of its shares or by borrowing on the issue of debentures or bonds. *Kennedy* v. *Acadia Pulp & Paper Mills Co.* (1). But there is an important difference between the share capital of a company and its borrowed capital; in respect of the latter the company owes a debt to its debenture or bond holders, whereas, in respect of the former, the liability of the company to its shareholders, whatever its nature may be, is clearly not that of debt.

This difference is the basis of section 5 (*b*) of the Act, which allows a deduction of interest only on borrowed capital. The borrowed capital may be that of a company or of an individual. No deduction is allowed in respect of the share capital of a company or the capital which an individual adventures out of his own resources, for no interest is owing in respect of it. This distinction between share and borrowed capital was clearly emphasized by Audette J. in *Dupuis Frères Limited* v. *Minister of Customs and Excise* (2), when he held that preference shares were not "borrowed capital" and that the dividends paid on them were not exempt from income tax.

It was argued that the appellant had incurred an obligation to pay $600,000 together with interest thereon at six per cent per annum and had paid such interest; that all the proceeds of the borrowing had gone into the exchequer of the appellant and that the amount of its borrowed capital was $600,000. Some support for this contention may perhaps be found in Lindley's Law of Companies, 6th Edition, at p. 543, where the author says:

A company's so-called borrowed capital or loan capital is neither more nor less than a debt; it is money borrowed by a company on certain terms, and is repayable by the company according to the terms on which the money has been lent.

(1) (1905) 38 N.S.R. 291 at 307. (2) (1927) Ex. C.R. 207.

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It seems to me that in the first part of this statement the author has failed to distinguish between the capital obtained by the borrowing and the obligation incurred in respect of it. It is, I think, inherent in the idea of capital, whether of a company or of an individual, that there is an asset in the form of money or a fund or other property capable of being or becoming a source of income to its owner. Its amount must be distinguished from the obligation or liability incidental to it. The capital is one thing, the liability or obligation in respect of it, whatever its nature or exent, is quite a different thing. What the appellant really did was to incur an obligation to pay $600,000 in 1952 together with interest thereon at six per cent per annum in consideration of receiving the present sum of $157,500. This was the only asset it obtained by borrowing and this was the amount of its borrowed capital. The difference between such amount and the amount of the obligation incurred, even although a capital obligation, never became part of the capital of the appellant, borrowed or otherwise. In this view of the matter, it is unnecessary to determine what the difference was.

There is a second reason why the appellant cannot succeed. The expression "used in the business to earn the income" contained in section 5 (*b*) of the Income War Tax Act shows in clear and explicit terms that the right of a taxpayer to deduct from what would otherwise be his taxable income interest on borrowed capital is not to be measured by the extent of his obligations in respect thereof but is restricted to only such borrowed capital as has actually been used in his business to earn the income. It is not the obligation incurred through the borrowing but the asset in the form of money or other property received from it and actually put into the business to earn the income that is the measure of the taxpayer's right, once the rate of interest has been allowed. The taxpayer is entitled only to such deduction as the section clearly permits and the expression referred to expressly limits his right in the manner specified. Consequently, whatever the appellant's borrowed capital was, it is clear that all that was used in the business to earn the income was the sum of $157,500. That was all that

could have been so used for that was all that the appellant ever received. That is the limit of the amount in respect of which it is entitled to deduct interest. The assessment allowing only such a deduction was in accordance with the Act and the appeal must be dismissed with costs.

Judgment accordingly.

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BETWEEN:

PERCY WALKER THOMSON..... APPELLANT;

AND

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

1943

Nov. 8

1945

Mar. 10

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 9 (a), 9 (b), 47—Meaning of terms "residing", "ordinarily resident", "sojourns", "during"—Person must reside somewhere—Constant personal presence not essential to residence—Person can have more than one residence—Whether a person was residing or ordinarily resident in Canada is a question of fact—Where word may have two meanings Court should reject that which would render Act nugatory or lead to absurd results—Appeal from assessment dismissed.

The appellant, a British subject, born at St. John, N.B., lived there and carried on business until 1921 when he moved to the nearby village of Rothesay. There he had a dispute over personal property tax and declared his intention of giving up residence in Canada. In 1923 he went to Bermuda, rented a house, made an affidavit of intention to establish his home and domicile there and obtained a passport. Thereafter he declared himself a resident of Bermuda, although he never made use of the house, was there for only a few days in 1926, 1928 and 1933 and never owned any property or had any assets or bank account there. Between 1923 and 1930 he spent most of his time at Pinehurst, North Carolina in rented houses, but in 1930 he built a $90,000 house there which was his chief place of abode in the United States. He kept a man looking after it all the year round. Between 1923 and 1932 he spent only a few days in Canada in any one year, and in some years was not there at all. In 1932, 1933 and 1934 he rented a summer place at St. Andrews, N.B., not far from St. John, because his wife wanted to come there, having relatives and friends at St. John. In 1934 he built a $90,000 house at East Riverside, near Rothesay, adjacent to the Golf Course, and bought about $16,000 worth of furniture. He built the house so that his wife could be nearer her relatives and friends than St. Andrews. The house was a large one of 15 to 20 rooms. Since 1934 and up to 1942 he spent the summer months there with his wife and family and staff of servants. He thought that if he spent less than 183 days in any year

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in Canada he would not be liable for income tax and his stay never exceeded that number of days. After building these two houses his routine of life was established. His main activity in life was playing golf. After it was too cold to play golf at East Riverside he went south to his home at Pinehurst and then to Florida but when it got too hot to play there he went back north to Pinehurst and then back to East Riverside. As he moved he took his wife and family, his motor cars and his staff of servants with him. He paid the annual taxes and annual maintenance of the East Riverside house and kept a housekeeper and his wife there each winter, the servants' quarters being open all the year round.

In 1940 he entered Canada as a tourist from Bermuda, although he came from Boston, and spent 159 days at East Riverside in the usual way. In 1941 he was requested to file an income tax return for 1940, but on his refusal to do so on the ground that his domicile was in Bermuda and that he was visiting Canada as a tourist, an assessment was levied against him on an assumed income of $50,000. He appealed to the Minister who confirmed the assessment on the ground that the facts disclosed that he was resident or ordinarily resident during the year 1940. An appeal to the Exchequer Court was then lodged.

Held: That a person must reside somewhere.

2. That constant personal presence is not essential to residence there and that a person may continue to be resident in a place although physically absent from it.

3. That while a person can have only one domicile, he can have more than one residence.

4. That the question of whether a person is ordinarily resident in one country or in another cannot be determined solely by the number of days that he spends in each; he may be ordinarily resident in both if his stay in each is substantial and habitual and in the normal and ordinary course of his routine of life. *Levene* v. *The Commissioners of Inland Revenue* (1928) 13 T.C. 486 followed.

5. That the terms "residing" and "ordinarily resident" in section 9 (*a*) of the Income War Tax Act have no technical or special meaning and that the question whether in any year a person was "residing or ordinarily resident in Canada" within the meaning of the section is a question of fact. *Lysaght* v. *The Commissioners of Inland Revenue* (1928) 13 T.C. 511 followed.

6. That the facts are conclusive that in 1940 the appellant was both residing and ordinarily resident in Canada within the meaning of section 9 (*a*) of the Act.

7. That when a word may have two meanings it should be read with reference to its context and the court should adopt that meaning which is in accord with the object of the Act and reject the one that would render the Act nugatory or lead to absurd results.

8. That the words "during such year" in section 9 (*a*) mean merely "in the course of or in such year".

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APPEAL under the provisions of the Income War Tax Act.

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

C. F. Inches, K.C. and E.F. Newcome, K.C. for appellant.

R. Forsyth, K.C. and E. S. McLatchy for respondent.

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

THE PRESIDENT, now (March 10, 1945) delivered the following judgment:

This is an appeal under the Income War Tax Act, R.S.C. 1927, chap. 97, from an assessment for the year 1940 and turns on the question whether the appellant was residing or ordinarily resident in Canada during such year.

The appellant was born at St. John, New Brunswick, 1872. He lived there and carried on business as a steamship owner until 1918, when he retired and became interested in a public utility company until 1921. On his retirement he moved to Rothesay, a village near St. John. In 1922 he had a dispute with the village tax authorities over personal property tax and decided to leave Canada. He announced his intention of giving up residence in Canada to the New Brunswick Cabinet and to his friends and notified the Rothesay tax authorities.

In 1923 he went to Bermuda, rented a house there, made an affidavit in which he says he declared that he had come to Bermuda to establish his home and domicile there and that he intended to stay there indefinitely, and obtained a passport for 10 years. He took out a new passport on December 8, 1933, from the British Consulate at Savannah, Georgia, in which he stated his domicile as St. Georges, Bermuda, which was renewed by the British Consulate at Baltimore until December 8, 1943. He took out a fresh passport from the same consulate on February 7, 1943. He made his arrangements for the rental of a house in Bermuda because he thought it necessary to do so to establish residence there, but, although he paid rent for 1 or 2

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years, he never occupied the house or did anything with it. Apart from his short stay in 1923 to make the arrangements mentioned he spent only 6 days in Bermuda in 1926, 8 in 1928 and 6 in 1933, and has not been there at all since 1933. He never owned any property or had any assets or bank account there. He has, however, consistently, since 1923, described himself as a resident of Bermuda.

The appellant appeared at the hearing and gave detailed particulars of his movements from January 1, 1925, to December 31, 1941, compiled from his diaries, in which he recorded the temperatures and his golf scores. He stated that he roamed all over to play golf and this appears to be his main activity in life, together with an interest which he takes in improving at his own expense the golf courses over which he plays.

Between 1923 and 1932 the appellant spent only the following days in Canada; none in 1924, 101 in 1925, none in 1926, 8 in 1927, 2 in 1928, 15 in 1929, 64 in 1930 and 2 in 1931. The 2 days spent in 1928 were in connection with a visit made to Ottawa to collect some money from the Custodian of Alien Enemy Property and to settle an income tax account for the year 1923. He paid $180.40 in full of this account on October 8, 1928, and on November 5, 1928, Mr. C. S. Walters, who was then Commissioner of Income Tax, wrote to him at an address in Boston as follows:

> With reference to our conversation on the 25th September last, the District Inspector of Income Tax at St. John has forwarded to this office the Return which you have now filed for the year 1923, in respect of which you have paid the sum of $180.40. This will advise that your liability under the Income War Tax Act up to and including the calendar year 1927 has been discharged.
>
> You will not become taxable again under The Income War Tax Act until
>
> (*a*) you again take up residence in Canada;
> (*b*) you sojourn in Canada for a period or periods amounting to 183 days during a calendar year;
> (*c*) you are employed in Canada;
> (*d*) you carry on business in Canada; or,
> (*e*) you derive income for services rendered in Canada.
>
> In any such case you would become liable to taxation in Canada, and would be required to again file a Return for taxation purposes.

Up to this time the appellant had spent most of his time at Pinehurst in North Carolina, living in one rented house after another. In 1930, however, he built a house at Pinehurst, costing approximately $90,000. He then

moved his furniture to Pinehurst from Rothesay, having disposed of his residence there. The new house at Pinehurst was his chief place of abode in the United States, his wife and only son living there with him. He kept a man looking after it the whole year, even when he was away playing golf somewhere else. The house was always open and available to him.

In 1932 the appellant spent 134 days at St. Andrews, a summer resort not far from St. John. He rented a house and brought his wife, son and grandson with him. His wife wanted to come there, having relatives and friends at St. John. This was the reason, according to the appellant, why he established a summer place there. He paid $700 per year for it and, although he was only a tenant, put in new bathrooms and other improvements. As he put it he was "stuck with a house and had to make it comfortable". He came back to the same rented house in 1933 and 1934, spending 138 days there in 1933 and 81 in 1934. In 1934, however, he built a house at East Riverside, a place near Rothesay, adjacent to the Golf Club, which cost him close to $90,000, and bought about $16,000 worth of furniture with which to furnish it. The house was a large one consisting of from 15 to 20 rooms. The appellant gave as his reason for building this house the fact that he had no desire to come to Canada himself, but his wife's relatives were in New Brunswick and she enjoyed "sojourning" with them during the summer months. His wife's relatives and friends lived in St. John and at Rothesay and it was her desire to be nearer to them than St. Andrews. Since then and up to 1942 the appellant spent his summers in this house with his wife and family together with his staff of servants. There the appellant spent 156 days in 1935, 138 in 1936, 169 in 1937, 145 in 1938, 166 in 1939, 159 in 1940 and 115 in 1941. He stated that after receiving the letter from Mr. Walters he thought that if he did not spend more than 183 days in Canada in any one year he was not liable for income tax. He placed the house in the name of a company which he incorporated as Property at East Riverside Limited, in which he, his wife and his son had one share each in trust, the balance being held by another company called Prospect Mining Company

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Limited, a company which he incorporated in Newfoundland, the shares of which were owned by himself, his wife and his son. The appellant paid for the house and furniture, paid the annual taxes on the property and paid for its annual maintenance. He kept a housekeeper and his wife there each winter. The servants' quarters were open all the year round but the rest of the house was closed after he left in the fall until he came back the following summer.

His routine of life was now established. After it was too cold to play golf at East Riverside he went south to his house at Pinehurst; then he frequently went to Florida, where he had a house at Belleair, but when it got too hot to play there he went back north to Pinehurst and then back to East Riverside. As he moved from place to place he took his family, his motor cars and his staff of servants with him.

In 1940 the appellant entered Canada as a tourist from Bermuda although he came from Boston, and brought his automobiles with him under tourist permits for six months. He remained at his house at East Riverside with his wife and family as in previous years from May 8 to October 25, with the exception of two brief trips to Boston and one to Perth and then returned to Pinehurst as usual.

In the United States the appellant paid income tax as a non-resident from 1930 to 1940, but since then he has been forced to pay as a resident. He said that the United States authorities put a lien on everything he had and that he compromised with them because he had to do so. Since 1940 he has paid income tax in the United States on the full amount of his income, without exception, but it took strong action on the part of the authorities to compel him to do so.

The appellant returned to East Riverside in 1941, but this time as a visitor from the sterling area. While he was there he received a letter from the acting inspector of income tax at St. John, dated August 11, 1941, requesting him to make his income tax returns for 1940, showing his income from all sources, and advising him that consideration would be given to a portion of taxes paid in the United Kingdom and in the United States.

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He replied that as he understood the Canadian law he was not compelled to file any income tax statement as his domicile was in Bermuda and that he was visiting Canada as a tourist. In consequence of his refusal to file any return an assessment amounting to $21,122.00 tax and $480.31 interest was levied against him for the year 1940, based upon an assumed income of $50,000. The Minister determined the amount of the tax to be paid under the authority of section 47 of the Income War Tax Act. From the assessment the appellant took an appeal to the Minister in which he stated that he was a resident of Bermuda, his residence dating as far back as 1923 and that during 1940 he sojourned in Canada for 161 days. No objection was raised as to the amount of the assessment, the only contention being a denial of liability under section 9 or any other section of the Act. The Minister affirmed the assessment on the ground that the facts disclosed that the taxpayer was resident or ordinarily resident in Canada during the year 1940 and hence was subject to income tax as provided by paragraph (*a*) of section 9 of the Act. After notice of dissatisfaction by the appellant and the reply of the Minister, an appeal from the assessment was duly lodged in this Court.

The only question to be determined is whether the appellant in 1940 was "residing or ordinarily resident in Canada during such year", within the meaning of section 9 (*a*) of the Income War Tax Act, as it was in force in 1940, or whether he was merely sojourning there within the meaning of section 9 (*b*). Section 9 provides in part as follows:

> 9. There shall be assessed, levied and paid upon the income during the preceding year of every person
>
> (*a*) residing or ordinarily resident in Canada during such year; or
>
> (*b*) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year; or

The terms "residing" and "ordinarily resident" are not defined in the Act, and apart from *In re Income Tax Act* (1), there is a dearth of Canadian authority on the question under review. There are, however, many cases in the United Kingdom, in which the terms, as they appear in the Income Tax Acts of Great Britain, have been considered, that are helpful.

(1) (1933) 41 M.R. 621.

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The words are common English words and resort may be had to dictionaries to determine their meaning. The word "sojourns" may be dealt with in the same way. The Shorter Oxford English Dictionary gives the meaning of "reside" as being "To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place". By the same authority "ordinarily" means "1. In conformity with rule; as a matter of regular occurrence. 2. In most cases; usually, commonly. 3. To the usual extent. 4. As is normal, usual". On the other hand the meaning of the word "sojourn" is given as "To make a temporary stay in a place, to remain or reside for a time." Sojourning is the temporary, from day to day stay of a transient or visitor, whereas residing implies a regular and usual relationship.

The cases, as it will be seen, really carry one no further than the dictionary, and, in the main, are but useful illustrations of the circumstances under which a person may be considered as residing or ordinarily resident in a place or country.

The cases clearly indicate that a person must reside somewhere. *Rogers* v. *Inland Revenue* (1). When it is a question whether a man is resident in a country, it is not necessary that he should have a fixed place of abode therein, for even a homeless tramp in a country may be a resident of it. *Reid* v. *The Commissioners of Inland Revenue* (2). Residence in a place must indicate something more than mere presence as Lord Hanworth, M.R. said in *Levene* v. *The Commissioners of Inland Revenue* (3). Indeed, it has been established, ever since *In re Young* (4), that constant personal presence in a place is not essential to residence there, and that a person may continue to be resident in a place although physically absent from it. In that case, a master mariner, trading between Glasgow and foreign ports, having a house for his wife and family in Glasgow, was held to be "residing in Great Britain" and liable for assessment on his salary, notwithstanding that he was abroad for the greater part of the year. At page 59, the Lord President (Inglis) said:

(1) (1879) 1 T.C. 225.
(2) (1926) 10 T.C. 673.
(3) (1928) 13 T.C. 486 at 496.
(4) (1875) 1 T.C. 57.

anything like continuous residence is not a thing that this statute can be held to contemplate at all, if by continuous residence were meant constant personal presence in one place.

and later:

I have no doubt myself that if a man has his ordinary residence in this country, it does not matter much whether he is absent for a greater or a shorter period of each year from that residence or from the country itself. That is a thing that depends a good deal on a man's occupation, or it may be on his tastes and habits, especially in the latter case, if he is a man not requiring to be engaged in business for his maintenance.

The appellant's contention that he has been a resident of Bermuda since 1923 may be dismissed curtly. His motions in going there, making an affidavit as to his intentions, renting a house, which he never used, and obtaining a passport were a pure farce. In my view, he never became a resident of Bermuda, but whether that is so or not, he was certainly not a resident of Bermuda in 1940. He had not been there since 1933 and his entry into Canada as a tourist from Bermuda was purely fictitious. Even if he were a resident of Bermuda that would not prevent him from being a resident of Canada as well for it is well established that while a person can have only one domicile, he can have more than one residence. *Lloyd* v. *Sulley* (1). In that case a merchant carrying on business in Italy where he ordinarily resided also owned a place of residence in the United Kingdom, at which he dwelt with his family for several months in the year. He was held to be a resident in the United Kingdom and liable to income tax in respect of the profits of the business carried on abroad. At page 41, the Lord President (Inglis) said:

Now if a man could only be resident in one place in any particular year there might be a great difficulty, but surely there is nothing more familiar to one's mind than that a man has during a particular year or during a course of years, residences in different places existing at the same time. A man cannot have two domiciles at the same time, but he certainly can have two residences.

And later he said of the various residences a man may have:

these are all residences in the proper sense of the term, that is to say, they are places to which it is quite easy for the person to resort as his dwelling place whenever he thinks fit, and to set himself down there with his family and establishment.

(1) (1884) 2 T.C. 37.

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The same view was taken in *Cooper* v. *Cadwalader* (1). There an American ordinarily resident in New York with no place of business in the United Kingdom rented a house and shooting rights in Scotland where he spent about two months continuously in each year. It was held that he was a person "residing in the United Kingdom" and liable to income tax assessment.

The words "ordinarily resident" have been considered in a number of cases. In *Reid* v. *The Commissioners of Inland Revenue* (2), the facts were striking. For a number of years prior to May, 1916, the appellant, a British subject, shared a house in Glasgow with two sisters, but partly for considerations of health was in the habit of travelling abroad for the greater part of the year spending only the summer months in the United Kingdom. In May, 1916, the house was given up and the furniture sold, and from that time the appellant lived in hotels in Glasgow or London until July, 1919, when she again went abroad. Except for a four day visit to London in September, 1919, she remained abroad, travelling about from place to place on the continent of Europe, till the end of June, 1920. She then came back and stayed at a hotel in London until October 14, 1920, when she returned to the continent and remained abroad until after April 5, 1921, when she returned to London. While on the continent she had no place of residence in the United Kingdom or any apartments reserved for her use, but she had a banking account in London, and her personal effects were stored there. The appellant contended that she was not ordinarily resident in the United Kingdom for the two years ending April 5, 1921, and claimed exemption from Income Tax for those years under a section of the Income Tax Act of 1918 granting such exemption to a person who was not "ordinarily resident in the United Kingdom." The Special Commissioners found that the appellant was ordinarily resident in the United Kingdom for the years in question and, on an appeal being taken, it was held that there was evidence upon which the Commissioners could come to their decision and that they had not misdirected themselves in law.

(1) (1904) 5 T.C. 101.

(2) (1926) 10 T.C. 673.

At page 680, the Lord President (Clyde), after setting out the facts, said:

> It was contended on her behalf that, even if these facts are consistent with her being held to "reside" in the United Kingdom, they are inconsistent with the view that she "ordinarily" so resides. And here again the argument was that the meaning of the word "ordinarily" is governed —wholly or mainly—by the test of time or duration. I think it is a test, and an important one; but I think it is only one among many. From the point of view of time, "ordinarily" would stand in contrast to "casually". But the appellant is not a "casual" visitor to her home country; on the contrary she regularly returns to it, and "resides" in it for a part—albeit the smaller part—of every year. I hesitate to give the word "ordinarily" any more precise interpretation than "in the customary course of events" and anyhow I cannot think that the element of time so predominates in its meaning that, unless the Appellant "resided" in the United Kingdom for at least six months and a day, she could not be said "ordinarily" to reside there in the year in question.

In *Levene* v. *The Commissioners of Inland Revenue* (1), the facts were that the appellant, a British subject, leased a house in London until March, 1918. He then surrendered his lease, sold his furniture, and until January, 1925, had no fixed abode but stayed at hotels either in England or abroad. Until December, 1919, he stayed in England and it was admitted that up to that date he was both resident and ordinarily resident in the United Kingdom. In that month he went abroad and did not return until July, 1920, and from that date until January, 1925, he spent between four and five months each year in the United Kingdom, the reason for his visits being to obtain medical advice for himself and his wife, to visit relatives and the graves of his parents, to take part in certain Jewish religious observances and to deal with his Income Tax affairs. In January, 1925, he leased a flat abroad and expected to continue to make visits to the United Kingdom though not to such an extent as in the past. The appellant contended that for the years 1920-21 to 1924-25 he was neither resident nor ordinarily resident in the United Kingdom and that he was entitled to certain exemptions in consequence thereof. The Special Commissioners came to the conclusion that he was resident and ordinarily resident in the United Kingdom in the years in question and the Courts refused to reverse this conclusion. Rowlatt J. dismissed the appeal

(1) (1928) 13 T.C. 486.

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and both the Court of Appeal and the House of Lords unanimously agreed with his judgment in so doing. At page 493, Rowlatt, J. said:

> Now it seems to me what the phrase "ordinary residence" means is this: I think that "ordinary" does not mean preponderating, I think it means ordinary in the sense that it is habitual in the ordinary course of a man's life, and I think a man is ordinarily resident in the United Kingdom when the ordinary course of his life is such that it discloses a residence in the United Kingdom, and it might disclose a residence elsewhere at the same time. Therefore, I think, as has been thought in Scotland, that a man can have two ordinary residences not because he commonly is to be found at those places, but because the ordinary course of his life is such that he acquires the attribute of residence at those two places.

In the House of Lords, Viscount Cave, L.C. said, at page 506:

> The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance.

And at page 509, Lord Warrington of Clyffe made this important statement:

> I do not attempt to give any definition of the word "resident". In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration . . . . . If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered.

It is, I think, settled that the question of whether a person is ordinarily resident in one country or in another cannot be determined solely by the number of days that he spends in each, he may be ordinarily resident in both if his stay in each is substantial and habitual and in the normal and ordinary course of his routine of life.

The last important United Kingdom case is *Lysaght* v. *The Commissioners of Inland Revenue* (1). In that case the appellant until 1919 lived in England where he was engaged in business as director and general manager of a company. In that year he partially retired but retained the post of advisory director; he sold his English residence and his family went to live permanently in Ireland. He himself went to Australia in 1919 for the company, and on his return took a furnished house in Somerset going backwards and forwards to Ireland until

(1) (1928) 13 T.C. 511.

1920, when he went to reside with his family in Ireland. Since then he had no definite place of abode in England. He however came every month to director's meetings in England where he remained on the company's business for about a week each time, staying either at holels or at his brother's house. The total number of days spent in England for the three years ended April 5, 1923, April 5, 1924, and April 5, 1925, were 101, 94 and 84 respectively, while he spent 48 days there in the period from April 5, 1925, to September 25, 1925. He owned a small three acre field in England which he was anxious to sell, he had no business activities in Ireland save the management of his estate, his main banking account was in Ireland although he had a small account in Bristol, and the registered address of his various securities was in Ireland. The appellant contended that for the years 1922-23 and 1923-24 he was neither resident nor ordinarily resident in the United Kingdom and was entitled to the exemptions which such a status would give him. The Special Commissioners decided that his claims for exemption failed and this conclusion was finally sustained by the House of Lords. Rowlatt J. felt that he could not differ from the Commissioners in their finding that the appellant was both resident and ordinarily resident in the United Kingdom for each of the two years in dispute and dismissed the appeal. The Court of Appeal reversed this judgment, Lawrence L.J. dissenting, but it was restored by the House of Lords, Viscount Cave, L.C. dissenting.

The *Lysaght Case* (*supra*) is important for a number of reasons. In the first place, it shows how far, on the facts, the authorities in the United Kingdom have gone in finding that a person is resident or ordinarily resident in the United Kingdom. Then, it clearly establishes that a person may reside in a country, not as a matter of free choice on his part, but because he is compelled to do so. At page 535, Lord Buckmaster dealt with this question and also the term "ordinarily resident". He said:

> it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will;

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and later:

> if residence be once established "ordinarily resident" means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.

The real importance of the case, however, lies in the fact that it finally established that the question whether a person is resident or ordinarily resident in the United Kingdom within the meaning of the Income Tax Acts of that country is a question of fact. It seems to have been assumed in the earlier cases that it was a question of law to be applied to the facts of the case in question. In *Reid* v. *The Commissioners of Inland Revenue* (supra), the Lord President (Clyde) pointed out the difficulties involved in defining the terms. At page 678, he said:

> The expression "resident in the United Kingdom" and the qualification of that expression implied in the word "ordinarily" so resident are just about as wide and general and difficult to define with positive precision as any that could have been used. The result is to make the question of law become (as it were) so attenuated, and the field occupied by the questions of law become so enlarged, as to make it difficult to say that a decision arrived at by the Commissioners with respect to a particular state of facts held proved by them, is wrong.

This reasoning implied that the question was one of mixed law and fact, but mainly fact. The matter came to a head in the *Lysaght Case* (*supra*). Rowlatt J. really regarded the finding of the Commissioners as one of fact. In the Court of Appeal a contrary view prevailed. Lord Hanworth, M.R. held at page 519:

> The meaning of "residence" in the Income Tax Act must be a question of law;..... this Court can reconsider the case upon the question of the meaning of "residence" in law, and ought to hold that the facts found do not satisfy that meaning and constitute residence.

Sargant L.J., also agreed that the conclusion of whether a man is resident was a conclusion of law, and Lawrence, L.J., although dissenting in the result, was of the same view. In the House of Lords the dispute was settled by the majority of the members of the Court. Lord Buckmaster's judgment was read by Lord Atkinson, who concurred in it. At page 533, Lord Buckmaster is reported as follows:

> The distinction between questions of fact and questions of law is difficult to define, but according to the Respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the legal construction to be placed upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word "reside" or "residence" in other Acts may have

special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning.

Lord Warrington of Clyffe took the same view. At page 536, he said:

> I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact.

I see no reason why the same view should not be taken in Canada and hold the terms "residing" and "ordinarily resident" in section 9 (*a*) of the Income War Tax Act have no technical or special meaning and that the question whether in any year a person was "residing or ordinarily resident in Canada" within the meaning of the section is a question of fact.

It should, perhaps, be noted that the determination of this question does not assume the same importance in Canada as it does in the United Kingdom, where there is no appeal from the Special Commissioners except on questions of law and the Courts do not review their findings of fact. In Canada the situation is different for under the Income War Tax Act the taxpayer has the same right of appeal, unless it has been taken away by some specific section of the Act, in respect of questions of fact as he has in respect of those of law.

As I view the facts, they present no difficulty and I agree with the conclusion of the taxing authorities that they disclose that in 1940 the taxpayer was residing or ordinarily resident in Canada. There is no substance in the appellant's contention that when he was at East Riverside he was merely sojourning there. There was nothing of a transient character about his stay there. He lived there regularly with his wife and family and his staff of servants. The house at East Riverside was a permanent one. He kept a housekeeper and his wife there throughout the year and the house was always available to him as his place of abode. The fact that he chose to stay there only while the weather made it pleasant to play golf is quite immaterial and does not affect the question. His liability to income tax assessment based upon residence cannot be determined by the fact that when it was too cold to play

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golf at East Riverside, he chose to go to Pinehurst to play golf there. Nor is the question of residence determined by the number of days spent at East Riverside. The regular and usual relationship implied in the term "residing" is present in this case. He stayed at East Riverside during a substantial part of each year, and his stay was habitual. Moreover he resided at East Riverside in the ordinary course of his life. There was nothing of an unusual character about it. He lived and played there as long as it suited his pleasure to do so. His residence at East Riverside was in the course of the regular, normal and usual routine of his life. In my opinion the facts are conclusive that in 1940 the appellant was both residing and ordinarily resident in Canada within the meaning of section 9 (*a*) of the Act and I so find. Section 9 (*b*) has nothing to do with the matter.

That being so, the only question that remains is the meaning of the words "during such year" in section 9 (*a*) of the Act. The word "during" may have two meanings, one being "throughout the whole continuance of" and the other "in the course of". It was contended on behalf of the appellant that the term must be given the former meaning and that, consequently, the appellant was not liable, even if he was residing or ordinarily resident in Canada, since such residence was not throughout the whole continuance of the year. While it is established that a taxing Act must be construed strictly, this does not mean that the canons of construction to be applied to it should be different from those applicable to any other Act. In all cases the true intent of the Act must be ascertained. It may perhaps be noted that the words "during such year" were not in the Act prior to the Revised Statutes of Canada, 1927, but were inserted by the Commissioners in charge of the Revision. It is, I think, clear that they are referable to the words "during the preceding year" in the earlier part of the section and were meant to make certain that the assessment upon income should be for the same year as that of the residence. That was, I think, the purpose of inserting the words. They were intended to indicate the year of the incidence of liability to assessment, not to make any change in its nature or extent. Ordinarily, a word is used in the same sense wherever it appears

in an Act. In that view, it would be as reasonable to contend that there should be no liability to assessment upon income in a case where it was received only in the course of a year and not during the whole continuance of it as to advance the contention put forward by the appellant. Section 9 clearly intended to draw a distinction between residents and sojourners, the former being subject to tax apart from any factor of time, but the latter being liable only if their sojourn exceeded a certain number of days. The adoption of the appellant's contention would not only import into the terms "residing" and "ordinarily resident" the necessity of continuous physical presence, a connotation which they do not carry, but would open the door to wholesale tax evasion and make the section largely nugatory; the sojourner for 183 days would be subject to tax, but a resident for a much longer period would be free; indeed, he would escape liability altogether if he took up residence outside of Canada for even a small portion of the year. This would be an absurd result. It is well settled that when a word may have two meanings it should be read with reference to its context and the Court should adopt that meaning which is in accord with the object of the Act and reject the one that would render the Act nugatory or lead to absurd results. In my view, the words "during such year" in section 9 (*a*) mean merely "in the course of, or in such year." In 1942 the words were changed to read "at any time in such year". The change removed all possibility of ambiguity but was, I think, merely declaratory of what was always the true intendment of the previous words.

The appellant's contentions in this appeal are quite untenable. The surprising thing is that the taxing authorities did not catch up with him sooner. The appeal is dismissed with costs.

Judgment accordingly.

1944
July 11
1945
Mar. 21

BETWEEN:

HIS MAJESTY THE KING, on the information of the Attorney General of Canada,

PLAINTIFF,

AND

NUMONT FUL-VUE CORPORATION, THE FUL-VUE SALES COMPANY, GEORGE PETER KIMMELL, ROBERT E. HILLIER, JULIUS H. TUVIN, ROSE E. EMONS, BESSIE HILLIER, RUTH HILLIER, N. R. KIMMELL, GALE KIMMELL, CECIL E. McLEOD, AMERICAN OPTICAL COMPANY, GEORGE B. WELLS, IRA MOSHER, CHARLES O. COZZENS, IRVING W. WILSON, HARRY H. STYLL, R. GILMAN WALLACE, HERBERT C. KIMBALL, E. E. WILLIAMS, A. TURNER WELLS, J. M. WELLS, C. McGREGORY WELLS, JR., CHARLES N. SHELDEN, AND UHLEMANN OPTICAL COMPANY,

DEFENDANTS.

Practice—Joinder of parties and causes of action—General Rules and Orders 42—Rules of Supreme Court, 1883, of England, Order XVI, r. 1, r. 4, r. 5, Order XVIII, r. 1, r. 8, r. 9—Separate disposal of causes of action on balance of convenience—Licensee not desiring to be heard not a necessary party in action for cancellation of patent.

Held: That there is power under Order XVI, r. 4 of The Rules of the Supreme Court, 1883, of England, to join in one action separate causes of actions against several defendants, regardless of whether any common question of law or fact will arise or not, and that no objection in point of law to such joinder can be sustained.

2 That while no limitation on the right of joinder can be found in Order XVI, r. 4 it is subject to the discretionary powers which may be exercised by the court or a judge under Order XVI, r. 5 and Order XVIII, r. 1, r. 8 and r. 9 and that these rules of Order XVIII make it clear that when several causes of action have been united in the same action the decision whether they should be tried or disposed of together or separately should depend upon the balance of convenience.

3. That where a person has been joined as a defendant in an action for cancellation of a patent and it is shown that such person is only a licensee of the patent, has no interest in it, does not wish to be heard in defence of its validity and states that he will be bound by the judgment of the court, such person is not a necessary party to the action and should be dismissed therefrom.

MOTIONS for separate disposal of causes of action, and for striking out certain paragraphs of information relating to one defendant.

The motions were heard before the Honourable Mr. Justice Thorson, President of the Court, in Chambers, at Ottawa.

O. M. Biggar, K.C. for defendant The Ful-Vue Sales Company.

F. Erichsen-Brown, K.C. for the defendants American Optical Company and Numont Ful-Vue Corporation.

Christopher Robinson for defendant Uhlemann Optical Company.

Gordon F. Henderson for plaintiff.

THE PRESIDENT now (March 21, 1945) delivered the following judgment:

The purpose of this action is to obtain a declaration that certain letters patent, six in number, are invalid or void and should be cancelled and set aside and that a certain industrial design registration should be expunged. It appears from the Information that, according to the records in the Canadian Patent Office, the defendant, The Ful-Vue Sales Company, a partnership, owns three of the patents, the defendant, American Optical Company, a voluntary association, one of them and the defendant, Uhlemann Optical Company, a corporation, the other two, and that the last named defendant also owns the industrial design registration. There are joined as defendants the persons said to be members of the partnership or members or associates of the voluntary association. The defendant, Cecil E. McLeod, is regarded as the owner of the patent standing of record in the name of the defendant, American Optical Company. The defendant, Numont Ful-

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Vue Corporation, is joined on the ground that it holds itself out and represents that it is vested with certain rights in the letters patent and industrial design and is attempting on its own behalf or on behalf of other defendants to enforce its or their alleged rights thereunder. The nature of the said rights is not stated.

The plaintiff seeks to join in one action separate causes of action against several defendants. Under these circumstances, a motion was made on behalf of the defendant, The Ful-Vue Sales Company, and its defendant members for an order directing the Attorney General to elect which cause of action he will confine this action to, on the grounds that no one of them can be conveniently disposed of together with any other or others, and that no one of them can in law or should as a matter of discretion be pursued in the same action as any other or others, and that in any event the allegations in the Information against Numont Ful-Vue Corporation are impertinent and irrelevant to any of the other causes of action and may tend to prejudice, embarrass and delay the fair trial thereof; and further directing that upon such election all appropriate amendments be made accordingly, and also, if the Attorney General elects to proceed against the defendant, The Ful-Vue Sales Company, for an order that he furnish further and better particulars of the objections to the validity of the patents of which the said defendant is alleged to be the owner, specifying the particulars required. Similar motions were made on behalf of the defendants, American Optical Company and Uhlemann Optical Company. A motion was also made on behalf of the defendant, Numont Ful-Vue Corporation, for an order striking out paragraphs 1 and 9 of the Information, referring to the said defendant, on the ground that the Information contains no allegations of fact disclosing any reasonable cause of action against it and claims no relief with which it is concerned.

There being no provision, within the meaning of Rule 42 of the General Rules and Orders of this Court, for the practice and procedure relating to the joinder of parties and causes of action, resort must be had to Orders XVI and XVIII of "The Rules of the Supreme Court, 1883" of England, relating to such matters.

Order XVI r. 4 reads as follows:

4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. . . . . .

Prior to 1896, Order XVI r. 1 read as follows:

1. All persons may be joined in one action as plaintiffs, in whom any right to relief is alleged to exist, whether jointly, severally, or in the alternative, . . .

In this state of the rules it was held by the House of Lords in *Smurthwaite* v. *Hanney* (1) that several plaintiffs could not in one action join separate and distinct causes of action, and in *Sadler* v. *Great Western Railway Co.* (2) that a plaintiff could not in one action join separate causes of action against several defendants. The decisions were based on the view that Order XV dealt with the joinder of parties and had no reference to the joinder of causes of action.

In 1896, following the decision in *Smurthwaite* v. *Hannay* (*supra*), and, no doubt, with a view to overcoming its effects, r. 1 was altered by the Rule Committee so that it was made clear that several plaintiffs could be joined in one action, even if they had separate causes of action, subject to certain restrictions or qualifications, firstly, that the right of relief should be in respect of or arise out of the same transaction or series of transactions and, secondly, that in the separate causes of action a common question of law or fact should arise, and subject also to the proviso that if upon the application of any defendant it should appear that the joinder might embarrass or delay the trial of the action, the court or a judge might order separate trials, or make such other order as might be expedient. While the Rule Committee amended r. 1 in the manner indicated it made no change in r. 4. Since the amendment of r. 1, the courts have given a liberal interpretation to r. 4, in accordance with its wide terms, and do not follow *Sadler* v. *Great Western Railway Co.* (*supra*), the reason being that the foundation of that decision, namely, that Order XVI related only to the joinder of parties and had no reference to the joinder of causes of action has ceased to exist and it can no longer be said that r. 4 is part of a code of rules that relates exclusively to the joinder of parties.

(1) (1894) A.C. 494. (2) (1896) A.C. 450.

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The Annual Practice, 1944, cites a number of decisions on Order XVI, r. 4. In my opinion, the true view is that expressed by Fletcher Moulton L.J. in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Limited* (1), where, after mentioning the judgments of the House of Lords above referred to, and the alteration of r. 1 by the Rule Committee, he said:

> The terms of this rule to my mind make it clear that Order XVI does not now deal solely with joinder of parties, but also deals with joinder of causes of action. Considering that rule with reference to the interpretation of r. 4, it appears to me that, just as the House of Lords, before the alteration of that rule, construed the wide and general language of r. 1 by reference to the general scope of the Order in which they could, as the rules then stood, find no intention to deal with joinder of causes of action, so now we are entitled to consider the meaning of the wide language of r. 4 as forming part of an Order which purports to some extent to deal with joinder of causes of action.

and then pointed out the difference between r. 1 and r. 4:

> Turning to r. 1 in its new form, I find that the words inserted are of the nature of words of restriction or qualification, which, while they shew that it is intended by the rule to deal with joinder of causes of action, at the same time put some limitation on the joinder of causes of action which may be made under it. Looking at r. 4 by the light of that rule, it appears that the Rule Committee deemed it to be unnecessary to insert similar words in r. 4, and that they thought it desirable to keep the terms of that rule of their original width, after making it clear that the Order was not limited to joinder of parties, but was intended to deal also with joinder of causes of action. The result appears to me that we are not bound to limit the plain meaning of the words of r. 4 by reference to a decision of the House of Lords given under a different state of circumstances, when Order XVI stood as it was originally framed.
>
> A number of decisions of the Court of Appeal have been cited to us. I confess that I find it difficult to reconcile all those decisions, and so I am driven back upon the plain meaning of the words of r 4. . . . .

In this view, the scope of application of the rule is wider than that indicated by the headnote of the case; so far as the rule itself is concerned it is without limits. Whatever limitation there may be in actual practice is the result of the exercise of discretion by the court or a judge under the enabling rules.

The matter was settled by the Court of Appeal in *Payne* v. *British Time Recorder Co.* (2). In that case, Lord Sterndale approved the statement of Fletcher Moulton

(1) (1910) 2 K.B. 354 at 365. (2) (1921) 2 K.B. 1.

L.J. in the *Compania Sansinena Case* (*supra*), and repeated what he had said, as Pickford L.J., in *Thomas* v. *Moore* (1):

joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right.

Warrington L.J. was of the same opinion. He quoted the remarks of Fletcher Moulton L.J., which I have cited, and said, at page 13:

It seems to me that that exactly expresses what I desire to express, —namely, that the limitation, if it exists at all, must be found in the rule itself.

Scrutton L.J. took a narrower view of the application of the rule and imported into it the qualifications appearing in r. 1. At page 15, he said:

it is now clear that the practice of the Court has been to read r. 4 as if it contained similar powers to those contained in r. 1 applying to the case of joinder of defendants and to put the same construction on r. 4 as upon r. 1.

This does not seem to be a correct statement of the practice, for if it means that the joinder of causes of action is permissible only where a common question of law or fact will arise, or is otherwise subject to the limitations appearing in r. 1, it is not in accord with the opinions of the other members of the Court, both of whom recognized the difference between r. 4 and r. 1, which had been so clearly pointed out by Fletcher Moulton L.J.

It should, I think, be held that there is power under Order XVI, r. 4 to join in one action separate causes of action against several defendants, regardless of whether any common question of law or fact will arise or not, and that no objection in point of law to such joinder can be sustained.

But, while no limitation on the right of joinder can be found in Order XVI, r. 4, it is subject to the discretionary powers which may be exercised by the Court or a judge under Order XVI, r. 5 and Order XVIII, r. 1, r. 8 and r. 9. Order XVI, r. 5, provides.

5. It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court or a judge

(1) (1918) 1 K.B. 555 at 565.

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may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

The relevant rules of Order XVIII provide:

1. Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of together.

9. If, on the hearing of such application as in the last preceding Rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of together, the Court or Judge may order any of such causes of action to be excluded and consequential amendments to be made and may make such order as to costs as may be just.

Nothing has happened in the action thus far to call for an order under Order XVI, r. 5, and the motions under discussion may be dealt with under the relevant rules of Order XVIII. These make it clear that when several causes of action have been united in the same action the decision whether they should be tried or disposed of together or separately should depend upon the balance of convenience. Mr. Biggar for the defendant, The Ful-Vue Sales Company, urged that his client should not have to sit through the trial while an attack was being made on other patents than its own and both Mr. Ericksen-Brown for the defendant, American Optical Company, and Mr. Robinson for the defendant, Uhlemann Optical Company, adopted his argument. The argument is a strong one for the avoidance of embarrassment and expense is an important factor in determining the balance of convenience. Mr. Henderson, for the plaintiff, contended that there should be no election at this stage since the plaintiff did not know what rights the defendant, Numont Ful-Vue Corporation, had in the patents and industrial design in dispute, that is to say, whether it was the owner of them or merely a licensee; that it was incumbent upon the plaintiff to bring in any person

who appeared to have an interest; that until the full interest of such defendant was ascertained, it would be embarrassing to the plaintiff to have to make any election, and that the motions were premature. This difficulty in the way of the plaintiff, which was a real one, was removed by the several statements of counsel for the defedants, Ful-Vue Sales Company, American Optical Company and Uhlemann Optical Company, that they were respectively the owners of the patents or industrial design standing of record in their names and that the defendant, Numont Ful-Vue Corporation, had only the rights of a licensee in respect thereof, and for the defendant, Numont Ful-Vue Corporation, that it had no proprietary interest or rights other than those of a licensee and would be bound if a declaration of nullity were made. The other contention made by Mr. Henderson was based on his affidavit filed in reply to the motions in which he stated that the patents and registered design all relate to the same subject matter, namely, opthalmic mountings for spectacles, and that the evidence required to substantiate the allegations relating to their invalidity would be given by the same expert or experts and he argued that this fact turned the balance of convenience in favour of trying the causes of action together, thereby avoiding a multiplicity of actions. While some time and expense might be saved in hearing the evidence of the experts in one action the advantage thus gained would, in my judgment, be more than offset by the difficulty confronting both counsel and the trial judge in trying to distinguish between the evidence applicable to all the patents and that which is referable only to some or one of them. There would, I think, be serious danger of confusion in the result if an attempt were made to try the validity of all the patents and the industrial design together. While this is particularly true with regard to the trial, there might also be confusion in the preparatory steps, such as the furnishing of particulars, production of documents, examination for discovery and the taking of commission evidence, if that should become necessary. It would, I think, be more satisfactory and lead to clearer results if the causes of action were dealt with separately from the outset. The record in each case

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would then be separate and distinct both for trial purposes and also for those of appeal proceedings if they should be taken. There would be nothing to prevent the plaintiff from proceeding with several actions concurrently so that they would all be ready for trial at the same time and it would be easy to arrange that they be tried consecutively before the same trial judge, if that should be deemed desirable. On the whole, I think that the balance of convenience lies in favour of granting the motions and it is, therefore, ordered that the Attorney General do elect whether he will confine this action to the three letters patent in the name of the defendant, The Ful-Vue Sales Company, or the one letters patent in the name of the defendant, American Optical Company, or the two letters patent and the industrial design in the name of the defendant, Uhlemann Optical Company, and that upon such election all consequential amendments be made, with the right reserved to the plaintiff to bring new actions in respect of such causes of action as are not continued in this one. Under all the circumstances it seems just that the granting of these motions should be without costs. If any difficulty should arise with regard to the form of the order the matter may be spoken to further. I have not dealt with the motions so far as they relate to particulars, for although the matter was raised by Mr. Biggar it was not fully argued. If particulars as requested are not given when the action has been reconstituted as ordered and the new actions have been brought further motions may be made.

The motion on behalf of the defendant, Numont Ful-Vue Corporation, for an order striking out paragraphs 1 and 9 of the Information, which, in effect, is a motion for dismissal of the said defendant from the action, should, I think, be granted. We are concerned not with whether a licensee may be joined as a co-plaintiff with the patentee in an action for infringement, particularly in view of section 55 of The Patent Act, 1935, but with the status of the defendant in this action. If it wished to remain in the action, having been brought in by the plaintiff, it might well be that it could do so, on the authority of *In re Brown's Patent* (1), in which Neville

(1) (1907) 24 R.P.C. 313 at 346.

J. held that licensees who had been served with a petition for revocation of the patent were entitled to appear and, on dismissal of the petition, to be paid their costs. While it is, of course, desirable in an action for cancellation of a patent that all the parties having an interest in it should be before the Court, and the plaintiff may have been justified in adding Numont Ful-Vue Corporation as a defendant when the nature of its rights was not known, the situation is changed by the statements of counsel that it is only a licensee of the patents, has no interest in them, does not desire to be heard in the action and will be bound by the judgment of the Court. It was settled in *Heap* v. *Hartley* (1) that a licence under a patent did not convey an interest in it. The question whether a licensee is a necessary party to a petition for revocation of a patent was raised but not decided In re *Stahlwerk Becker Aktiengesellschaft's Patent* (2), and need not be decided here. All that need be held is that where a person has been joined as a defendant in an action for cancellation of a patent and it is shown that such person is only a licensee of the patent, has no interest in it, does not wish to be heard in defence of its validity and states that he will be bound by the judgment of the Court, such person is not a necessary party to the action and should be dismissed therefrom. This being now the position of the defendant, Numont Ful-Vue Corporation, its dismissal from the action is ordered, with costs to it.

Judgment accordingly.

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(1) (1889) 6 R.P.C. 495 at 501. (2) (1918) 35 R.P.C. 81.

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Oct. 20

Dec. 10

BETWEEN:

BARON EDOUARD de ROTHSCHILD, GERMAINE HALPHEN, wife separate as to property of the said Baron Edouard de Rothschild, MISS BETHSABEE de ROTHSCHILD, and JACQUELINE de ROTHSCHILD, wife separate as to property of Gregor Piatagorsky, all of the City of New York, State of New York, United States of America... PLAINTIFFS,

AND

THE CUSTODIAN OF ENEMY PROPERTY ..... DEFENDANT.

Practice—General Rules and Orders, Rule 114—Impertinent or irrelevant matter in pleadings—Rule to be applied only in clear cases—Disputed issues of law not to be tried on motion under Rule.

Held: That while Exchequer Court Rule 114 provides that the Court or a Judge may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action, such an order should not be made unless the matter complained of is clearly impertinent or irrelevant or is clearly a breach of the rules of pleading.

2. That impertinent matter in a pleading is such matter as is not pertinent to the questions in issue and can have no bearing upon them. Matter ought not at the commencement of a suit to be treated as impertinent which may at the hearing be found relevant.

3. That disputed issues of law are not to be tried on a motion under Rule 114.

MOTION under Rule 114 to strike out paragraphs in Statement of Claim as being impertinent or irrelevant.

The motion was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

D. L. McCarthy, K.C. and *F. Read* for the motion.

E. F. Newcombe, K.C. and *K. Archibald contra.*

The PRESIDENT, now (December 10, 1942) delivered the following judgment:

This is a motion by counsel for the defendant for an order to strike out certain paragraphs of the plaintiffs' statement of claim, made under the provisions of Rule 114 of the General Rules and Orders of the Exchequer Court of Canada, reading as follows:

> The Court or a Judge, may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action.

The action is brought for a declaration by the Court as to whether or not certain securities, namely 1,534,000 florins Royal Dutch Company capital stock held by the Royal Bank of Canada, Montreal, for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, have been at any time on and since the 2nd day of September, 1939, subject to the Consolidated Regulations Respecting Trading with the Enemy (1939).

Before this action could be brought it was necessary to obtain the consent in writing of the Custodian of Enemy Property as required by section 27 of the above Regulations, which reads as follows:

> 27 (1) In case of a dispute or question as to whether or not any property belongs to an enemy or is subject to these Regulations the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration, as to the ownership thereof or as to whether or not such property is subject to these Regulations.
>
> (2) The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.
>
> (3) No mandamus proceedings shall be taken against the Custodian to obtain his consent, nor shall any proceedings by way of petition of right be instituted by any claimant where the Custodian has, under paragraph (1) hereof, refused a consent.

The consent of the Custodian, dated May 20th, 1942, was filed in the Exchequer Court with the Statement of Claim on August 28th, 1942.

From this consent it appears that the plaintiffs, on August 1st, 1940, applied to the Custodian for the release of the capital stock in question and that the Custodian was prepared to release control over it on payment of a

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commission of 2 per cent. on its value, but that the plaintiffs contested the right of the Custodian to charge any commission. Thereafter the plaintiffs applied for the consent of the Custodian to take proceedings in the Exchequer Court. This consent was given on May 20th, 1942.

The operative portion of the consent, apart from its recitals reads as follows:

> Now THEREFORE the Custodian hereby consents to the said applicants proceeding in the Exchequer Court of Canada for a Declaration as to whether or not the said 1,534,000 florins Royal Dutch Company capital stock held by the Royal Bank of Canada, Montreal, for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, have been at any time on and since the 2nd day of September, 1939, subject to the Consolidated Regulations Respecting Trading with the Enemy (1939).

This action was then brought. The statement of claim contains 34 paragraphs, most of which were objected to by counsel for the defendant on the hearing of this motion, as being irrelevant and embarrassing. It is not necessary to set out the specific allegations to which objection was taken, since the objection was really of a general nature and affected classes or groups of allegations.

The statement of claim puts forward two main contentions; firstly, that the securities in question never belonged to an enemy and were never physically located in enemy or proscribed territory, that the plaintiffs were never enemies, that the property in question was never enemy property or held by or for an enemy and that consequently it is not subject to the Consolidated Regulations Respecting Trading with the Enemy (1939) at all, and secondly, that the property never vested in the Custodian, was never investigated by him within the meaning of the Regulations and that he is not entitled to charge any commission on its value.

In support of these contentions the statement of claim contains allegations with reference to such matters as the organization of N. V. Commissie en Handelsbank, the ownership and location of its capital stock, the place of business of the company and the residence of its directors, the nature of the company's business and its location, the ownership of the shares in question by the plaintiffs, the circumstances surrounding the holding of the shares for the plaintiffs and their deposit with the Royal Bank of

Canada, the place of residence and status of the plaintiffs, the steps taken by the Royal Bank with regard to the shares, the circumstances surrounding the application made by the plaintiffs for the release of the securities, the actions of the Custodian with regard to the application and the conditional release of the securities.

In the consent given by the Custodian there are a number of recitals including statements that under the Consolidated Regulations Respecting Trading with the Enemy (1939) the Royal Bank of Canada duly reported to the Custodian that it was holding the capital stock in question for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, and that the Custodian in consequence of the plaintiff's application and the Bank's report made an investigation and following upon the said investigation was prepared to release control of the said capital stock on payment of a commission of 2 per cent. on its value.

It would appear that the Custodian based his right to such a commission on the provisions of section 44 of the Regulations, subsection 1 of which reads as follows:

> 44 (1) The Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released, in addition to any other charges authorized under these Regulations, an amount not exceeding two per centum of the value of all such property, including the income if any.

The plaintiffs contest the right of the Custodian to charge any commission.

The purpose of this action is to obtain a declaration from the Court as to the Custodian's right to charge the commission. If the Regulations do not apply at all, as the plaintiffs contend, then the Custodian cannot avail himself of section 44 of the Regulations; if on the other hand, the Regulations do apply, it remains for determination whether the facts come under the provisions of section 44 and give the Custodian the right to impose a commission as a condition of his release of the securities.

Counsel for the defendant referred to several sections of the Regulations including section 44, and contended that the plaintiffs' action must be confined within the four corners of the consent given by the Custodian and

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that the plaintiffs had wandered beyond the terms of the consent. It was urged that there was a duty cast upon the Royal Bank of Canada to report to the Custodian that it held the capital stock in question for the account of N. V. Commissie en Handelsbank, Amsterdam, Holland, and that as soon as such report was made by them to the Custodian, there was a duty cast upon the Custodian to make an investigation when an application was made for the release of the property in question. It was contended that it was a matter of indifference as to who owned the shares, that the ownership of the shares, asserted by the plaintiffs, was not in issue and that all the allegations relating to the ownership of the shares or the relationship between the plaintiffs and N. V. Commissie en Handelsbank or the status of either were inconsistent with the consent and irrelevant and embarrassing.

Counsel for the plaintiffs in reply contended that the plaintiffs were not bound by the preamble to the consent and were entitled to allege any facts relating to any element as to the ownership of the shares with a view to shewing that there was no enemy ownership or property in the shares in question and that consequently they were not subject to the Regulations at all.

To order the pleadings to which objection has been taken to be struck out, at this stage, would involve a disposition of some of the issues in this action on an interlocutory application, contrary to the intent of the rule under which the application is made and the purposes which the rule was intended to serve.

While Exchequer Court Rule 114 provides that the Court or a Judge may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action, such an order should not be made unless the matter complained of is clearly impertinent or irrelevant or is clearly a breach of the rules of pleading.

It seems clear from the authorities that although the language of the rule is very wide its application should be restricted to clear breaches of the rules of pleading

and that great care should be taken to avoid a determination on an interlocutory application, of issues, which ought to be dealt with on the hearing of the action.

In *Knowles* v. *Roberts* (1), Bowen, L.J. said:

> It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right.

Odgers on Pleading and Practice, 12th Ed., at p. 155, commenting upon the corresponding English Rule, Order XIX r. 27, says:

> But it is not easy to obtain an order under this rule. One party has no right to dictate to the other how he shall plead.

This statement of the practice in applying the rule was quoted with approval by Middleton J.A. in *Canada Starch Co. Ltd.* v. *St. Lawrence Starch Co. Ltd.* (2)

The jurisdiction to strike out pleadings as irrelevant should be exercised only in plain cases, such as where the matter complained of is utterly irrelevant—*Tomkinson* v. *The South Eastern Railway Co.* (3).

Impertinent matter in a pleading is such matter as is not pertinent to the questions in issue and can have no bearing upon them. If a pleading is so impertinent as to be embarrassing within the rule it may be struck out. Matter ought not, however, at the commencement of a suit to be treated as impertinent which may at the hearing be found relevant—*Reeves* v. *Baker* (4). In that case the Master of the Rolls, at p. 449, said:

> the Court ought not, at the commencement of a suit, to treat as impertinent matter that which at the hearing may be found to be relevant.

and

> I conceive that in a case where there are questions of a doubtful nature, I am not bound to hold passages impertinent, unless they clearly appear to be so, with reference to the ultimate result of the suit. If, however, they are clearly impertinent, the Court is bound to strike them out at once, but if it be doubtful, they must be left for further consideration.

(1) (1888) 38 Ch. D. 263 at 270.
(2) (1936) O.R. 261 at p. 279.
(3) (1887) 57 L.T. 358.
(4) (1851) 13 Beav. 436.

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The same Master of the Rolls (Lord Longdale) in a previous case, *The Attorney General* v. *Rickards* (1), held that exceptions for impertinence cannot be maintained, if the materiality of the passages is so connected with the merits of the cause as to render it proper matter for discussion and for the determination of the Court at the hearing. At p. 449, he said:

> Those who are acquainted . . . . with the real difficulty there often is in ascertaining whether an allegation is material or not would not, in the least degree be disposed to concur in the opinion that because a fact may, at the hearing or at the end of a cause, turn out to be immaterial, it is therefore to be treated as impertinent from the beginning.

and at p. 450:

> The Court cannot go into all the merits of a case and consider what the ultimate rights of a plaintiff may be, for the purpose of determining, . . . whether certain allegations, the materiality of which may be doubtful, are actually to be considered as immaterial. It would have the effect of drawing the whole merits of a cause into question, upon an allegation of impertinence.

He also at p. 450, made the following statement as to the principles that should govern matters of this kind.

> It is a matter of importance to avoid unnecessary length; but it is of much more importance, in discussing a question of length or materiality, not to determine the merits, before the court has before it all that is material to the merits.

A restricted meaning has been given to the term "embarrassing" as applied to pleadings. In *City of London* v. *Horner* (2) Pickford, L.J., at page 514, said:

> I take "embarrassing" to mean that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence on that ground, it seems to me that their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence.

The limits of the rule have been stated in a great many cases. In *Duryea* v. *Kaufman* (3), Riddell J., at page 168, put the limits as follows:

> No pleading can be said to be embarrassing if it allege only facts which may be proved . . . . . But no pleading should set out a fact which would not be allowed to be proved—that is embarrassing.
>
> Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Any-

(1) (1843) 6 Beav. 444.
(2) (1914) 111 L.T. 512.
(3) (1910) 21 O.L.R. 161.

thing which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded—but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result.

From this review of the authorities, it seems clear that effect should not be given, on this motion, to the main arguments of counsel for the defendant. To do so would be to deprive the plaintiffs of one of their main contentions, and would at the same time be a decision in advance that the shares in question are subject to the Regulations.

Since the purpose of the action is to have a declaration of the Court as to whether or not the shares in question are subject to the Regulations, the plaintiffs must be left free to make their contention that they are not subject to the Regulations at all.

Section 27 of the Regulations which provides for the consent of the Custodian that a claimant may proceed in the Exchequer Court for a declaration as to whether or not the property in question is subject to the Regulations contemplates that there may be circumstances under which the property in dispute may not be subject to the Regulations.

The operative part of the consent does not restrict the plaintiffs to the sole issue as to whether or not there has been an investigation within the meaning of the Regulations, but allows a determination of the whole question as to whether or not the shares in question are subject to the Regulations at all. Since this is so, effect cannot, on this motion, be given to the argument that the case must be confined to the issue as to whether an investigation was made within the meaning of the Regulations for this would be a determination in advance that the shares are subject to some of the Regulations, such as for example, section 44. A decision of this sort is not contemplated on an interlocutory motion of this sort. Disputed issues of law are not to be tried on a motion under this rule.

The plaintiffs must be left free to show what reasons they can in support of their contention that the Regulations do not apply to the shares in question at all, and to allege whatever facts may be necessary to support such

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contention. Whether such reasons are sound in law or not is a matter which should not be determined upon an application of this nature. The plaintiffs allege, for example, that they are the real owners of the shares, that they are not enemies within the meaning of the Regulations, that N.V. Commissie en Handelsbank was not an enemy, and that all other persons having any connection whatever with the shares were not enemies. To strike out such allegations, at the outset of the action would be to deprive the plaintiffs of proof essential to one of their main contentions. I express no opinion as to whether this contention of the plaintiffs even if the facts alleged in support of it are proved, is sound in law or not. It is sufficient to say that the allegations made in support of it are not so utterly or clearly impertinent or irrelevant as to warrant their being summarily struck out on this application. It should be left to the Court to determine at the hearing of the action the validity of the contentions made by he plaintiffs, when all the facts that may be material will be before the Court.

There are, however, some allegations in the statement of claim which ought to be struck out. The allegations in paragraph 19, relating to the delivery of certain shares to Baron Robert de Rothschild, a cousin of the plaintiff, Baron Edouard de Rothschild, and all the allegations in paragraph 20, since they relate to a different transaction from the one in question in this action are so utterly and clearly impertinent and irrelevant that they cannot be allowed to stand. This was admitted on the argument of the motion by counsel for the plaintiffs.

Similarly, although a paragraph in a prayer is rarely struck out on an application of this kind—*Harcourt* v. *Solloway Mills & Co. Ltd.* (1), paragraph A of the prayer asking for a declaration that the plaintiffs are and were the real and beneficial owners of the shares in question in certain proportions should be struck out as being a prayer for a declaration clearly outside the terms of the consent, and one which the Court is not required to make in these proceedings.

In paragraph 15 the words "as a matter of routine" will be struck out, as agreed.

(1) (1931) 40 O.W.N. 214.

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In paragraph 22 the words "the aforesaid persons" will be struck out and the words "the plaintiffs" substituted, for purposes of clarity.

The application is therefore granted only in respect of the specific allegations in paragraphs 15, 19, 20 and 22 of the statement of claim and paragraph A of the prayer above referred to, but is otherwise dismissed.

It was also pointed out on the argument that the defendant ought to be described as the Secretary of State for Canada in his capacity as the Custodian of Enemy Property. The plaintiffs may, of course, make the necessary amendment. The plaintiffs are to file their amended statement of claim within ten days from the date hereof. The defendant will have fourteen days from the date of the filing and delivery of the statement of claim as amended within which to file his statement of defence herein.

The order will be without costs.

Order accordingly.

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Mar. 20, 21

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May 10

ALFRED LAPERRIERE, labourer, of the City of Courville, in his quality of tutor to his minor son Joseph Gaston Guy Laperriere ..... PETITIONER,

AND

HIS MAJESTY THE KING

RESPONDENT.

Crown—Petition of Right—Injury to minor child through negligence of army officers in leaving live explosives in a field after manœuvres—Presumption of negligence under Article 1054 C.C. arises only when the damage has been caused by a dangerous article itself and not because of the conduct of the person injured—Doctrine of contributory negligence applicable when cause of action arises in Quebec Province—Division of negligence—Liability of Crown.

During the evening of October 10, 1942, a detachment of officers and non-commissioned officers of a Canadian regiment, under the authority of the Minister of National Defence, carried on military exercises partly on the course of the old Kent Golf Club and partly on the

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neighbouring farm of one Giroux. During these manœuvres some seventy-five thunderflashes were used. On October 31, in the afternoon one live thunderflash was found on the Giroux property by two boys aged about ten years each who had been looking for golf balls. The boys opened the thunderflash, took out some of its contents and burnt them. They then came home for supper, with the understanding that they would meet after supper on one of the streets of the town. As a matter of fact these two boys with several others, among whom was Gaston Laperrière, gathered on the street in the evening. After taking a small quantity of the powder left in the thunderflash and burning it, the two boys who had found the explosive and Gaston decided to set fire to what remained of the thunderflash. Gaston with one of the boys, namely, Marcel Dubeau, thinking that the explosive had not been properly lighted went to pick it up; at this moment the explosion occurred with the result that Gaston had the thumb and three first fingers of his right hand torn away. Shortly after the accident he had to have his right hand amputated.

The Suppliant in his quality of tutor to his minor son Gaston by his Petition of Right claims from His Majesty the King damages for the injuries suffered by his son.

Held: That the injury to Gaston Laperrière resulted from the negligence of the officer in charge of the manœuvres in leaving in a field used for these manœuvres a live explosion and in his failure to look for unexploded thunderflashes in the field after the manœuvres were finished and from the negligence on the part of the quartermaster in not exacting from the officers to whom he had given thunderflashes to account for them and surrender those that had not exploded.

2. That there is no presumption of negligence in the present case, even if Article 1054 C.C. applied, because the presumption of responsibility for the damage caused by a thing under one's care only arises when the damage has been caused by the thing itself, not when it is ascribable to the conduct of the person by whom it is manipulated.

3. That the cause of action having arisen in the Province of Quebec the doctrine of contributory negligence is applicable; that a child of ten years of age, of normal intelligence and development as the injured boy was, should have been more prudent and should have foreseen to a certain degree the probable consequence of his action and he is accordingly liable for contributory negligence, estimated in the present case at one-third.

PETITION OF RIGHT by Suppliant claiming damages against the Crown for injuries suffered by the minor son of Suppliant alleged to have been caused by the negligence of an officer or servant of the Crown in the performance of his duties.

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

C. N. Dorion, K.C. and *Frederic Dorion, K.C.* for Suppliant.

Gerard Lacroix, K.C. for Respondent.

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

ANGERS J. now (May 10, 1945) delivered the following judgment:

Par sa pétition de droit le pétitionnaire, en sa qualité de tuteur, réclame de l'intimé la somme de $15,400. pour dommages résultant d'un accident survenu à son fils mineur Joseph-Gaston-Guy le ou vers le 31 octobre 1942 en la ville de Courville, province de Québec.

Le pétitionnaire, dans sa pétition, allègue en substance:

le ou vers le 10 octobre 1942 un détachement de militaires de la cité de Québec, sous les ordres du ministre de la Défense nationale, s'est rendu sur un terrain appartenant à la compagnie Quebec Power situé dans la ville de Courville et de là sur un autre terrain appartenant à Joseph-R. Giroux, cultivateur du même endroit;

sur le terrain dudit Giroux ledit détachement a fait des exercices dans le but de se préparer à un raid simulé qui devait avoir lieu à Québec quelques jours plus tard; de fait ledit raid simulé a eu lieu contre la ville de Québec après l'exercice susdit;

ledit détachement a laissé sur le terrain dudit Giroux des boîtes et tout ce qui restait de la préparation dudit raid simulé;

ledit détachement a fait partir des explosifs, a produit des écrans de fumée et a laissé sur le terrain dudit Giroux un explosif très violent communément appelé "thunderflash";

plusieurs de ces explosifs avaient été employés sur le terrain dudit Giroux et avaient creusé des cavités profondes en explosant;

le samedi, 31 octobre 1942, vers six heures et demie du soir, le fils du pétitionnaire, âgé de onze ans, accompagné de plusieurs amis de son âge, était à jouer dans la ville de Courville lorsqu'à un moment donné il fut appelé à participer, avec le jeune Joseph-Emerilde Dubeau, à la préparation d'un feu d'artifice avec un "thunderflash" dont il ignorait la valeur explosive et que ledit Joseph-Emerilde

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Dubeau s'était procuré dans un champ à Courville, appartenant à J.-Raphaël Giroux, sur lequel avaient eu lieu les exercices ci-dessus mentionnés;

au moment où ledit Joseph-Gaston-Guy Laperrière s'approchait de l'explosif une violente explosion se produisit, lui enlevant partie de la main droite; ceci nécessita l'intervention des médecins qui durent lui amputer la main droite;

Joseph-Gaston-Guy Laperrière ne connaissait pas la valeur explosive dudit "thunderflash";

le pétitionnaire, par jugement rendu le 17 novembre 1942, a été nommé tuteur à son fils mineur, Joseph-Gaston-Guy;

à la suite de l'amputation de la main droite, le fils du pétitionnaire souffre des dommages au montant de $15,400., dont $400. pour frais de médecins et d'hôpital et $15,000. pour diminution de capacité permanente;

l'accident est dû à la négligence, l'incurie et la faute dudit détachement, qui, dans les circonstances, agissait sous les ordres de Sa Majesté le Roi, par l'intermédiaire de son ministre de la Défense nationale.

L'intimé a fait une inscription en droit totale à l'encontre de la pétition de droit, présentable à l'ouverture de la session de la Cour à Québec et donné avis de cette inscription aux procureurs du pétitionnaire.

Au soutien de son inscription en droit l'intimé dit que les faits invoqués par le pétitionnaire ne donnent pas ouverture au droit réclamé; qu'il n'appert aucun lien de droit entre le pétitionnaire et l'intimé; que le pétitionnaire n'allègue pas que le "thunderflash" qu'il prétend avoir été la cause de l'accident provenait de l'intimé ou de ses officiers ou préposés; que le pétitionnaire mentionne seulement que le jeune Laperrière a été blessé par un objet en la possession d'un jeune Dubeau et n'allègue nulle part que celui-ci ait été un employé, préposé ou officier de l'intimé; que les faits allégués dans la pétition ne rattachent aucunement l'objet prétendu dommageable à la garde ou au contrôle de l'intimé et n'indiquent aucun lien juridique entre le pétitionnaire et l'intimé.

La règle numéro 149 des règles et ordonnances de la Cour de l'Echiquier déclare que nulle inscription en droit n'est permise comme plaidoirie distincte; elle décrète

cependant qu'une partie a le droit de soulever tout point de droit dans sa plaidoirie et qu'un point de droit ainsi soulevé doit être décidé par la Cour ou un juge pendant ou après le procès.

Ladite inscription en droit a été présentée à l'ouverture de la Cour et, du consentement des parties, ajournée après l'enquête. A la clôture de l'enquête le procureur de l'intimé a de nouveau présenté ladite inscription en droit. Après avoir eu l'occasion de lire attentivement la pétition de droit ainsi que l'inscription en droit de l'intimé, sans tenir compte de l'irrégularité de celle-ci, j'en suis arrivé à la conclusion que la pétition de droit, quoique pas aussi claire et précise qu'elle aurait pu l'être, était suffisante pour donner ouverture au droit réclamé, en assumant naturellement que les faits y allégués seront prouvés de façon satisfaisante, et j'ai conséquemment rejeté l'inscription en droit, sans frais.

Le procureur du pétitionnaire a alors présenté une motion pour amender sa pétition de droit en ajoutant au paragraphe 7 d'icelle les mots suivants:

"et que le jeune Joseph E. M. Dubeau s'était procuré dans un champ situé à Courville, et appartenant à M. J. Raphael Giroux, champ sur lequel avait eu lieu les exercices dont il est question dans les six premiers paragraphes de la présente pétition;"

Bien que je ne considérais pas cet amendement nécessaire étant donné l'opinion que j'avais formulée de la suffisance de la pétition de droit en rejetant l'inscription en droit de l'intimé, j'ai cru à propos d'accorder la motion du pétitionnaire pour amender afin de prévenir le cas où un tribunal d'appel jugerait ladite pétition insuffisante telle qu'originalement libellée.

Pour défense à la pétition de droit, le Procureur Général du Canada, au nom de Sa Majesté le Roi, sous réserve de son inscription en droit, plaide en substance ce qui suit:

il admet que le ou vers le 10 octobre 1942 des exercices ont eu lieu à Courville pour la préparation à un raid simulé qui devait avoir lieu à Québec;

il demande acte de l'admission que ces exercices ont eu lieu sur des terrains privés, celui de la compagnie Quebec Power et celui de Joseph-R. Giroux, cultivateur de Courville;

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il admet qu'au cours desdits exercices on s'est servi d'un explosif appelé "thunderflash";

il dit que le jugement mentionné au paragraphe 10 de la pétition fait foi de son contenu;

il nie les autres allégations de la pétition;

et il ajoute:

à la fin de septembre des exercices ont eu lieu, au cours desquels toutes les précautions requises ont été prises et il n'y a eu aucune négligence de la part des officiers ou des hommes participant à ces exercices;

les instructions données pour ces exercices ont été suivies et chaque homme et officier a fait rapport de l'emploi des objets à lui confiés pour lesdits exercices, qui ont tous été employés pour les fins déterminées;

si Joseph-Emerilde Dubeau a eu en sa possession un "thunderflash", provenant des terrains où ont eu lieu les exercices, ce qui est nié, il l'a eu dans l'exercice d'un acte illégal pour lequel l'intimé n'est pas responsable;

la pétition est mal fondée en fait et en droit et l'intimé ne doit rien au pétitionnaire.

En réponse à la défense le pétitionnaire allègue, entre autre, ce qui suit:

il demande acte des admissions contenues dans la défense, en nie les autres allégués et dit que l'enfant du pétitionnaire avait la permission tacite du propriétaire du terrain d'y aller, comme le faisaient généralement les enfants de la localité.

[The learned Judge here reviews the evidence heard at trial and continues.]

La preuve révèle que les témoins Bancroft, Brown, Hutchinson, Malone, Price (Richard), Whyte et Walsh n'ont pas participé aux manœuvres qui ont eu lieu durant la nuit du 10 au 11 octobre 1942 si, par ailleurs, ils ont peut-être pris part à celles exécutées dans l'après-midi du 27 septembre. Il est difficile de concevoir la raison pour laquelle on amène en cour, à titre de témoins, sept officiers ou sous-officiers qui ne connaissent rien des faits dont il s'agit dans l'action. Il semble évident que la cause n'a pas été préparée de la part de l'intimé de façon satisfaisante et que ses représentants sont venus au procès ignorant ce que l'on

pourrait prouver avec l'aide de ces témoins. L'intimé n'a certes pas voulu délibérément embrouiller les faits mais le nombre considérable de témoins totalement étrangers à l'affaire laisse perplexe. Le résultat de cette confusion a été une perte de temps et une augmentation des frais absolument inutiles.

La preuve démontre de façon péremptoire que le "thunderflash" qui a été l'instrument de l'accident a été trouvé sur la terre de François-Xavier Giroux. Les militaires ont-ils fait toutes leurs manœuvres sur le terrain du club de golf, comme l'ont soutenu certains témoins de l'intimé, ou ont-ils pénétré, inconsciemment ou délibérément, sur la terre de Giroux, comme l'a déclaré son fils Henri, peu importe. Une chose, à mon avis, certaine c'est que Guy Bouchard et Marcel Dubeau ont ramassé l'explosif dans le champ de Giroux. Il est possible que le "thunderflash" en question ait été lancé du terrain du golf sur la propriété de Giroux. Il ressort de la preuve qu'il y avait parmi le groupe d'officiers qui ont participé aux manœuvres de bons, de médiocres et de mauvais lanceurs; les distances mentionnées varient en effet de 25 à 100 pieds. Au cas où j'admettrais, ce que je ne suis pas disposé à faire, qu'aucun militaire n'est entré sur la propriété de Giroux durant les manœuvres, je ne verrais pas d'autre conclusion à tirer qu'un "thunderflash" a été jeté sur sa propriété.

Je crois que le fait d'avoir laissé dans un champ utilisé pour des manœuvres militaires un explosif constitue une négligence de la part des officiers qui avaient la direction de ces manœuvres. Ceux-ci auraient dû rapporter au quartier-maître les "thunderflashes" qui n'avaient pas été utilisés ou qui n'avaient pas explosé. De son côté, le quartier-maître aurait dû exiger des officiers à qui il avait confié des explosifs qu'ils rendent compte de l'usage qu'ils en avaient fait et qu'ils remettent ceux qui n'avaient pas été employés. En outre des officiers prudents auraient dû faire ou faire faire des recherches sur le terrain des manœuvres pour vérifier s'il y restait des "thunderflashes" non éclatés. Rien de cela n'a été fait. Ces omissions de la part des officiers et du quartier-maître, tous serviteurs de la Couronne aux termes de l'article 50A de la Loi de la Cour de l'Echiquier, entraînent, à mon avis, la respon-

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sabilité de l'intimé. Voir *Savatier, Traité de la Responsabilité Civile,* tome I, nos 45, 173 et 354; *J. Charlesworth, Liability for Dangerous Things,* pp. 172 et seq.; *Salmond, Law of Torts,* 9e éd., pp. 546 et seq.; *Sullivan* v. *Creed* (1); *Germain* v. *Canadian National Railways Company* (2); *Dalloz Périodique,* 1905, 3, 48; *Jur.-Cl. Civ., Délits et Quasi-Délits,* articles 1382, 1383, 1ère p., 12e cahier, p. 7, n° 1328.

Dans les notes du juge Gibson in re *Sullivan* v. *Creed,* on trouve, à la page 325 du rapport, les observations suivantes qui me semblent au point:

> Our decision depends on the answer to the question, was the misfortune the direct consequence of a danger which a prudent man ought to have perceived? It is immaterial that the specific mischief was not actually foreseen. The possessor of a dangerous article is bound to exercise diligence for the protection of those likely to be injured by a probable use of such article. Thus, there is actionable liability where the vendor of a dangerous commodity, without warning, sells it to a purchaser presumably unaware of such danger: *Clarke* v. *Army and Navy Co-operative Society, Limited* (1903, 1 K.B. 155); where a master entrusts to a young and unfit messenger a gun negligently left loaded which it was his duty to have made safe: *Dixon* v. *Bell* (5 M. & S. 198) . . . .; where a railway company omits to guard against the known risk arising from boys being in the habit of trespassing on a particular part of their line: *M'Dowall* v. *Great Western Railway* (1902, 1 K.B. 618); where a schoolmaster, being in the position of father towards his boys, leaves an explosive in a conservatory to which his pupils have access: *Williams'* Case (10 Times L.R. 41); where a person leaves a dangerous thing in a place where he ought to know it is likely to be set in motion, or used (even without authority) to the injury of anyone: *Lynch* v. *Nurdin* (1 Q.B.D. at p. 35); *Clark* v. *Chambers* (3 Q.B.D. at p. 339).

Ce n'est pas la première fois malheureusement qu'un pareil accident se produit. J'ai eu à juger un cas à peu près semblable dans une cause de *Martial St-Jacques* v. *Sa Majesté le Roi* (n° 19985) non rapportée, où des officiers avaient laissé sur un champ de manœuvres cinq "thunderflashes". L'un de ces explosifs, trouvé par un fermier de 24 ans sur une terre où il était à faire la récolte du foin, laquelle terre avait précédemment servi pour des manœuvres militaires, et allumé par lui, a produit une explosion plus violente qu'il ne le prévoyait et lui a mutilé la main droite au point de nécessiter l'amputation de l'index au complet et d'une partie du pouce, du majeur et de l'an-

(1) [1904] 2 Irish Rep. 317. (2) [1943] C.S. 226.

nulaire. J'ai cru devoir dans ce cas décider qu'il y avait faute commune et imputer deux-tiers de la responsabilité au pétitionnaire et un tiers à l'intimé.

J'ai déjà dit que la preuve révélait clairement que le "thunderflash" qui a causé l'accident a été ramassé par Guy Bouchard et Marcel Dubeau sur la terre de Giroux. La prétention de l'intimé qu'il aurait été trouvé sur le terrain de golf n'est pas appuyée par la preuve et ne me paraît pas soutenable.

Le procureur de l'intimé a plaidé qu'il ne peut y avoir de présomption de faute contre la Couronne. J'avouerai que je ne suis pas prêt à adopter cette opinion. Le point cependant ne me paraît avoir aucune importance en l'espèce étant donné qu'aucune présomption de faute n'existe. La présomption ne pourrait être basée que sur les dispositions suivantes de l'article 1054 du Code Civil:

> Elle (toute personne capable de discerner le bien du mal) est responsable non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé par la faute de ceux dont elle a le contrôle, et par les choses qu'elle a sous sa garde.
>
> .....
>
> La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage.

L'article 1054 vise, quant à ce qui concerne le dommage causé par les choses qu'une personne a sous sa garde, le dommage résultant du fait autonome de la chose, sans intervention de qui que ce soit.

Voir dans ce sens:

Curley v. *Latreille* (1). Le juge Anglin, à la page 140 du rapport, expose ainsi la doctrine relative au dommage causé par les choses:

> Responsibility for damage caused by a thing which he has under his care (Art. 1054 C.C. par. 1) arises only when the occurrence is due to the thing itself, not when it is ascribable to the conduct of the person by whom it is put in motion, controlled or directed, D. 1918, 2. 7; D. 1912, 2. 255. See, too, D. 1907, 2. 17.

La Compagnie des Tramways de Montréal et Dame Lapointe (2). A la page 375 le juge Lamothe, juge en chef de la Cour du Banc du Roi, exprime la même opinion:

> Nous croyons que ni l'art. 1054 C. civ., ni le jugement du Conseil privé re *Vandry* (1920, 26 R.L. n.s., 244; 1920, A.C. 662) ne peuvent s'interpréter dans le sens voulu par la demanderesse-intimée. Il y a des

(1) [1919] 60 S.C.R. 131. (2) [1921] R.J.Q. 31 B.R. 374.

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distinctions à faire. Lorsqu'une chose inanimée participe à un accident par suite du fait qu'elle est entre les mains d'une personne qui s'en sert imprudemment, on ne peut dire que cet accident est dû à la chose inanimée; il est dû à la négligence humaine. La chose inanimée a joué, pour ainsi dire, le rôle d'un instrument dans les mains de cette personne. Si, au contraire, l'accident est dû à un vice de la chose même, l'art. 1054 s'applique; il s'applique aussi lorsque le dommage est causé par la 'chose' elle-même, sans aucune intervention extérieure.

Voir aussi les notes du juge Greenshields au bas de la page 378.

Dame Collier v. *Montreal Tramways Company* (1).

Montreal Tramways Company and Frontenac Breweries (2). Le juge Martin adopte l'opinion émise par le juge Anglin dans la cause de *Curley* v. *Latreille* précitée (p. 161):

> Responsibility for damage caused by a thing which a person has under his care arises only when the occurrence is due to the thing itself, not when it is ascribable to the conduct of the person by whom it is put in motion, controlled or directed (D. 1907-2-17; D. 1912-2-255; D. 1918-2-7; Anglin, J., 60 Supr. C. Rep. p. 140).
>
> The accident here was not caused by the inanimate thing alone but by the fact that such inanimate thing was being manipulated by human agency. This Court has had occasion to consider and pronounce on this point on several occasions recently, notably in the case of *Montreal Tramway* v. *Lapointe* and *News Pulp & Paper Co.* v. *McMillan.*

Fortin v. *Montreal Tramways Company* (3).

Il me semble évident que le "thunderflash" qui a blessé le fils du pétitionnaire n'aurait pas explosé s'il n'eût pas été manié par lui. Il y aura lieu de déterminer si le maniement de cet explosif par le fils du pétitionnaire peut être considéré comme ayant constitué une négligence de sa part.

Forrester v. *Handfield* (4).

Voir *Josserand, Cours de Droit Civil,* tome 2, n° 540.

Comme je l'ai dit, les omissions susmentionnées de la part des officiers et du quartier-maître qui ont eu à s'occuper des manœuvres militaires exécutées dans la nuit du 10 au 11 octobre 1942 sur l'ancien terrain du club de golf Kent et une partie de la terre de F.-X. Giroux constituent une négligence de la part d'employés ou serviteurs de la Couronne dans l'exercice de leurs fonctions ou

(1) [1921] 27 R.L. n.s. 117.
(2) [1922] R.J.Q. 33 B.R. 160.
(3) [1918] R.J.Q. 54 C.S. 428, 432.
(4) [1944] R.L. 260.

de leur emploi. Le cas qui nous occupe est régi par le sous-paragraphe (*c*) du paragraphe 1 de l'article 19 et par l'article 50A de la Loi de la Cour de l'Echiquier.

La partie pertinente de l'article 19 se lit comme suit:

19. La cour de l'Echiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi;

L'article 50A est ainsi conçu:

50A. Aux fins de déterminer la responsabilité dans toute action ou autre procédure intentée par ou contre Sa Majesté, une personne qui, en tout temps depuis le vingt-quatrième jour de juin mil neuf cent trente-huit, était membre des forces navales, militaires ou aériennes de Sa Majesté pour le compte du Canada, est censée avoir été à cette époque un serviteur de la Couronne.

Je suis d'opinion par ailleurs que Gaston Laperrière, le fils du pétitionnaire, a lui-même été partiellement responsable de l'accident. C'est un enfant intelligent qui savait que la poudre est une matière inflammable, explosive et dangereuse et qui, désireux, comme il le dit, de faire un feu d'artifice, a, avec son ami Marcel Dubeau, décidé de mettre le feu à ce qui restait du "thunderflash" et de le faire éclater. Le pauvre enfant ne savait pas évidemment qu'il y avait dans le "thunderflash" une quantité de poudre aussi considérable que celle qui s'y trouvait encore et il ne prévoyait pas qu'une explosion si violente se produirait.

La responsabilité de l'enfant pour négligence a été discutée, entre autres, par Savatier dans son Traité de la Responsabilité Civile et par H. et L. Mazeaud dans leur Traité Théorique et Pratique de la Responsabilité Civile, Délictuelle et Contractuelle.

Savatier, au tome I de l'œuvre précitée, dit, entre autres, ce qui suit:

199. *Critère de la responsabilité ou de l'irresponsabilité.*—La minorité n'est pas, en soi, une impossibilité de prévoir et d'éviter l'acte illicite, donc une cause d'irresponsabilité; il en est ainsi même pour l'impubère, dont les tribunaux ont à rechercher s'il avait l'intelligence assez développée pour comprendre, sinon la malice, au moins l'imprudence de son acte...

200. *Conséquences de la responsabilité ou de l'irresponsabilité.*—Lorsque l'enfant était hors d'état, à raison du développement insuffisant de ses facultés, de prévoir et d'éviter l'acte illicite, son activité ne peut

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être considérée, à son propre égard, que comme un cas fortuit. Non seulement il n'est tenu alors à aucune responsabilité pour le dommage créé par lui, mais encore, il a le droit de réclamer la réparation du dommage subi par lui, du fait de la faute d'une autre personne ou d'une chose dont une autre personne devait répondre. Et cette réparation doit être alors intégrale.

Quand, au contraire, une faute est retenue à la charge de l'enfant, il doit être condamné à la réparer, et cette condamnation, exécutoire sur ses biens, peut être prononcée ès-qualité contre son tuteur ou son administrateur légal. Il ne peut lui-même demander réparation, tout au moins intégrale, du dommage que sa faute entraîne pour lui.

Souvent d'ailleurs, la faute de l'enfant victime d'un accident se combine avec celle de l'auteur de cet accident, ce qui entraîne une responsabilité partagée.

Que l'enfant ait été, ou non, conscient de l'acte illicite accompli par lui, une responsabilité peut soit coexister avec la sienne, soit s'y substituer, en la personne de ceux qui avaient la charge de le surveiller. Cette responsabilité peut, selon les cas, être présumée, ou, au contraire, rester à prouver par la victime du dommage subi par l'enfant.

Plus loin, dans le chapitre IV (titre II, livre II), intitulé "Les moyens de défense et de recours du gardien chargé des risques de la chose", Savatier exprime l'opinion suivante:

393. *L'acte d'imprudence d'un enfant.*—Il se peut que la victime soit un enfant ayant commis un acte objectivement imprudent, mais que son âge rendait incapable d'avoir conscience de cette imprudence. En ce cas, l'enfant lui-même ne peut encourir aucune responsabilité (V. *supra*, n° 200) fondée sur une faute. Il n'y a place que pour celle qui dérive du risque de la chose dommageable; l'article 1382 ne peut alors corriger chez la victime l'application de l'article 1384.

Cependant, une autre faute est susceptible d'exister: celle des parents ou gardiens de l'enfant. Si c'est l'enfant qui est demandeur en responsabilité, cette faute doit être considérée comme la faute d'un tiers (V. *supra*, n° 252). C'est donc dans la section suivante que les conséquences en seront examinées.

Mais si, l'enfant étant mort, les parents intentent *en leur nom* l'action en responsabilité, et se présentent ainsi comme victimes du dommage, leur faute doit normalement produire les résultats rationnels de toute faute établie à la charge de la victime: ils ne pourront, croyons-nous, agir contre le gardien de la chose dommageable qu'en établissant la faute de ce dernier. La question est exactement celle que nous avons examinée aux numéros précédents.

On ne peut dire que la jurisprudence ait, sur ce point particulier, nettement pris parti. Si plusieurs décisions ont exonéré, en cas de poursuite des parents en faute, l'automobiliste auteur de l'accident, et à la charge duquel aucune faute n'avait pu être prouvée, d'autres ont paru permettre aux parents de le poursuivre, mais dans des termes qui semblaient en général impliquer, à la charge de l'automobiliste, une faute établie.

Nous ne reviendrons pas ici sur la question de savoir si, et quand, le fait de l'enfant actionnant une chose dommageable, ou se jetant devant une automobile, peut être considéré, indépendamment de toute faute,

comme un cas de force majeure. Comme il s'agit d'un fait extérieur à la chose dommageable, ce point doit s'apprécier de la même manière que pour l'article 1382 (V. *supra*, n° 189).

Voir dans l'œuvre de H. et L. Mazeaud précité, au tome 2, le paragraphe 1468 et la note sous ce paragraphe, et particulièrement, dans cette note, le paragraphe (4).

Voir aussi *Sourdat, Traité Général de la Responsabilité*, tome I, n° 17; *Demolombe, Cours de Droit Civil*, tome 31, n^{os} 494 et 495; *Baudry-Lacantinerie & Barde, Traité de Droit Civil*, tome 15, n° 2864; *Planiol et Ripert, Traité Pratique de Droit Civil*, tome 6, n° 497.

Il me semble à propos de citer un extrait du paragraphe 2864 du traité de *Baudry-Lacantinerie & Barde* auquel il est ci-dessus référé:

2864. Le mineur qui accomplit sans discernement un acte illicite, n'est pas responsable. Qu'elle provienne de l'âge ou de la démence, l'absence de tout discernement exclut l'imputabilité. Mais la minorité n'est pas, par elle-même, une cause d'irresponsabilité: 'Il (le mineur) n'est point restituable contre les obligations résultant de son délit ou quasi-délit', dit l'art. 1310. Il faut examiner si, en fait, l'intelligence du mineur était suffisamment développée pour qu'il pût comprendre ce qu'il faisait: 'On ne peut, disait Pothier, précisément définir l'âge auquel les hommes ont l'usage de la raison, et sont, par conséquent, capables de malignité, les uns l'ayant plus tôt que les autres; cela doit s'estimer par les circonstances...' (*Oblig.*, n. 118, al. 3, édit. Dupin, I, p 63). Le mineur, nonobstant son âge, est pécuniairement responsable s'il a pu se rendre compte de la portée de son acte (Bordeaux, 31 mars 1852, P., 53. 1. 284, D.P., 54. 5. 656, et *Répert. alph.*, v° *Resp.*, n. 140; 23 janv. 1905, S., 1905. 2. 188)... Les règles posées dans les art. 66 et 67 C. pén. ne peuvent pas être étendues au droit civil. Aussi, par exemple, un enfant âgé de dix ans seulement, mais ayant agi avec discernement, a-t-il été déclaré pécuniairement responsable de la blessure causée à un de ses camarades par un morceau d'ardoise qu'il avait lancé en l'air dans la cour de la pension où les élèves se trouvaient réunis (Nancy, 26 mai 1888, joint à Civ. cass., 13 janv. 1890, S., 91. 1. 49, D.P., 90. 1. 145). Les tribunaux doivent donc, suivant les espèces, prononcer ou écarter la responsabilité.

Nonobstant le silence des avocats sur ce point, je crois bon de noter que la question de la responsabilité des enfants, dans le cas de quasi-délit, a fait le sujet de plusieurs arrêts des cours de la province de Québec. Il a généralement été reconnu qu'un enfant n'ayant pas atteint l'âge de discernement, autrement dit âge de raison, ne peut être tenu responsable de ses actes de négligence ou d'imprudence. Passé l'âge de sept ans l'enfant est, dans la

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plupart des cas, déclaré responsable de tels actes. Je crois opportun de passer brièvement en revue les principales décisions traitant du sujet.

Dans la cause de *Rowland* v. *La Corporation de la paroisse de Rawdon et autres* (1), la question en litige offre beaucoup de similitude avec celle qui nous occupe. Les faits dans cette cause étaient les suivants. La corporation défenderesse ayant entrepris la réfection d'un chemin il devint nécessaire d'employer de la dynamite. La corporation confia la charge de cette opération au défendeur King. Celui-ci faisait généralement, à l'aide d'un foret, un trou dans le roc qu'il remplissait de dynamite. Il installait dans le trou un détonateur qu'il mettait en contact avec la dynamite et recouvrait d'une pierre et de gravier, laissant à découvert un bout de la mèche pour pouvoir l'allumer. Il procédait de cette façon à trois ou quatre endroits simultanément. Pendant cette opération personne n'avertissait le public ni ne l'empêchait de circuler. Après avoir installé tous ses détonateurs il donnait ordre à ses subalternes d'arrêter la circulation, il allumait la mèche d'un détonateur, courait vers le second et l'allumait et ainsi de suite jusqu'au dernier, allant alors se mettre à l'abri et ne revenant sur les lieux qu'après l'explosion de la dernière charge.

Le jour de l'accident, King avait préparé trois ou quatre charges. En passant de la première à la seconde il rencontra le jeune Fred. Allan Rowland et son frère, fils du demandeur, causa avec eux et continua sa route pour préparer sa deuxième charge et les suivantes. Les deux jeunes garçons continuèrent leur route vers la première charge. Quand King fut prêt à allumer ses mèches il donna le signal habituel pour arrêter la circulation. Il alluma la première mèche, courant à la seconde et l'alluma, courut à la troisième mais s'aperçut que le détonateur et la mèche avaient disparu. Il chercha un peu mais alla se mettre à l'abri, vu que deux mèches étaient allumées. Après les deux explosions il revint vers la troisième charge, chercha de nouveau mais ne trouvant pas le détonateur il en installa un autre et rapporta au contremaître qu'un détonateur était disparu.

(1) [1939] R.J.Q. 77 C.S. 477.

Le rapport révèle qu'interrogé au sujet des personnes qui venaient de passer à cet endroit King a déclaré qu'outre les deux fils du demandeur deux jeunes filles et un jeune garçon étaient aussi passés mais qu'il n'avait pas soupçonné que les fils du demandeur avaient pris le détonateur, vu qu'ils passaient à cet endroit tous les jours et que les travaux de dynamitage étaient en cours depuis deux ou trois mois, admettant cependant qu'il ne pouvait jurer que l'idée ne lui était pas venue que c'était les fils du demandeur qui s'étaient emparé du détonateur.

Le rapport fait voir en outre que King ne tenta pas de rejoindre les fils du demandeur qui venaient de passer, que personne n'était chargé de surveiller les détonateurs et que le public pouvait circuler librement.

Le jeune Rowland, voyant le bout de la mèche, la prit, la mit dans sa poche, l'en sortit à plusieurs reprises même devant son père, l'apporta chez lui, tenta de l'allumer avec une allumette mais sans succès, alla ensuite derrière la maison et l'alluma avec un feu de papier, croyant que cela ferait l'effet d'une pièce pyrotechnique; l'explosion se produisit et lui causa des blessures aux mains et à l'œil, lesquelles font la base de l'action.

L'honorable juge Archambault, après s'être demandé si en face de ces faits la corporation défenderesse et King devaient être tenus responsables et avoir déclaré qu'il est évident que King, préposé de la corporation défenderesse, aurait dû savoir qu'il était dangereux de laisser sans surveillance des explosifs à un endroit où le public et surtout des enfants circulaient librement, émet l'opinion suivante (p. 479):

> La loi impose un devoir de surveillance à ceux qui ont sous leur contrôle des choses qui peuvent devenir une menace et un danger pour le public et l'omission de ce devoir constitue une négligence. Dans l'espèce, non seulement le défendeur King a commis une négligence répréhensible et grossière en ne surveillant pas ces explosifs, en permettant au public de circuler sans l'avertir du danger, mais il en a commis une autre en ne faisant pas une enquête plus approfondie pour retrouver le détonateur et surtout en ne rejoignant pas les deux fils du demandeur qu'il soupçonnait. Il est certain que s'il avait fait cette démarche, l'accident n'aurait pas eu lieu; d'autant plus que ces détonateurs sont très dangereux, ils peuvent faire explosion non seulement en allumant la mèche, mais aussi en les heurtant légèrement contre un objet solide (témoignage de Tomkinson).
>
> Le défendeur King est responsable en vertu de l'article 1053 C.C. à cause de sa négligence et imprudence, et en vertu de 1054 C.C. parce que

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le dommage a été causé par un objet inanimé sous son contrôle. Le seul moyen pour lui de repousser la présomption de faute en vertu de l'art. 1054 aurait été de démontrer soit que la cause de l'accident était un cas fortuit, ou qu'il lui était absolument impossible de l'empêcher. Il n'a pas même tenté de faire cette preuve.

Je dois dire avec déférence que je ne crois pas que la presomption créée par l'article 1054 C. C. s'appliquait dans cette cause pas plus qu'elle ne s'applique dans la présente, parce que l'explosion dans l'un et l'autre cas n'est pas due au fait autonome de la chose mais a été provoquée par l'intervention d'un enfant.

Dans la cause de *Cutnam* v. *Léveillé* (1), à laquelle le juge Archambault fait allusion, il a été décidé par l'honorable juge Belleau (p. 84):

1. Commet une faute personnelle grave, des conséquences de laquelle il doit répondre, celui qui, ayant la garde d'explosifs, néglige de les tenir hors de l'atteinte de personnes étrangères et irresponsables (art. 1053 C.C.).

2. Le père, gardien desdits explosifs, est responsable du dommage causé à un tiers par son fils mineur, au moyen desdits explosifs (art. 1054 C.C.).

En Cour du Banc du Roi le jugement de la Cour Supérieure a été confirmé sur la question de responsabilité. Il n'a été modifié que relativement au montant des dommages. La Cour Supérieure avait accordé la somme de $300 et la Cour d'Appel a porté ce montant à $1,078.

Le juge Archambault, dans la cause de *Rowland* v. *La Corporation de la paroisse de Rawdon et autres,* dit (p. 480) qu'un jugement basé sur des circonstances identiques a été rendu le 2 mai 1933 par le juge McDougall dans une cause de *Plante* v. *La Cité de Montréal,* portant le numéro 75,238 des dossiers de la Cour Supérieure de Montréal, lequel apparemment n'a pas été rapporté. Le juge Archambault déclare qu'il s'agissait d'une réclamation en dommages pour blessures causées à un enfant de 14 ans par un détonateur que celui-ci avait ramassé, qu'il avait allumé et qui avait fait explosion. L'enfant avait trouvé ce détonateur sur le sol à un endroit où la cité de Montréal faisait des opérations de minage. Le juge Archambault cite l'un des considérants du jugement du juge McDougall, qui se lit comme suit (p. 481):

The plaintiff has clearly proven the accident to his minor son and has shown that it directly resulted from the explosion of the detonator which he had picked up at the site of the works, formerly carried on by

(1) [1931] 37 R.L. n.s. 84.

the defendant. It is evident that the defendant was aware or cannot be absolved from the knowledge that there was danger in leaving any of these explosives where they could be a menace to passersby, particularly since it has been shown that the spot where they were found is a public place, open to pedestrians and where children are accustomed to play without hindrance. The law imposes a duty of carefulness upon those who have the control and management of articles which are or may be dangerous to human life or limb. Omission on the part of the defendant to fulfill such duty must, in law, be regarded as constituting negligence.

Le juge Archambault réfère ensuite à une décision de la Cour Suprême dans une cause de *Makins* v. *Piggott & Inglis* (1) et déclare que cette cour, en vertu du même principe, a tenu le propriétaire d'un bâton de dynamite responsable d'un accident survenu à un enfant de 15 ans qui l'avait ramassé et fait éclater en le frottant simplement.

Il me semble opportun de citer le jugé (p. 188):

Work on the construction of a railway was going on near the unused part of a public cemetery in connection with which were used detonating caps containing fulminate. M, a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place the workmen would hurriedly place any explosives they might have in their possession under their tool box, and then run away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require.

Held, reversing the judgment of the Court of Appeal, that in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shown to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M. in exploding the cap as he did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser, was also a question for the jury, who did not pass upon it.

Dans la cause de *Rowland* v. *La Corporation de la paroisse de Rawdon et autres,* le juge Archambault a tenu les défendeurs conjointement et solidairement responsables de l'accident survenu au jeune Rowland dans la proportion de 75 pour cent.

(1) [1898] 29 R.C.S. 188.

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Dans une cause de *Lambert* v. *Canadian Pacific Railway Company* (1), où il s'agissait d'un accident survenu à un enfant de 8 ans, l'honorable juge Fortier a condamné la défenderesse à payer au demandeur en sa qualité de tuteur à son fils mineur, victime de l'accident, les deux-tiers du montant des dommages, mettant l'autre tiers à la charge du demandeur vu la négligence de son enfant mineur.

Le jugé dans cette cause est ainsi conçu:

Les compagnies de Chemin de Fer, en vertu d'une ordonnance passée par la Commission des Chemins de Fer, en 1909, ont le droit, pendant l'hiver, d'enlever le madrier ou la planche voisine de chaque rail, à l'intérieur du rail, s'il s'agit d'une traverse de chemin public, et toutes les planches ou madriers lorsqu'il s'agit d'une traverse de ferme. Et la compagnie de Chemin de Fer sera responsable d'un accident arrivé à cause du fait qu'elle aura enlevé toutes les planches ou madriers à l'endroit d'une traverse de chemin public. Mais le fait pour un enfant de 8 ans de glisser dans une rue aboutissant à une traverse de chemin de fer, dans un tel état défectueux, à la connaissance de ses parents, sans être un acte illégal en soi, ni une contravention à un règlement de l'autorité ou une défense expresse de la Compagnie de Chemin de Fer, est un amusement périlleux pour un enfant de cet âge, constitue une faute commune, laquelle n'étant pas seule à causer l'accident, sans dégager la responsabilité de la Commission des Chemins de Fer, contribue cependant au partage de cette responsabilité.

Dans une cause de *Morin* v. *Lacasse* (2), il a été jugé par l'honorable juge Albert de Lorimier ce qui suit:

Lorsqu'un enfant de sept ans traverse une rue ailleurs qu'à l'endroit de passage pour les piétons, ce fait constitue une faute aux termes d'un règlement de la Cité de Montréal. Un automobiliste poursuivi pour avoir blessé l'enfant dans ces circonstances peut bénéficier de la règle de la faute commune et faire supporter une partie du dommage éprouvé par le père de l'enfant pour n'avoir pas exercé une surveillance convenable sur cet enfant.

Dans une cause de *Burke* v. *Provencher* (3), concernant une réclamation pour dommages-intérêts réclamés par le père d'un enfant âgé de huit ans à la suite d'un accident survenu à celui-ci, l'honorable juge Boyer a trouvé faute commune de la part du défendeur et de celle de l'enfant du demandeur, mais n'en a pas fixé la proportion. Peut-être y a-t-il lieu de reproduire le jugé:

Commet une faute le conducteur d'un automobile qui, non seulement excède la vitesse permise, mais néglige d'arrêter lorsqu'il le pouvait encore, alors qu'un enfant de huit ans apparaît devant lui.

(1) [1932] 38 R. de J. 196.
(2) [1931] R.J.Q. 69 C.S. 280.
(3) [1929] R.J.Q. 67 C.S. 500.

L'enfant victime de l'accident est aussi en faute lorsqu'il traverse une rue en faisant irruption derrière un tramway sans s'assurer qu'il peut le faire sans danger, mais vu son âge la faute doit peser plus légèrement sur lui.

Dans une cause de *Desroches* v. *St-Jean* (1), la Cour du Banc du Roi a jugé que le fait qu'un enfant se précipite pour traverser une rue, en débouchant derrière une voiture qui obstruait la vue d'un automobiliste, ne constitue pas un cas fortuit et que la preuve de ce fait ne libère pas le conducteur de l'automobile de la présomption de faute créée par la Loi des Véhicules-Moteurs, surtout s'il conduisait à une vitesse illégale. La cour a en outre décidé que quoiqu'on ne puisse attendre d'un enfant de 9 ans le discernement et la prudence d'un adulte, au cas de faute de sa part, il sera responsable de l'accident dont il est victime mais dans une proportion moindre que celle d'un adulte. La Cour du Banc du Roi a jugé à propos de lui imputer un quart de la responsabilité et réduit en conséquence le montant accordé par la Cour Supérieure.

Dans une cause de *Normand ès-qual.* v. *The Hull Electric Company* (2), où il s'agissait d'un accident survenu au fils du demandeur, âgé de dix ans et demi, résultant du fait qu'il avait voulu monter sur un tramway en mouvement, la Cour de Revision, modifiant le jugement de la Cour Supérieure quant au montant des dommages, vu son opinion qu'il y avait eu négligence de la part de l'enfant du demandeur, a décidé ce qui suit:

Held:—A boy of eleven years of age and of sufficient intelligence, in the estimation of the Court, to understand the probable consequence of his actions, is liable for contributory negligence in the case of an accident, while attempting to board a tramway car as a trespasser and in disobedience to orders of the school-masters in charge of him.

Dans une cause de *Figiel* v. *Hoolahan et al.* (3), relative à un accident dans lequel le fils du demandeur, âgé de 10 ans, avait été blessé par une automobile en traversant une ruelle à l'arrière de la résidence de ses parents, le jugé dit, entre autres:

A person driving an automobile through a lane in a residential district beside which is a vacant lot where children are accustomed to play and at an hour when children are out must be on his guard against children suddenly crossing the lane and should have his automobile

(1) [1928] R.J.Q. 44 B.R. 562. (2) [1909] R.J.Q. 35 C.S. 329.
(3) [1939] R.J.Q. 78 C.S. 179.

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under sufficient control to be able to stop almost instantly if a child runs out. The sudden appearance of the victim in front of the automobile was something which should have been expected.

There was fault on the part of the victim of the accident in that he stepped from the vacant lot into a paved lane practically in front of the automobile without looking to his left to see whether any traffic was coming and as he was ten years old he had attained a sufficient degree of intelligence so that he could have some appreciation of the danger to which he was exposing himself.

L'honorable juge Mackinnon a condamné les défendeurs conjointement et solidairement à payer au demandeur en sa qualité de tuteur à son enfant mineur les trois-quarts du montant des dommages établi par la preuve.

Dans une cause de *Marquis* v. *Prévost et al.* (1), l'honorable juge Rhéaume a décidé qu'un enfant de 9 ans qui s'engage à la course dans l'intersection de deux ruelles, sans se soucier de la circulation, commet une faute contribuant dans une large mesure à l'accident dont il est victime; le juge a imputé 40 pour cent de la responsabilité à l'enfant et 60 pour cent aux défendeurs.

Dans une cause de *Légaré ès-qual.* v. *Quebec Power Company* (2), où il s'agissait d'une réclamation pour dommages-intérêts par le père d'un enfant de 13 ans blessé par un courant électrique provenant de fils appartenant à la défenderesse, rompus et tombés sur la voie publique, que l'enfant a touchés, bien qu'il eût été conseillé de ne pas le faire, l'honorable juge Marchand a décidé qu'il y avait faute commune et imputé à l'enfant 75 pour cent de la responsabilité.

Dans une cause de *Lauzon* v. *Lehouiller* (3), l'honorable juge Bond a décidé que, pour déterminer la proportion dans laquelle un enfant victime d'un accident doit en supporter les conséquences, il y a lieu de tenir compte de l'âge de l'enfant et de faire supporter à un enfant de huit ans une part de responsabilité moindre que celle qui devrait être imputée à un enfant plus âgé.

Il s'agissait en cette cause d'une réclamation pour dommages-intérêts par le père d'un enfant de huit ans, frappé par une automobile conduite à une vitesse excessive, alors qu'appréciant mal l'allure de la voiture, à une cinquantaine de pieds de distance et croyant avoir le temps nécessaire, l'enfant traversait la rue.

(1) [1939] 45 R. de J. 494. (2) [1939] R.J.Q. 77 C.S. 552.
(3) [1944] R.L. 449.

Relativement à la négligence du conducteur de l'automobile, le juge Bond dit (p. 451):

The Defendant at the time was travelling at a prohibited speed. The Motor Vehicles Act, Section 41, provides that the following is specially forbidden:

(*d*) A speed in excess of twenty miles per hour on winding mountain roads, in curves, in commercial districts, in front of schools, at intersections and at level railway crossings.

In the present instance, not only was he driving at a prohibited speed but the speed itself was directly connected with the unfortunate result. Had he kept within the speed limit prescribed in the school zone, he would have been able to stop his car or bring it under control when he saw this boy attempting to cross the road in front of him; in fact, the boy would have had time to cross if the car had been going at twenty miles instead of twice that speed. At twenty miles per hour, the automobile could have been stopped in forty feet (according to the tables contained in *Meredith "Civil Law On Automobile Accidents"*), and the boy was fifty feet away when the Defendant saw him start to cross. At forty miles per hour, according to the same tables, it would take one hundred and fifteen feet to stop.

Traitant ensuite la question de faute commune le savant juge, après avoir commenté brièvement les décisions dans les causes de *Champagne* v. *La Compagnie des Chars Urbains de Montréal* (1) et de *Desroches* v. *St-Jean* (précitée), conclut qu'il y a lieu d'imputer 75 pour cent de la responsabilité au défendeur.

De son côté le juge Chase-Casgrain, dans la cause de *Moisan* v. *Rossini* (2), a décidé qu'une enfant de 5 ans ne peut être tenue responsable de négligence. L'enfant avait traversé une ruelle située en arrière de la maison de ses parents et, sans regarder, était allée se jeter sur l'aile gauche de l'automobile du défendeur. Elle fut projetée par terre, perdit connaissance comme résultat de la commotion cérébrale subie et dut être transportée à l'hôpital.

Le juge, à la page 305 du rapport, déclare ce qui suit:

Evidemment qu'il ne peut être question de faute contributoire de la part de la petite Marthe Moisan, vu qu'elle n'était alors âgée que de cinq ans. En effet, il a été décidé par la Cour d'appel, dans la cause de *Delâge v. Délisle,* 10 B.R., 481, qu'un enfant en bas âge de sept ans ne peut être tenu responsable de négligence et qu'aucune faute ne peut lui être attribuée. Cette décision a été suivie par la même Cour, dans la cause de *Bernier v. Généreux,* 12 B.R., 24, et approuvée par la Cour suprême dans la cause de *Bouvier v. Fee,* 1932, S.C.R., 118. Il est vrai que la Cour d'appel dans la cause de *Desroches* v. *St-Jean,* 44 B.R., 562, a trouvé faute contributoire de la part d'un enfant, mais il s'agissait dans cette cause d'un enfant de neuf ans, que la preuve avait démontré

(1) [1909] R.J.Q. 35 C.S. 507. (2) [1935] 41 R.L. n.s. 300.

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avoir atteint un degré d'intelligence et de discernement suffisant pour pouvoir, jusqu'à un certain point, apprécier le danger auquel il s'exposait. Dans cette cause, cependant, il a aussi été décidé que le fait qu'un enfant se précipite en courant pour traverser une rue, en débouchant derrière une voiture qui obstruait la vue de l'automobiliste, ne constituait pas un cas fortuit.

Voir aussi dans le sens de la non-responsabilité d'un enfant de 7 ans ou moins *Beauchamp* v. *Cloran* (1); *Hoodelman* v. *Numeroff* (2); *Delâge* v. *Delisle* (3); où il s'agissait d'un enfant de 8 ans.

Dans la cause de *Germain* v. *Canadian National Railways Company* précitée, le demandeur, en sa qualité de tuteur à son fils mineur Denis, réclamait de la défenderesse des dommages-intérêts à raison d'un accident survenu à celui-ci sur un terrain appartenant à la défenderesse. En jouant le jeune Denis a trouvé une petite torpille agrippée à un rail du chemin de fer. Il a enlevé cet apareil qui contient un explosif, utilisé en cas d'urgence sur la voie principale comme signal d'arrêt; il s'est rendu chez lui avec la torpille et l'a montrée à sa mère et son grand-père qui ne savaient pas ce que c'était. Il a demandé à sa mère un marteau et il est allé sur la voie ferrée. Il a placé la torpille sur un des rails et frappé dessus avec son marteau. Une explosion s'est produite, lui occasionnant la perte d'un œil. Le demandeur tient la défenderesse responsable de l'accident parce qu'il aurait été causé par une chose dont elle avait la garde et par la négligence de ses préposés qui avaient laissé à la portée du public un objet dangereux. Il fait aussi valoir que la défenderesse est en faute pour n'avoir pas fermé l'accès de sa voie ferrée au public.

La défenderesse a plaidé que ses employés n'avaient pas commis de négligence et qu'aucune torpille n'avait été laissée par eux à l'endroit où elle a été trouvée; qu'elle n'était pas tenue d'avoir des clôtures; qu'elle interdisait au public de circuler dans ses cours et que ses employés avaient souvent l'occasion d'envoyer les enfants qui allaient y jouer; que l'endroit où la torpille aurait été ramassée était sa propriété et que l'accidenté s'y trouvait sans droit; que l'accident est dû à l'imprudence des parents de ce

(1) (1866) 11 L.C.J. 287. (2) [1936] R.J.Q. 74 C.S. 498.
(3) [1901] R.J.Q. 10 B.R. 481.

dernier qui permettaient à leur enfant d'aller jouer sur la propriété de la défenderesse, endroit de toute façon dangereux.

Selon le rapport, l'enquête a révélé que l'accident était survenu dans les circonstances relatées dans les actes de procédure, qu'entre chez le demandeur, ses voisins et la voie ferrée il n'y avait pas, depuis près de dix ans, de clôture, que le chef cantonnier a essayé plusieurs fois d'empêcher les gens de passer sur le terrain de la défenderesse mais que ceux-ci y reviennent toujours et qu'au commencement des vacances un constable demandait au curé de l'endroit de défendre aux enfants d'aller sur la propriété de la défenderesse et que celui-ci se rendait à cette demande.

L'honorable juge Laliberté déclare que le recours du demandeur, tel qu'exercé, est basé tant sur la responsabilité prévue à l'article 1053 C. C. que sur celle établie par l'article 1054 C. C. Il soutient qu'en droit ce recours n'est pas fondé sur la responsabilité découlant de l'article 1054, mais plutôt sur la responsabilité provenant de la faute des employés de la défenderesse dans l'exercice de leurs fonctions. Il dit qu'en effet, lors de l'accident, la garde juridique de la chose avait été soustraite à la défenderesse par la victime qui s'en était emparé sans consentement de son propriétaire. Il ajoute qu'une preuve positive ne révèle pas que ce sont les employés de la défenderesse qui avaient laissé la torpille à l'endroit où l'accidenté l'a ramassée, mais que, comme une preuve faite sans objection fait voir que la torpille a été trouvée agrippée à l'un des rails usagés entassés avec les autres près de la remise à outils, il y a une présomption que ce sont les employés des trains ou les cantonniers de la défenderesse qui ont omis de l'enlever. Il croit que, si cela constitue une faute dont la défenderesse peut être tenue responsable, il faut l'attribuer non à un passant, selon la prétention de la défenderesse, mais aux employés eux-mêmes de celle-ci dans l'exercice de leurs fonctions. Il cite à l'appui de son opinion la décision dans la cause de *Makins* v. *Piggott & Inglis* précitée.

Puis le juge fait les remarques suivantes (p. 228):

> En premier lieu, il faut apprécier si les employés de la défenderesse ont commis une faute en laissant cette torpille sur un rail qui est demeuré sur son terrain et si, vis-à-vis l'accidenté qui s'en est emparé chez la défenderesse, cette faute peut asseoir le présent recours.

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Si la torpille avait été laissée sur un chemin public, dans un lieu où tout le public était en droit de passer, cela ne ferait aucun doute, vu la nature dangereuse de l'objet spécialement pour un enfant qui n'avait pas encore 7 ans. Une longue jurisprudence est à cet effet. Deux jugements récents en ce sens ont été mentionnés par la demande. *Rowland v. Corporation de Rawdon* (1939, 77 C.S. 477); *Plante v. Cité de Montréal* (N° 75, 238 C.S. Montréal, E. M. McDougall J., 2 mai 1933).

Le savant juge fait ensuite observer qu'une difficulté surgit de ce que la torpille a été ramassée sur un terrain qui était la propriété de la défenderesse. Il signale que celle-ci invoque le jugement de la Cour d'Appel dans la cause de *Canadian National Railway Company* v. *Laterreur* (1), ainsi que les opinions et arrêts y commentés, pour conclure qu'à l'égard d'un *trespasser* la défenderesse n'a pu encourir de responsabilité. Il discute alors la question de violation de propriété (trespass), qui n'offre aucun intérêt dans la présente cause. Puis il continue ses observations ainsi (p. 230):

> Dans l'espèce, il était à la connaissance de la défenderesse que le public généralement passait constamment sur son terrain, que des enfants allaient y jouer, au point que le chef cantonnier Lamothe l'assimile dans son témoignage à une route nationale pour les piétons. Admettant qu'il n'y avait ni acquiescement ni tolérance de la part de la défenderesse, il n'en est pas moins certain que cet état de choses existait et était connu des employés de la défenderesse. Le sachant, n'ont-ils pas commis une faute, une imprudence grave en ne voyant pas à mettre hors de la portée de tous la torpille en question qui constituait un danger d'autant plus grand qu'il était caché? Les soins à apporter à la garde d'une chose ne doivent-ils pas être proportionnels à la gravité du danger qu'elle présente? Cette torpille, dans l'appréciation du soussigné, était de nature à attirer l'attention des enfants, à exciter leur curiosité et à les pousser à en faire un jouet.

Passant à la responsabilité de l'enfant, le juge déclare ce qui suit (p. 231):

> Maintenant, bien que ce point n'ait pas été soulevé spécialement le soussigné s'est demandé si la véritable cause de l'accident n'était pas le coup de marteau donné par l'enfant sur la torpille, savoir une faute attribuable à l'accidenté lui-même, malgré la négligence première des employés de la défenderesse dans la garde de la torpille. Il faut conclure négativement vu l'âge peu avancé de l'enfant et la preuve démontrant qu'il ne s'est pas rendu compte qu'il commettait une imprudence.

Je crois à propos de citer en outre la cause de *Yachuk v. Oliver Blais Company Limited et al.* (2), dans laquelle un garçon, alors âgé de 14 ans, et son père réclamaient des dommages pour blessures causées à l'enfant dans les circonstances ci-après relatées.

(1) [1941] 52 C.R.T.C. 223. (2) [1944] 3 D.L.R. 615; [1945] O.R. 18.

Deux frères, âgés respectivement de 9 et 7 ans, achetèrent de l'essence à un poste pour une valeur de 5c., déclarant faussement qu'ils en avaient besoin pour la voiture de leur mère en panne à quelque distance de là sur la rue. Le commis, un garçon de 15 ans, qui avait reçu instructions de ne pas vendre d'essence à moins de la mettre dans un récipient de sûreté, en vendit à ces deux jeunes garçons, la mit dans un seau que les garçons avaient apporté et ferma le seau avec son couvercle. De là les deux garçons se rendirent dans une ruelle; l'aîné trempa une quenouille dans l'essence, la remit à son frère et l'alluma; la quenouille, enflammée brusquement, lança des étincelles; le plus jeune des deux frères, effrayé, tenta de l'éteindre en l'écrasant avec ses pieds sur le sol; des étincelles volèrent et l'essence contenue dans le seau prit feu, qui se communiqua aux pantalons de l'aîné; celui-ci eut les jambes sérieusement brûlées.

L'honorable juge Urquhart, de la High Court of Justice d'Ontario, a trouvé faute commune de la part du propriétaire du poste d'essence et de celle de l'enfant et imputé 25% de la responsabilité aux défendeurs et 75% à la victime de l'accident.

Après en être arrivé à la conclusion que la défenderesse avait été coupable de négligence, le juge exprime l'opinion suivante (p. 632):

> The next question which must be asked is: Was the infant plaintiff guilty of negligence which caused or contributed to his injuries?
>
> I have little hesitation in finding that he was so negligent.
>
> The first point that should be considered is whether a boy of 9 yrs. and 1 month, as this boy was at the time, could be guilty at all of contributory negligence. I have examined a great many cases on this subject and my conclusion is that where the boy is an ordinary bright alert lad as this boy appears to be, and was shown to be at the time, there has been a sort of dividing line fixed at seven years. Under seven years unless there is extraordinary brightness in scarcely any case has a child been held guilty of contributory negligence.

Le juge Urquhart passe en revue quelques causes (*Winnipeg Electric Railway Company v. Wald* (1); *Downing v. G.T.R.* (2); *Bouvier v. Fee* (3); *Tabb v. G.T.R.* (4); *Potvin v. Canadian Pacific Railway Company*

(1) [1909] 41 S.C.R. 431.
(2) [1921] 58 D.L.R. 423; [1921] 49 O.L.R. 36.
(3) [1932] 2 D.L.R. 424; [1932] S.C.R. 118.
(4) [1904] 8 O.L.R. 203.

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(1); *Mayer* v. *Prince Albert* (2); *Mercer* v. *Gray* (3); *Adams* v. *Betts* (4)) et fait les remarques suivantes (p. 633):

Applying the principles laid down in the above cases to the facts and circumstances herein, I find that this boy is now a bright, intelligent boy. . . The accident, of course, occurred nearly 4 yrs. ago, but casting back my mind from the present I would say that when the plaintiff was 9 yrs. and 1 month old, he was a mentally alert, bright young fellow, standing well in the grades of his school and extremely intelligent, and I have no hesitation in finding that he would be quite capable of being guilty of contributory negligence in the abstract and also in respect of the handling of gasoline and gasoline fires. . . The plaintiff admitted that he had before the occurrence watched gasoline in his father's torch and had been with his father on a job or two, had seen his father lighting his torch and knew that there was gasoline in it, and had been told by his father to keep away from the torch. His father would not allow the children into the workshop. I have no doubt that the boy fully appreciated that gasoline was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner.

In lighting the bulrush as he did, in the proximity of a can of gasoline, the consequences of which I think he ought to have foreseen, he was guilty of negligence, and while it is true that the subsequent act of the brother in attempting to extinguish the bulrush by beating it on the ground actually touched off the gasoline in the can, really causing the accident, it was the negligence of the plaintiff that started the train of events which caused his injuries, after the two boys had the can of gasoline in the lane, and had got the bulrush and the matches, and, therefore, his negligence contributed materially to the accident.

Les deux parties ont appelé de ce jugement.

La Cour d'Appel a rejeté l'appel de la défenderesse et accueilli celui des demandeurs, déclarant que dans les circonstances révélées par la preuve elle ne pouvait conclure qu'il y avait eu négligence de la part de l'enfant (5).

Acceptant la fixation des dommages déterminée par le juge Urquhart, la Cour d'Appel a condamné la défenderesse à payer aux demandeurs la somme totale des dommages ainsi fixés.

Traitant de la responsabilité de la défenderesse, l'honorable juge McRuer, qui a rendu le jugement de la Cour, s'exprime ainsi (p. 29):

Applying the language of Lord Macnaghten (in re *Cooke* v. *Midland Great Western Railway of Ireland*, 1909, A.C. 229) to the facts of this case, I would put the question for consideration as follows: Would not a private individual of common sense and ordinary intelligence,

(1) [1904] 4 O.W.R. 511.
(2) [1926] 4 D.L.R. 1072; [1926] 21 S.L.R. 145.
(3) [1941] 3 D.L.R. 564; [1941] O.R. 127.
(4) [1936] 1 D.L.R. 182.
(5) [1945] O.R. 18.

placed in the position in which Black was placed, and possessing the knowledge which must be attributed to him, have seen that there was likelihood of some injury happening to these two small boys in whose hands he had placed a quantity of gasoline in a lard pail, and would he not have thought it his plain duty to refuse to deliver it to them under the circumstances?

Gasoline is a highly dangerous substance. It is not only very inflammable, but, in certain conditions, explosive. The vapours from it will ignite at some distance from the liquid itself. When a small quantity touches one's clothing, it makes the clothing inflammable. These facts are well known by the average adult, and ought to be known by anyone selling gasoline, and have a bearing on the duty of the defendant's servant, when putting such a substance into the hands of two boys, seven and nine years of age, under the circumstances of this case. These facts also have a bearing on what may be expected of children into whose hands there has been put a substance with such dangerous and tempting possibilities.

Passant à la question de la responsabilité de l'enfant, le juge McRuer émet l'opinion suivante (p. 30):

The learned trial judge finds that the infant plaintiff was of such an age that he could be guilty of contributory negligence "in the abstract", and also "in respect of the handling of gasoline and gasoline fires". He gives as his reason for this that he was a bright boy, standing well in the grades at school, and that he knew the danger of matches. He had watched his father operate a gasoline torch in his workshop and had been told to get away from the torch. . . .

With the greatest respect, I cannot agree with the learned trial judge in this finding. I do not think that the learned trial judge has applied the proper principles in finding the infant plaintiff guilty of contributory negligence. I am of the opinion that it is inconsistent with the finding that Black was negligent in supplying the gasoline to the infant plaintiff and his brother. If the infant plaintiff was a person who could be reasonably responsible for the use of gasoline, not only by himself but in company with his younger brother, there would have been no liability on the defendant. If, on the other hand, it was negligence on the part of the defendant to put gasoline in the hands of the two boys under the circumstances found by the learned trial judge, it cannot be an answer to say that the boys used the gasoline for a dangerous purpose under those circumstances and did thereby cause injury to one of them.

J'avouerai, avec toute la déférence voulue, que je n'aurais pas été enclin à exculper entièrement l'enfant de responsabilité, si par contre je n'aurais pas cru devoir lui en imputer 75%, comme l'avait fait la Cour de première instance.

Il y a lieu de conclure de ces multiples décisions que l'enfant, qui a atteint l'âge de discernement, généralement fixé à sept ans, doit être tenu responsable de ses actes de négligence et appelé à en supporter, seul ou conjointement avec d'autres selon le cas, les conséquences. Comme le dit

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Savatier (op. cit. n° 199), "la minorité n'est pas, en soi, une impossibilité de prévoir et d'éviter l'acte illicite, donc une cause d'irresponsabilité".

Gaston Laperrière est un enfant normal, sain d'esprit, d'une intelligence suffisamment développée et capable de comprendre, dans une certaine mesure, l'imprudence de son acte.

Je regrette de ne pouvoir écarter totalement la responsabilité de l'enfant, blessé par un explosif dangereux négligemment laissé sur le terrain de manœuvres par des officiers, membres des forces militaires de Sa Majesté pour le compte du Canada. Je considère le fait de laisser des explosifs sur les terrains de manœuvres comme une négligence grossière, d'autant plus grossière qu'elle est facilement évitable.

Gaston Laperrière prévoyait vraisemblablement une détonation, mais il ne s'attendait certainement pas à ce qu'elle fût aussi violente et lui causât des blessures. Il a malheureusement joué avec un objet dangereux et il en a subi les conséquences. Dans les circonstances, je crois qu'il y a lieu de le tenir partiellement responsable de l'accident, conjointement avec l'intimé. La doctrine de la faute commune, qui me paraît être la plus juste et la plus raisonnable dans le cas de réclamations pour dommages-intérêts provenant de quasi-délits, a toujours prévalu dans la province de Québec si, dans la plupart des autres provinces, la faute même légère de la victime de l'accident avait pour effet, jusqu'à tout récemment, d'exculper l'auteur du dommage, en fût-il responsable pour une plus large part que la victime. Sur cette question il y a lieu de consulter les arrêts suivants: *Price* v. *Roy* (1); *La Corporation de la paroisse Ste-Catherine et Orenstein* (2); *Luttrell v. Trottier et al.* (3); *Paquet v. Dufour* (4); *Lafrenière v. La Corporation de la paroisse de St-Ambroise de Kildare* (5); *Cité de Montréal v. Dame Gamache* (6); *Canadian Pacific Railway Company v. Fréchette* (7); *Bégin v. Sharp Construction Company* (8); *Montreal Tramways Company v.*

(1) [1899] R.J.Q. 8 B.R. 170; [1899] 29 R.C.S. 494.
(2) [1909] R.J.Q. 18 B.R. 569.
(3) [1900] 6 R. de J. 90.
(4) [1907] 39 R.C.S. 332.
(5) [1909] 15 R. de J. 263.
(6) [1915] R.J.Q. 24 B.R. 312.
(7) [1914] R.J.Q. 23 B.R. 511; [1915] R.J.Q. 24 B.R. 459.
(8) [1917] R.J.Q. 26 B.R. 345.

McAllister (1); *Morin v. Quebec Railway, Light, Heat and Power Company* (2); *Silver Granite Co. Ltd. v. Goulet* (3); *Légaré ès-qual. v. Quebec Power Company* (4); *Bourmistroff v. Rejou et al.* (5).

Voir aussi *Mignault, Droit Civil,* tome 5, p. 383.

Il s'agit d'assigner à Gaston Laperrière et à Sa Majesté le Roi leur part de responsabilité. Après avoir mûrement délibéré, j'en suis venu à la conclusion d'attribuer 33⅓% de la responsabilité à Gaston Laperrière et 66⅔% à l'intimé.

Le montant des dommages s'établit à $15,372.59, comme suit:

déboursés:

hôpital et comptes de médecins..$	122 59
souffrances physiques	250 00
incapacité partielle permanente (65%)	15,000 00
	$15,372 59

Le capital requis pour produire une rente viagère égale à la perte que subira Gaston Laperrière comme conséquence de son incapacité permanente de 65%, basé sur un salaire annuel de $1,200., excède la somme de $15,000.; je dois cependant m'en tenir à ce montant étant donné que c'est celui réclamé par la pétition de droit.

Je noterai que les deux médecins entendus comme témoins de la part du pétitionnaire ont fixé à 65% la diminution de capacité permanente de Gaston Laperrière et que l'intimé n'a pas jugé à propos de faire entendre de médecins. Je n'ai pas d'autre alternative dans les circonstances que d'accepter le chiffre de 65% mentionné par les témoins du pétitionnaire. Au surplus, cette évaluation de l'incapacité résultant de la perte de la main droite est soutenue par l'*Evaluation des Incapacités* du *Docteur Léon Imbert,* p. 23, et par *Forgue et Jeanbrau* dans leur ouvrage intitulé *Guide Pratique du Médecin dans les Accidents du Travail,* 4e édition, p. 536 et par *Sachet, Traité de la Législation sur les Accidents du Travail,* tome 1, p. 406.

Les deux tiers de $15,372.59 représentent $10,248.39.

Il y aura donc jugement en faveur du pétitionnaire contre l'intimé pour $10,248.39, avec dépens.

(1) [1920] 26 R.L. n.s. 301.
(2) [1922] R.J.Q. 32 B.R. 71.
(3) [1931] R.J.Q. 50 B.R. 424.
(4) [1939] R.J.Q. 77 C.S. 552.
(5) [1940] 46 R. de J. 203.

1943
Dec. 9
1945
May 25

BETWEEN:

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

PLAINTIFF,

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED

DEFENDANT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, chap. 97—Secs. 9B. (2) (a), 9B. (4), 9B. (9), 84, 86, 87—Canadian debtor—Company resident where central control and management abides—Nationality of company determined by country of incorporation—Intention to tax must be expressed in clear and unambiguous terms—New obligation not to be extracted from doubtful and ambiguous language—Presumption that Parliament does not assert or assume jurisdiction beyond limits of consent of nations.

Section 9B. (2) (*a*) of the Income War Tax Act, in effect from April 1, 1933, imposes a tax on non-residents of Canada in respect of dividends received from Canadian debtors. By section 9B. (4) the debtor is required to collect such tax, withold its amount from the non-resident and remit it to the Receiver General of Canada and by section 84 he is made liable, if he fails to collect it, for the amount he should have collected.

The action is against the defendant to recover the amount of its alleged liability for failure to collect and remit the tax in respect of dividends declared and paid by it to its non-resident stockholders during the period between April 1, 1933, and April 29, 1941. The defendant was incorporated in England in 1897 under the Companies Acts, 1862-1893, and had its registered office and register of members in London, England. It was registered in British Columbia in 1898 as an extra provincial company under the Companies Act, 1897, of British Columbia, and kept its Colonial register of members resident in Canada at its head office at Vancouver, B.C. The defendant carries on the business of supplying electric power and light and running electric railways and motor buses in British Columbia. During the period in question the business of the defendant, except the fulfilment of its statutory and articles of association requirements, was conducted and carried on in Canada, its officers and directors were residents of Canada, its directors' and general meetings were held in Canada, its assets, with some exceptions, were situate in Canada, the income from which it paid its dividends was earned in Canada, the dividends were declared in Canada, but were payable and were paid in London, England, to its stockholders except those on its Colonial register and those on its London register, whose addresses were in Canada. The defendant did not withhold any portion of the dividends paid by it and contended

that it was not under any duty to do so, on the ground that it was not a Canadian debtor within the meaning of section 9B. (2) (*a*) of the Income War Tax Act.

Held: That it is not the function of the Court to make any particular state of facts fit into a supposed scheme of taxation. The scheme does not exist apart from the language by which it is expressed and if a person is not clearly caught by the scheme as expressed in words he is not subject to it. The Court must not assume any governing purpose to tax to be given effect to in doubtful cases or any intention to tax apart from the words by which the tax is imposed nor may it infer any such intention from ambiguous words. The Court must deal with the Act as it stands. If defects in the tax structure are found, it is for the appropriate legislative authority, and not for the Court, to cure them.

2. That the Defendant is not a "Canadian debtor" within the meaning of section 9B. (2) (*a*) of the Income War Tax Act, notwithstanding its residence in Canada; it is only upon such a debtor that the duty of tax collection and remission is imposed by section 9B. (4); and no such duty having been cast upon the defendant it cannot be liable under section 84 for failure to perform it.

3. That the term "Canadian debtor", as used in sec. 9B. (2) (*a*) of the Income War Tax Act, does not "clearly and unambiguously" apply to a non-Canadian company, such as the defendant; that the plaintiff has, therefore, failed to show that the duty of tax collection and remission under section 9B. (4) has been imposed upon the defendant in such clear and explicit terms as the law requires in such cases; and that, no duty having been imposed in "clear and unambiguous" terms, there can be no liability under section 84 for failure to perform it.

4. That in the absence of clear and explicit expression to the contrary the term "Canadian debtor" in section 9B. (2) (*a*) should be interpreted as being confined to a company incorporated in Canada and as not including a company incorporated outside of Canada.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant the amount of its alleged liability for failure to collect taxes under the Income War Tax Act in respect of dividends declared and paid by defendant to its non-resident stockholders.

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

F. P. Varcoe, K.C. and *Robert Forsyth, K.C.* for plaintiff.

Aimé Geoffrion, K.C. and *A. B. Robertson,* for defendant.

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

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Thorson J.

THE PRESIDENT, now (May 25, 1945) delivered the following judgment:

During the period between April 1, 1933, and April 29, 1941, the defendant declared and paid dividends to non-residents of Canada on its fully registered 5 per cent. cumulative perpetual preference stock. It is alleged that it should have withheld five per cent of such dividends and remitted the same to the Receiver General of Canada and that having failed to do so it is liable therefor together with interest at the rate of ten per cent per annum. This action is brought to recover from the defendant the amount of such alleged liability.

The claim is based upon certain sections of the Income War Tax Act, R.S.C. 1927, chap. 97, as enacted by chap. 41 of the Statutes of Canada, 1932-1933, the sections relied upon being 9B. (2) (*a*), 9B. (4) and 84, which provide respectively as follows:

"9B. (2) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of

(*a*) All dividends received from Canadian debtors irrespective of the currency in which the payment is made,

9B. (4) In the case of interest or dividends in respect of fully registered shares, bonds, debentures, mortgages or any other obligations, the taxes imposed by this section shall be collected by the debtor who shall withhold five per centum of the interest or dividend on the obligation and remit the same to the Receiver General of Canada.

84. Any person who fails to collect or withhold any sum of money as required by this Act or regulations made thereunder, shall be liable for the amount which should have been collected or withheld together with interest at the rate of ten per centum per annum."

These amendments were deemed to have come into force on April 1, 1933, and remained in force until April 30, 1941, when the increase in the rate of tax to fifteen per cent became effective. During this period the defendant declared and paid to the holders of its 5 per cent cumulative perpetual preference stock, whose addresses in its register of members were elsewhere than in Canada, 16 dividends totalling $2,780,682.37. It did not withhold any portion of such dividends, and contends that it was not under any duty to do so, on the ground that it was not a Canadian debtor within the meaning of section 9B. (2) (*a*) of the Act. The amounts paid to non-residents of Canada within the meaning of the section

was not proved at the trial, it being agreed that if the defendant were found liable the amount of its liability would be determined by a reference for such purpose.

The issue depends upon the interpretation of the term "Canadian debtors" in section 9B. (2) (*a*). If it is not clearly applicable to the defendant the action must fail. Under the scheme set up by the sections referred to a tax is imposed upon non-residents of Canada in respect of dividends received from Canadian debtors; the tax is levied upon the non-resident, not upon the Canadian debtor. The Canadian debtor is required to collect the tax, to withhold the amount of it from the non-resident creditor and remit it to the Receiver General. A duty of tax collection and remission is imposed upon him and, if he fails to perform it, he is liable for the amount he should have collected. The duty is a statutory one and so is the liability. If, therefore, the defendant is not a "Canadian debtor", it is free from any duty of tax collection or remission and any liability for failure to perform it.

The facts are not in dispute. The defendant was incorporated in England in 1897 under the Companies Acts, 1862 to 1893, of the United Kingdom of Great Britain and Ireland, and has always had its registered office and kept its register of members in respect of its 5 per cent cumulative perpetual preference stock in London, England. It was registered in British Columbia in 1898 as an extra-provincial company under the Companies Act, 1897, of British Columbia. Under section 103 of the Companies Act, 1929, of the United Kingdom, 19 & 20 Geo. V, chap. 23, it has kept a Dominion register, called "the Colonial register", of members resident in Canada, at its office at Vancouver, British Columbia. Stock on this register can be transferred only on such register, but all other stock can be transferred only on the register kept in London, England. The defendant carries on the business of supplying electric power and light and operating electric railways and motor buses in British Columbia, and has its head office at Vancouver. During the period under review the whole business of the defendant, except such formal administrative business as was required by the statutes governing it or by its articles

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of association to be transacted at its registered office, was conducted and carried on in Canada; all its directors and officers were residents of Canada; all such stockholders' meetings as were held and all directors' meetings were held in Canada; all its assets, except for certain records and books of account kept in London, England, and certain cash remitted there from time to time, were situate in Canada; all the income from which its dividents were paid was earned in Canada; all the dividends were declared by resolution of the board of directors in Canada and approved by resolution of a general meeting in Canada; all the dividends payable to the stockholders, except those on the Colonial register and those whose addresses on the London register were in Canada, were paid from London, England, by the defendant's registrar and paying agent there by cheque and warrants drawn and payable in London, the necessary funds for such purpose having been sent from Canada. Only the dividends payable to the stockholders on the Colonial register or those on the London register whose addresses were in Canada were paid by cheques drawn and payable at Vancouver. Only a small amount of the stock was held by such stockholders.

On these facts there can be no doubt that the defendant, although incorporated in England, was resident in Canada, certainly, at any rate, for income tax purposes. It was held by the House of Lords in *De Beers Consolidated Mines, Limited* v. *Howe* (1) that a foreign corporation may reside in the United Kingdom for the purposes of income tax, that the test of residence is not where it is registered, but where it really keeps house and does its real business, and that the real business is carried on where the central management and control actually abides. Lord Loreburn L.C. said, at page 458:

> In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. . . . . The decision of Kelly C.B. and Huddleston B, in the *Calcutta Jute Mills* v. *Nicholson* and the *Cesena Sulphur Co.* v. *Nicholson* ((1876) 1 Ex. D. 428), now thirty years ago, involved the principle that a company

(1) (1906) A C. 455

resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

On the facts the Court held that the company, although registered in South Africa, was resident in the United Kingdom. The *De Beers Case* (*supra*) was followed by the House of Lords in *Egyptian Delta Land and Investment Company Limited* v. *Todd* (1) which settled that the test of residence of a company for income tax purposes was the same for all companies, whether incorporated abroad or in the United Kingdom. In that case a company incorporated in England, which had transferred the whole of its business to Egypt and did nothing in England beyond fulfilling its statutory requirements there, was found by the Commissioners to be not resident in England. Rowlatt J. reversed this finding and his judgment was affirmed by the Court of Appeal. The House of Lords, however, unanimously reversed their judgment and held that the finding of the Commissioners should not be disturbed. Viscount Sumner in an exhaustive and illuminating judgment applied the rule that a company is resident where "the central management and control of the company abides" and rejected the contention that a company must necessarily reside at the place where it is registered and its statutory requirements must be complied with. The central management and control of the defendant was certainly in Canada, and I find that it was resident in Canada for the purposes of the Income War Tax Act.

While the defendant was thus resident in Canada, it could not, in my opinion, properly be described as a Canadian company. It was incorporated in England under the Companies Acts of that country and is subject to them. Its status is that of an English company, for it is well established that the nationality of a company, so far as such a term is applicable to it, is determined by the country of its incorporation. In *The Queen* v. *Arnaud* (2), a company incorporated in Great Britain was held not to be a foreigner although some of its shareholders were foreigners. In *Janson* v. *Driefontein Consoli-*

(1) (1929) A.C. 1.

(2) (1846) 9 Q.B. 806.

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dated Mines, Limited (1), the House of Lords regarded a company incorporated in the South African Republic as an alien although most of its shareholders were British subjects. In *Bohemian Union Bank* v. *Administrator of Austrian Property* (2) a company, which had been incorporated in Prague and was, therefore, an Austrian company, was dealt with as a Czecho-Slovakian corporation and national after the recognition of Czecho-Slovakia as an independent state. And the *Egyptian Delta Case* (*supra*) Viscount Sumner, referring to the effect of incorporation under the English Companies (Consolidation) Act, said, at page 13:

> The first effect of the incorporation is to make the new company amenable to English law and English law courts and to give it the status of an English company,

On the authority of such cases, the defendant is an English company.

Under these circumstances can it be said that the defendant was a Canadian debtor within the meaning of section 9B. (2) (*a*) of the Income War Tax Act? Counsel for the plaintiff contended that the term "Canadian debtor" means a "debtor resident in Canada" and that the defendant, being resident in Canada and being a debtor in respect of dividends, came within its meaning. Counsel for the defendant, on the other hand, contended that the term when applied to a company means a "Canadian company debtor" and that the adjective "Canadian" when applied to a company is descriptive not of its residence but of its nationality or country of incorporation and means a company incorporated in Canada and cannot, therefore, apply to the defendant, since it is an English company by reason of its incorporation in England. These conflicting views present a problem which, in my opinion, is one of difficulty and importance.

The Act is clear and explicit in the distinctions drawn between a resident in Canada and a non-resident, both in the case of an individual and in that of a company, and if it had been intended to impose the duty of tax collection and remission upon a debtor resident in Canada such intention could have been clearly expressed. If that were the intent it would follow that there would be

(1) (1902) A.C. 484. (2) (1927) 2 Ch. 175.

no such duty imposed upon a Canadian company, that is, a company incorporated in Canada, that was not resident in Canada, for if the term "Canadian debtor" means a "debtor resident in Canada" it could not include both a non-Canadian company resident in Canada and a Canadian company that was not resident in Canada. If "Canadian" means "resident in Canada" it cannot also mean "non-resident in Canada".

Ordinarily a term is used in the same sense wherever it appears in an Act and it is frequently possible to determine its meaning in a particular section by reference to its use in other sections of the same Act. Unfortunately, this is not fully possible with regard to the use of the term "Canadian" in the Income War Tax Act. Even in Section 9B. itself it is used in different senses and has different meanings. The section speaks of Canadian funds in subsections 1 and 2 (*b*), of a Canadian estate or trust in subsection 2 (*d*), of Canadian residence in subsection 10, and of a Canadian company in subsection 11. In some of these cases the use of the term is purely geographical signifying merely presence in Canada, but in others it imports the idea of national character. "Canadian residence", for example, in subsection 10 clearly means residence in Canada whereas "Canadian company" in subsection 11 means a company incorporated in Canada. Some assistance may be found in other sections of the Act. In section 22A. the use of the term "any *other* Canadian debtor" in subsection (*b*) (iii) when read with subsection (*b*) (ii) indicates that a company incorporated in Canada is also a "Canadian debtor", within the meaning of that section. And in section 4 (*r*) a company incorporated in Canada is described as a Canadian company. Then in section 39A. there is a reference to "Canadian, British or foreign debtors" in such manner as to suggest that the adjectives are indicative of nationality. Such assistance as these other sections afford lends support to the contention of counsel for the defendant.

Section 9B. (2) (*a*) imposes a tax upon non-residents of Canada in respect of dividends received from Canadian debtors. The term debtor when read with the term dividend indicates that the debtor is a company, since it is

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only a company that can become a debtor in respect of a dividend. The defendant became a debtor to its stockholders when the dividends were declared and became payable. *In re Severn and Wye and Severn Bridge Railway Company* (1). It is not unreasonable, therefore, to say that the term debtor in section 9B. (2) (*a*) means a company.

Moreover, it is in accordance with the natural meaning of such terms as "Canadian" when applied to a company to regard them as descriptive of the country of its incorporation. In the United States it was a common practice to incorporate companies in Delaware or New Jersey and to call such companies Delaware or New Jersey companies regardless of where they carried on their business. Companies incorporated in the provinces of Canada are also commonly described by reference to the provinces of their incorporation. Such terms as British or English or Scottish, French, German, United States and the like, when applied to a company, are in their natural and ordinary sense descriptive of the countries of origin of such companies. They are adjectives denoting nationality or domicile and indicate the country of incorporation of the company. The term "Canadian", when applied to a company, should be dealt with similarly and be regarded as meaning a company incorporated in Canada.

To give effect to the contention of counsel for the plaintiff that the term "Canadian debtor" means a "debtor resident in Canada" involves amendment rather than interpretation of it. It would be quite erroneous to describe an individual as Canadian merely because of his residence in Canada. The residents of Canada are not all Canadian and there are many persons not resident in Canada who are, nevertheless, Canadian. The adjective "Canadian" is not an apt one to describe residence. It is, if possible, even a more strained use of it, when applied to a company, to import into it the attribute of residence in Canada, for not only is such use not natural or ordinary, but it is also contrary to the established jurisprudence.

Counsel for the plaintiff advanced a subsidiary argument that the term "Canadian debtor" means a person who owes a Canadian debt and that the debt of the defen-

(1) (1896) 1 Ch. 559.

dant to its stockholders in respect of dividends was a Canadian debt. In support of this view he relied upon the fact that the dividends were declared in Canada, and put this forward as an important factor in determining that the debt was a Canadian one and subject to Canadian law. No authority for such a proposition was cited and I am unable to accept it. It is established that the domicile of a company is in the country of its incorporation and that such domicile "clings to it throughout its existence". While it may change its residence, it cannot change its domicile. *Gascue* v. *Inland Revenue Commissioners* (1). And it is fundamental that the rights of the members of a company are governed by the law of its domicile. *Colonial Bank* v. *Cady and Williams* (2). In that case the House of Lords was dealing with a problem affecting the share certificates of a company incorporated in New York, and Lord Watson, in the course of his judgment, said at page 275:

> The Company and its undertaking are American, and the rights of its shareholders, as well as the effect of its stock certificates, are admittedly governed by the law of the State of New York.

The defendant, having been incorporated in England, has its domicile there, notwithstanding its residence in Canada, and is consequently subject to the law of England in matters affecting the relationship between it and its members. The rights of the stockholders, including the right to dividends are determined by the law of England. The conditions subject to which dividends are payable are prescribed by such law. It is, no doubt, a condition precedent of indebtedness in respect of dividends that they should be duly declared, but I am unable to see how the place of declaration can affect the character of the resulting debt. Once the dividends were declared, no matter where the declaration was made, the defendant owed a debt to its stockholders. Such debt arose either under an English contract on the subscription for the stock or as an incident of the ownership of the stock attached by English law. Moreover, it was payable to the non-resident stockholders in England. Under these circumstances the debt of the defendant to its non-resident stockholders was, in my opinion, an English debt.

(1) (1940) 2 K.B. 80 at 84. (2) (1890) 15 A.C. 267.

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It was also urged that the debt was a Canadian one because it could be enforced in Canada. No doubt the non-resident stockholder who had not been paid a declared dividend could sue the defendant in Canada, since it was resident and has its assets here. But there is also no doubt that he could bring his suit in England. While the defendant was resident in Canada, and not in England, for income tax purposes, it is clearly resident in England for the purposes of founding jurisdiction in the English courts to entertain an action against it. The debt to the non-resident stockholders was payable in England, the defendant has its registered office and its register of members there, and it is subject to winding-up proceedings in the English courts. The rights of the non-resident stockholders against the defendant are clearly within the jurisdiction of the English courts to enforce.

Section 84 of the Income War Tax Act imposes a statutory liability for failure to perform the statutory duty of tax collection and remission required to be performed by section 9B. (4). Both the duty and the liability for failure to perform it are new and do not exist apart from the terms of the Act. Before the plaintiff can succeed in an action to recover the amount of the liability for failure to perform the duty, he must show that the requirement of performance of the duty has been imposed upon the defendant in clear and explicit terms. If he cannot do so the action must fail. This statement is, I think, in accord with accepted canons of construction.

The rules to be applied in interpreting an Act which imposes a tax or duty are well established. They have been expressed by the House of Lords in many cases. In the leading case of *Partington* v. *Attorney General* (1) Lord Cairns said:

> 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.

It is the letter of the law rather than its spirit that governs in a taxing Act. And in a later case, *Cox* v. *Rabbits* (2), the same judge said:

(1) (1869) L.R. 4 H.L. 100 at 122. (2) (1878) 3 A.C. 473 at 478.

a Taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed.

Lord Cairns explained what is meant by the rule that a taxing Act is to be construed strictly in *Pryce* v. *Monmouthshire Canal and Railway Companies* (1) in the following terms:

the cases which have decided that Taxing Acts are to be construed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequence.

The Judicial Committee of the Privy Council has taken the same view. In *Oriental Bank Corporation* v. *Wright* (2) Lord Blackburn stated it as a rule:

that the intention to impose a charge on the subject must be shown by clear and unambiguous language,

It is not the function of the Court to make any particular state of facts fit into a supposed scheme of taxation. The scheme does not exist apart from the language by which it is expressed and if a person is not clearly caught by the scheme as expressed in words he is not subject to it. The Court must not assume any governing purpose to tax to be given effect to in doubtful cases or any intention to tax apart from the words by which the tax is imposed nor may it infer any such intention from ambiguous words. The Court must deal with the Act as it stands. If defects in the tax structure are found, it is for the appropriate legislative authority, and not for the Court, to cure them. These principles have been laid down in numerous cases. In *Partington* v. *Attorney General* (*supra*) Lord Cairns said, at page 122:

if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

In *Tennant* v. *Smith* (3) Lord Halsbury L.C. stated a fundamental principle:

(1) (1879) A.C. 197 at 202. (2) (1880) 5 A.C. 842 at 856.
(3) (1892) A.C. 150 at 154.

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> 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 . . . . . 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.

In *Brunton* v. *Commissioner of Stamp Duties* (1) Lord Parker, speaking for the Judicial Committee, said:

> the intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shown by clear and unambiguous language and cannot be inferred from ambiguous words:

And, in *Greenwood* v. *F. L. Smidth & Co.* (2), Lord Buckmaster took a strong stand against attempting to extract new obligations from doubtful and ambiguous language:

> It is, I think, important to remember the rule which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer.

While the rules to which I have referred are those governing the interpretation of taxing Acts, I see no sound ground of principle for not applying them with equal force to the interpretation of enactments, such as section 9B. (4) and section 84 of the Income War Tax Act, by which a new statutory duty and liability are imposed. Words must be found in the Act to impose such duty and liability, and such words must be clear and unambiguous. If the requirement of performance of the duty is not expressed in clear and unequivocal terms, the imposition of it is not to be assumed nor may it be inferred from ambiguous language. It follows that if the duty is not clearly and explicitly imposed there can be no liability for failure to perform it.

I have come to the conclusion that this action cannot succeed. In my opinion, the defendant is not a "Canadian debtor" within the meaning of section 9B. (2) (*a*) of the Income War Tax Act, notwithstanding its residence in Canada; it is only upon such a debtor that the duty of tax collection and remission is imposed by section 9B. (4); and no such duty having been cast upon the defendant, it cannot be liable under section 84 for failure to perform it.

(1) (1913) A.C. 747 at 760. (2) (1922) 1 A.C. 417 at 423.

Even if this positive reason for dismissing the action were not entirely free from doubt, there is what might be called a negative one. On the strength of the rules governing the interpretation of an Act such as the one under review it should, I think, be held that the term "Canadian debtor", as used in section 9B. (2) (*a*) of the Income War Tax Act, does not "clearly and unambiguously" apply to a non-Canadian company, such as the defendant; that the plaintiff has, therefore, failed to show that the duty of tax collection and remission under section 9B. (4) has been imposed upon it in such clear and explicit terms as the law requires in such cases; and that, no duty having been imposed in "clear and unambiguous" terms, there can be no liability under section 84 for failure to perform it.

There is a further reason why the term "Canadian debtor" should, in the absence of clear and unambiguous expression of a contrary intention, be interpreted as excluding the defendant. In this connection, consideration must be given to certain sections of the Act, in addition to those already cited. Section 9B. (9) provides:

> 9B. (9) Every agreement for payment of interest or dividends in full without allowing any such deduction or withholding shall be void.

And sections 86 and 87 read:

> 86. No action shall lie against any person for withholding or deducting any sum of money as required by this Act or regulations made thereunder.
>
> 87. The receipt of the Minister for any sum of money collected, withheld or deducted by any person as required by this Act or regulations made thereunder shall constitute a good and sufficient discharge of the liability of any debtor to his creditor with respect thereto to the extent of the amount referred to in the receipt.

It is apparent from these sections, when read with sections 9B. (2) (*a*), 9B. (4) and 84, that it was intended not only that the non-resident should be taxed in respect of the dividends received from a Canadian debtor, but also that he should actually bear the tax himself and not be able to pass it back to the debtor. No tax is imposed upon the debtor; it is the non-resident, not the debtor, who is the taxpayer; the debtor is made a tax collector; if he collects the tax and remits it, he is free from any liability to anyone. Payment of the tax to the Receiver General is a pro tanto discharge of the debtor's liability to

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the creditor. The contract to pay the dividend in full is avoided and the creditor's right of action for its payment in full is barred. The scheme of legislation thus expressed purports to alter the rights of non-resident creditors against a Canadian debtor, to assume control over the indebtedness and to provide a statutory pro tanto discharge of it. There can be no objection in law to such statutory action where the Canadian debtor is a company incorporated in Canada and the indebtedness is in respect of dividends, for the relationship between such a company and its members, whether resident in Canada or not, is governed by Canadian law and their rights in respect of dividends are subject to alteration by competent Canadian legislative authority. Every shareholder would know that his rights in respect of his shares or the dividends from them would be determined by Canadian law. The situation is otherwise, however, in the case of a non-Canadian company where the rights of its members are regulated by the law of another country. There is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations. 31 Hals. para. 658. And it is a rule that statutes are to be interpreted, provided that their language admits, so as not to be inconsistent with the comity of nations. 31 Hals. para. 659. It has already been pointed out that the debt of the defendant in respect of dividends was payable to its non-resident stockholders in England and that their rights against the defendant are regulated by English law and are within the jurisdiction of the English Courts to enforce in accordance with such law. Halsbury points out that the presumption to which I have referred must give way before an intention clearly expressed. But where there is no such clear expression of intention it should be applied. It cannot be said in the present case that the term "Canadian debtor" clearly and explicitly refers to a non-Canadian company such as the defendant. The scheme of legislation under discussion, of which this term is an integral part, should, therefore, I think, be interpreted in accordance with the presumption and rule referred to in such a way as not to assume an intention on the part of Parliament to alter the rights of persons in another country, conferred upon

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them pursuant to the law of such country and within the jurisdiction of the courts of such country to enforce. In the absence of clear and explicit expression to the contrary, the term "Canadian debtor" in section 9B. (2) (*a*) should be interpreted as being confined to a company incorporated in Canada and as not including a company incorporated outside of Canada. By such interpretation full effect can be given to the scheme of legislation without running counter to the presumption and rule of interpretation referred to. Such an interpretation, of course, places the defendant outside the scheme.

For the reasons given, there will be judgment dismissing the action with costs.

Judgment accordingly.

BETWEEN:

HIS MAJESTY THE KING, on the information of the Attorney General of Canada,

PLAINTIFF,

AND

WEDDEL LIMITED,

DEFENDANT.

1944

May 31, June 1, 2

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June 29

Revenue—Customs Duty—Customs Act, R.S.C. 1927, chap. 42, and amendments, secs. 2 (2), 4, 35, 38, 41, 48, 52 and 112—Functions of appraisers—Right of Minister to determine value for duty—Minister's determination an administrative act, not subject to review by the Court.

The defendant during 1940, 1941 and 1942 imported into Canada large quantities of canned corned beef from Argentine, Uruguay and Brazil and paid customs duty based on the values at which the goods were entered for customs. It being considered that the goods had been undervalued, the Chief Dominion Customs appraiser made fresh appraisals and directed the defendant to make amended entries and pay additional customs duty and taxes amounting to $50,415.12. Protests being made against these appraisals, the matter was referred to the Minister of National Revenue who, on August 19, 1943, determined the value for duty of the canned corned beef imported by the defendant during 1940 to 1942, showing $49,312.03 payable by the defendant as additional customs duty and tax. Action was brought to recover this amount or, in the alternative, the additional amount resulting from the appraisal made by the Chief Dominion Customs appraiser.

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Held: That when goods are imported into Canada, the Minister has power to find that it is difficult to determine their value for duty for any one or more of the causes or reasons specified in paragraphs (*a*) to (*e*) of section 41 of the Customs Act; that his findings thereon, even if erroneous, are not subject to review by the Court; that, having made such findings, the Minister may determine the value for duty of such goods; that such determination is an administrative act; that it is conclusive of the value upon which the duty on such goods is to be computed and levied; and that it is not subject to review by the Court.

2 That, when the Minister makes a valid determination under section 41, his determination is not prospective in effect but is referable to the specific goods whose importation and subsequent disposition caused him to make his inquiry and determination. *The King* v. *Noxzema Company of Canada, Ltd.* (1942) S.C.R. 178 followed.

INFORMATION exhibited by the Attorney General of Canada to recover from the defendant the additional amount of customs duty and taxes resulting from the determination by the Minister of National Revenue of the values for duty of certain goods imported into Canada in excess of those at which they had been entered for duty.

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

J. C. McRuer, K.C. and *Robert Forsyth, K.C.* for plaintiff.

Aimé Geoffrion, K.C. for defendant.

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

THE PRESIDENT now (June 29, 1945) delivered the following judgment:

During 1940, 1941 and 1942 the defendant imported into Canada large quantities of canned corned beef from Argentine, Uruguay and Brazil and paid customs duties based on the values at which the goods were entered for customs. On December 16, 1942, the Commissioner of Customs of the Department of National Revenue notified the defendant that the importations appeared to have been undervalued and that he proposed to instruct the collectors at the various ports where its entries had been passed to call for amending entries accounting for additional duty on appraised values on all entries passed by it since January 1, 1940. After correspondence between the Depart-

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ment and the defendant or its Ottawa representative, the Chief Dominion Customs appraiser made appraisals of the values of the imported goods at $104,031 in excess of those at which they had been entered for duty and directed the defendant to make amended entries and pay additional customs duty and taxes amounting to $50,415.12, and, on April 6, 1943, sent the defendant a statement showing such appraised values and the amount of underpaid duty and taxes. No appeal from the appraisals was taken, but representations protesting against them were made to the Department by the defendant and its Ottawa representative. Subsequently the matter was referred to the Minister of National Revenue, and, on June 29, 1943, the Minister advised the defendant's Ottawa representative by letter that it appeared that this might be a proper case in which to determine the value for duty under section 41 of the Customs Act, but that, before he decided what determinations should be made, he would be glad to arrange an appointment to hear any further representations or to receive any further statement in writing. An appointment was then arranged with the Minister on July 14, 1943, at which time he heard oral representations both by the defendant's Ottawa representative and by its counsel. Further written representations were also made. Finally, on August 19, 1943, the Minister made his determination as follows:

19th August, 1943.

Memorandum for:

DAVID SIM, Esq.,
Deputy Minister of National Revenue,
Customs Excise.

WHEREAS Messrs. Weddel Limited, Montreal, imported into Canada a quantity of Canned Beef during the calendar years 1940, 1941 and 1942,

AND WHEREAS, on reviewing the circumstances and conditions of importation, it appears to me and I find that such circumstances and conditions render it difficult to determine the value of the goods in question for duty, because—

(1) Such goods are not sold for use or consumption in the country of production;

(2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption,

ACTING under the provisions of The Customs Act, I determine that the value for duty of the Canned Beef imported into Canada from Brazil,

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Argentine and Uruguay during the calendar years 1940, 1941 and 1942, by Messrs. Weddel Limited, shall be as set forth in the statement attached as Schedule "A" hereto.

COLIN GIBSON,
Minister of National Revenue.

Encl.

The schedule showed that the amount of additional customs duty and taxes payable by the defendant amounted to $49,312.03. On August 21, 1943, the Deputy Minister of National Revenue (Customs and Excise) notified the defendant's Ottawa representative of the Minister's determination, sent him a copy of the schedule and required the entries to be amended not later than September 2, 1943.

On the defendant's refusal to pay any additional duty or taxes this action was brought. The plaintiff claims the additional amount of customs duty and taxes resulting from the determination of the Minister purporting to act under section 41 of the Customs Act, R.S.C. 1927, chap. 42, and amendments, and, in the alternative, the additional amount resulting from the appraisal by the Chief Dominion Customs appraiser purporting to act under section 48.

It is not necessary to outline the scheme of customs administration in Canada for this was done by Rinfret J., as he then was, in delivering the judgment of the Supreme Court of Canada in *Reference Concerning the Jurisdiction of the Tariff Board of Canada* (1). In this action we are concerned mainly with the sections of the Customs Act dealing with the valuation of goods for duty and the respective functions and duties relating thereto of the Dominion Customs appraisers and the Minister.

The basic section is section 35, which reads as follows:

> 35. Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

This section presupposes not only that the goods are sold for home consumption in the country of export but also that there are principal markets in such country in which the goods are so sold. Isolated sales in the country of export do not, of themselves, satisfy the conditions of the section.

(1) (1934) S.C.R. 538.

The function of valuing goods for duty is primarily performed by appraisers, whose appointment is provided for by section 4, and the manner in which the Dominion Customs appraisers shall perform their duties is specified by section 38 as follows:

38. The Dominion Customs appraisers and every one of them and every person who acts as such appraiser, or the collector, as the case may be, shall, by all reasonable ways and means in his or their power, ascertain, estimate and appraise the true and fair market value, any invoice or affidavit thereto to the contrary notwithstanding, of the goods at the time of exportation and in the principal markets of the country whence the same have been imported into Canada, and the proper weights, measures or other quantities, and the fair market value thereof, as the case requires.

While the appraiser is not bound by the value at which the goods are entered or by any affidavit as to their value but is given wide powers to ascertain, estimate and appraise the true and fair market value "by all reasonable ways and means", he is governed by section 35 for it lays down the basis for the value he is to find and such basis rests upon the assumption that goods are sold for home consumption in the principal markets of the country of export. He cannot make a valid appraisal except in cases where he can use the basis laid down by section 35 and where the conditions presupposed by it in fact exist.

There are several sections in the Act providing for review of the action of an appraiser. Under section 38 (4) there may be a review by the Board of Customs, now succeeded by the Tariff Board, but such Board is confined to a review of the appraiser's decision and is bound by the same limitations of jurisdiction as the appraiser.

A second provision for reviewing an appraisal appears in section 48. This is an important section for consideration since it was under it that the Chief Dominion Customs appraiser purported to make his appraisal. It provides as follows:

48. If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised, or allowed entry at an erroneous valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation, and may direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any, on such goods, or a refund

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of a part of the duty paid, as the case requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for.

The Dominion appraiser's jurisdiction under section 48 is confined to making a "fresh appraisement or valuation", but he is also governed by section 35 and may act only in those cases where the basis laid down by it can be used.

Then it is further provided by section 52 that an appeal may be taken from the decision of the appraiser under section 48 to a board of three valuators who are to examine and appraise the goods in accordance with the provisions of the Act.

The appraiser has no power to decide whether goods are sold for home consumption in the country of export. The power to make this decision and other decisions in special cases of difficulty is vested exclusively in the Minister by section 41. This section is of such importance as to warrant its citation in full. It provides as follows:

> 41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because
>
> (*a*) such goods are not sold for use or consumption in the country of production; or
>
> (*b*) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or
>
> (*c*) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or
>
> (*d*) such goods are usually or exclusively sold by or to agents or by subscription; or
>
> (*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;
>
> the Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.
>
> 2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

Section 41 sets out two conditions for the exercise of the Minister's jurisdiction to determine the value for duty of goods. In the first place the goods must be imported. The fact of such importation is an essential condition of a valid determination by the Minister, and without it his act

would be a nullity. The second condition is of a different nature. While the Minister may determine the value for duty when goods are imported under such circumstances or conditions as render it difficult to determine their value for duty for the causes or reasons set out in paragraphs (*a*) to (*e*), it does not seem to be essential to the exercise of his jurisdiction that any of these causes or reasons should in fact exist, for by subsection 2 the Minister is made the sole judge as to the existence of all or any of them. Parliament has clearly given the Minister the power to find the facts of this second condition, upon which the exercise of his jurisdiction to determine value for duty depends, and has made him the sole judge of their existence. The case falls squarely within the second class of cases referred to by Lord Esher M.R. in his well known discussion of jurisdiction in *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1) where he said:

> When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more.

In this case one condition of the valid exercise of jurisdiction by the Minister, namely, an importation of goods, does exist in fact, for the importations of canned corned beef by the defendant during 1940 to 1942 are proved. As to the other condition, namely, the existence of circumstances or conditions rendering it difficult to determine the value for duty of the goods for one or more of the causes or reasons specified in paragraphs (*a*) to (*e*), the Minister in his determination of value, dated August 19, 1943, found the existence of two such causes or reasons, namely,

(1) Such goods are not sold for use or consumption in the country of production; and

(1) (1888) 21 Q.B.D. 313 at 319.

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(2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption.

There is, I think, evidence to support these findings but, even if there were not, it is not for the Court to question them, for Parliament has made the Minister the sole judge in the matter. His findings as to the existence of any of the causes or reasons specified in paragraphs (*a*) to (*e*), even if erroneous, are not open to review by the Court. The goods in the present case having been imported, and the Minister having found the existence of reasons (*a*) and (*e*) for rendering it difficult to value them for duty, the two conditions for the exercise of his jurisdiction to determine their value for duty were satisfied and he could validly make his determination.

The Minister's determination was, I think, purely an administrative act within the jurisdiction vested in him by Parliament and, there being no provisions for appeal from it, it is not subject to review by the Court. This was settled by the Supreme Court of Canada in *The King* v. *Noxzema Chemical Company of Canada, Ltd.* (1). There the Court had to consider similar powers of the Minister of National Revenue under section 98 of the Special War Revenue Act, R.S.C. 1927, chap. 179, as amended by 23-24 Geo. V, chap. 50, section 20, which reads as follows:

98. Where goods subject to tax under this Part or under XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

The Minister had found that the prices obtained by the respondent from sales to a distributor were less than the fair prices on which sales tax and excise tax should be imposed and had determined the fair price on which the taxes payable by the respondent should be imposed. In this Court Maclean J. held that the determination by the Minister was not conclusive, but the Supreme Court of Canada unanimously took a different view. Davis J., speaking of the Minister's duty, said at page 180:

My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new sec. 98; . . . . . .

(1) (1942) S.C.R. 178.

If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

Kerwin J. was more specific and definite in his statement. At page 185, he said:

> We cannot be aware of all the reasons that moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less,—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it,—but less than what he considered was the fair price on which the taxes should be imposed. The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the Court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal.

He then quoted with approval the principle laid down by the House of Lords in *Spackman* v. *Plumstead District Board of Works* (1), where the Earl of Selborne L.C. said:

> And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

I am, therefore, of the view that, when goods are imported into Canada, the Minister has power to find that it is difficult to determine their value for duty for any one or more of the causes or reasons specified in paragraphs (*a*) to (*e*) of section 41 of the Customs Act; that his findings thereon, even if erroneous, are not subject to review by the Court; that, having made such findings, the Minister may determine the value for duty of such goods; that such determination is an administrative act; that it is conclusive of the value upon which the duty on such goods is to be computed and levied; and that it is not subject to review by the Court.

It was contended for the defendant that the Minister's determination was a reversal of the appraisal by the Chief Dominion Customs appraiser and that effect should not be given to it unless it could be shown that Parliament had conferred upon the Minister power to reverse an existing appraisal. I am unable to accept this view. Clearly, of course, the determination under

(1) (1885) 10 A.C. 229 at 235.

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section 41 and the appraisal under 48 cannot both stand. If the Minister's determination is valid and referable to the goods imported by the defendant, the appraisal may be disregarded. The question is which valuation is valid, the appraisal or the determination; if the latter is valid the former is not. The question is not whether a power of reversing an existing appraisal has been conferred upon the Minister at all, but rather whether the Minister has validly exercised the jurisdiction conferred upon him by Parliament. If he has, he need not concern himself with whether there has been an appraisal or not, for it is, I think, obvious that if the Minister has validly determined the value for duty of specific goods under section 41, no appraiser has any right to make an appraisal in respect of the same goods. In the field of jurisdiction assigned to the Minister there is no place for the appraiser. If the Minister finds, for example, that the goods are not sold for home consumption in the country of export, of which he is the sole judge, the jurisdiction to determine their value for duty belongs to him and not to the appraiser.

It was also contended that section 41 did not apply when an appraisal had been made and the duty on the goods had been paid, but was applicable only when the appraiser found that he could not make an appraisal because there was no home market in the country of export. Related to this contention, but not entirely consistent with it, was the argument that the determination by the Minister does not affect goods already imported but is applicable only to goods to be imported in the future. It was argued that the words "are imported" in section 41, when used with regard to goods, cannot refer to goods that have been imported but must refer only to goods that are being imported, and that the words " the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied" clearly contemplate future use of the determination. The contention generally was that section 41 was not retrospective in effect but prospective only. There are a number of reasons why this view cannot be adopted. Whether section 41 has retrospective effect is not really involved at all. The section gives the Minister jurisdiction to deal with a

specific matter, namely a specific importation of goods when such goods are imported into Canada under the circumstances and conditions specified. That is to say, there must have been an importation of goods before he can exercise any jurisdiction. An analysis of the various causes or reasons specified in paragraphs (*a*) to (*e*) shows that a number of them relate to matters that must be subsequent to the importation of the goods. We are concerned only with reasons (*a*) and (*e*). Reason (*a*) is one that must exist before or at the time of importation but reason (*e*) relates to a condition that can exist only after the time of importation. The Minister must apply his mind to the specific goods that have been imported and the circumstances and conditions which render it difficult to determine their value for duty and in order to make his findings in respect thereto he must consider not only the state of things in the country of export but also what has happened in Canada with reference to the said goods. Then, when he has made his findings, he may determine the value for duty of "such" goods, that is to say, the very goods whose importation and subsequent disposition gave him his jurisdiction to determine their value for duty. Similarly, when it is provided that the value determined by the Minister shall be the value upon which the duty shall be computed and levied it is the duty on "such" goods that is specified, that is, the specific goods whose importation and subsequent disposition caused him to make his enquiries, his findings and his determination. I think it is clear, on the grammatical construction of the section, that the Minister's determination was referable to the canned corned beef imported by the defendant during 1940 to 1942.

Section 41 should be read in the light of section 2, subsection 2, which provides as follows:

> 2. 2. All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made according to its true intent, meaning and spirit.

The adoption of the defendant's contention would run counter to this guide to the interpretation of the Act in that it would lead to anomalous results and permit the importation of goods at values for duty not contemplated

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by the Act. If section 41 did not apply to the importation of goods that had been appraised and the determination by the Minister were referable only to goods being imported but not appraised or to goods to be imported in the future it would mean that when goods have been imported and appraised by the original appraiser at the port of entry and the duty has been paid, and it is then shown that the goods were not sold for home consumption in the country of export, the original appraisal would have to stand, for, under the contention put forward, no one would be able to review it if the Minister should make a determination under section 41 as he did in the present case. The Minister's finding that the goods were not sold for home consumption in the country of export would make it impossible for the Chief Dominion Customs appraiser to act under section 48, for the case would then fall outside of section 35 and he could not find the fair market value in accordance with the basis laid down by such section. Likewise, if the Minister's determination were not referable to the goods already imported, he also would be powerless to act. This would mean that the appraisal would stand without review and that the goods would have been imported at a value for duty not in accord with section 35, which is a governing section. Such a result is so anomalous as to warrant the rejection of an interpretation that will lead to it. Moreover, if the original appraisal were to stand under the circumstances mentioned, it would be tantamount to saying that the appraisal was conclusive, even if the goods were not sold for home consumption in the country of export. Not only would this run counter to section 35, but it would also involve a right on the part of the original appraiser to decide whether the case falls within section 35 or not. He has no power to make such a decision, for only the Minister is empowered to make it. The adoption of the defendant's contention would also run counter to section 41, for it would imply a right in the original appraiser to make a decision which he has no power to make and thus oust the Minister's jurisdiction in a matter of which he is the sole judge.

A reference to section 43 will also show that the defendant's contention is untenable. Section 43 is clearly

prospective in effect. It provides for the fixing of values for duty for the future in respect of certain classes or kinds of goods where the conditions specified by the section appear to exist. Section 41 does not deal with classes or kind of goods but with specific goods imported under specified circumstances and conditions and the Minister is given power to determine the value for duty of "such" goods. If it had been intended to make the Minister's determination referable only to goods to be imported in the future similar to the goods already imported, Parliament would have made such intention clear by the use of words other than those used. Section 41 would then more properly have been incorporated in section 43. It is not meant to cover a future situation but an existing one. It was designed to fill a gap which the appraisers have no power to fill and for which section 43 makes no provision.

There is further authority for rejecting the defendant's contention. In the *Noxzema Case* (*supra*), section 98 of the Special War Revenue Act gave the Minister power to act.

> Where goods subject to tax under this Part or under Part XI of this Act *are* sold at a price. . . . .

In that case the sales were made during a period prior to the Minister's determination. There was no question there of the Minister's determination being referable only to sales in the future; it was clearly applicable to specific sales already made by the respondent. The words used in section 98 of the Special War Revenue Act are "are sold". In section 41 of the Customs Act the words used are "are imported". In both cases the Minister is given power to make a determination in respect of specific goods, in the one case in respect of goods already sold, and in the other in respect of goods already imported.

It is, in my opinion, quite clear that, when the Minister makes a valid determination under section 41, his determination is not prospective in effect but is referable to the specific goods whose importation and subsequent disposition caused him to make his enquiry and determination.

The determination by the Minister in the present case is, therefore, the value upon which the duty on the canned

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corned beef imported by the defendant during the years 1940 to 1942 is to be computed and levied. The additional amount found payable by the defendant as the result of such determination is, under section 112 of the Act, a debt due and payable to His Majesty, and the plaintiff is entitled to recover it from the defendant.

Under these circumstances it is unnecessary to deal further than I have done with the contentions of the parties relating to the appraisal made by the Chief Dominion Customs appraiser.

The powers of the Minister under section 41 of the Act are very wide and might conceivably be abused without any power on the part of the Court to intervene. While the exercise of the powers in the present case seems to bear harshly upon the defendant, it must be borne in mind that the Court is not aware of all the facts that may have caused the Minister to make his determination. In any event, the Court cannot concern itself with the wisdom of the policy or the harshness of its effects in any given case, for these are matters for Parliament to determine. The Court must confine itself strictly to interpretation of the law as laid down by Parliament. In my opinion, the Minister acted within his jurisdiction in his determination of value for duty, dated August 19, 1943, the determination is referable to the canned corned beef imported by the defendant during 1940, 1941 and 1942 and the defendant is liable for the amount of additional customs duty and taxes found by the Minister to be payable. There will, therefore, be judgment for the plaintiff for $49,312.03. and costs.

Judgment accordingly.

1944
June 2
1945
June 29

BETWEEN:

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

PLAINTIFF;

AND

WATT & SCOTT (TORONTO) LTD.,

DEFENDANT.

AND

BETWEEN:

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

PLAINTIFF;

AND

TEES AND PERSSE LIMITED,

DEFENDANT.

Revenue—Customs Duty—Customs Act, R.S.C. 1927, chap. 42, and amendments, secs. 2(m), 112—Liability for duty of person acting on behalf of owner or importer of goods.

Each of the defendants during 1940, 1941 and 1942 imported into Canada large quantities of canned corned beef from South American countries and paid customs duties based on the values at which the goods were entered for customs. Each of the defendants received the goods on consignment and acted as selling agent for an Argentine company, which was said to be the owner of the goods. Each of the defendants cleared the imported goods through customs on behalf of its principal, and on customs forms on which the goods were entered for home consumption it was stated in each case that the goods were imported by the defendant.

It being considered that the goods had been undervalued, the Chief Dominion Customs appraiser made fresh appraisals and directed each of the defendants to make amended entries and pay additional customs duty and taxes. Protests being made against these appraisals the matter was referred to the Minister of National Revenue who, on August 19, 1943, determined the value for duty of the canned corned beef imported by each of the defendants during 1940 to 1942, showing the additional customs duty and taxes payable by each of the defendants. Actions were brought to recover in each case such additional amount or, in the alternative, the additional amount resulting from the appraisal made by the Chief Dominion Customs appraiser.

Held: That when goods are imported into Canada consigned to a selling agent for their owner and the agent acts for the owner in clearing them through customs and enters them as being imported by himself, such agent is liable for the customs duty and taxes payable in respect of them. *The King* v. *Weddel Limited* (1945) Ex. C.R. 97 followed.

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THE KING v. WATT & SCOTT AND TEES & PERSSE

INFORMATIONS exhibited by the Attorney General of Canada to recover from each of the defendants the additional amount of customs duty and taxes resulting from the determination by the Minister of National Revenue of the values for duty of certain goods imported into Canada in excess of those at which they had been entered for duty.

The actions were tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

J. C. McRuer, K.C. and *Robert Forsyth, K.C.* for plaintiff.

Aimé Geoffrion, K.C. for Watt & Scott (Toronto) Limited.

Aimé Geoffrion, K.C. and *E. K. Williams, K.C.* for Tees & Persse Limited.

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

THE PRESIDENT, now (June 29, 1945) delivered the following judgment:

With one difference, the issues in these two cases are similar to those in *The King* v. *Weddel Limited,* in which judgment for the plaintiff has just been given. In each case, the defendant during 1940, 1941 and 1942 imported into Canada large quantities of canned corned beef from countries in South America and paid customs duties based on the values at which the goods were entered for customs. Subsequently, early in 1943, it being considered that the importations had been undervalued, the Chief Dominion Customs appraiser made fresh appraisals of the value of the imported goods. In the case of the defendant Watt & Scott (Toronto) Ltd., these were at $348,780 in excess of those at which they had been entered for duty and the appraiser directed the defendant to make amended entries and pay additional customs duty and taxes amounting to $167,157.68. In the case of the defendant Tees & Persse Limited, the excess values found on the fresh appraisals amounted to $131,947 and the amount of additional duty and taxes directed to be paid on the amended entries came to $63,955.18. Protests against these appraisals were made to the Department

of National Revenue and eventually the matter was referred to the Minister of National Revenue. He followed the same steps as he took in the *Weddel Limited* case and finally, on August 19, 1943, made a determination of the value for duty of the canned corned beef imported by each defendant during 1940 to 1942 in terms similar to his determination in the *Weddel Limited* case. The amount of additional customs duty and taxes found payable by the defendants as the result of these determinations was, in the case of the defendant Watt & Scott (Toronto) Ltd., the sum of $158,215.18 and, in the case of the defendant Tees & Persse Limited, the sum of $68,825.30. On the refusal of the defendants to pay any additional duty or taxes these actions were brought, the plaintiff, in each case, claiming the additional amount of customs duty and taxes resulting from the determination of the Minister purporting to act under section 41 of the Customs Act, R.S.C. 1927, chap. 42, and amendments, and, in the alternative, the additional amount resulting from the appraisal by the Chief Dominion Customs appraiser purporting to act under section 48.

The difference between the present cases and the *Weddel Limited* case is that Weddel Limited imported the canned corned beef as owner thereof, whereas each of the present defendants was an agent of an Argentine company, Frigorifico Armour de la Plata, of Buenos Aires, the owner of the goods, and received the goods on consignment as selling agent for such owner, the defendant Watt & Scott (Toronto) Ltd. being the sales representative of Frigorifico Armour de la Plata for Eastern Canada, and the defendant Tees & Persse Limited being its sales representative for Western Canada. Each of the defendants denies that it was the importer of the goods or liable for customs duty, it being alleged that the importer was Frigorifico Armour da la Plata, the owner of the goods, and that the defendant was merely consignee of the goods as selling agent for the owner.

I have come to the conclusion that this difference does not free the defendants from liability. Section 112 of the Customs Act provides as follows:

112. The true amount of Customs duties payable to His Majesty with respect to any goods imported into Canada or exported therefrom

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shall, from and after the time when such duties should have been paid or accounted for, constitute a debt due and payable to His Majesty, jointly and severally, from the owner of the goods at the time of the importation or exportation thereof, and from the importer or exporter thereof, as the case may be; . . . . .

and section 2 (*m*) provides:

2. In this Act, or in any other law relating to the Customs, unless the context otherwise requires,

(*m*) "owner", "importer", or "exporter" includes any person lawfully acting on behalf of the owner; importer or exporter;

The evidence is conclusive that each of the defendants lawfully acted on behalf of its principal in clearing the imported goods through customs. The customs brokers of each defendant, acted for it and in accordance with its instructions. The defendant, in each case, paid the necessary customs duties and taxes in order to obtain possession of the goods of which it took delivery in its own name, and was then re-imbursed by its principal in accordance with the agency and consignment agreement between it and its principal. Whether Frigorifico Armour de la Plata was the owner or importer of the goods makes no difference for each defendant lawfully acted on its behalf in clearing the goods through customs and thus completing their importation. Moreover, on the Customs forms on which the goods were entered for home consumption it was stated, in each case, that the goods were imported by the defendant. Thus the defendant not only lawfully acted for the owner of the goods but was itself a de facto importer of them. It would, I think, be estopped from contending that it was not the importer when it put forward an entry stating that the goods were imported by it and thus obtained possession of them. It was urged that, because of the broad terms of section 112, making the owner of the goods and their importer or exporter jointly and severally liable for the customs duties payable on them, the definition of section 2 (*m*) should not apply. I see no reason why it should not do so. There is nothing in the context to render the definition inapplicable and each defendant comes clearly within its terms. It is part of the scheme of the Act that, whoever is the owner of the imported goods and wherever such owner may be, there shall be somebody in Canada who may be assessed for duty in respect of them, whether

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as agent for the owner or importer, or as an importer or de facto importer. Each defendant was in such a position. I conclude, therefore, that when goods are imported into Canada consigned to a selling agent for their owner and the agent acts for the owner in clearing them through customs and enters them as being imported by himself, such agent is liable for the customs duty and taxes payable in respect of them.

The defendants are, therefore, in the same position in the matter of liability as was the defendant in *The King* v. *Weddel Limited* (*supra*), and the reasons for judgment in that case are, *mutatis mutandis,* incorporated herein. In each case, the Minister acted within his jurisdiction in the determination of value for duty made by him, the determination is referrable to the canned corned beef imported by the defendant during 1940, 1941 and 1942 and the defendant is liable for the amount of additional customs duty and taxes found by the Minister to be payable. There will, therefore, be judgment for the plaintiff against the defendant Watt & Scott (Toronto) Ltd. for $158,215.18 and costs; and judgment for the plaintiff against the defendant Tees & Persse Limited for $68,825.30 and costs.

Judgments accordingly.

BETWEEN:

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

PLAINTIFF;

1944

June 15 & 16
June 19

AND

THE EASTERN TRUST COMPANY, a body corporate, with head office at Halifax, in the Province of Nova Scotia,

DEFENDANT.

Expropriation—Owner of expropriated property to be compensated by receiving its money equivalent in value—Fair market value to be based upon most advantageous use for which property is adapted and might in reason be applied, but only present value of such advantages to be taken into account—Evidence of assessment value admissible as check against excessive valuations—Evidence of sales of comparable property made near the time of expropriation useful—

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v.
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Evidence of awards in other expropriation proceedings or settlements in such proceedings made to avoid litigation not admissible—Valuation of subdivision lands on lot by lot basis subject to substantial reduction.

Plaintiff expropriated certain property in the City of Halifax, Nova Scotia, for a wartime housing project. The land had been subdivided into lots for building purposes. The action is to determine the value of the expropriated property.

Held: That the former owner of expropriated property is to be compensated for the property taken from him by receiving its money equivalent in value; he had no right to make any profit out of the expropriation; neither is he obliged to suffer any loss of value; the form of his property is changed by the expropriation, but its total money value should remain the same. He loses his land and all his rights in it, but, in its place, he receives its money value, which is its fair market value. *The King* v. *W. D. Morris Realty Limited* (1943) Ex. C.R. 141, followed.

2. That the market value of the expropriated property should be based on the most advantageous use for which it is adapted and to which it might in reason be applied, present or prospective, but it is only the present value, as at the date of the expropriation of such advantages that may be taken into account. *The King* v. *Elgin Realty Company Limited* (1943) S.C.R. 49 at 52, followed.

3. That while evidence of assessment value is admissible its usefulness is often confined to the check which it affords against excessive valuations.

4. That evidence of sales of property near the expropriated property affords an excellent basis for arriving at its fair market value, provided such sales were of property comparable with the expropriated property and were made at a time near the date of the expropriation.

5. That evidence cannot be given in expropriation proceedings of awards made in other expropriation proceedings or of settlements in such proceedings made with a view to avoid litigation.

6. That in determining the value of expropriated property subdivided into lots for building purposes a valuation made on a lot by lot basis is subject to substantial reduction; account must be taken of such items as interest on the investment involved, taxes paid, expenditures for improvements, cost of installing water and sewer services and making street improvements, selling costs such as advertising and commissions and a proportion of the owner's overhead, and regard must be had to the probable length of time it would take to sell the property in lots.

INFORMATION by the Crown to have certain property expropriated in the City of Halifax, Nova Scotia, for a wartime housing project, valued by the Court.

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

F. D. Smith, K.C. and *J. G. Fogo, K.C.* for plaintiff.

C. B. Smith, K.C. for defendant.

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

THE PRESIDENT, now (June 19, 1944) delivered the following judgment:

The expropriated property involved in these proceedings is situate in the northwest part of the City of Halifax. There were three expropriations completed by the deposit of the necessary plans and descriptions in the office of the Registrar of Deeds for the County of Halifax, in accordance with the provisions of Section 9 of the Expropriation Act, the first on September 2, 1942, the second on October 23, 1942, and the third on October 28, 1942. On the deposit of such plans and descriptions the lands covered by them became vested in His Majesty the King.

The parties have been unable to come to an agreement as to the amount of compensation money to which the defendant is entitled and these proceedings have been brought for an adjudication thereon. The plaintiff tendered $45,000 and interest on April 13, 1944, but this tender was refused by the defendant. The offer was repeated in the Information herein which was filed on April 28, 1944. By its statement of defence the defendant claims the sum of $75,000 with interest. There is, therefore, a wide discrepancy between the parties as to the amount of compensation money to which the defendant is entitled.

The principal grounds upon which an award of compensation should be made are well settled. They were stated by this Court in *The King* v. *W. D. Morris Realty Limited* (1) and need not be restated in detail. In that case I held, following a number of leading English authorities, that the owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent value to be estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be estimated by its fair mar-

(1) (1943) Ex. C.R. 141.

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ket value as it stood at the date of its expropriation. The former owner of expropriated property is to be compensated for the property taken from him by receiving its money equivalent in value. He has no right to make any profit out of the expropriation; neither is he obliged to suffer any loss of value; the form of his property is changed by the expropriation, but its total money value should remain the same. He loses his land and all his rights in it, but, in its place, he receives its money value, which is its fair market value.

The expropriated property may fairly be considered in two portions; firstly, that which lies to the west of Connolly Street and is bounded on the south by Berlin Street, on the north by Bayers Road for a portion of it and by Young Street for the remainder, and on the west by Connaught Avenue; this portion was covered by the first two expropriations which included the so-called streets; and, secondly, that which lies to the east of Connolly Street and includes four blocks bounded on the south by Summit Street, on the north by Edinburgh Street and on the east by property facing on the west side of Oxford Street; this portion was covered by the third expropriation.

The expropriated property formerly belonging to the defendant forms part of what has been called by the defendant the "Ardmore Subdivision". The Ardmore property was acquired by the defendant in 1912 and 1913 as security for advances made by it to one D. Lorne McGibbon of Montreal. The deeds to the defendant although absolute in form were in reality mortgages. These were subsequently foreclosed and the defendant acquired title to the foreclosed property in 1928. The defendant has been in possession of the property for a long time. In 1913 it subdivided the whole of the Ardmore property including the expropriated property but this 1913 subdivision was merely on paper. In 1929 the portion of the Ardmore subdivision east of Oxford Street was re-subdivided into 40 foot lots. This re-subdivision did not include any of the expropriated lands involved in this action. In 1938, however, the expropriated property was re-subdivided and a plan of the subdivision was registered in the Halifax Registry Office on June 4, 1942, a few months

prior to the expropriation. According to this plan there were 87 lots in the 4 blocks to the east of Connolly Street and 149 lots in the remainder to the west of Connolly Street.

At the time of the expropriation the land between Connolly Street on the west and Oxford Street on the east was fairly level and regular in its contour. The land west of Connolly Street was rougher; it sloped to the west and north; there were a number of valleys in it and a gulch; what was called Almon Street was really a valley and what was called Edinburgh Street was a hill; it could fairly be said to be pasture land. As to the whole of the expropriated property, no streets had actually been laid out; sewer and water were available to the lots on the north side of Edinburgh Street between Oxford and Connolly Streets; there was also sewer and water on Oxford Street which was a graded street with curb and gutter; there was only a travelled way on Connolly Street, on which the City of Halifax in 1934 had constructed a sewer as an unemployment project, from Bayers Road south along Connolly Street almost to Almon Street; apart from these improvements all of the expropriated property of the defendant was unimproved with no streets laid out and no sewer or water installed.

The defendant contended that its policy had been to sell the portion of the Ardmore property east of Oxford Street first, before selling the portion west of Oxford Street; that by 1940 the lots east of Oxford Street had all been sold; and that the time had arrived when there was a reasonable prospect of the lots west of Oxford Street being sold in the very near future. It is in the light of this situation that the Court must view the property and ascertain its money value. In doing this, well-known principles must be applied. While the property was not improved otherwise than I have mentioned, its future possibilities and its possible sale in lots must be taken into account, but there again it is only the present value as at the date of the expropriation that is to be considered. In the *W. D. Morris Realty Limited* case (*supra*), which I have mentioned, I quoted with approval the statement made by Nichols on

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Eminent Domain, 2nd Edition, paragraph 219, page 665, which reads as follows:—

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

This is sometimes spoken of as the assessment of market value based upon best use of the property. I also referred to the statement made by Taschereau J. of the Supreme Court of Canada in *The King* v. *Elgin Realty Company Limited* (1), where he said:

> The value to the owner consists in all advantages which the land possesses, present, or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value.

While, therefore, a considerable portion of the expropriated land was in fact pasture land at the time of the expropriation, it is not fair to value it solely as such, but its present value for building purposes in the future must also be ascertained. That is part of the money value of the land.

Three valuations were given, two on behalf of the defendant and one on behalf of the plaintiff. The onus of proof of value is on the defendant. Mr. Stephens, the real estate officer of the defendant, valued the land on a lot by lot basis, that is, 236 lots, on November 26, 1942, shortly after the expropriation, at $96,000, the detail of which is given in exhibit "N". He allowed a deduction of approximately one-third of this amount for the sale of the property en bloc and arrived at a final valuation of $65,000. His opinion was that the lots in the expropriated property could all be sold within 10 years. Mr. Clark and Mr. de Wolf joined in a valuation on a lot by lot basis. This amounted to $86,900. They allowed a 20 per cent reduction for a sale en bloc and Mr. Clark expressed the opinion

(1) (1943) S.C.R. 49 at 52.

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that the land could all be sold within 5 years. The final valuation arrived at by Mr. Clark and Mr. de Wolf was $69,520. Their valuation was made sometime in April, 1943, for Wartime Housing Limited which had done a considerable amount of work on the expropriated property. On the other hand, Mr. Minshull, for the plaintiff, valued the 87 lots to the east of Connolly Street at $17,600. He regarded these lots as being marketable at the date of the expropriation or in the near future. He valued the land west of Connolly Street on an acreage basis at $800 per acre for 20 acres or $16,000, making a total valuation of $33,600. His valuation, even on the basis used by him, is subject to increase since the acreage is somewhat in excess of 22 acres. Mr. Minshull was strongly of the view that the land could not be sold in lots within 10 years, but thought the period of time it would take would be closer to 20 years. There is also evidence of the assessment of the property at $16,000, on an average basis, but assessment value is not the same thing as fair market value. While evidence of assessment value is admissible, its usefulness is often confined to the check which it affords against excessive valuations. There is thus a great discrepancy between the valuations offered to the Court. This is not an unusual situation in expropriation proceedings. Experts vary in their opinions and it becomes the duty of the Court to assess the weight which should be attached to their opinions in any case.

Fortunately, in the present case there is evidence which affords a check upon the opinions given by the experts. A good deal of evidence was given of sales of property near the expropriated property. Evidence of such sales affords an excellent basis for arriving at fair market value, provided the sales are of property comparable with the property whose value is being ascertained by the Court and were made at a time near the date of expropriation. Mr. Stephens gave a long list of sales of property the details of which are shown by exhibit 11. These run from 1930 to 1940 and there were as well some sales in 1943. These run as high as $600 per lot but, with few exceptions, they are sales of lots east of Oxford Street where, generally speaking, the installation

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of water and sewer and street improvements preceded the sale of the lots, although Mr. Stephens did say that some lots had to be sold on a street before improvements on it were made. An improved lot on a graded street, with sewer and water available to it, is not comparable with an unimproved lot, where these services are not available, and the evidence of sales given by Mr. Stephens is subject to discount for that reason. At the other end of the scale, evidence was given by Mr. Hubley of sales on the north side of Swain Street in 1937, 1938 and 1939. He thought highly of his lots. He said that he advertised these lots for $200 each, but the best price he could get for them was from $100 to $150 each, even although they were served with sewer and water. These lots are just to the south of the western portion of the expropriated property and, to that extent, are closer to the centre of the city than some of the other lots in it. Evidence was also given of the sale of about 30 lots in 1938 in blocks "O" and "N" just south of the western portion of the expropriated property to Mr. Butler at $100 per lot. It was contended by Mr. Hubley that these lots, and the lots sold by him, were better than those in the western part of the expropriated property, but it may well be that the value of Mr. Hubley's lots was effected considerably by the zoning regulations that were in effect, for they are in the immediate vicinity of the Halifax Airport. The zoning regulations would, of course, also affect the lots in the western part of the expropriated property on Connaught Avenue, which is the western boundary of the expropriated property and, at the same time, the eastern boundary of the Halifax Airport.

Evidence was not available as to the sale of blocks of land in subdivisions. I ruled that evidence cannot be given in expropriation proceedings of awards made in other expropriation proceedings or of settlements in such proceedings made with a view to avoiding litigation. The latter portion of the rule is well established and is dealt with in the *W. D. Morris Realty Limited* case (*supra*) where I held that an offer to buy property made by the expropriating party for the purpose of avoiding controversy and litigation is not a fair test of its market value, nor is an offer to sell property made by the owner

for the same purpose to be regarded as an admission by him as to its value. There is also a sound basis for the former part of the rule. Sales from willing vendors, not obliged to sell, to willing purchasers, not obliged to buy, go to establish market value. An award in expropriation proceedings is a different thing. It is the result of the Court's finding based on the evidence before the Court in that particular case and cannot be used as proof of market value in another case. Each case must stand on its own facts and evidence as to market value.

There was, however, some evidence of sales which, in my opinion, was very helpful. In 1938 fifteen lots on the west side of Oxford Street were sold to Piercey Investors at an average of $425 each. These were immediately adjoining the expropriated property. I take into account that these were sold en bloc. In addition, 6 lots were sold between 1938 and 1942 on the south side of Edinburgh Street just west of Oxford Street. These were served with sewer and water and were on improved streets. Sewer and water costs $3.50 per front foot or $140 for a 40 foot lot, and there are also charges which must be made for street improvements of various kinds. These lots, that is, the ones sold to Piercey Investors, on the west side of Oxford Street and the 6 lots on Edinburgh Street were the most valuable lots in the Ardmore subdivision west of Oxford Street. I think this is particularly true of the lots on the west side of Oxford street. There is also evidence given by Mr. Walker of sales of lots on Oxford Street just west of the expropriated property at $400 and $450 per lot on an improved street served with sewer and water. In my opinion, these sales afford a valuable check on the valuations tendered by the experts. They are sales made at a time very near the date of expropriation of property very close to the expropriated property. They are, however, sales of improved lots and when any comparison is made between such lots and other lots the cost of installing water and sewer and making other improvements must be taken into account.

In view of these facts, I think it is possible to check the valuations made by the various experts. In my opinion, the valuation made by Mr. Stephens is an excessive

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one. His estimates for the 87 lots east of Connolly Street run from $350 to $500 per lot. Only 9 of these lots were served with sewer and water. His total for them comes to $34,800. His estimate for the lots west of Connolly Street is, in my opinion, even more excessive, for in that part of the expropriated property the lots, according to his estimate, run from $350 to $600 per lot, with only two lots going as low as $300 and one as low as $250, which makes his estimate for the total area west of Connolly Street $61,450. The average for all the lots is approximately $405. It seems somewhat strange to me that the average for the portion west of Connolly Street runs higher than that for the portion east of it. Almost all of the lots are unimproved. This average of approximately $405 runs against the known sales of lots of superior location, served with water and sewer on improved streets, at $425 or, at the most, $475. In my opinion, the valuation made by Mr. Stephens is subject to very substantial reduction. I do not think that it is necessary to estimate the amount of such reduction, but it would not be unfair to reduce it by at least $100 per lot. Mr. Clark's valuation is, in my opinion, unwarranted by the facts. It is true that he did not make his valuation until April, 1943, after Wartime Housing Limited had done a good deal of work on the expropriated property in the way of grading and levelling. It had cut down the hill to which I have referred and had filled in some of the valleys. Mr. Clark's valuation ran from $500 per lot on Edinburgh Street, where there were water and sewer which he said he had taken into account, to $300 for the poorest lots. I think his valuation is subject to substantial reduction for the same reasons as those in the case of Mr. Stephens' valuation. I am not surprised that the valuation made by Mr. Clark and Mr. de Wolf was not accepted by the right of way department of the Canadian National Railways. On the other hand, the valuation given by Mr. Minshull is not entirely sound. He valued the 87 lots east of Connolly Street at from $200 to $300 each. While, in my opinion, this valuation is closer to the real market value, having regard to the sales of improved lands nearby, than the other estimates were, I think it is on the low side. As

Mr. Minshull valued the remaining land solely on an acreage basis, in my opinion, he does not sufficiently take into account the possibilities of the sale of the land as lots and, for that reason, I am of the opinion that the valuation made by him should be substantially increased. Mr. Stephens deducted one-third of his total valuation on a lot by lot basis for the sale of the expropriated property en bloc and thought that this was a fair and reasonable reduction to make. He should know, for the reason that he has had experience in handling the other portions of the Ardmore property for a great many years. Mr. Clark deducted only one fiifth of the lot by lot valuation for a sale en bloc, but he admitted that this was an arbitrary figure. Some deduction must, of course, be made, and the extent of the deduction that should be made must depend to some extent, at any rate, upon the time that it would take to sell the property on a lot basis. Account must be taken of such items as interest on the investment involved, taxes paid, expenditures for improvements, cost of installing water and sewer services and making street improvements, selling costs such as advertising and commissions and a proportion of the defendant's overhead. The amount of many of these items will depend upon the length of time it would take to sell the property. The defendant held the property both east and west of Oxford Street for a great many years, in one capacity or another, since 1913. It did not sell the lots east of Oxford Street until 1940, and, in respect of the lots west of Oxford Street, it had sold only the lots to the School Board, the 13 lots on Oxford Street to Piercey Investors, and the 6 lots on Edinburgh Street. While the defendant and its witnesses were optimistic about the length of time it would take to sell the property west of Oxford Street when evidence was being given at the trial, it did not show the same optimism about the future when it applied for an extension of time for paying the city sewer charges on Connolly Street. When it made this application it gave as one of the grounds for such extension the fact that the situation in respect to the property was the same as it had been in 1937, namely, that that section was not yet ready for development as they had a considerable number of unsold lots

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on Edinburgh Street and other streets closer to the city. This letter was written, not in 1937, but on January 17, 1942, just a short time before the expropriation. When that letter was written the defendant was not optimistic that the lands would be saleable in lots at any rapid rate of time. While the trend in the expansion of the city, according to the evidence, was westward, the presence of the Airport on the western limit of the expropriated property would, in my opinion, have some adverse effect on the sale of lots near it. I think this is a natural assumption to make. The slope of the land westward and northward made use of the Connolly Street sewer impossible for the western portion of the expropriated land and the rough nature of it, the valleys and the gulch in it, made considerable expense necessary before it could be put into a saleable state. It is impossible to forecast future development. From 1931 to 1941 the census figures for Halifax, strangely enough, show no increase in population. On the other hand, it may well be that the construction of buildings of a permanent nature may result in increased population in Halifax and the future may bring an increase in industrial development. Likewise, available land for building purposes is becoming less. In the future land might appreciate in value but, on the other hand, it has been known from experience in the past that the reverse is possible.

A valuation made on a lot by lot basis is subject to substantial reduction in order to arrive at the true value of the property on the basis of a sale en bloc and I am of the opinion that the percentage allowed by Mr. Clark of 20 per cent, which he admitted was an arbitrary figure, is too low and that the percentage considered as fair and reasonable by Mr. Stephens is a better one, but, in view of the fact that much depends upon the time factor, it is difficult to fix the percentage with any degree of exactness. Having regard to all the facts and the evidence given, the experience of the defendant in the past in selling its lots, the evidence of sales of improved lands, the small number of lots sold in the Ardmore subdivision west of Oxford Street up to the time of the expropriation, the state of the land at the time of its expropriation, its future possibilities and the present value of such possibilities, the opinions given

by the experts, and the other facts affecting the value of the land which I have mentioned, I have come to the conclusion that the sum of $50,000 would be ample compensation to the defendant, and I find that this is the value of the expropriated property as at the date of its expropriation, and, consequently, the amount of compensation money to which the defendant is entitled. Since this amount represents the value of the land, as at the date of the expropriation, the defendant must pay out of such amount whatever claim the City of Halifax may have in respect of the unemployment relief sewer project on Connolly Street. Counsel have agreed that this amounts to $4,381.15. I do not think it necessary for me to attempt to decide whether this constitutes a lien or charge upon the land at the time of the expropriation or an inchoate lien or charge, if there is such a thing, but, in any event I wish to make it clear that the sum of $50,000 is inclusive of whatever amount the defendant must pay to the City of Halifax.

Since the amount of the award exceeds that of the tender by the plaintiff, the defendant will be entitled to interest on the sum of $50,000 at 5 per cent per annum from the date when the expropriation was completed, namely, October 28, 1942, to this date, that is, the date of judgment. The expropriation took place in three sections, the earliest expropriation having been made on September 2, 1942. It is difficult to fix the amount of compensation money that is attributable to each portion of the expropriated property, but if I were to allow interest on one half of it, that is, interest on $25,000 from September 2, 1942, to October 28, 1942, in addition to the interest on $50,000 already mentioned this would be an ample allowance of interest. The defendant will also be entitled to its costs to be taxed in the usual way.

There will, therefore, be the usual judgment declaring that the expropriated lands described in the Information are vested in His Majesty the King as from the various dates of the depositing of the plans and descriptions in the Registry Office for the County of Halifax. There will be a declaration that the amount of compensation money to which the defendant is entitled is the sum of $50,000, inclusive of whatever charges it may have to pay to the City of Halifax, and that the defendant is entitled to be paid

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such amount on providing the necessary releases and discharges of all claims, liens or encumbrances either in respect of the expropriated lands or in respect of the compensation money, and there will also be an order to the effect that the defendant is entitled to interest as indicated and costs as stated.

Judgment accordingly.

BETWEEN:

1943

May 11

1945

Aug. 30

C. FAIRALL FISHER, carrying on business under the name and style of Fisher Bros. Reg'd.,

PETITIONER.

AND

BRITISH COLUMBIA PACKERS LIMITED,

RESPONDENT.

Word mark "Sea-lect"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, secs. 2 (c), 2 (m), 2 (o), 26 (1) (c), 26 (1) (d), 29, 52—First registration prevails over first user—Distinctiveness—"Adapted to distinguish"—Descriptive words may by user acquire secondary meaning and become adapted to distinguish—Laudatory epithets cannot be or become word marks—Not permissible to find distinctiveness in a word mark from the appeal which its form makes to the eye—Corruption or misspelling of a word cannot change its character.

In 1940 petitioner commenced using the word "Sea-lect" on canned fish and lobster and sold such goods under such mark widely and extensively throughout Canada, but did not apply for registration of it. In 1941 respondent with no knowledge of the petitioner's use of the word used it on fresh and frozen fish and obtained registration of it as a word mark for fish and fish products, either canned or fresh or frozen. On the respondent's refusal to cancel the registration the petitioner brought these proceedings for an order to expunge the respondent's registration and to obtain a declaration that he was himself entitled to registration for canned fish and lobster.

Held: That the petitioner cannot succeed in attacking the registration on the ground that the respondent was not the first user of it. *Canada Crayon Company Limited* v. *Peacock Products Ltd.* (1936) Ex. C. R. 178) followed.

2. That distinctiveness is an essential requirement of a trade mark.

3. That the word "Select" as applied to goods is a laudatory epithet that is incapable of distinctiveness; it cannot become adapted to distinguish the goods of one person from those of another; and it should not be registered as a word mark.

4. That it is not permissible under section 2 (*o*) to find distinctiveness in a word mark from the appeal which its form makes to the eye.

5. That the corruption or misspelling of a descriptive word cannot change its character. *Kirstein Sons & Co.* v. *Cohen Bros.* (1907) 34 Can. S.C.R. 286 and *The "Orwoola" Trade Mark Application* (1909) 26 R.P.C. 850) followed.

6. That the word "Sea-lect" is merely a corruption or misspelling of the laudatory epithet "Select" and as such is incapable of distinctiveness and ought not to be registered as a trade mark.

7. That a laudatory epithet such as "Select", including any corruption or misspelling of it such as "Sea-lect" should not be made the subject of a declaration of registrability as a word mark under section 29, no matter what the extent of its user may be.

PETITION for an order expunging the respondent's registration of the word "Sea-lect" as a word mark for fish and fish products either canned or fresh or frozen and for a declaration that the petitioner is entitled to registration of it for canned fish and lobster.

The petition was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

R. S. Smart, K.C. and *Eric L. Medcalf* for petitioner.

E. H. Charleson for respondent.

The President now (August 30, 1945) delivered the following judgment.

These proceedings are taken under sections 52 and 29 of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38. The petitioner seeks both an order expunging the respondent's registration of the word "Sea-lect" as a word mark for fish and fish products, either canned or fresh or frozen, and also a declaration that he is himself entitled to registration of it for canned fish and lobster.

The facts are not in dispute. The petitioner has places of business in Montreal and Charlottetown with distributing agents throughout Canada, his business consisting principally of canning and marketing various kinds of fish and lobster. Since the early part of 1940 he has marked canned fish and lobster with the word "Sea-lect". He intended to register it as a word mark in 1940 and inter-

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viewed an official in the office of the Registrar of Trade Marks who advised him that the word, being a misspelling of the word "Select", was descriptive and could not be registered. In view of this advice he did not apply for registration but continued to use the word on his canned fish and lobster. Since he commenced using it his sales of canned fish and lobster have been widely made throughout Canada and have amounted to approximately $900,000.

In June 1941 the respondent thought of using the word "Sea-lect" for fish products, canned, fresh or frozen, and instructed its Vancouver solicitors to register it. It had no knowledge, direct or indirect, that the word "Sea-lect" was in use by the petitioner. The respondent's solicitors caused a search to be made in the office of the Registrar of Trade Marks at Ottawa and reported that there was nothing on the register to prevent its registration. The respondent then sold fish products, both fresh and frozen, under the word "Sea-lect" from its Vancouver and New Westminster plants, such sales being on July 8, 9 and 10, 1941, and applied for registration on July 16, 1941. The word was registered as a word mark in the name of the respondent in the Trade Marks Office on July 24, 1941 as No. N. S. 15313, Register 58, for use in association with fish and fish products, either canned or fresh or frozen. The respondent has made no use of the mark beyond the sales mentioned but explains this by government regulations under which its pack of herring and salmon was required for export to Great Britain and none of it was available for distribution in Canada. It says that it intends to use the mark as soon as the governmental restrictions which render its present use impossible are removed. The respondent does a very extensive business in fish and fish products, including canned fish such as herring and salmon. There has been no abandonment of user of the mark by it. When the petitioner learned of the respondent's registration he requested it to cancel the same and on its refusal to do so took the present two fold proceedings.

The attacks on the registration are based upon section 52 of The Unfair Competition Act, 1932, on the ground that it does not accurately express or define existing rights of the respondent.

It was contended for the petitioner that the respondent was not entitled to registration of the mark because it was not the first user of it. While it is a fact that the petitioner used the word "Sea-lect" before the respondent made even its limited use of it, this does not enable the petitioner to succeed in his attack on this ground in view of the decision of this Court in *Canada Crayon Company Limited* v. *Peacock Products Limited* (1). In that case the petitioner commenced the use of the word "Peacock" and the representation of a peacock as a trade mark in July, 1926, but failed to apply for registration of it until April 7, 1934. On February 21, 1933, the respondent, acting in good faith, obtained registration of its trade mark, similar in appearance to that of the petitioner, which it had been using since December, 1932. The petitioner moved for an order expunging the respondent's registration but Angers J. dismissed the motion. He held that, under the circumstances of the petitioner's failure to register his mark, his prior use of it was immaterial and that the respondent's prior registration was in order and should not be disturbed. No appeal was taken from this judgment. It must, I think, be regarded as conclusive in this Court against the petitioner's contention that the registration was invalid because the respondent was not the first user of the mark.

The major attack on the registration was on quite a different line. Counsel for the petitioner contended that the word "Sea-lect" was excluded from registration under section 26 on the ground that it was a misspelling of the word "Select" and as such was descriptive of the quality of the wares in connection with which it was proposed to be used. The relevant portions of section 26 read as follows:

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

(*c*) is not, to an English or French speaking person, clearly descriptive or misdescriptive of the character or quality of the wares in connection with which it is proposed to be used, or of the conditions of, or the persons employed in, their production, or of their place of origin;

(*d*) would not if sounded be so descriptive or misdescriptive to an English or French speaking person;

(1) (1936) Ex. C.R. 178

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The New English Dictionary gives the following meanings for the word "Select": "1. Selected, chosen out of a larger number, on account of excellence or fitness; picked. 2. Hence, Choice, of special value or excellence; composed of or containing the best, choicest or most desirable; superior." And Webster's New International Dictionary gives these meanings: "1. Taken from a number of the same or an analogous kind by preference; selected; picked; 2. Of special value or excellence; choice;"

The word "Select" is clearly descriptive of quality and would be excluded from registration by section 26 (1) (*c*). And, it seems to me, the word "Sea-lect" is excluded by section 26 (1) (*d*), for when sounded it would be as descriptive to an English speaking person as the word "Select". On this ground alone the petitioner is entitled to an order for expungement.

There is a stronger reason for expunging the registration than the one thus put forward by counsel. Section 26 (1) provides that a word mark "shall be registrable" if it does not come within any of the categories specified in the succeeding paragraphs. But it is essential to registration that a word shall be a "word mark" as defined by the Act. Since word marks are a class of trade marks it is necessary to look at the definition of a trade mark as well as that of a word mark. Section 2 (*m*) defines a trade mark as follows:

2. (*m*) "Trade mark" means a symbol which has become adapted to distinguish particular wares falling within a general category from other wares falling within the same category, and is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, and/or users of such wares that they have been manufactured, sold, leased or hired by him, or that they are of a defined standard or have been produced under defined working conditions, by a defined class of persons, or in a defined territorial area, and includes any distinguishing guise capable of constituting a trade mark;

And section 2 (*o*) gives the definition of a word mark:

2. (*o*) "Word mark" means a trade mark consisting only of a series of letters and/or numerals and depending for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, independently of the form of the letters or numerals severally or as a series.

It is clear from these definitions that distinctiveness is an essential requirement of a trade mark. It is also clear

that such distinctiveness is a quality that can be acquired, even although originally lacking in the mark, for the definition speaks of a symbol which has "become" adapted to distinguish. It is also implied that the mark must be capable of distinctiveness for without such capability it can never "become adapted to distinguish". There are some words which, because of their nature, are common property and cannot be made the subject of monopoly. They are incapable of distinctiveness. Laudatory epithets are of such a nature. They are, it is true, descriptive of quality. But, while merely descriptive words may acquire distinctiveness by user of them in association with the goods of a particular person in such a way that they have become adapted to distinguish his goods from those of another person, no amount of user of laudatory epithets can give them the quality of distinctiveness that is essential to a trade mark. If a mark cannot be distinctive it cannot become adapted to distinguish and no amount of user of it can make it a trade mark. This principle is strikingly laid down in *Joseph Crosfield's & Sons Ld's Application* (1), commonly referred to as the *Perfection Case*. The applicants sought to register the word "Perfection" as a trade mark for common soap. They had used it for thirty years. Prior to the Trade Marks Act, 1905, the word was not registrable, but under section 9 (5) of that Act a wide discretion was given to the Board of Trade and the Court to allow the registration of words not previously registrable. The Court of Appeal held that the word "Perfection" was not a distinctive mark, notwithstanding its long user by the applicants, was not adapted to distinguish their goods from those of other persons and could not, therefore, be registered as a trade mark. Cozens-Hardy M. R. said, at page 854:

> It is apparent that no word can be registered under this paragraph unless it is "distinctive"—that is to say, is "adapted to distinguish" the goods of the proprietor from the goods of other persons. There are some words which are incapable of being so "adapted" such as "good", "best" and "superfine". They cannot have a secondary meaning as indicating only the goods of the applicant. There are other words which are capable of being so "adapted", and as to such words the tribunal may be guided by evidence as to the extent to which use has rendered the word distinctive. It is easy to apply this paragraph to geographical words, and it is possible to suggest words having direct reference to

(1) (1909) 26 R.P.C. 837.

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character or quality which might be brought within it. But an ordinary laudatory epithet ought to be open to all the world and is not, in my opinion, capable of being registered.

In a most illuminating judgment Fletcher Moulton L. J. dealt with the subject of distinctive and descriptive terms. In his view it was a fallacy to assume that there is a natural and innate antagonism between distinctive and descriptive as applied to words and that if a word is descriptive it cannot be distinctive. Words originally descriptive and as such not registrable as trade marks could acquire distinctiveness and, in a proper case, become entitled to registration. He thought that under the Act of 1905 the Court had power to allow descriptive words to be registered if a case on the merits was proved before it sufficiently strong to induce it to do so. In his opinion the new Act recognized that distinctiveness—that is, being adapted to distinguish the goods from those of other traders—was not the innate quality of the word but might be acquired. Then at page 858, he said:

> The extent to which the Court will require the proof of this acquired distinctiveness to go will depend on the nature of the case. If the objections to the word itself are not very strong it will act on less proof of acquired distinctiveness than it would require in the case of a word which in itself was open to grave objection. I do not think, for instance, that any amount of evidence of user would induce a Court to permit the registration of ordinary laudatory epithets, such as "best", "perfect", etc. On the other hand, in the case of a peculiar collocation of words it might be satisfied with reasonable proof of acquired distinctiveness even though the words taken separately might be descriptive words in common use.

Fletcher Moulton L. J. thus also took laudatory epithets out of the class of descriptive words that could by user acquire distinctiveness. Farwell L. J. expressed similar views. At page 862, he said:

> I cannot myself see how words which are simply a direct statement of quality, for example "good" or "best" can ever lose their primary meaning and come to mean not good or best but the articles made by A. B.

In my opinion, a similar view should be taken with regard to the word "Select". When used in connection with goods it simply means that they are picked goods—that they are "choice" or "choicest" or "superior" or "better" or "best" goods. I am unable to distinguish in principle the word "Select" from the words held incapable

of distinctiveness in the *Perfection Case* (supra). In my view, the word "Select" as applied to goods is a laudatory epithet that is incapable of distinctiveness; it cannot become adapted to distinguish the goods of one person from those of another; and it should not be registered as a word mark.

Counsel for the respondent contended that section 26 (1) (*c*) excluded the registration of a word mark only if it was clearly descriptive or misdescriptive and that if there was any doubt as to it being "clearly" of such a character the registration should remain. His argument was that "Sea-lect" was more than merely a misspelling of "Select", that there was in it a reference to the place of origin of the wares but not enough to make it clearly descriptive of their place of origin, that the mark was a smart mark with its oblique reference to the sea, that it was to be distinguished from the adjective on the ground that this other meaning could be given to it, and that it had distinctiveness.

I have given these arguments the careful consideration they merit, but have come to the conclusion that they cannot be accepted. Counsel relied upon the last sentence in the passage from the judgment of Fletcher Moulton L. J. in the *Perfection Case* (*supra*) which I have cited but, in my view, the word "Sea-lect" cannot be regarded as a collocation of words within the meaning of that sentence. Nor can I agree with the suggestion that distinctiveness is not as essential to a trade mark in Canada as it is in the United Kingdom. Counsel also relied upon the judgment in *New York Mackintosh Co.* v. *Flam et al* (1). There it was held that the word "Bestyette" was sufficiently distinctive to constitute a valid trade mark for waterproof capes and cloaks, but was not infringed by the use of the word "Veribest" by a defendant on similar garments. District Judge Holt said, at page 572:

> "Bestyette", when spoken, sounds the same as "Best Yet", and undoubtedly the claim that is merely a descriptive word has much weight. But, in trade-marks, the impression produced on the sight of the buyer is the main thing; and, upon the whole, I think that the compounded and fantastically spelled word "Bestyette" is sufficiently distinctive to be a trade-mark.

(1) (1912) 198 Fed. Rep. 571.

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This opinion runs counter to that expressed by Cozens-Hardy M.R. in the *Perfection Case* (*supra*). At page 855, he said:

> There is one important distinction between word marks and other marks. The former appeal to the ear as well as, and indeed more than, to the eye. The latter appeal to the eye only. It seems to follow that a word, not being an invented word, ought not to be put on the Register, if the spelling is phonetic and resembles in sound a word which in its proper spelling could not be put on the Register.

There is a wide divergence in these views, but, in my opinion and in so far as either case may be considered in view of the terms of the Canadian Act, the latter authority is to be preferred. Under it, if "Select" is a word that should not be put on the register, neither should the word "Sea-lect" be. In sound it resembles "Select", as frequently and commonly pronounced, and phonetically is not distinguishable from it. It then is excluded, as I have said, by section 26 (1) (*d*).

There is another important reason for not accepting the arguments of counsel in support of the registration. It appears from the remarks of Cozens-Hardy M. R., which I have just cited, that in England a word mark may appeal to the ear as well as to the eye, but that the appeal is more to the ear than to the eye. If this should be authority for the rejection of "Sea-lect" as being similar in sound to "Select", the case for its rejection is even stronger under The Unfair Competition Act, 1932. That Act divided trade marks into design marks and word marks and defined the distinctiveness that each must possess. By section 2 (*c*) a design mark must depend for its distinctiveness upon its form and colour, or upon the form, arrangement or colour of its several parts, *independently* of any idea or sound capable of being suggested by the particular sequence of the letters and/or numerals, if any, forming part, thereof, or by their separation into groups; whereas by section 2 (*o*), which I have cited, a word mark must depend for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, *independently* of the form of the letters or numerals severally or in series. From these statutory definitions it would seem that in the case of a design mark the appeal is only to the eye but that in the case of a word

mark the appeal which its form may make to the eye must be excluded from consideration in determining whether it is distinctive or not. Its distinctiveness depends not upon its form but only upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups. It is not permissible under section 2 (*o*) to find distinctiveness in a word mark from the appeal which its form makes to the eye. This difference in distinctiveness between a design mark and a word mark resulting from the statutory definitions in The Unfair Competition Act, 1932, must constantly be kept in mind in considering the effect that should be given to English or American decisions on word marks in a Canadian case. In view of this difference alone, it is difficult, to say the least, to see how such a decision as *New York Mackintosh* v. *Flam et al* (*supra*) could have any bearing on the present case.

Whatever distinctiveness the word "Sea-lect" may lay claim to, including the oblique reference to the sea, is by reason of its form and the separation of "Sea" from "lect" by a hyphen but when its form is eliminated from consideration in determining whether it has distinctiveness because of the statutory definition in section 2 (*o*) no distinctiveness remains and it must be regarded merely as a corruption or misspelling of the word "Select".

It is well established that the corruption or misspelling of a descriptive word cannot change its character. This was decided by the Supreme Court of Canada in *Kirstein Sons & Co.* v. *Cohen Bros.* (1). In that case the action was to restrain the defendants from continuing an alleged infringement of the trade mark "Shur-on" claimed by the plaintiffs as their registered trade mark for eye-glass frames sold by them as traders in optical goods by the use of the term "sta-zon" for similar goods sold by the defendants. The Court held that the terms were merely corruptions of words descriptive of the eye-glass frames to which they were intended to be applied and as such could not be trade marks. A similar view was taken by the English Court of Appeal in *The Orlwoola Trade Mark Application* (2). There the word "Orlwoola" was held to be not registrable

(1) (1907) 34 Can. S.C.R. 286. (2) (1909) 26 R.P.C. 850.

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as being merely a misspelling of "All Wool" which was clearly not registrable. At page 860 Fletcher Moulton L. J. said:

> This case presents no difficulty. It is in substance a case of registration of the words "All Wool", grotesquely mis-spelt, as a Trade Mark for textile fabrics. When a Trade Mark consists solely of words it will be used orally as well as in writing, and to be proper to constitute a trade mark such words must be suitable, whether spoken or written. The mis-spelling does not affect the words when spoken, so that we have only to decide whether the words "All Wool" are proper for registration in respect of such goods. To this there can be but one answer. If the goods are wholly made of wool the words are the natural and almost necessary description of them. If they are not wholly made of wool it is a misdescription which is so certain to deceive that its use can hardly be otherwise than fraudulent. In either case the words are utterly unfit for registration as a Trade Mark.

And Farwell L. J. expressed similar views. At page 863, he said:

> "All Wool" or "All Woolly" cannot possibly be regarded as adapted to distinguish woollen goods; they are purely descriptive of their nature. I doubt if any amount of evidence could prove that they had lost their primary and acquired a secondary meaning. It can make no difference whether the words are spelt phonetically, fantastically, or conventionally; they are registered in respect of all wool goods and to the ear they mean all wool. It is said that to the eye "Orlwoola" and "All Wool" are quite distinct; but that is not enough; the mark is not pictorial but verbal, and the words are meant to be spoken as well as read, and the pronunciation of words of the British public is at the present day somewhat various.

These decisions should be followed on this point, the statutory requirements being also kept in mind. "Sea-lect" is as much a corruption of "Select" as "Orlwoola" was of "All Wool". It was registered not as a design mark but as a word mark. Consequently, its form must be eliminated as a test of distinctiveness with the result that the idea or sound suggested by it is the same whether it is spelled correctly or not. Nor does it matter whether "Sea-lect" is pronounced with a long "e" for the first syllable or the accent thrown upon it or not, for "Select" is also often so pronounced by the Canadian public. It should therefore, be held that the word "Sea-lect" is merely a corruption or misspelling of the laudatory epithet "Select" and as such is incapable of distinctiveness and ought not to be registered as a word mark. If the word were given registration it might mean that no person other than the registered owner of it would be entitled to use the word

"Select" in association with fish or fish products. Such a possibility should not be permitted. No person is entitled to a monopoly of such a common laudatory epithet as "Select", whether corrupted or misspelled or not. It is public property and cannot be made the subject of exclusive private use. There will, therefore, be an order for the expungement of the registration of the word mark "Sealect", as No. N.S. 15313, Register 58.

While the petitioner succeeds in the first part of his proceedings, his success is such as to disentitle him to success in the second part. He seeks a declaration of the Court under section 29 of the Act, which reads in part as follows:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

(2) Any such declaration shall define the class of wares with respect to which proof has been adduced as aforesaid and shall specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or should be limited to a defined territorial area in Canada.

The purpose of the section is somewhat similar to that of section 9 (5) of the English Trade Marks Act, 1905, under which it was sought to register the word "Perfection" for common soap in the *Perfection Case* (*supra*) and a considerable number of declarations have been made by the Court under it. The section recognizes that there is no "natural or necessary incompatability between distinctiveness and descriptive in the case of words used as trade marks", to use the words of Fletcher Moulton L. J. in *The Perfection Case* (*supra*). Indeed, his judgment, in my opinion, is an excellent guide to follow in dealing with applications under the section. Marks which are excluded from registration by some section of the Act, such as section 26, may acquire such secondary meaning by user and general recognition that they have become adapted to distinguish the goods of the owner of the mark from those

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of other persons and in such cases the mark may be registered if the Court makes the necessary declaration. The Court has a wide discretion under the section and could, in a proper case, make such declaration in the case of a descriptive word, excluded from registration by section 26 (1) (*c*), where the requirements of the section have been met.

There are a number of reasons why the discretion ought not to be exercised in favour of the petitioner, even if its exercise were otherwise permissible. It would not be possible to limit the registration to a defined territorial area in Canada and there is nothing in the evidence to warrant such a limitation. Nor would it be fair to give the mark exclusively to the petitioner for the whole of Canada, in view of the respondent's use of it in good faith, even although limited, since such limited use has been reasonably explained. Nor would it be fair to divide the mark and allow it to the petitioner only for canned fish and lobster for even although the respondent's user was only in respect of fresh and unfrozen fish and did not extend to canned fish it might well be argued, although I need not decide the matter, that such user by it carried the right of user on canned fish as well, as being similar wares.

In my judgment, however, this case falls outside section 29 altogether. If a word were merely descriptive of quality and nothing more, or a corruption or misspelling of such a word, the Court would have to decide whether it should, having regard to the evidence of user placed before it, exercise the discretion vested in it. The section provides for the registration of a trade mark and it is implied that the mark has acquired, although it may have lacked it originally, the quality of distinctiveness and has become "adapted to distinguish". *The Perfection Case* (*supra*) decided that laudatory epithets are incapable of distinctiveness and cannot be adapted to distinguish no matter how much evidence of user has been adduced. Farwell L. J. put the matter in a striking way when he said, at page 862:

> My own opinion is that no amount of user could possibly withdraw the word "Perfection" from its primary and ordinary meaning and make it mean "Crosfield's" instead of "Perfect".

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The authority of that case should be followed and it should be held that a laudatory epithet such as "Select", including any corruption or misspelling of it such as "Sealect", should not be made the subject of a declaration of registrability as a word mark under section 29, no matter what the extent of its user may be. Such an epithet is incapable of being or becoming a word mark. The petitioner's application under section 29 must, therefore, be dismissed. There being divided success, neither party is entitled to costs.

Judgment accordingly.

BETWEEN:

GRACE GILHOOLY ..... APPELLANT,

AND

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

1945

June 21

Aug 24

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, sec. 5 (1) (a)—"Derive"—"Income derived from mining"—One who receives dividends from a mining company derives such dividends from mining and in the case of an estate such income is that of the beneficiary and not that of the trustee—Intervention of a trustee does not deprive ultimate beneficiary of the right to deduction for depletion—Court should hesitate to set aside a practice long followed by a government department when words of a statute clearly permit the interpretation placed on them by such government department.

Appellant has a life interest in a proportion of the income received by the executors of her father's will. Appellant claims a deduction from her income of twenty per cent of that part of her income paid to her by the executors and received by them as dividends on stock held in a Mining Company in accordance with the practice followed by the taxing authorities for 20 years and discontinued in 1937. Such deduction was disallowed by the Commissioner of Income Tax whose decision was affirmed by the Minister of National Revenue. Appellant appealed to this Court.

Held: That one who receives dividends from a mining company derives them from mining and is entitled to the deduction provided for by s 5 (1) (*a*) of the Income War Tax Act.

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2. That the income is that of the beneficiary, the appellant herein, and not that of the trustees or executors of her father's will and the beneficiary derives it from mining.
3. That the mere intervention of a trustee or executor does not deprive the ultimate beneficiary of the right of deduction for depletion.
4. That when the words of a statute clearly permit the interpretation placed on them by a government department and that practice has long continued a Court should hesitate to adopt a construction of the statute which would set aside a method long followed.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Ottawa.

M. L. Gordon, K.C. and *Allan Lewis, K.C.* for appellant.

E. S. MacLatchy and *J. G. McEntyre* for respondent.

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

CAMERON, Deputy Judge, now (August 24, 1945) delivered the following judgment:

This is an appeal from five assessments made by the Commissioner of Income Tax upon the Appellant in respect of income tax for the years 1937, 1938, 1939, 1940 and 1941, and affirmed by the Minister of National Revenue (hereinafter called "The Minister").

The assessment for the year 1937 was made on September 20, 1943, and for the other years on August 4, 1943. The taxpayer gave Notice of Appeal on or about September 2nd and 17th, 1943. On December 14, 1944, the Minister gave his decision affirming the assessments and stated, in part:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said Assessments on the ground that the taxpayer is not entitled to an allowance for depletion under paragraph (*a*) of Subsection 1 of Section 5 of the Act in respect of income received from the Estates of John McMartin; that the legal fees and the portion of the investment counsel fees which were disallowed, were not expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of paragraph (*a*) of Subsection 1 of Section 6 of the Act and therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

On December 20, 1944, the Appellant filed Notice of Dissatisfaction and on January 2, 1945, the Minister gave his reply and pursuant to terms of Section 62 of the Income War Tax Act gave notice that he affirmed the assessments.

The appeals as set down for hearing include certain minor matters with which I am not now concerned, the parties having presented no evidence in regard thereto and having agreed that these matters should stand in abeyance pending a possible settlement, or, if necessary, a later hearing.

The Appellant for each of the years mentioned claimed to be entitled to deduct from her income 20 per cent of that part of her income paid to her by the executors of her father's will and received by them as dividends on stock held in a mining company—such claim being based on Section 5, 1. (*a*) of the Income War Tax Act. The Minister disallowed that claim in its entirety for reasons which will later be made clear.

The original War Tax Act was first enacted in 1917. On April 12, 1918, John McMartin, of Cornwall, Ontario, died and probate of his will was granted to the Trusts and Guarantee Company, Limited, of Toronto, and other individual executors. He devised all of his estate to his executors on trust and after providing for payment of certain legacies and annuities gave power to his executors to retain as investments of his estate all stocks, bonds, etc., owned by him at the time of his death; and with power to sell same at their discretion subject to the terms of an existing agreement; provided for payment to his wife of an annuity of $40,000 and the income from one-sixth of the residue of his estate; and for payment to each of his children, upon marriage or attaining twenty-five years of age, of the income from one-sixth of the estate for life, together with certain contingent supplements. In addition, certain limited powers of appointment were given to the children. He further directed that following the death of his wife and the last of his children, that all of the estate then remaining should be divided equally among all his grandchildren, per capita. I have not attempted to set out all the details of the will, but only such parts

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thereof as are necessary to the consideration of this case.

A large portion of his estate was in Hollinger Consolidated Gold Mines Limited, and very large sums are received annually by the executors as dividends from that Company and disbursed to the children of the deceased (the Appellant being one of the daughters) as provided in the said will.

It is clear therefore that the Appellant has a life interest in a proportion of the income received by the executors and that the remaindermen are the grandchildren of the Appellant's father. The shares in the mines are registered, I assume, in the name of the executors or some of them.

The relevant section in the original Income War Tax Act of 1917 was as follows:

3. (1) For the purposes of this Act, "income" means. . . . .with the following exemptions and deductions:—

(*a*) such reasonable allowance as may be allowed by the Minister for depreciation, or for any expenditure of a capital nature for renewals, or for the development of a business, and the Minister, when determining the income *derived* from mining and from oil and gas wells, shall make an allowance for the exhaustion of the mines and wells;

By R.S.C. 1927, Chapter 97, it was provided:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following Exemptions and deductions:—

(*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income *derived* from mining and from oil and gas wells and timber limits *shall* make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair;

In 1928, paragraph (*a*) of subsection one of section five was amended by adding thereto the following:

And in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

In 1940 paragraph (*a*) was repealed and the following substituted:

(*a*) The Minister in determining the income *derived* from mining and from oil and gas wells and timber limits *may* make such an allowance for the exhaustion of the mines, wells and timber limits as *he may deem just and fair,* and in the case of leases of mines, oil and gas wells and timber limits the lessor and lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive;

Paragraph one of section 11 of the Act is as follows:

The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

In order to clarify the issue it will be convenient at this point to indicate the practice of the Department in dealing with the question of depletion, as shown by the evidence of the Deputy Minister taken on Examination for Discovery and read into the record.

From 1917 to 1928 those companies engaged in base metal operations were allowed to represent 25 per cent of their profits as depletion; from 1929 to the present 33⅓ per cent has been allowed. From 1917 to 1928 those persons who received dividends from companies operating base metal mines were allowed 25 per cent as depletion; from 1929 to 1937 33⅓ per cent and from 1934 to the present—20 per cent.

From 1917 to 1933 those companies operating precious metal mines were allowed to represent 50 per cent of the net profits as depletion and from 1934 to the present 33⅓ per cent. Those who received dividends from such mines from 1917 to 1933 were allowed 50 per cent as depletion and from 1934 to the present—20 per cent.

Prior to 1938 an estate receiving mining dividends reduced the dividends by the appropriate depletion allowance and the remainder was included with any other income of the estate and distributed to the life tenant for tax purposes. It followed that if the executor distributed the amount of the depletion it was not taxed at all to the beneficiary who thereby had the benefit of the exemption.

But in 1938 and thereafter the mining dividend income if passed by the executors to a life beneficiary has been taxed in the hands of the latter without considering depletion. The grounds given for such change in 1938 were that such beneficiary received his income from an estate and not by way of dividends from a mining company; that such beneficiary had no capital to deplete and that he could not trace the source of his dividends (the income from the estate) without being involved in the executors' allocation of expenses.

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It is clear therefore that from 1917 to 1945—a period of 28 years—the Minister, in exercising the power under what is now Section 5, 1 (*a*), in determining what was just and fair to those *deriving* their income from mines, etc., by way of allowances for the *exhaustion of the mine*, has consistently made that allowance in two forms:

(1) to the mining company;

(2) to its registered shareholders.

And, further, that from 1917 to 1937—a period of 20 years —that that part of the allowance secondly mentioned was also allowed to those who derived their incomes from mines as beneficiaries receiving their income from an estate, the executors of which were the registered shareholders. It is clear, too, that the change in practice made in 1938 was made in the Department and not as the result of any change in the law; and that it was so made because the Department felt that the law was not being properly interpreted at that time and that such allowance for depletion to the beneficiaries of an estate had been made contrary to law.

Quite apart from the words of the statute it would seem that an allowance for exhaustion should be made only to the owner of the capital so depleted—i.e. the owner of the mine itself, and in the case of a mining company, to the company itself and not to the shareholders. Counsel for the respondent argued before me that there was nothing in the Act that specifically required any allowance even to registered shareholders, and that is so, in the sense that shareholders are not mentioned—but the practice of the Department has been quite different. But the statute itself does not say that the allowance shall be made only to the owner of the mine—but to those *deriving* income from mines. If Parliament had intended to limit the application of the allowance to the mine owner it would have been very simple to use apt words to so indicate.

The history of the determination of the allowance is also shown in the evidence of the Deputy Minister. Apparently it was realized by all parties that it would be extremely difficult, and probably impossible, to ascertain with any degree of accuracy, just what would be a fair allowance for depletion of any individual mine. After consultation with the leaders of the industry, an arrangement was made to

meet the practical difficulty by establishing several classifications of mines—base metals and precious metals—and by the allowance of certain rates of depletion to both the operating company and those who received dividends therefrom.

The practice therefore has been that the Minister, from time to time, has found to be just and fair for the exhaustion of the mine an allowance which is the sum of its two parts—the one to the company and the other to those who receive income from it by way of its dividends.

The word "derive" is defined in Murray's New English Dictionary, Volume 3, p. 230, as "to flow, spring, issue, emanate, come, arise, originate, having its derivation from", and in the Shorter Oxford English Dictionary, Volume 1, as "to draw, fetch, obtain; to come from something as its source".

In my view the true meaning that would give effect to the words in the section is "income originating from mining or coming from mining as its source". Can there be any question that mining dividends are derived from mining? I think not—and while I have not been referred to any decisions in the Canadian Courts, where the matter has been directly considered, I find that it has been referred to in other courts.

In *Commissioners of Taxation* v. *Kirk* (1) Lord Davey said: "Their Lordships attach no special meaning to the word 'derived', which they treat as synonymous with arising or accruing".

In the case of *W. R. Wilson* v. *Minister of National Revenue* (2), the late President of this Court found that premiums on dividends paid in American funds were income derived from mining. It is true that he did not have to consider the question as to whether the dividends on mining shares were derived from mining, but it would scarcely be possible to find that the premiums were derived from mining unless the face value of the dividend cheques were also derived from mining.

I find therefore that in the absence of any provision in the section limiting the allowance for exhaustion to the mine owner, that one who receives dividends from a

(1) (1900) A.C. 588. (2) (1938) Ex. C.R. 246.

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mining company does derive them from mining and is entitled to the allowance provided for. My opinion that this is the correct interpretation of the section is strengthened by the fact that the department has so construed it since 1917.

I turn now to consideration of the question as to whether this Appellant—not herself a shareholder, but receiving the income from an estate, the executors of which are the registered shareholders—is entitled to the deduction claimed.

Counsel for the Respondent put forward several reasons why the deduction should not be allowed.

His first contention was that an allowance for depletion is for the purpose of reimbursing the owner of capital for its loss through depletion and that the beneficiary in an estate (as in this case) has no interest in the capital. The first part of that proposition is probably quite correct in theory, but the words of the section provide that the allowance, while made for the exhaustion of a mine, is for the benefit of those *deriving income* from mining. The theory as to why depletion is allowed must give way to the words of the section. And it is quite apparent to me that the Appellant here has an interest—and a very important one—in the exhaustion of the mine. Her income will, of necessity, be affected by the depletion of the mine and, in fact, might terminate entirely.

Counsel for the Respondent also urged upon me the rule of construction of taxing statutes that exemption provisions should be strictly construed, referring to the case of *City of Montreal* v. *College Ste. Marie* (1), quoting from the judgment of former Chief Justice Duff: "That those who advance a claim to special treatment in such matters must show that the privilege involved has unquestionably been created". In my opinion, as will be noted from my previous findings, the section clearly uses such express words conferring the benefit of the deduction on all those deriving income from mines, that there is no need to presume any special privilege. It is contained in the very words of the section itself.

(1) (1921) A.C. 288.

It was argued on behalf of the Respondent that all amounts received by a life beneficiary of an estate are received *as income* regardless of the source from which they are paid and the Judgment of Mr. Justice Finlay in *Brodie* v. *Commissioner of Inland Revenue* (1), was referred to. That was a case in which trustees in an estate were directed to pay the deceased's widow four thousand pounds per annum out of the income, and if in any year the income fell short of that amount they were directed to raise and pay the deficiency out of capital. The question there was whether the payments made out of capital were subject to income tax. It was held that the substance of the transaction was that the widow was to have an income of four thousand pounds and that the whole income was subject to tax. That case, I think, is readily distinguishable from the one before me. It had to do with the question of whether capital paid over to make up a fixed annuity was or was not taxable income in the hands of the recipient. It was held to be income and taxable as such. But no question arose therein as to special exemption for certain types of income such as existed in the case now before me or whether any special exemptions or allowances in favour of shareholders in certain companies would be available to a beneficiary in an estate which held shares in such companies. On page 438 Finlay J. said:

> Of course, if certain sums of capital were simply handed over by the trustees to the lady and received by the lady as capital, it is quite clear that Income Tax would not attach, but it is, to my mind, not less clear that, if the sums paid were paid to the lady and were received by the lady as income, *then it is immaterial what they may have been in the hands of the trustees who paid them.*

It was urged that the concluding words above quoted were of great importance. But a consideration of the whole judgment, and even of the sentence quoted, satisfied me that too wide an interpretation should not be given to these words and that in saying that "it is immaterial what they may have been in the hands of the trustees" means only that it is immaterial whether they were capital or income in the hands of the trustees under the circumstances of that case.

(1) (1933) 17 T.C. 432.

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I shall now turn to consideration of the other main points raised by the Respondent—that the income of the beneficiary is received from the estate and not from a mining company and that to hold otherwise would involve consideration of the executors' accounts, their origin, allocation of expenses, etc. I have been unable to find any case in our own courts but there are several in other courts of the Empire where the matter has been given consideration, and which I have found of great assistance in reaching my conclusions.

In the tax case reported in 22 V.L.R. 539, a trustee receiving dividends for the true owner residing elsewhere, it was held that the trustee was exempt and that the owner abroad was the real person to whom the income belonged. In that case, however, no estate or life beneficiary was involved.

In another tax case in Australia, reported in 29 V.L.R. 525, it was held that income from certain companies was not taxable in the hands of either the trustee or the beneficiaries. In this case the widow was entitled to an annuity under her husband's will. She objected to her assessment on the ground that her taxable income should be reduced by the amount derived through the executors from certain companies. The companies in question came under the provisions of Section 9 (2) of the Act, as follows:

> In the assessment of the income of any taxpayer liable to tax there shall not be included any dividends from any company except. . . . . .

Counsel for the Tax Commissioner argued that once the money got into the hands of the trustee it lost its original character and the source from which it was derived could not be looked at; that it was simply a sum of money handed by the trustee to the beneficiary as income. The Court held that neither the trustee nor the beneficiary could be taxed in respect of such dividends.

A'Beckett J. said: "In the case before us the dividends are received in the first instance by the trustee, but he has no beneficial interest in them; he has merely to deal with them for the purpose of paying them over to other people".

Hood J. said: "The income is that of the beneficiaries —it is *derived from dividends*".

In that case it is to be noted that the section said: "There shall not be included any *dividends* from any company

except. . . .", and that in the case now before me the words are "derived from mining". If the principles involved are the same—and I think they are—then, the words of Section 5 1. (*a*) "derived from mining" would seem to strengthen the position of the Appellant herein.

Syme v. *Commissioner of Taxes* (1), is a decision of the Privy Council in a tax case arising in Australia. It was held that in respect of the income so received by the Appellant he was entitled to be assessed under the Income Acts 1895 and 1896 of Victoria, as upon income derived from personal exertion and that he was wrongly assessed as upon income the produce of property.

In that State the rate charged on income from produce of property was double that derived from personal exertion. By the will of the Appellant's father his trustees carried on certain businesses which the testator was carrying on at his death and paid one-fifth of the annual profits to the Appellant. Counsel for the Respondent urged that the income received by the Appellant from trustees was a different income from that derived by the trustees from the business, being paid out of a fund arrived at by the trustees after setting off profits and losses and deducting prior charges.

At p. 1020 the Court said:

Lastly, it is said that the income is not the same income, and the fund which produces it is not the same fund, when the trustees are assessed as when the cestui que trust is assessed. They carry on several businesses, one great and the rest relatively small, some at a profit and some at a loss. They set off losses against profits, and bring down a balance on profit and loss account; they discharge sundry prior charges, and then divide an ultimate balance. All this is true, but all this is mere bookkeeping. *It does not follow when the appellant receives the cheque for his share that he is getting a part of a new mixed fund or that the connection between his income and the newspaper business is lost.* There is no difficulty, either in fact or in theory, in keeping the "Age business" apart from the other businesses, and all the businesses apart from those concerns the income of which is the produce of property. The Commissioner's argument conceived the fund out of which the appellant is paid as a reservoir, fed by various streams descending from sundry sources, and blending their waters in one basin, out of which they flow indistinguishably and indissolubly. With all respect to the learned judges, the majority in the High Court of Australia in Webb v. Syme, who adopted this figurative way of putting a very plain set of facts, their Lordships are only able to regard this argument as fallacious. There is no question here of shewing whence the sovereigns came in the first instance which

(1) (1914) A.C. 1013.

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were ultimately paid to the appellant. In the ordinary course of business the trustees may mix all the sums that come to their hands from all sources, and with them discharge indiscriminately all or any of the obligations which fall upon them whether at law or in equity, but they keep accounts all the time, and there is no doubt whatever that the appellant's £17,025.17s.3d. comes from the "Age business" and that of the Melbourne Mansions Company was made in them, and is his solely because under his father's will they are carried on for him and the other members of the family. What was the produce of personal exertion in the trustees' hands till they part with it *does not in the instant of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of the cestui que trust.*

A tax case in Queensland reported in 1929 Q.S.R., p. 276, is, in many respects, similar to the instant case and the judgment is of great interest. The headnote is as follows:

It is provided by s. 8 of The Income Tax Acts, 1924-1928:

The following incomes, revenues and funds shall be exempt from income tax:—

(8) Income *derived as dividends* from any company which has paid in Queensland income tax on the profits of the company from which such dividends are paid;.....

(9) Income *arising or accruing* from.....bonds.....issued by the Government of Queensland or of the Commonwealth of Australia.

A testator, by his will, directed trustees to invest £25,000 of his estate, or set apart investments of the value of £25,000, to provide an income of £1,200 for his wife during her life, and subject thereto devised his real estate and bequeathed his personal estate to trustees on trust for his children. The trustees set aside 25,000 shares in a company, some of which were sold and the proceeds invested in Commonwealth Government bonds, not chargeable with income tax. The company had paid income tax on its profits. The trustees paid the income from the shares and the bonds to the widow.

Held, that although the widow's title to such income sprang from the dispositions of the will, the income was not liable to taxation, being (i) income "derived as dividends" from the company and (ii) income "arising or accruing" from bonds issued by the Government of the Commonwealth of Australia.

Held, further: (i) The words "*derived*" as dividends" are *directed to the nature of the original source of the income rather than to whether the ultimate recipient is the shareholder himself, or a person otherwise entitled to the benefit of the dividend.*

(ii) The *exemptions* allowed by s. 52B of The Commonwealth Inscribed Stock Act 1911-1918, and s. 8, subsecs. 8 and 9, of The Income Tax Acts, 1924-1928, *are not,* in the case of a trustee-investor, *confined to the trustee, but may be claimed also by the beneficiary.*

(iii) The widow has a right to be paid the annuity out of the income from investments set aside or made for the purpose of providing for that annuity, and is not in the position of a mere annuitant.

For the Commissioner the following contentions were raised (p. 281):

The income that is being taxed is an annuity paid to appellant out of the estate of the deceased. The income is, therefore, taxable under the definition of "income from the produce of property" and s. 11, subsec. 3. The will merely directs the payment of an annuity and the appropriation of investments to secure it; it gives the appellant no specific right to the income, or to any part of the income of such investments, or to the investments themselves. Under these circumstances, the exemption clauses, s. 8, subsecs. 8 and 9, do not apply. Section 8, subsec. 8, only exempts "income derived as dividends." The trustees, the holders of the shares, derive the income as dividends, but the appellant derives it as income of the estate; the words "derived as dividends" connote that the recipient is the registered shareholder: "derived" means directly received by the taxpayer.

On similar reasoning, it was contended that the language of s. 8, subsec. 9, "income arising or accruing from. . . .bonds," connotes that the person entitled to the exemption is the legal owner, the holder of the bonds. In the hands of the appellant, the income does not arise or accrue from the bonds, but from the gift to her of the annuity made by the will.

Henchman J. after referring with approval to (1903) 29 V.L.R. 525, which I have mentioned above, said at page 284:

It follows from the above reasoning that the Victorian Court treated s 9, subsec. 2, as including the case where the taxpayer was not himself the shareholder, but the trustee received the dividends and handed on to the taxpayer, as beneficiary, his share of them. *Looking at the real substance of the facts, it treated the beneficiary's income as derived, in his hands, from the dividends, and not from the trust estate. The words "dividends from any company" were thus not limited to dividends paid to and still in the hands of the taxpayer.*

In my opinion, the above reasoning is sound, having regard particularly to the fact that in the interpretation of an Income Tax Act the Court looks to the true substance of a transaction, and not to its form, and *treats the ascertainment of the actual source of a given income as a hard practical matter of fact.*

Is there, then, anything in the words in s. 8, subsec. 8, of our Act, "income derived as dividends from any company," to compel me to set aside this reasoning and its result? Do the words "derived as dividends from any company" necessarily connote the meaning "received by the taxpayer from the company as dividends"?

I do not think so. If that were the meaning, and if it had been intended to bring about a result different from that reached by the Victorian Court, it would have been easy to say "income received (or received by the taxpayer) as dividends from any company. . . . ." But the words are "derived as dividends," and *these words appear to me to be directed to the nature of the original source of the income, rather than to whether the ultimate recipient is the shareholder himself or a person otherwise entitled to the benefit of the dividend.* Here, it seems to me, the income received by Mrs. A. from the trustees was income "derived as dividends from the company," none the less because the

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trustees directly received it and could alone discharge the company. I am not called upon now to decide what would be the position in the case of a mere annuitant, or other person merely entitled to receive part of the income of any estate—although the Victorian Court's reasoning would seem to cover every such case. But here Mrs. A. is entitled to receive her £1,200 out of these very dividends, so long as the shares are, in fact, appropriated to answer her annuity. *Her income is thus, in fact, derived as dividends from the company, though her title to them springs from the dispositions of the will.*

The principles involved in the instant case were considered by the Appellate Division of the Supreme Court of South Africa in 1938, in the case of *Armstrong* v. *Commissioner of Inland Revenue,* reported in South African Tax Cases (1), Volume 10, p. 1. The Court, after referring with approval to *Syme* v. *Commissioner of Taxes,* above mentioned, unanimously allowed the appeal from the Natal Provincial Division, which had held that the exemption applied only in the case of a taxpayer who actually received the dividends from the company and as the appellant received them from the trustee who received them from the administrator, who in turn received them from the company, and was the only person who could enforce payment from the company, the exemption provided by the statute did not apply to her.

The Appellate Court—

Held, allowing the appeal, that the *intervention of a representative taxpayer* to receive the dividends from the company for the benefit of the ultimate beneficiary *did not deprive the latter of the exemption provided* by section 10 (1) (*k*) of the Income Tax Act, No. 40 of 1925, the intention of which was to relieve from twofold taxation income derived from a certain source, *irrespective of the personal capacity of the ultimate recipient.*

Held, further, that the *difficulties in applying the exemption* in such a case as that of the Appellant, where only a portion of the exempted amount was allocable to a certain taxpayer, *were of administration only and not of* law and could be overcome by bookkeeping and arithmetical calculation.

The entire judgment is important and deals with most of the arguments presented to me, but I shall quote only portions of it: Page 5—

It cannot matter whether the original owner of that revenue, the testator, created that trust or whether it was created by the appellant or by her daughters or by a cessionary from any of them. The simple and essential position is the same as if the owner of shares puts them into the name of a trustee to pay a portion of the dividends to the appellant. *The crux of the question lies in the simple fact of the intervention of*

(1) (1938) 10 South African Tax Cases 1.

a trustee between the companies and the appellant. It was this intervention which the Provincial Division considered fatal to the claim for exemption under sec. 10 (1) (*k*). Shortly stated, the reasoning of both learned Judges was that the exempting subsection required for the invocation of its benefit by the appellant a vinculum juris between her and the companies producing the revenue, ...that unless the appellant could sue the companies for payment of the dividends she could not be said to receive such dividends from the companies. . . .

Page 6—

Take the case of minors on whose behalf a trustee is put on the register of shareholders; since companies do not recognize the representative character of a registered shareholder, the company could not be sued and on the line of reasoning adopted minors would be taxed. . . . . It will be noticed that the words of the subsection allowing the exemption are: "*dividends . . . . . .received or accrued from any company* chargeable with the normal tax" and that Hathorn, J., in his reasons has read them as implying the words "by the taxpayer" after the words "received". . . . . .*The emphasis is not upon the receipt but upon the derivation of the income. And the clear intention of the Act can only be effectively and generally carried out by exempting the person ultimately receiving such monies.* In the simple case I am now examining, namely, that of a trio comprising a company, the intervening trustee, and the beneficiary, it is manifest that in the truest sense the beneficiary derives his income from the company, for that income fluctuates with the fortunes of the company and the *trustee can neither increase nor diminish it, he is a mere 'conduit pipe.*" This leads on to the firm conclusion that the *true test of exemption* of the person beneficially entitled to the income *is not the right to sue the company but the derivation of that income. . . . . .I am supposing the beneficiary would be entitled to the exemption on all moneys coming to him through a trustee but obtained by the latter from companies.*

Page 7—

We have next to deal with the actual facts of the case and with the points raised by respondent's counsel (1) that the trustees had to deal with a fund composed partly of income from companies and partly from other sources, (2) that the trustees did not receive dividends but merely a balance, (3) that the trustees divide the fund among a plurality of beneficiaries and have not to pass any particular item to any particular beneficiary and (4) that the appellant receives a fixed amount, not a proportionate amount. These objections to the exemption were used "cumulatively" by counsel, but as I have already said the problem cannot be resolved in that way, either these objections are separately sound or they have no bearing on the question. . . . . .

The total income received by the trustee is composed partly of what, for convenience, I will call "free" money and partly of income liable to tax, *the one amount does not contaminate the other, and the beneficiaries are entitled to receive their calculated proportions of the two.* This, as the learned Lord pointed out, is *merely a matter of bookkeeping and arithmetical calculation.* . . .

The difficulty suggested is that it is impossible to say from which of the several types of incomes these deductions should be made. . . . .There is, in my judgment, no difficulty in apportioning these expenses, etc.;

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. . . . . .It would indeed be an absurd result if in the case of a fund composed of £5,000 dividends and £50 from other sources the deduction of the trustee's remuneration were to render the whole £5,000 liable to tax.

Page 9—

It will be seen that all the *difficulties suggested by the respondent's counsel, with the exception of that created by the intervention of a trustee, are practical and not legal and can, as I have pointed out be overcome by proper bookkeeping and artithmetical calculations.*

The cases which I have referred to above, almost without exception, are from other jurisdictions and arose in the interpretation of different taxing statutes. But in my view they have to do with the fundamental issues of this case and throw a good deal of light on the problems and principles involved. The emphasis in Section 5 (1) (*a*) of the Income War Tax Act is on the derivation of the income—not on the recipient—and I have no difficulty in reaching the conclusion that a shareholder in a mining company does derive his income from mining and is clearly entitled to the deduction established from time to time by the Minister. There is nothing in the Act to indicate otherwise and the words of the section permit that interpretation and the Department has long followed it.

Nor do I think that the mere intervention of a trustee or executor (whose duty is merely to collect mining dividends and turn over that income in the proportions and to the persons mentioned in the testator's will, as in this case) results in the ultimate beneficiary being deprived of the right of deduction for depletion.

I adopt the reasoning in the cases above referred to. In the last two cases which I have mentioned, practically the same arguments were presented on behalf of the taxing authority as were made in this case, and they were held to be invalid. The income is clearly that of the beneficiary and not that of the trustee and the beneficiary derives it from mining. This Appellant has the right to receive from the trustees her proportion of the income from the mining shares set apart to produce income for her and the other life tenants.

(I refrain from making any finding as to whether the result would be the same were the appellant entitled to

receive a fixed sum by way of an annuity, although some of the cases cited seem to be to that effect; but that matter was not before me and I shall not deal with it.)

The indentity and origin of the mining dividends received by the trustees are not lost or merged in the general income; books are kept and the amounts so received accurately recorded. Nor do I think that the mere fact that the work of the Department would be increased by such an interpretation (due to the necessity of going into the trustees' accounts) is a sufficient reason for denying the statutory deduction. The work would probably be more difficult but that is not a valid reason for denying the statutory right. It is a matter of mathematical calculation.

To decide otherwise than I have done would, in my view, create discrimination. It is clear that the amount to be allowed as depletion for exhaustion of a mine should depend on the rate of exhaustion. The percentage of depletion allowed, as pointed out above, is given in two ways—to the mining company and to those receiving dividends. It is the sum of these two that makes up the allowance and that allowance, in fairness, should not vary with the quality of the one receiving the dividends—i.e. whether he is a registered shareholder or whether he receives it through an intermediary trustee. My point will be made clear by considering the simple case of a testator who is the owner of large holdings in a mining company. To his wife he may by his will give one-half of his shares outright; and to a daughter the trustee is directed to pay the income only from the remaining one-half, with a gift over of the corpus to her children on her death. In this case, under the present practice, the widow would be entitled to the deduction for depletion and the daughter would not be so entitled. Under these circumstances the full fair and reasonable allowance, as determined by the Minister for the exhaustion of that mine, would not be made so long as the life interest was outstanding. Other illustrations where discrimination would result may readily be found, such as the case of two very similar mines operating at the same rate, where the shares in one were owned outright and in the

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other were held by trustees and income paid to life tenants. It is clear that in such a case the allowance for exhaustion should be the same.

Counsel for the Appellant called no witnesses at the trial but read the evidence of the Deputy Minister taken on Examination for Discovery. He also filed, as Exhibit 1, a document entitled "brief" composed of a copy of a probate of the will of John McMartin, instructions and rulings from the Income Tax Department to its Inspectors, extracts from a budget speech in Parliament and from Hansard and copies of T-3 Income Tax forms. Objection to the admissibility of these documents (except as to the copy of the probate of the will of John McMartin) was made by Counsel for the Respondent on the ground that they had not been proven and that they were irrelevant. Some correspondence had taken place prior to the trial suggesting that these documents be admitted without formal proof. In the absence of any clear proof that the parties had agreed that they be accepted at the hearing without proof, I must find that they cannot be considered as evidence. In my consideration of the evidence therefore I have confined myself to the documents accompanying the certificate dated January 18, 1945, the Examination for Discovery of the Deputy Minister and the will of the deceased.

Some reference should be made to the practice in the Department as to the allowance still made to shareholders in a mining company and until 1938 made also to life tenants, as previously pointed out. It was contended for the Respondent that such allowances were extralegal and that, in any event, no weight should be attached to the practice. Reference was made to the case of *Gleaner Company Limited* v. *Assessment Committee* (1). This was an appeal from the Supreme Court of Jamaica and the judgment merely determined that no weight should be attached to the practice of the taxation authorities in England. In any event that case seems to have always been regarded with some doubt in England. See *Absalom* v. *Talbot* (2), House of Lords, particularly in the judgments of Lord Simon, L.J. at 645, and Lord Porter at 652, the latter referring to Halsbury, Hailsham edition, volume 17, p. 162, note (t). In this case it was found that the practice had statutory

(1) (1922) A.C. 169.

(2) (1944) 1 All E.R. 642.

authority and was not conceded only by the benevolent practice of the department.

Reference was also made to an older case—*Trustees of the Clyde Navigation* v. *Laird and Sons* (1). In that case referring to a departmental practice extending over eighteen years, Lord Blackburn said: "I think that raises a strong prima facie ground for thinking there must exist some legal ground on which they could rest", and later he pointed out that enjoyment for any period short of what would give rise to prescription, if founded on a mistaken construction of a statute, could not bind the Court so as to prevent it from giving the true construction.

After giving careful consideration to all the cases referred to by counsel, I have reached the conclusion that when the words of an act clearly permit the interpretation placed on them by a government department and that practice has long continued (in this case it continued from the time the act first came into effect in 1917 until 1938) a Court should hesitate to adopt a construction of the statute which would lead to the destruction of a method long followed. See *Steamship Glensloy Company, Limited* v. *Lethem*—Surveyor of Taxes (2).

In the case now before me the words of the section clearly permit of the practice followed from 1917 to 1938. The Minister in charge of the Department must be assumed to have known of the interpretation placed thereon by his officials. In fact, as shown by the evidence of the Deputy Minister, public notice of changes in rates was given by the Minister in 1935 by introducing a resolution in the House of Commons and these changes affected both the mining company and those receiving dividends therefrom.

For the reasons which I have set forth above, I am of the opinion that the Appellant must succeed. There will, therefore, be judgment allowing the appeal and declaring that the Appellant is entitled for the years 1937 to 1941 to deduct from her income the allowances in force for the respective years as provided for in Section 5 (1) (*a*) of the Income War Tax Act and as allowed by the Minister to registered shareholders of the mine mentioned. The Appellant is also entitled to be paid her costs after taxation.

Judgment accordingly.

(1) (1883) 8 A.C. 658.

(2) (1914 6 T.C. 453 at 462.

BETWEEN:

1943
Feb. 22-23
1945
Aug. 21

FREDERIC J. A. DAVIDSON,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Petition of right—Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, Chap. 97, secs 5 (a), 6 (b), 33, 53, 54, 58, 69—Nature and purpose of depreciation allowance—No right to depreciation allowance where no claim made—Beneficiaries of estate entitled to income not entitled to depreciation allowances—Taxpayer's return may be basis of jurisdiction to assess—Right to refund of overpayment of tax if disclosed by examination of returns—Mistake in making returns—Taxpayer barred from relief if appeal not taken from assessment within time prescribed.

Suppliant was executor of his father's estate. After the death of his mother he became entitled to one half the estate in his own right. The corpus of the other half was to be held for the issue of the suppliant but he was entitled to the income from it subject to an annuity to his brother. Suppliant filed two returns each year, a T-3 return as executor of the estate and a T-1 return as an individual taxpayer. In the T-3 return he gave particulars of the income of the estate, the interest paid on borrowed money, the taxes paid on properties, the expenses for maintenance and repairs and the amounts claimed for depreciation and also showed the amounts of income accruing to beneficiaries. In his T-1 return he included as his income the same amount as that shown on the T-3 return as accruing to him as beneficiary. Suppliant received assessment notices in due course and filed no appeal from any of them.

Suppliant claims that he made overpayments of income tax for each of the years 1917-1934 by mistake in failing to deduct from income from the estate amounts allowed to it for depreciation, that such mistake was known to the taxing authorities and that he had a statutory right to refund of the overpayments made.

Held: (1) that where no claim for depreciation was made by a taxpayer there was no duty on the part of the Minister under section 5 (*a*) to make any allowance of depreciation to him and the taxpayer had no statutory right to any allowance.

(2) That the beneficiary of an estate, in so far as he is entitled only to income from it, is not entitled to deduct any amount of depreciation in respect of such income, since it is not his assets but those of the estate that have been used in the production of such income. Any amount that may be allowed for depreciation being an item of capital enures to the benefit of the estate and those entitled to its corpus.

(3) That an examination based upon the taxpayer's own return of his taxable income cannot be said to be an assessment made without jurisdiction to assess.

(4) That the term "such examination" in section 53 (2) means the examination not only of the taxpayer's T-1 return but also of any other return that would normally be looked at in the course of the examination and that in the present case it would include the T-3 return made by the suppliant as executor of the estate.

(5) That section 53 (2) was meant to cover cases where it is clear from the examination of the returns that there has been an overpayment of income tax by the taxpayer and where the exact amount of such overpayment is clearly ascertainable, as, for example, where the overpayment was due to an error in computation of rates or calculation of amounts or failure to make or subtract specified deductions. It does not cover cases involving an adjudication as to rights.

(6) That the suppliant having failed to take advantage of the provisions of the Act by way of appeal from the assessment is now barred from relief by section 69.

PETITION of right to recover overpayment of income tax alleged to have been made by the suppliant in respect of the years 1917-1934.

The petition was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

J. C. McRuer, K.C. and *T. C. Newman, K.C.* for suppliant.

O. M. Biggar, K.C. and *W. R. Jackett* for respondent.

The President now (August 21, 1945) delivered the following judgment.

The suppliant brings this petition of right to recover the sum of $11,144.77 as the total amount of overpayments of income tax alleged to have been made by him in respect of the years 1917 to 1934.

The suppliant is one of the executors of the estate of his father, Joseph Davidson, who died on March 1, 1901. His mother was entitled to an annuity of $3,000 per year out of the income of the estate for the support and maintenance of herself and her son, Judson France Davidson, now a co-executor of the estate, but after her death on November 18, 1922, the suppliant became entitled to half of the estate in his own right. The corpus of the other

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half was to be held for the issue of the suppliant, but he was entitled to receive the income from it subject to an annuity to his brother and co-executor, Judson France Davidson, the amount of which, after certain judicial proceedings to determine the meaning of certain clauses in the will, was agreed upon at $2,200 per year.

The suppliant has managed the estate since the death of his father. It was in a difficult and confused position when he took it over, consisting mainly of real estate, against which there were substantial liabilities.

After the Income War Tax Act came into effect in 1917 the suppliant made two sets of returns each year, one known as the T-3 return as executor of the estate, and the other as the T-1 return as an individual taxpayer. By this time the suppliant had a secretary to assist him in the management of his affairs and those of the estate and it was one of the duties of the secretary to prepare the income tax returns. While he relied upon his secretary for the accuracy of these returns, it is also a fact that he checked the correctness of some of them himself and that he always kept in close personal touch with the administration of the estate.

The T-3 returns gave particulars of the income of the estate, the interest paid on borrowed money, the taxes paid on its properties, the general expenses incurred for repairs and maintenance, and the amounts claimed for depreciation. They also showed the amounts of income accruing to beneficiaries, including the suppliant, and the names and addresses of such beneficiaries. The T-3 was an information return. On the suppliant's own T-1 return as an individual taxpayer he included as his income the same amount as had been reported on the T-3 return as income accruing to him as beneficiary. In due course he received assessment notices from the taxing authorities. In some cases such notices showed that no further income tax was due, in others that further tax was payable, which the suppliant subsequently paid, and in others that an overpayment of tax had been made in which case they were accompanied by a refund. No appeal was ever taken from any of the assessments made in any of the years in question.

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In his petition of right the suppliant claims that on the T-3 returns filed on behalf of the estate claims were made for depreciation on certain improved real estate owned by the estate, the income from which he was entitled to receive, but that on his own T-1 returns he by mistake neglected or omitted to deduct the amount so claimed for depreciation, but by mistake paid on the gross income without making such deduction which he was entitled to make. He also claims that his mistake was known to the taxing authorities and that it was the duty of the Minister and or his officials, as soon as they discovered this overpayment in each year, to refund the amount so overpaid. The suppliant then sets out the amounts which he claims were overpaid in each of the years.

There is nothing to show how each of these amounts is arrived at nor were any of them proved.

It was contended for the respondent that even if the suppliant ever had any right to relief such right was now barred by his failure to follow the procedure prescribed by the Income War Tax Act, R.S.C. 1927, chap. 97. Section 58 of the Act, prior to its amendment in 1944, read as follows:

> 58. Any person who objects to the amount at which he is assessed, or who considers that he is not liable to taxation under this Act, may personally or by his solicitor, within one month after the date of mailing of the notice of assessment provided for in section fifty-four of this Act, serve a notice of appeal upon the Minister.

Such notice must be in writing and be served by mailing the same by registered post addressed to the Minister of National Revenue at Ottawa. It must follow a prescribed form and set out clearly the reasons for appeal and all facts relative thereto. The section is, I think, wide enough to cover any cause of complaint by a taxpayer. Then section 59 provides that the Minister shall duly consider the notice of appeal and affirm or amend the assessment and notify the appellant by registered post. If the taxpayer is dissatisfied with the Minister's decision, he may, by section 60, within one month from the date of the mailing of the decision, mail to the Minister by registered post a notice of dissatisfaction together with a final statement of the facts, statutory provisions and reasons he intends to submit to

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the court in support of the appeal. Section 61 provides for security for costs, section 62 for the decision of the Minister upon receipt of the notice of dissatisfaction and statement of facts and section 63 for the transmission of the necessary documents to the Exchequer Court of Canada. When these have been transmitted the matter is deemed to be an action in the said court ready for trial or hearing. Then section 66 provides:

66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act, etc.

This language is, I think, clearly wide enough to cover questions affecting the validity or correctness of the assessment and any complaint the appellant may allege or have against it. Then section 67 provides:

67. An assessment shall not be varied or disallowed because of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision up to the date of the issuing of the notice of assessment.

Finally, the part of the Act dealing with appeals and procedure concludes with section 69 as follows:

69. If a notice of appeal is not served or a notice of dissatisfaction is not mailed within the time limited therefor, the right of the person assessed to appeal shall cease and the assessment shall be valid and binding notwithstanding any error, defect or omission therein or in any proceedings required by this Act.

If the suppliant had any right to relief from the income tax levied against him by any assessment on the ground that he had made a mistake in his return he could have appealed from the assessment in accordance with the above procedure and the court could have given effect to his rights if established by setting the assessment aside. Then, if he failed to recover the amount of tax he had overpaid the way would be clear for a petition of right by him without being faced by a valid and binding assessment. The suppliant never made any appeal from any of the assessments but now seeks to recover the amounts which he alleges he overpaid. Counsel for the respondent contended that the suppliant was barred from relief by section 69. It is well established that if the law prescribes the procedure to be followed by an aggrieved person in obtaining relief such procedure must be followed. The assessments are, there-

fore, now binding upon the suppliant and his case must fail unless he can bring himself outside the implications of section 69 and show his entitlement to relief apart from the procedure prescribed by the Act. The onus is on him and it is a heavy one for the language of section 69 is very wide.

Counsel for the suppliant contended that the assessments made in each of the years in dispute were invalid. Two lines of attack upon their validity were laid down. In the first place, counsel relied upon section 5 (*a*) of the Act, as it stood prior to its amendment in 1940, which read as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation,

and upon the judgment of the Judicial Committee in *Pioneer Laundry and Dry Cleaners, Limited* v. *Minister of National Revenue* (1), where Lord Thankerton said, at page 136:

> the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based. The Minister has a duty to fix a reasonable amount in respect of that allowance.....

Counsel's argument was that under the section the suppliant had a statutory right to an allowance for depreciation, that the Minister was under a statutory duty to exercise his discretion in allowing a reasonable amount for depreciation, that the exercise of such discretion was a condition precedent to there being a valid assessment and that since there was no evidence that it had been exercised in the suppliant's case the assessments levying income tax against him were invalid and void *ab initio* and the suppliant was not barred from relief by section 69, even although he had not appealed from any of the assessments.

There is more than one answer to this contention. The suppliant never made any claim for depreciation in respect of any of the amounts he reported as income from the estate. It is, I think, clear from section 5 (*a*) that it presupposes that a claim for depreciation has been made and that it is in respect of such a claim that the Minister is to exercise his discretion and allow a reasonable amount. The

(1) (1940) A.C. 127.

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use of the word "allow" in the section connotes that there is a claim before the Minister for his consideration. It follows that where no claim for depreciation was made by a taxpayer there was no duty on the part of the Minister under section 5 (*a*) to make any allowance of depreciation to him for there was nothing before him in respect of which he could exercise his discretion. To suggest that the Minister must make an allowance for depreciation to a taxpayer even when he has not claimed any and that his failure to do so will render an assessment invalid and of no effect is, in my opinion, an utterly untenable proposition. If there was no duty on the part of the Minister to make an allowance for depreciation to the suppliant he could have no statutory right to it.

Even if the suppliant had claimed depreciation in respect of the amounts he reported as income from the estate it does not follow that he would have been entitled to it. This aspect of the case was not dealt with by counsel but is, I think, an important one. The depreciation allowance authorized by the Act is not an item of expenditure. It is quite a different thing from the expenses that may properly be offset against receipts in order to arrive at net profit or gain. The depreciation allowance is purely a statutory allowance authorized as a deduction or exemption from what would otherwise be taxable income. Without the statutory authority for its deduction or exemption it would be taxable income. In that sense it is income that is exempt from tax but the true reason for such exemption is that, while it is included in what would otherwise be taxable income arrived at by deducting expenses from receipts, it is in reality an item of capital rather than one of income. That this is so is recognized by the Act itself, for section 6 (*b*) provides:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act;

and it is, I think, clear that section 5 (*a*) comes within the exception referred to in section 6 (*b*). The depreciation allowance authorized by the Act is not limited as in the

United Kingdom to depreciation to plant and machinery resulting from wear and tear but extends to any asset used by the taxpayer in the production of his income. Likewise, the allowance is restricted to the assets so used by the taxpayer. The principle underlying the depreciation allowance is that an asset used in the production of income will in time be used up in the course of such production and that it would be unfair to tax the taxpayer on the full amount of the income produced from the use of his asset, since to do so would mean taxing him not only on the income from use of the asset but also on that portion of the asset itself that has been used up in the production of such income. The allowance for depreciation is, therefore, in this sense an item of capital representing the diminution in value of the asset for use in income production and is granted in order to enable the tax payer to keep his tax producing position intact—he will still have his asset with its diminished tax producing value but he will also have the depreciation allowance to make up for such diminished value. A taxpayer whose income comes to him otherwise than from the use of his assets is not entitled to any depreciation allowance in respect of such income. It follows that a beneficiary of an estate, in so far as he is entitled only to income from it, is not entitled to deduct any amount of depreciation in respect of such income, since it is not his assets but those of the estate that have been used in the production of such income. Any amount that may be allowed for depreciation, being an item of capital, enures to the benefit of the estate and those entitled to its corpus.

It should be noted in respect of half of the estate it was to be held as to the corpus for the issue of the suppliant and the supliant was entitled only to the income therefrom subject to the annuity to Judson France Davidson. In respect of the income from this half of the estate the claim of the suppliant that he made a mistake in failing to deduct depreciation from it fails completely for he had no right to any such deduction.

Moreover, the evidence is against the suppliant's contention that he was mistaken as to his rights in the matter of deducting depreciation allowance. As executor of the estate he made full and detailed claims for depreciation in

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respect of the various assets of the estate used in the production of its income such as apartment blocks, houses and machinery and, although there is no direct evidence as to any action by the Minister in respect of such claims, it may fairly be assumed that they were allowed to the estate. Then, the suppliant in his own right claimed depreciation in respect of the assets he received from the estate in his own right. While the court order dividing the estate was not made until December 15, 1930, it is clear that there was a division made earlier. This was done sometime after making the 1926 returns, for in the T-1 returns by the suppliant commencing with the year 1927 claims for depreciation were made by him in respect of assets which were formerly shown as assets of the estate. It will be remembered that the suppliant became entitled to half of the estate in his own right on the death of his mother in 1922. The returns show that the suppliant as executor of the estate always claimed depreciation in respect of the assets belonging to it; that from 1927 to 1934 he claimed depreciation in respect of the assets to which he was entitled in his own right; and that he never claimed any depreciation in respect of the amounts which were reported as income from the estate. His whole course showed a correct understanding of when he was entitled to claim depreciation and when he was not.

For the years 1927 to 1934 the suppliant included in his T-1 returns income from assets he had taken over from the estate in his own right and claimed and was allowed depreciation in respect thereof. He also included income from the other half of the estate the corpus of which was held for his issue. In respect of such income he was not entitled to any deduction for depreciation since it did not come from the use of any of his assets. If the amounts received by him from this half of the estate during the said years exceeded the amounts he was entitled to receive as income from it, that was a matter of accounting between the suppliant and the estate and does not entitle him to any relief in these proceedings. I am unable to see any valid claim by the suppliant in respect of the years 1927 to 1934. Likewise, in respect of the years 1917 to 1922, prior to the death of his mother, the suppliant was entitled only to specific

amounts of income from the estate and in respect thereof had no right to any depreciation allowance. His claim in respect of such years also fails. This leaves only the years 1923 to 1926 for consideration. For these years the suppliant's position was a different one. He had become entitled to half of the estate in his own right, and, inasmuch as the depreciation allowance to the estate was a capital item enuring to the benefit of the estate, he was entitled to a half interest in it as being part of the capital of the estate. His share of the capital of the estate, including the depreciation allowance made to it, was, as such, of course not subject to income tax.

The second attack upon the validity of the assessments may now be dealt with. Counsel for the suppliant contended that they were invalid in that they assessed as income that which was not assessable as such, that an attempt was made to tax that which the Act exempted from taxation, namely, the amount allowed to the estate for depreciation, and that in attempting to do so the taxing authorities went beyond their jurisdiction. Counsel relied upon such authorities as *Toronto Railway Company* v. *Corporation of the City of Toronto* (1); *Donohue* v. *Corporation of Parish of St. Etienne de la Malbaie* (2); *Becker et al* v. *City of Toronto* (3); *and Canadian Oil Fields Co.* v. *Village of Oil Springs* (4). All these cases turn on the question of jurisdiction to assess and decide that an assessment made where there is no jurisdiction to make it is a nullity. In my opinion, they have no application to the present case at all. By section 33 of the Income War Tax Act every person liable to taxation under the Act is required on or before the thirtieth of April in each year to deliver to the Minister a return in such form as the Minister may prescribe of his total income during the last preceding year. Then, by section 54 it is provided that after examination of the taxpayer's return the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by him in his return. The suppliant made his T-1 returns in which he stated his income. Each return contains a certificate by him that he has made a full

(1) (1904) A.C. 809.
(2) (1924) S.C.R. 511.
(3) (1933) O.R. 843.
(4) (1907) 13 O.L.R. 405.

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and complete disclosure of his total income from all sources, that the information given therein and the statements of income and expenditure therein and all statements and information contained in any documents furnished therewith are true in every respect and that the expenditures claimed were actually incurred. The taxpayer's own return of his income, while not binding upon the Minister, may be the basis of the assessment made by him. It is reasonable that this should be so since the taxpayer knows better than anyone else what his income is. How, then, can it possibly be said that an assessment based upon the taxpayer's own return of his taxable income is an assessment made without jurisdiction to assess? The question carries its own answer. In my opinion, the fact that the taxpayer's own return of his taxable income may be the basis from which the assessment may be made distinguishes this case from those relied upon by counsel. The taxpayer may make an error in his return by including as income that which may really be capital or by failing to claim a deduction to which he may be entitled, and he may be able on appeal, in the manner prescribed by the Act, to show such error and have the assessment set aside but there is a vast difference between an assessment that is invalid as being erroneous and one that is invalid as being made without jurisdiction to make it. The latter is a nullity and can be attacked in collateral proceedings, but the former is not a nullity and is valid until it is set aside in proceedings taken in conformity with the Act. If the suppliant erroneously included in his T-1 returns of his income items to which he was entitled not as income but as capital any remedy he might have had was by way of appeal from the assessments. The contention of his counsel that each of the assessments for the years 1917 to 1934 was a nullity cannot be accepted. Both attacks on the validity of the assessments fail.

There remains for consideration one other contention. Counsel for the suppliant relied strongly on section 53 which provides as follows:

> 53. The returns received by the Minister shall with all due despatch be checked and examined.
>
> 2. In all cases where such examination discloses that an overpayment has been made by a taxpayer the Minister shall make a refund of the amount so overpaid by such taxpayer, etc.

He contended that the section gave the suppliant a statutory right to a refund of the amounts of income tax overpaid by him. His argument was that the returns made by the suppliant disclosed overpayments of income tax by him, that there was a statutory duty on the Minister to refund such overpayments and that the suppliant had a statutory right to receive such refunds. This is the only section in the Act under which the suppliant has any possible hope for success, but he must show clearly that his case comes within its terms. It is, I think, clear that the primary purpose of the section was to simplify the process of making refunds. Without some such section no refund of an overpayment of tax could be made without an order in council under the Consolidated Revenue and Audit Act, R.S.C. 1927, chap. 178. Where it was clear from the returns that an overpayment had been made by a taxpayer it was deemed desirable that a refund should be made without the necessity of passing an order in council and the Minister was directed to make such refunds. While that was the primary purpose of the section, the language is mandatory and I see no reason why the reasoning that prevailed in the *Pioneer Laundry* case (*supra*) in respect of section 5 (*a*) should not also govern in respect of section 53 (2). If there was a statutory duty on the Minister to make a refund, there was a statutory right in the taxpayer to receive it.

Counsel for the respondent argued that section 53 (2) referred only to examination of returns made by the taxpayer. If this be so, the suppliant has no case under it, for there is nothing in any of his T-1 returns that could disclose any overpayment of income tax by him. Counsel for the suppliant contended, however, that more than merely the taxpayer's returns were referred to. The sections preceding section 53 deal with returns of various kinds, some taxpayer's returns and others information returns, such as the T-3 returns. Section 53 requires the checking and examination of all returns. The interpretation of what is meant by " such examination " in section 53 (2) depends upon what is involved in the examination. The T-1 return is before the assessor for examination; he sees in it an item of income from an estate; this takes him to the T-3 return of the estate. The evidence of Mr. Patterson in the present

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case was that the T-3 returns were always checked against the T-1 returns. I am, therefore, of the view that the term "such examination" in section 53 (2) means the examination not only of the taxpayer's T-1 return but also of any other return that would normally be looked at in the course of the examination and that in the present case it would include the T-3 return made by the suppliant as executor of the estate.

What did such examination disclose? The T-3 returns show for each year the amounts of income accruing to the beneficiaries. In the earlier years there are six beneficiaries, but in the later ones there are only two, the suppliant and his brother, Judson France Davidson. In most of the years the total amount shown as accruing to beneficiaries exceeded the amount of net income of the estate after deduction of the depreciation allowance to it. This fact was apparent to the tax official who examined the returns. The 1922 T-3 return carries the following notation: "Excess of net Income paid Beneficiaries out of Depreciation account. W" The 1923 return carries a similar notation. On the 1924 return the notation is "Excess Income shown as paid to Beneficiaries is paid out of Depreciation Fund and is taxable." Similar notations with some variations in language appear on the T-3 returns for the following years. Counsel for the suppliant contended that it was apparent on the fact of the two returns taken together that the suppliant was making overpayments of income tax, that the notations were proof that the taxing authorities were aware of such overpayments and that the suppliant came within the terms of section 53 (2). I am unable to accept this contention. All that the T-3 returns show is that the total amounts of income accruing to beneficiaries exceed the amounts of net income of the estate left after deducting the amounts of the depreciation allowances. This is not enough to warrant a claim under section 53 (2).

In my opinion, section 53 (2) was meant to cover cases where it is clear from the examination of the returns that there has been an overpayment of income tax by the taxpayer and where the exact amount of such overpayment is clearly ascertainable, as, for example, where the overpayment was due to an error in computation of rates or cal-

culation of amounts or failure to make or subtract specified deductions. It does not cover cases involving an adjudication as to rights. It may be that the suppliant as executor of the estate made a mistake in distributing as income more than he should have distributed as such or in distributing as income that which should have been distributed only as capital but that is a matter of estate administration. And it may well be that the suppliant has paid more income tax because of the distributions by the estate than he might have had to pay if the distributions had been made differently. The fact is that the distributions by the estate were made, whether rightly or wrongly, as distributions not of capital but of income and were reported as such. Likewise, they were received and reported as such by the suppliant and it is this receipt, rather than the source from which it came, that is of primary concern. There was no distribution or division of the capital of the estate until after 1926. It might also be debatable whether, if gross income from the estate was being distributed to beneficiaries as income, there was any right to depreciation allowance to the estate since the purpose of such allowance was not being observed, namely, the maintenance of the estate's tax producing value. I pass no opinion on these questions. Certainly the taxing authorities were not called upon to make an adjudication in respect of them in order to determine whether the returns disclosed that the taxpayer had paid too much tax. Such adjudication might have been made by the court if an appeal from the assessment had been made, but that has nothing to do with the question whether an overpayment of tax was disclosed by the examination of the returns. It must be the examination of the returns, and not the determination of some other matter, that discloses the overpayment.

Moreover, before the suppliant can succeed under section 53 (2) he must show not only that the examination of the returns discloses an overpayment of income tax by him but also that it discloses the exact amount of such overpayment so that the Minister may be able to make a refund of "the amount so overpaid". The suppliant cannot comply with this requirement of the section. It would, in my opinion, be quite impossible, even it were assumed that there had

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been an overpayment of tax by the suppliant, to take the returns for any one year and ascertain the amount of such overpayment. It is not possible to determine how the amounts of income of the suppliant are arrived at, nor can it be ascertained from the returns how much of it was income to which he was entitled as such or how much of it came out of the depreciation fund or reserve or from some other source.

In my judgment, not only did the examination of the returns in this case not disclose any overpayments of income tax by the suppliant, having regard to the distributions made by the estate, but also, even if that were not so, it would be impossible for the Minister to determine from the returns what refund to make. The suppliant's case falls outside section 53 (2) on both grounds.

While it may well be that the suppliant has in the result paid more income tax than he would have been called upon to pay if he had kept his administration accounts of the estate in better order and made its distributions differently, he has only himself to blame for this state of affairs. Having failed to take advantage of the provisions of the Act by way of appeal from the assessments, by which he might have obtained relief from his mistakes of accounting or distribution, he is now barred from relief by section 69. Under the circumstances, the judgment of the Court must be that the suppliant is not entitled to any of the relief sought by him in his petition of right and that the respondent is entitled to costs.

Judgment accordingly.

1945
June 14
Aug. 3

BETWEEN:

WRIGHTS' CANADIAN ROPES LIMITED,

APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE,

RESPONDENT.

Revenue—Income tax—Income War Tax Act R.S.C. 1927, c. 97, sects. 6 (1) (i) and 6 (2)—Taxpayer not entitled to consideration of claim for deduction under s. 6 (1) (i) of the Income War Tax Act where

claim covers obligations not referred to in the subsection—Onus is on taxpayer to prove that Minister of National Revenue has not exercised his discretion on proper legal principles—Minister not required to disclose reports received from local Inspector of Income Tax—Minister may disallow any item in an expense account without disallowing the account in its entirety.

The appellant is a manufacturing company incorporated under the Dominion Companies Act. Its principal shareholders are two corporations in England who own all except three shares of its issued capital stock. By an agreement entered into with one of its English shareholders the appellant in return for the performance of certain services and an undertaking that the English Company would not sell rope in certain designated territory, undertook to pay that Company five per cent on all sales made by appellant anywhere. The appeal herein is from the refusal by the Minister of National Revenue to allow all of such payments as a deductible item from appellant's income for the years 1940, 1941 and 1942

Held: That appellant is not entitled to consideration by the Minister under s. 6 (1) (i) of the Income War Tax Act of its claim for deduction since the deduction claimed covers obligations not referred to in the subsection.

2. That it is not incumbent on the Minister of National Revenue to disclose to an appellant any report or reports received by him from a local inspector of Income Tax.

3. That the onus of proof that the Minister of National Revenue has not exercised his discretion on proper legal principles is upon the appellant and the appellant has not discharged such onus.

4. That every item in an expense account is in itself an expense and the Minister under s. 6 (2) of the Income War Tax Act is not required to disallow in its entirety any expense account which he found in any small particular to be in excess of what was reasonable or normal.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Ottawa.

H. R. Bray, K.C. for appellant.

Robert Forsyth, K.C. and *H. H. Stikeman* for respondent.

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

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CAMERON, Deputy Judge, now (August 3, 1945) delivered the following judgment:

This is an appeal from three assessments made by the Commissioner of Income Tax upon the Appellant in respect of income tax and excess profits tax, for the years 1940, 1941 and 1942, and affirmed by the Minister of National Revenue (hereinafter called "The Minister"). The appellant is incorporated under the Dominion Companies Act.

On August 13, 1943, the Inspector of Income Tax at Vancouver notified the appellant by letter that under the powers vested in the Minister under section 6 (2) and section 75 (2) of the Income War Tax Act discretion was about to be exercised in respect of the matters now in dispute (*inter alia*) which appeared to be in excess of what was reasonable for the said business; and invited the appellant to submit written representations for consideration of the matter. In reply thereto the appellant, on September 8, 1943, forwarded copies of the agreements later herein referred to as exhibits 1 and 2.

On October 9, 1943, the said Inspector at Vancouver further notified the appellant that it was proposed to recommend to the Minister that commissions paid to Wrights' Ropes Limited, in 1940, 1941, 1942, be disallowed as deductions except as to the sum of $7,500 in each year.

The appellant, on October 21, 1943, acknowledged receipt of that letter and stated "We have nothing further to add to ours of the 8th ultimo and await the outcome of your recommendations to the Minister and the exercise of his discretion". No further representation were made by the appellant except that on October 29, 1943, it advised the Inspector that Wrights' Ropes Limited, had not the controlling interest in the Company as had been indicated in the letter of the Inspector, of October 9, 1943. The Minister—by the Commissioner of Taxation—under section 75 (2) of the Act, exercised his discretion and on May 10, 1944, notices of assessment for the said years were mailed to the appellant, all payments to Wrights' Ropes Limited of Birmingham, England, by way of commission on sales being disallowed as deductions except as to the sum of $7,500 in each of the said years.

On May 29, 1944, the appellant gave notice of appeal from the said assessments together with the required statement of facts and reasons for appeal.

On September 26, 1944, the Minister—by his Deputy Minister of National Revenue for Taxation—gave his decision which in part is as follows:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto related and having exercised his discretion under the provisions of Subsection 2 of Section 6 of the Income War Tax Act, hereby affirms the said assessment wherein $9,881.94 of the Commission of $17,381.94 in the year 1940, $21,825.85 of the commission of $29,325 85 in 1941 and $31,980.91 of the commission of $39,480.91 in 1942 paid to Wrights' Ropes Limited of Birmingham were disallowed as expenses or deductions for the purposes of the said Act. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act the said Assessments are affirmed.

On October 11, 1944, the appellant filed a Notice of Dissatisfaction together with statement of facts and stating its reasons for appeal as follows:

Reasons for Appeal

1. That the commissions paid by the appellant to Wrights' Ropes Limited were an obligation imposed on the appellant by a valid contract.

2. That the opinion of the Minister herein was not based on a consideration of the facts.

3. That the opinion of the Minister herein was unreasonable and was not formulated in accordance with the law.

4. That the Minister in forming his decision appealed from, gave no consideration to the provisions of section 6 (i) of the Income War Tax Act containing in lines 8 to 13 thereof as follows:

but only if the company or organization to which sums are payable, or the company in Canada, is controlled directly or indirectly by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or otherwise;

5. That no opportunity has been given the appellant to refute any material that may have been laid before the Minister of National Revenue or the Commissioner of Income Tax relative to the said assessment and which may be prejudicial to the interests of the appellant.

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6. That the Minister did not exercice his discretion as required by Subsection 2 of said Section 6 of the said Act.

The Sections of the Income War Tax Act having to do with the issues raised are as follows:

6—1. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of . . . . .

(i) Any sums charged by any company or organization outside of Canada to a Canadian company, branch or organization, in respect of management fees or services or for the right to use patents, processes or formulae presently known or yet to be discovered, or in connection with the letting or leasing of anything used in Canada, irrespective of whether a price or charge is agreed upon or otherwise; but only if the company or organization to which such sums are payable, or the company in Canada, is controlled directly or indirectly by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or otherwise; provided that a portion of any such charges may be allowed as a deduction if the Minister is satisfied that such charges are reasonable for services actually rendered or for the use of anything actually used in Canada.

2. The Minister may dissalow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

The Excess Profits Tax Act provides as follows:

Section 8. In computing the amount of profits to be assessed, subsections one and two of section six of the Income War Tax Act shall, *mutatis mutandis,* apply as if enacted in this Act. . . . .

The payments made by the appellant to Wrights' Ropes Limited were made pursuant to an agreement dated September 12, 1935 filed as Exhibit 2 herein. This agreement was supplemental to an agreement dated May 19, 1931, between the same parties—the appellant therein being referred to as Cooke's (Exhibit 1).

The agreement of September 12, 1935, is between Wrights' Ropes Limited, Birmingham, (called Wrights'); Charles Hirst & Sons Limited, (called Hirst's) and the appellant (called the Canadian Company). It recites that Wrights' have assigned and transferred to the Canadian Company its business and sales agencies in Western Canada (in accordance with the agreement of May 19, 1931) and *inter alia* provides as follows:

2. (*a*) Except as provided by paragraph (*c*) of this clause Wrights' will not directly or to their knowledge supply for sale or sell any wire ropes in Western Canada.

(*b*) Wrights' to refer to the Canadian Company Enquiries and orders for Western Canada.

(*c*) Payment by Wrights' to the Canadian Company of certain commissions.

(*e*) The Canadian Company to be at liberty to consult Wrights' in all matters pertaining to the business of the Canadian Company and Wrights' to act as technical advisers, etc.

(*f*) Wrights' to furnish the Canadian Company with information regarding developments in wire rope industry, etc.

(*g*) Wrights to direct and supervise the supply of wire by Hirst's to the Canadian Company.

5. In consideration of the due performance by Wrights' of their obligations under this Agreement the Canadian Company will pay to Wrights' a commission at the rate of five per centum upon all cash received in respect of the net selling price of all wire ropes both manufactured and sold by the Canadian Company after the date of this agreement. . . . .

The payments claimed by the appellant as deductible expenses were made pursuant to paragraph five of the above agreement and the evidence establishes that the payments were made in fact in accordance with the said agreement.

I propose to deal with the appellant's case by considering separately the reasons for appeal and in the order mentioned therein.

(1) There is no dispute that the commissions paid by the appellant to Wrights' Ropes Limited were an obligation imposed by a valid contract. The original contract (exhibit 1) was executed in 1931 and extended with some alterations in 1935 by a further agreement (exhibit 2). A copy of the contract was in the possession of the Commissioner when the assessments were made and was no doubt given consideration. By section 6 (2) very wide powers are given to the Minister to disallow *any* expense which he, in his discretion, may determine to be in excess of what is reasonable or normal for the business. There is nothing in this section which requires him to allow as proper deductions any sums paid by a taxpayer under a valid contract.

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(2) There is no evidence to support the contention that the decision (opinion) of the Minister was not based on a consideration of the facts. The evidence of the Deputy Minister of National Revenue for Taxation taken on his examination for discovery and read into the record at the hearing shows that consideration was given to the facts.

(3) No evidence was given to indicate that the decision (opinion) of the Minister was unreasonable unless it could be referred to as unreasonable because the whole claim was not allowed; and I recall no suggestion in the evidence or in the argument that it was not formulated in accordance with the law except for the matters mentioned in reason 5 below.

(4) There is no evidence that the Minister did or did not give consideration to the provisions of section 6 (1) (i) of the Act particularly lines 8 to 13 thereof. It is clear however that he—acting through the Commissioner of Taxation—exercised the discretion conferred on him by section 6 (2) and the assessments later made on the appellant were made, in so far as the matters in dispute are concerned, under section 6 (2) and not under section 6 (1) (i). This is clearly established by the letter of August 13, 1943, above referred to and by the decision of the Minister, dated September 26, 1944.

The contention of the appellant is that the Minister should have considered the matter under section 6 (1) (i) of the Act and should have found:

(1) That the commissions paid by the appellant to the English Company were in respect of the matters mentioned in the first part of the subsection and

(2) That the appellant was not controlled by Wrights' Ropes Limited (referring to lines 8 to 13 of said section) and

(3) That, therefore, as the items claimed as deductions were not paid to a controlling company, they could not be disallowed but, in fact, should be allowed in full.

I find it somewhat difficult to ascertain the exact meaning of lines 8 to 13 of subsection (i). The intent seems to

be that the charges mentioned in the first part of the paragraph should be disallowed *only if* the payer or payee of the sums charged is controlled in the manner indicated (subject to the later proviso as to the power of the Minister to allow a portion of such charges).

The appellant endeavoured to establish that it was not controlled by Wrights' Ropes Limited but the evidence is not at all clear. The share capital of the Company is 1,500 common shares all of which are issued—749 shares being held in the name of Hirsts' Limited, 748 in the name of Wrights' Ropes Limited and 3 qualifying shares held in the name of the three Canadian directors. In the appellant's letter to the inspector, dated October 29, 1943, it stated that Wrights' Ropes Limited and Hirsts' Limited each held 50 per cent of the shares. In the consent, dated June 1, 1945, and filed at the trial, it was agreed that at all pertinent times Wrights' Ropes Limited *held* 49·86 per cent of the shares and not 50 per cent as mentioned in the letter of October 29, 1943.

At the hearing, on cross-examination, the managing director was asked how many shares were held by Wrights' Ropes Limited and he answered "750 odd" which, of course, would appear to give control at a general meeting. His counsel then interrupted the cross-examination saying "you can take a look at that" (showing a document, presumably the share register) and the witness then said "748 shares". No evidence was given as to whether the three directors' shares were held beneficially or as nominees of one or other of the two major shareholders. The first answer of the witness is possibly significant and it would not be at all surprising to find that the control was actually in Wrights' Ropes Limited. However, in the view I take of the matter, it is not necessary to make any finding in regard thereto.

I have reached the conclusion that section 6 (1) (i) does not apply to the present case. It is to be noted that the agreement under which the payments were made (exhibit 2), provided in clause 5 thereof, that the commission of 5 per cent payable by the appellant to Wrights' Ropes Limited is "in consideration of the due performance by the latter of their obligations under this agreement".

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These obligations have been heretofore summarized and while they include the rendering of certain services and possibly certain managerial duties—as mentioned in section 6 (1) (i)—they also include a covenant not to sell or supply for sale any wire rope in Western Canada and to pay certain commissions to the appellant. These latter are not matters which are included in any way in the subsection. It is important to observe that neither at the hearing, nor when asked by the inspector at Vancouver to supply him with any further representations, did the appellant make any effort to break down the total charges of 5 per cent into portions, due in respect of management fees or services which, in my opinion, are the only two obligations undertaken by Wrights' Ropes Limited which could possibly be within the provisions of the subsection. In fact, I think, I could assume that it would be almost impossible to do so. No evidence was given at the trial as to what services were supplied, how frequently they were supplied or how important they were. It is true that the managing director expressed the opinion that the advice and services were worth the amounts paid but, without proof as to what they were, I would hesitate to accept that statement. In any event in considering section 6 (1) (i) I must deal with the sums charged by Wrights' Ropes Limited, which so far as the evidence shows, could only be under clause 5 of the agreement of 1935. These charges covering obligations not referred to in the subsection, I must find that section 6 (1) (i) has no application to the case.

(5) The appellant laid great stress on the fact that it had not been shown any report made by the local Inspector at Vancouver to the Minister and Commissioner or given any opportunity to meet any statements therein contained. It is clear that, following the usual practice, the local inspector did make one or more reports, statements or recommendations, to the Commissioner or Minister; that such were not shown to the appellant and that they were part of the material considered by the Minister—acting through the Commissioner—when the discretion was exercised. There is absolutely no evidence before me as to what was contained therein. It may or may not have been material. It may have contained nothing more than the

recommendations of the Inspector as stated to the appellant in the letter of October 9, 1943.

Counsel for the appellant referred me to the case of *Rex* v. *Local Government Board—ex-parte Aldridge* (1) as authority for holding that the Minister had acted improperly in not disclosing such report of the inspector and that the appellant was, therefore, prejudiced to such an extent that the assessments should be set aside. The decision referred to however was reversed in the House of Lords (2) where it was held that an appellant to the Local Government Board is not entitled as of right to see the report made by the Board's inspector upon the public local inquiry. This decision was referred to with approval in the case of *Danby and Sons Limited* v. *Minister of Health* (3). Reference may be made more particularly to page 350, where Swift J. quoting from the *Aldridge* case said:

...but there is one point which needs notice, namely, the claim that the respondent was entitled as of right to see the report of the inspector who held the public inquiry. No such right is given by statute or by an established custom of the department. Like every administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the department should be made public. It would, in my opinion, cripple the usefulness of these inquiries. It is not for me to express my opinion of the desirability of an administrative department taking any particular course in such matters, but I entirely dissociate myself from the remarks which have been made in this case in favour of a department making reports of this kind public. Such a practice would, in my opinion, be decidedly mischievous.

Taking therefore, the view, as I do, that the Minister of Health and the person whom he causes to hold the inquiry are persons who, in arriving at their decision, must act judicially in the sense I have mentioned above, I see no reason for holding that such a report is liable to disclosure on the contrary, I am of opinion that it is not.

In the *Aldridge* case (4) Lord Shaw said:

I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in Courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants, and consultants of various degrees of experience, many of whose opinions may differ but all of which form the material for the ultimate decision. To

(1) (1914) 1 K.B. 160.
(2) (1915) A.C. 120.
(3) (1936) 1 K.B. 337 at 343.
(4) (1915) A.C. at 137.

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set up any rule that that decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action. This is, in my opinion, implied as the legitimate and proper consequence of any department being vested by statute with authority to make determinations.

This conclusion is in no way changed by the circumstance of the determinations being, in point of fact, upon appeal from the deliverances of another or inferior authority. The judgments of the majority of the Court below appear to me, if I may say so with respect, to be dominated by the idea that the analogy of judicial methods or procedure should apply to departmental action. Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. The Department must obey the statute. For instance, in the present case it must hold a public local inquiry, and upon a point of law it must have a decision of the Law Courts. *Quoad ultra* it is, and, if administration is to be beneficial and effective, it must be the master of its own procedure.

While it is true that the decisions above referred to arose out of consideration of special acts, I believe that the principles there laid down are applicable to the present case. I have, therefore, reached the conclusion that it was not incumbent on the Minister to disclose to the appellant any report, or reports, he received from the local Inspector at Vancouver.

This conclusion has not been reached without some doubt in view of part of a judgment of Lord Loreburn in the case of *Board of Education* v. *Reid* (1) where he says:

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statements prejudicial to their view.

This decision was referred to with approval by Davis J. in the case of *The King* v. *Noxzema Chemical Company* (2).

In neither of these cases, however, was it necessary for the Court to determine the direct question as to whether a report submitted by an official or an inspector to the departmental head should be disclosed to the opposite party and for that reason I prefer to follow the decisions previously referred to.

It was urged by counsel for the appellant that the Minister did not exercise his discretion as required by section

(1) (1911) A.C. at 182. (2) (1942) S.C.R. at 180.

6 (2) of the Act. I find no evidence that such is the case. Unquestionably his decision was made under that subsection, as above pointed out, after exercising his discretion. As to the manner of exercising that discretion there seems to be no valid ground for complaint. It was fully demonstrated that the appellant had every opportunity of presenting any material relevant to the case; that it received notice that discretion was about to be exercised; that the Minister when exercising his discretion had before him all the material submitted by the appellant and all other necessary information on which to reach a conclusion and to exercise his discretion.

Following the tests laid down by the Privy Council in *Pioneer Laundry & Dry Cleaners Limited* v. *Minister of National Revenue* (1) it is clear that the exercise of the discretion involved an administrative duty of a quasi-judicial character to be exercised on proper legal principles. I can find no evidence that the discretion in this case was not exercised in such a manner. The onus of proof that the discretion of the Minister was not properly exercised is on the appellant and it has not satisfied that onus.

Counsel for the appellant also argued that the Minister could not have used section 6 (2) as it required him to disallow the expense in toto. With that argument I can not agree. Every part of an expense account is in itself an expense—something that has to be expended—and the very words of that section make it quite clear that the Minister may disallow any expense which, in his discretion, he may determine to be in *excess* of what is reasonable or normal. If the argument for appellant were correct it would mean that the Minister would be required to disallow in its entirety any expense account which he found in any small particular to be in excess of what was reasonable or normal.

For the reasons above stated I have come to the conclusion that the discretion of the Minister conferred on him by section 6 (2) of the Act was properly exercised and that the assessments in question were properly made and it follows, therefore, that the appeals fail and must be dismissed with costs.

Judgment accordingly.

(1) (1940) A.C. 127.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1945
Mar. 2, 3, 4
Mar. 15

BETWEEN:

FRANKLIN GALE ..... PLAINTIFF,

AND

THE SHIP *SONNY BOY* ..... DEFENDANT.

Shipping—Collision—Liability—Plea of limitation of liability may be raised by way of defence or counterclaim without the institution of a separate action—One of two or more joint owners of a ship not in default may plead limitation of liability—Canada Shipping Act 24-25, Geo. V., c. 44, s. 649.

In an action for damages arising from a collision between plaintiff's ship and defendant ship the Court found the defendant ship alone to blame for the collision. Defendant ship is owned by two persons who were registered as joint owners of all her shares. Defendants pleaded in the alternative that they were entitled to limit their liability under the provisions of the Canada Shipping Act, Statutes of Canada 1934, c. 44, s. 649. It was contended that defendants should have raised the issue of limitation of liability in a separate action after their liability had been determined or admitted.

Held: That a defendant in an action of damage who is entitled to institute a separate suit of limitation of liability may plead his right to limited liability by way of defence in the action of damage in which he is a defendant and may set up a counterclaim in the same action claiming a decree of limitation of liability such as he might have claimed as a plaintiff in a separate action of limitation of liability.

2. That a joint owner of a ship against whom no default is established is not precluded from the right of limited liability.

ACTION by the plaintiff to recover damages for loss suffered by plaintiff through a collision between plaintiff's ship and defendant ship.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver, B.C.

R. W. Ginn, for Plaintiff.

J. V. Clyne and *V. Hill,* for Defendant.

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

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FRANKLIN GALE v. THE SHIP SONNY BOY

SMITH, D.J.A.

SIDNEY SMITH D.J.A. now (March 15, 1945) delivered the following judgment:

This suit involves a collision which occurred in Ogden Channel, B.C., at approximately 12.30 a.m. on Monday 21st August, 1944, between the motor vessels *Colnet* and *Sonny Boy*. The *Colnet* is owned by the plaintiff and is a fish packer, 54 feet long, 13 feet beam, 8 knots speed, and of 25 tons net register. She was in the course of a voyage from Prince Rupert to Queen Charlotte City, and was manned by a crew of three young men, the eldest of whom James Gale, a son of the plaintiff, was only 19 years of age. He had no certificate, but had had experience in boats from his youth, and had been in charge of the *Colnet* for a year and a half. Of the other two lads one, Roberts, 17 years of age, was the deckhand, and the other, Ross, 16 years of age, was the engineer. The *Sonny Boy* is a fishing vessel 38 feet long, 12 feet beam, 6 knots speed and with a net register tonnage of 13·76 tons. She was owned by Olav Knutson and Martin Gunstveit. They were the registered joint owners of all her sixty-four 64th shares. The former, also uncertificated, was her Master and Engineer. In addition, she had a crew of four fishermen. Both vessels were equipped with electric light.

Soon after midnight in question the vessels were approaching each other in the fairway of Ogden Channel about opposite Camrie Head. The night was clear and dark, with the water further shadowed by the mountains on either hand. The Master of the *Colnet* had been at the wheel till midnight when he was relieved by Roberts, who had only made four trips through the Channel. The Master accordingly stayed on look-out in the wheel-house until the vessel should get into open water. The third lad was below. The crew of the *Sonny Boy* at this time were all below except one fisherman, Halverson, who was at the wheel, and who, somewhere around midnight, had taken over charge of the vessel from the Master. About half past twelve the two ships collided, the stem of the *Sonny Boy* cutting into the port side of the *Colnet* just forward of midships, causing heavy damage. The Master and deckhand of the *Colnet* say their lights were burning while the *Sonny Boy* showed no lights. Halverson in charge of the *Sonny Boy* says the exact opposite. He says the *Sonny*

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FRANKLIN GALE v. THE SHIP SONNY BOY

SMITH, D.J.A.

Boy lights were burning while the *Colnet* lights were out. There is also evidence as to the lights from the other members of the crew of the *Sonny Boy,* who say generally that at various times during the earlier part of the night the lights of their vessel were burning. On behalf of the *Sonny Boy* there is also evidence from one, Jonson, who was in charge of a fishing vessel that passed the *Sonny Boy* earlier in the evening, just at dusk, and who said the *Sonny Boy's* lights were then burning. But this testimony was weakened by other evidence he gave which I thought unfounded and which I thought showed a bias against the *Colnet.* On the other hand, Engineer Ross of the *Colnet* said that the lights of his vessel were burning when he went below, and also when he came on deck again immediately after the collision. It should be noticed here also that the crews of both vessels say that the lights of the other ship became visible shortly after the collision, while the *Sonny Boy* was manoeuvring alongside preparatory to beaching the *Colnet.*

The defendants in their defence set up in the alternative contributory negligence on the part of the *Colnet* but this was not pressed in argument by either counsel. Both counsel submitted that it was merely a question of lights or no lights, which again was one of credibility. But I have not excluded from consideration that there may be a middle view, either that the lights of both vessels were out, or that the lights of both vessels were burning but that each kept a bad look-out.

I am quite unable to find, as I was invited to find, that the three lads in the *Colnet* concocted their story in order to deceive the Court. On the contrary, I think they all dealt fairly with the Court. I was particularly impressed with the Master. He seemed to me to be a truthful witness and in my opinion any alleged inconsistencies between his evidence at the trial and his casualty report, or between his evidence and his previous statements, were not such as to throw any doubt upon his veracity. I therefore accept the evidence of those on board the *Colnet,* and find that at the time of the collision the *Colnet* was exhibiting the regulation lights, that the *Sonny Boy* was showing no lights, that such default was the cause of the disaster and that the *Sonny Boy* must be held alone to blame.

There was much evidence and argument as to whether the crew of the *Sonny Boy* had been drinking while at Queen Charlotte City. The crew of the *Colnet* said that when taken on board the *Sonny Boy* they found certain members of her crew showing signs of a "hang-over", and two of them with face marks indicative of a fight. I accept this evidence. I think there can be no doubt that the Master, another fisherman named Murray (who acted as cook), and Halverson, had been drinking during Saturday night and into early Sunday morning, and that the first two named had been fighting. Halverson said that whiskey had been purchased on Saturday night, that he had paid $15.00 for his share and that he and others had been drinking in a hotel room. He gave no clear account of how much he had taken and contradictory accounts of the time when he returned on board his ship. All this is in striking contrast with the seemly conduct of the crew of the *Colnet* on the Saturday night and on the Sunday afternoon prior to leaving Prince Rupert.

The defendants in their defence pleaded, in the alternative, that they were entitled to limit their liability under the provisions of s.649 of the Canada Shipping Act, Statutes of Canada, 1934, c. 44. Counsel for the plaintiff contended that this was a wrong method of procedure, and that the defendants should have raised this issue in a separate action after their liability had been determined, or admitted. I am of opinion that, both in England and in Canada, a defendant in an action of damage who is entitled to institute a separate suit of limitation of liability may, if he chooses, plead his right to have his liability limited, by way of defence in the action of damage in which he is defendant, and set up a counterclaim in the same action, claiming a decree of limitation of liability such as he might have claimed as a plaintiff in a separate action of limitation of liability. Williams & Bruce's Admiralty Practice, 3rd ed. p. 349. *The Satanita* (1); *Waldie Bros.* v. *Fullum et al* (2). The defendants' pleadings are therefore not in order; but as the plaintiff clearly has not been prejudiced thereby, and in view of the point not having been settled in Canada, I now grant the defendants leave to file a counterclaim, claiming the right to limit their liability.

(1) [1895] P. 248 at 250; [1897] A.C. 59.

(2) [1909] 12 Ex. C.R. 325 at 372.

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SMITH, D.J.A.

It remains to consider whether Knutson and Gunstveit, as joint owners of the *Sonny Boy*, are in these circumstances entitled to such limitation. The onus of proving that the collision occurred without their actual fault or privity is upon them, and they are not entitled to limitation unless they discharge that onus. In my opinion, as regards Knutson, the onus has not been discharged. I am not satisfied either that the lights of *Sonny Boy* were burning when he, as Master, handed over charge of the vessel to Halverson some half-hour before the collision; or that Halverson was then in a fit condition to take charge. Either contingency would constitute a default on the part of the Master. I therefore find that Knutson is not entitled to limitation of his liability.

As regards Gunstveit the position is different. The evidence is clear that he was not on board the vessel at the material time, and there is nothing to indicate that he had anything to do with the events at Queen Charlotte City.

It has been decided that if the loss is occasioned by the actual fault of one of several part-owners, his co-owners are not thereby precluded from a right to the limited liability *The Spirit of the Ocean* (1). Neither counsel was able to furnish me with authority as to whether this principle held good in the case, as here, of joint ownership; nor have my own researches disclosed any. But from the reasoning of Dr. Lushington in the above decision I am prepared to hold, lacking authority to the contrary, that the principle is the same in both cases. I therefore find that Gunstveit is entitled to limit his liability as provided in s. 649 of the Canada Shipping Act.

There will be a reference to the Registrar to assess the damages.

There is one point as to costs to which reference must now be made. The trial was originally set for February 5th and the plaintiff, in setting it down, observed the provisions of Rules 115 and 119. But the defendants were unable to proceed on that day as their witnesses were at sea, fishing, and they were without means of communicating with them. I think the costs thereby incurred by the plaintiff, and which were thus thrown away, should be borne by both parties equally. The plaintiff had several witnesses from

(1) [1865] 167 E.R. 388.

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Queen Charlotte Islands. Transportation facilities are limited to and from these Islands. I think he should have made sure that the action would go on before bringing them down. On the other hand, the defendants knowing this action was pending, should not have allowed their witnesses to go to sea where they could not be reached, without some understanding with the plaintiff. There was unfortunately lack of co-operation on both sides and both should share the needless expense thereby incurred.

The plaintiff is entitled to his costs.

Judgment accordingly

1943

Sept. 29

1945

Oct. 5

BETWEEN:

NICHOLSON LIMITED ..... APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, chap. 97, secs. 6 (2), 6 (3), 58-69, 75 (2)—Disallowance of excessive expense—Discretionary powers vested in the Minister—Discretion to be exercised on proper legal principles—Duty of supervision by the Court—Appellate jurisdiction of the Court—Appeal to the Court is an appeal from the assessment and does not involve an appeal from the Minister's determination in his discretion—Minister's determination in his discretion under section 6 (2), if discretion exercised on proper legal principles, not open to review by the Court.

Certain amounts of the salaries paid to executive officers of the appellant were disallowed as deductible expenses by the Commissioner of Income Tax under the authority of section 6 (2) and section 75 (2) of the Income War Tax Act, as being in excess of what was reasonable or normal expense for the business carried on by it and the amounts so disallowed were added to its taxable income in the assessments levied against it.

Held: That the duty cast upon the Minister by section 6 (2) is an administrative duty of a quasi-judicial character, requiring that the discretion vested in him should be exercised in the manner prescribed by law. The discretion must be exercised on proper legal principles. *Pioneer Laundry and Dry Cleaners, Limited,* v. *Minister of National Revenue* (1940) A.C. 127 at 136 followed.

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2. That the appeal to the Exchequer Court provided by the Income War Tax Act is not an appeal from any decision of the Minister but an appeal from the assessment made by him in the course of his functions in respect thereof and it is incorrect to describe it as an appeal from the decision of the Minister.

3. That the sole issue before the Court in an appeal under the Income War Tax Act is whether the "assessment under appeal" is correct in fact and in law.

4. That the opening words of section 66 "Subject to the provisions of this Act" require the Court to apply and give effect to all the sections of the Act, including section 6 (2).

5. That the correctness of the amount of excessive expense to be disallowed under section 6 (2) depends, not upon the amount that is in excess of what is reasonable or normal as a matter of fact, but on the amount determined by the Minister in his discretion; the amount so determined is the correct one and an assessment in which such amount has been included is, to the extent of such inclusion, correct in fact. Being made as the law requires, it is also correct in law.

6. That the right of appeal to the Court conferred by the Act does not carry with it any right of appeal from the Minister's determination in his discretion under section 6 (2).

7. That it is the duty of the Court to supervise the manner in which the Minister exercises his discretionary powers, but there its function stops; with the quantum of such exercise the Court is not concerned.

8. That when the Minister has determined in his discretion under section 6 (2) of the Income War Tax Act the amount of excessive expense to be disallowed to a taxpayer as a deduction from his income and has exercised his discretion on proper legal principles, the amount so determined is not open to review by the Court; and an assessment in which a disallowance so determined has been included cannot, to the extent of such inclusion, be successfully attacked as incorrect either in fact or in law in an appeal to the Court under the Act. *Pioneer Laundry and Dry Cleaners, Limited* v. *Minister of National Revenue* (1939) S.C.R. 1; (1940) A.C. 127 discussed and *Dobinson* v. *Federal Commissioner of Taxation* (1935) 3 Australian Tax Decisions 150 distinguished.

APPEAL under the provisions of the Income War Tax Act.

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

Hon. J. W. de B. Farris K.C. and *J. L. Lawrence* for appellant.

Dugald Donaghy K.C. and *H. H. Stikeman* for respondent.

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

THE PRESIDENT now (Oct. 5, 1945) delivered the following judgment:

This appeal from the assessments for income and excess profits tax for the taxation years ending January 31, 1940 and 1941, is brought by the appellant because certain amounts of the salaries paid to its executive officers were disallowed as deductible expenses by the Commissioner of Income Tax.

The appellant carries on the business of printing at Vancouver, British Columbia. It does some job printing but the bulk of its business consists of specialty printing, such as street railway tickets and transfers, steamship tickets, theatre, exhibition, bread and milk tickets and coupon books for transportation, fishing and logging companies. This requires special equipment and special qualifications on the part of its employees. During the years in dispute the appellant had four executive officers, who were also its directors, and fifteen employees. Each of the officers in addition to performing executive duties did other work. The appellant's business increased rapidly with an increase in profits and, since it was not possible to obtain additional staff, both employees and officers were called upon for overtime work. The directors, on the recommendation of the general manager, declared a salary bonus of $3,600 for 1940 and $3,575 for 1941. In each year $1,800 of such bonus was distributed among the officers and the balance among the employees, the reason for such equal distribution being that "the wages of the employees just about broke even with the salaries paid the other four members of the firm." The salaries of the directors prior to the bonus, the distribution of it among them and the amount of salary disallowed in each case are set out in a table filed as Exhibit 4.

The amounts of the disallowances were determined by the Commissioner of Income Tax under the authority of section 6 (2) of the Income War Tax Act, R.S.C. 1927, chap. 97, reading as follows:—

6. 2 The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the

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business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

and section 75 (2) by which the Minister may authorize the Commissioner of Income Tax, now the Deputy Minister of Taxation, to exercise such of the powers conferred by the Act upon the Minister, as may, in his opinion, be conveniently exercised by the Commissioner of Income Tax. The necessary authority was given on August 8, 1940; *Vide* Canada Gazette, September 13, 1941, page 852. For the sake of convenience the discretionary powers in question will be referred to as those of the Minister and their exercise as his.

Before any determination was made, the Inspector of Income Tax at Vancouver notified the appellant on October 27, 1942, that discretion was about to be exercised in the matter of the salaries paid to its directors and invited it to submit its representations for final consideration and either arrange for an authorized person to attend the Vancouver office in person or submit its representations in writing as soon as possible. The appellant accepted this invitation and made lengthy representations in writing through its representative, Income Tax Specialists Limited, of Vancouver, by letter dated October 29, 1942, in which the facts regarding it were fully set out and justification for the salary increases was put forward, such as increased business and profits, limit of plant capacity, impossibility of extension and need for additional effort and overtime on the part of employees and executive officers. On January 12, 1943, the Commissioner of Income Tax determined that the salaries of the directors were in excess of what was reasonable for the business carried on by the appellant and disallowed $1,050 in 1940 and $1,811.50 in 1941 as deductions from income. On January 26, 1943, notices of assessment were given to the appellant, adding the amounts disallowed to its taxable income. From such assessments the appellant appealed to the Minister. In its notice of appeal the appellant sought to justify the increased salaries on the same grounds as those advanced by its representative. No new facts were put forward for the consideration of the Minister that had not been referred to in the representations already made on its behalf. The decision of the

Minister, to which reference will be made later, affirmed the assessments and the appellant now brings its appeal from them to this Court.

This appeal raises squarely for the first time in Canada the question whether the Court under its appellate jurisdiction may review the actual exercise of discretionary powers vested by the Act in the Minister where such exercise may affect the assessment under appeal and substitute its own opinion for the Minister's discretion. The question is one of major importance in view of the many sections in the Income War Tax Act by which wide discretionary powers that may affect an assessment are conferred upon the Minister.

It is first necessary to deal with the appellant's submission that the Minister's discretion under section 6 (2) of the Act must be confined to a determination of what is in excess of reasonable or normal expense but that what is reasonable or normal expense is a question of fact in respect of which the Minister has no discretion. I am unable to adopt this view. In my opinion, the Minister's discretion extends not only to a determination of what is in excess of reasonable or normal but also to a determination of what is reasonable or normal. This is, I think, the true meaning of the section, for without such meaning it would not be possible to carry out what appears to be the policy of Parliament. Parliament decided as a matter of policy that excessive expenses should not be allowed as deductions from taxable income; it realized that in many cases it would be difficult, if not impossible, to determine what was reasonable or normal expense as a matter of fact and that without such determination it would not be possible to determine what was an excessive one and, therefore, decided to leave the determination of the amount of excessive expense to be disallowed to the discretion of a person in whom it had confidence, namely, the Minister of National Revenue, who was responsible to it for the administration of his department; then by section 75 (2) it allowed the Minister to authorize a specified officer, namely, the Commissioner of Income Tax, now the Deputy Minister of Taxation, the permanent head of the taxing authority, to

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exercise such of the powers conferred by the Act upon the Minister, as might, in the Minister's opinion be conveniently exercised by the Commissioner.

The duty cast upon the Minister by section 6 (2) is an administrative duty of a quasi-judicial character requiring that the discretion vested in him should be exercised in the manner prescribed by law.

The courts have always jealously supervised the manner in which administrative bodies have exercised the discretionary powers vested in them, so far as they are of a judicial nature, whether the Act conferring them granted an appeal from the decision of the body or not, in order to ensure their exercise in a proper manner, but there is no case of which I am aware in which the court has gone beyond such supervision and assumed the exercise of such powers itself in the absence of specific statutory authority enabling it to do so.

Where there has been no provision for appeal the supervision has been mainly by writ of certiorari or mandamus. The judgments dealing with the matter phrase the requirements for the proper exercise of such discretionary powers in varying terms but the necessity for acting judicially runs through them all. This broad requirement was stated in *Local Government Board* v. *Arlidge* (1), where Viscount Haldane L. C. fully discusses the manner in which an administrative body should perform its judicial duties. In an earlier case, *Board of Education* v. *Rice* (2) Lord Loreburn L. C. emphasized that such a body "must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything". This was approved in the *Arlidge Case* (*supra*) and in *The King* v. *Noxzema Chemical Company of Canada, Limited* (3). It is obviously essential to the proper performance of its judicial duty by an administrative body that before it decides a person's case it should afford such person an opportunity of placing his side of the case before it; it cannot act judicially unless it does so. In *Leeds Corporation* v. *Ryder* (4), Lord Loreburn L.C. stated that persons exercising discretionary powers must act honestly and endeavour to carry out the spirit and purpose of the statute. In *Hayman*

(1) (1915) A.C. 120 at 132
(2) (1911) A C. 179 at 182
(3) (1942) S C.R. 178 at 180
(4) (1907) A.C. 420 at 423

v. *Governors of Rugby School* (1) it was laid down that such powers must be fairly and honestly exercised. In *The Queen* v. *Vestry of St. Pancras* (2) Lord Esher M. R. stated that the persons exercising discretion should exercise it fairly and not take into account any reason for their decision which is not a legal one and that if they do so then in the eye of the law they have not exercised their discretion. These statements of the manner in which administrative bodies should discharge their judicial duties should not be regarded as statements of independent principles governing them but rather as particular applications of the general principle that they must act judicially. If they do, their exercise of discretion will not be disturbed; if they do not, the Courts will interfere by writ of certiorari, mandamus or other appropriate remedy.

It was contended for the appellant that these decisions, being in certiorari or mandamus proceedings, have no application in the present case, since an appeal is provided by the Income War Tax Act, and that the Court under its appellate jurisdiction is not restricted to supervision over the manner of exercise of the Minister's discretion under section 6 (2) but may and should review such exercise itself and substitute its own opinion of the amount of expense to be disallowed, if any, for the determination by the Minister. Proper disposition of this contention requires careful consideration of the scheme of appeal provided by the Act, the subject matter of the appeal and the nature and extent of the Court's jurisdiction.

The Act affords the taxpayer two opportunities for relief from the assessment levied against him. He may appeal to the Minister and then, if he is dissatisfied with his decision, he may bring his appeal to this Court; in each case the appeal is from the assessment.

Part VIII of the Act deals wth the subject of appeals and procedure. Section 58 (1), prior to its amendment in 1944, read as follows:

58. Any person who objects to the amount at which he is assessed, or who considers that he is not liable to taxation under this Act, may personally or by his solicitor, within one month after the date of mailing of the notice of assessment provided for in section fifty-four of this Act, serve a notice of appeal upon the Minister.

(1) (1874) 18 Eq. 28 at 68. (2) (1890) 24 Q.B.D. 371 at 375.

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The taxpayer may thus appeal on grounds of fact as well as of law. The notice of appeal must be in writing, be served by mailing it by registered post addressed to the Minister of National Revenue at Ottawa and set out clearly the reasons for appeal and all facts relative thereto. Section 59 sets out the duties of the Minister as follows:

> 59. Upon receipt of the said notice of appeal, the Minister shall duly consider the same and shall affirm or amend the assessment appealed against and shall notify the appellant of his decision by registered post.

From this it appears with certainty that what is before the Minister on the appeal to him is "the assessment appealed against", together with the notice of appeal from it. The sole issue before him is whether the assessment is correct. If it is, he must affirm it; if it is not, he is required to amend it. The requirement that the Minister shall affirm or amend the assessment is consistent with the scheme of the Act which assigns the function of assessment to him.

The sections following section 59 prescribe the procedure to be followed before the appellant can have his appeal to the Court heard. This appeal has frequently been referred to as an appeal from the decision of the Minister but such a description of it is incorrect. What is before the Court is not the decision of the Minister but the assessment. Examination of the Act makes this quite clear. Section 60 provides that if the appellant, after receipt of the Minister's decision, is dissatisfied with it, he may, within one month from the date of the mailing of the decision, mail to the Minister by registered post a notice of dissatisfaction stating that he desires his appeal to be set down for trial. With such notice of dissatisfaction he must forward a final statement of the facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal. Section 60 thus contemplates that the appellant may carry his appeal beyond the Minister's decision and bring it to this Court; the only appeal thus far referred to is the appeal mentioned in the notice of appeal, namely, an appeal from the assessment; the appeal throughout the whole scheme of the Act is from the assessment, first to the Minister and then to the Court. Section 61 provides for the giving of security for costs of the appeal and section 62 requires that upon receipt of the notice of dissatisfaction and statement of facts the Minister shall reply thereto by

registered post admitting or denying the facts alleged and confirming or amending the assessment or any amended, additional or subsequent assessment. The purpose of sections 60 and 62 is to ensure that all the facts, statutory provisions and reasons which the appellant intends to submit to the Court shall first be brought to the attention of the Minister so that he may deal with the assessment as required, since the making of the assessment or its amendment if necessary is exclusively his function under the Act. The appeal is then ready to be launched in this Court. Section 63 requires that, within two months from the date of mailing the reply, the Minister shall cause to be transmitted to the Registrar of the Exchequer Court of Canada, to be filed in the said Court, typewritten copies of certain specified documents; these include the appellant's income tax return, the notice of appeal, the Minister's decision, the notice of dissatisfaction and the Minister's reply thereto, but special reference should be made to the following other specified documents, namely:

(*b*) The Notice of Assessment appealed;

and

(*g*) All other documents and papers relative to the assessment under appeal.

This makes it clear that the appeal to the Court is an appeal from the assessment. Section 66 then sets out the Court's appellate jurisdiction as follows:

66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.

The Court is given jurisdiction over the assessment because that is the subject matter of the appeal before it. It is not concerned with the decision of the Minister as such; the question which it must consider is the correctness of the assessment "under appeal". Finally, section 69 concludes Part VIII of the Act with the provision that if a notice of appeal is not served or a notice of dissatisfaction is not mailed within the time limited therefor, the right of the person assessed to appeal shall cease and the assessment shall be valid and binding notwithstanding any error, defect, or omission therein or in any proceedings required by the

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Act. From this it is clear that if the appeal goes no further than to the Minister and no notice of dissatisfaction is mailed within the time limited, it is the assessment and not the decision of the Minister that is made binding. Nowhere in the Act is the appeal to the Court referred to as an appeal from the decision of the Minister. It is, I think, beyond dispute that the appeal to the Exchequer Court provided by the Income War Tax Act is not an appeal from any decision of the Minister but an appeal from the assessment made by him in the course of his functions in respect thereof. The exact nature of the subject matter of the appeal to the Court must be kept clearly in mind if confusion of thought is to be avoided.

Counsel for the appellant argued that the appeal under the Act involves an appeal from the exercise of the Minister's discretion; that the purpose of the appeal to the Minister is to enable him to review such exercise and that he must do so; that his failure to do so would deprive the appellant of a right to which it is entitled under the Act and make the assessment before the Court an improper one; and that the Court under its appellate jurisdiction has the same power of review and is under the same duty to exercise it as the Minister, since it is the same appeal that is carried throughout. I am unable to accept these contentions. They are, I think, based upon a misconception of the nature of the appeal.

The decision of the Minister on the appeal to him was given in the following terms:—

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal and matters thereto relating hereby affirms the said Assessments on the ground that Section 6 (2) of the Act provides that the Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable for the business carried on by the taxpayer; that in the exercise of such discretion he has determined that the salaries paid or credited to four employees of the taxpayer were to the extent of $1,050.00 in 1940 and $1,811.50 in 1941 in excess of what is reasonable for the business carried on by the taxpayer and has disallowed as an expense of the taxpayer the said amounts so determined and therefore the Assessments are accordingly affirmed under and by reason of the provisions of the said section 6 (2) and other provisions of the Income War Tax Act in that respect made and provided.

The Minister put his decision squarely on the ground that he had determined the amount of excessive expense

to be disallowed in his discretion under section 6 (2) and confirmed the assessments accordingly. I see no failure of duty on the Minister's part in taking this ground. It is not the purpose of the appeal to the Minister to enable him to review the exercise of his discretion and there is nothing in section 59 requiring him to do so. The question before him is whether "the assessment appealed against" is correct in fact and in law and he must "duly" consider the notice of appeal in the light of such question. This requires consideration of the various items involved in the assessment and whether they have been properly included. The only item against which complaint is made is the amount of expense that was disallowed. If this has been lawfully determined, no exception can be taken to the assessment in respect of such item. The Minister was, in my opinion, quite within his rights in confirming the assessment on the ground taken by him and if his discretion was exercised judicially his decision in confirming the assessment on such ground was a sound one. He owed no duty to review his exercise of discretion; the appellant has suffered no loss of legal right by his not doing so and has no cause for complaint against him on such score. It may, indeed, be open to doubt whether the Minister, while acting under his appellate jurisdiction, had any right to review the exercise of discretionary powers vested in him in his administrative capacity. But whether that be so or not, and even if the Minister on the appeal to him, while not obliged to review the exercise of his discretion is not precluded from so doing, it by no means follows that the Court may do so. There is a *non sequitur* in this line of reasoning, for the Act specifically vests the discretionary powers in the Minister and there is no such vesting in the Court.

The extent of the Court's jurisdiction under section 66 of the Act is very wide. Subject to the provisions of the Act it has exclusive jurisdiction to hear and determine all questions that may arise in connection with the assessment. It may, therefore, deal with issues of fact as well as questions of law. Nor is its jurisdiction restricted to questions arising subsequent to the assessment; it may deal with all questions, whether they arise before or after the assessment, provided they are connected with it.

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The wide extent of this jurisdiction led counsel for the appellant to the argument that the appeal to the Court is in the nature of a trial *de novo* and that it may examine all the facts that were before the Minister prior to his determination in his discretion since such facts are connected with the assessment and draw its own conclusions from them. There is, I think, a fallacy in this argument. It is true that section 63 (2) provides that when the necessary documents have been transmitted to the Registrar of the Exchequer Court the matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing, but this is mainly for procedural purposes to enable proceedings such as discovery to be had, witnesses to be subpoenaed and the like, and does not affect the nature of the issue before the Court. But it is not correct to say that the facts before the Minister prior to his determination are facts connected with the assessment. A clear distinction must be drawn between the Minister's determination and the assessment; they are not the same; the determination must be made before the assessment can be levied. The facts before the Minister do not enter into the assessment; it is the Minister's determination that does so. The determination itself is, therefore, a fact connected with the assessment. The facts before the Minister are connected with his determination but not with the assessment. The issues before the Minister on his determination and the Court on the appeal to it are not the same. I can find no support anywhere for the view that the Court may try *de novo* matters left by Parliament for determination by the Minister in his discretion. What is before the Court is an appeal from the assessment, not an appeal from the Minister's determination. The sole issue before the Court in an appeal under the Income War Tax Act is whether the "assessment under appeal" is correct in fact and in law. If it is, the appeal must be dismissed; if not, it must be allowed. It will be remembered that section 59 requires the Minister after duly considering the notice of appeal to confirm or amend the assessment appealed against and that section 62 imposes similar requirements upon him in his reply to the notice of dissatisfaction. No similar duty is cast upon the Court. The reason is clear; it is no part of the duty of the Court to make, confirm or amend an

assessment or perform any administrative act that may affect it; such functions, under the Act, belong exclusively to the Minister. All the Court is concerned with is the correctness of the "assessment under appeal". That question is solely a judicial one.

The Court's jurisdiction is by section 66 made "subject to the provisions of this Act". Counsel for the appellant sought to narrow the meaning of these opening words. He referred to section 6 (3) which reads as follows:

> 6. (3) For the purpose of determining earned income the Minister may reduce the amount of any salary, wages, fees, bonuses, gratuities or honoraria, which, in his opinion, are not commensurate with the services actually rendered, and the amount of such reduction shall be treated for the purposes of this Act as investment income. The decision of the Minister on any question under this subsection shall be final and conclusive.

and argued from the fact that no sentence similar to the last sentence in section 6 (3) appears in section 6 (2) there is by implication an appeal from the Minister's determination under section 6 (2); and that the opening words of section 66 must be limited to provisions of the nature of the final sentence in section 6 (3). It is, I think, open to serious doubt whether the final sentence of section 6 (3) adds anything to the effect of the Minister's acts under the powers vested in him by it. I am inclined to the view that it does not, but, in any event, the appellant's argument puts an unwarranted limitation upon the opening words of section 66. In my opinion, they require the Court to apply and give effect to all the sections of the Act, including section 6 (2). The general words conferring the appellate jurisdiction are, in my view, specifically made subject to the provisions of the Act. Even if this were not so, they would, I think, have to give way to a specific enactment such as section 6 (2), under the maxim *generalia specialibus non derogant*. This is particularly so where Parliament, as in section 6 (2), has expressly specified the manner in which a particular item which may affect an assessment is to be determined and has done so as a matter of policy because of the difficulty or impossibility of having it ascertained otherwise. If such an item, determined in accordance with Parliament's policy as expressed in clear and specific terms, is included in an assessment, how can the Court properly hold that the assessment is erroneous

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in fact or in law because of such inclusion? To that extent the assessment is in accordance with the law as laid down by Parliament.

There is another way of looking at the matter. The Court has jurisdiction over questions of fact as well as of law. What is the question of fact before the Court into which it must enquire before it can decide whether the assessment is correct in fact or not? The only complaint the appellant has against the assessment is the amount of expense that was disallowed. The only issue of fact connected with the assessment that is before the Court is, therefore, whether the amount of the disallowance was correct or not. If it has been determined in accordance with the law, how can it be found to be incorrect? When counsel for the appellant contends that the Court may look into all the facts that were before the Minister prior to his determination in his discretion and draw its own conclusion from them as to the correct amount of expense to be disallowed, he misapprehends the nature of the issue of fact before the Court. The correctness of the amount of excessive expense to be disallowed under section 6 (2) depends, not upon the amount that is in excess of what is reasonable or normal as a matter of fact, but on the amount determined by the Minister in his discretion; the amount so determined is the correct one and an assessment in which such amount has been included is, to the extent of such inclusion, correct in fact. Being made as the law requires, it is also correct in law.

The purpose of granting a right of appeal from an assessment is to ensure to the taxpayer that it shall be a correct one. It is not to be assumed that Parliament in granting such right meant that the Court should apply a different standard for adjudicating as to the correctness of the assessment under appeal from that laid down for its correct levy by the Minister in the discharge of his functions. The Court must apply the law and section 6 (2) is binding upon it. The Court may not, therefore, substitute its own opinion as to the correct amount of expense to be disallowed for the amount determined by the Minister in his discretion under section 6 (2). The amount so determined is not open to review by the Court. The right of appeal to

the Court conferred by the Act does not carry with it any right of appeal from the Minister's determination in his discretion under section 6 (2).

The Minister's discretion under section 6 (2) must be exercised in a proper manner. If in making his determination he has not acted judicially, within the meanng of the cases cited, he has not exercised the discretion required by the section at all, and if his determination so made is included in an assessment the assessment is, to such extent, incorrect. Whether the discretion has been exercised in a proper manner is, therefore, a question connected with the assessment over which the Court has jurisdiction. Indeed, the Court owes a duty of supervision over the manner of its exercise in order to ensure that the Minister acts as the law ordains. The fact that it has appellate jurisdiction does not alter the nature of the principles to be applied in its duty of supervision; they are the same as those applied by the courts in the certiorari and mandamus cases. This was settled in *Pioneer Laundry and Dry Cleaners, Limited* v. *Minister of National Revenue* (1) where, at page 136, Lord Thankerton, in delivering the judgment of the Judicial Committee, adopted the statement of Davis J. in the Supreme Court of Canada that the exercise of the discretionary powers of the Minister under section 5 (*a*) of the Act involved:—

> an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

The statement that the discretion of an administrative officer in the discharge of his quasi-judicial duties must be exercised on proper legal principles is, in my judgment, just another way of stating as Viscount Haldane L.C. did in *Local Government Board* v. *Arlidge* (*supra*), that he "must act judicially".

Much of the argument on the hearing before me centred around the *Pioneer Laundry Case* (*supra*) and it would not be proper to conclude my reasons for judgment without discussing it. Its importance in Canadian income tax law has not been eliminated by the fact that the immediate effect of the judgment has been nullified by amendment of the Act, but there has been considerable misunderstanding of it, and it is desirable to ascertain what it actually decided

(1) [1939] S.C.R. 1; [1940] A.C. 127.

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so that its continuing effect may be appreciated. The facts were that the appellant had claimed depreciation allowances in respect of certain second hand machinery and equipment which had formerly belonged to a company that had gone into voluntary liquidation; that it was controlled by the same shareholders who had formerly controlled such company; and that the machinery and equipment, while owned by such company, had been fully written off by depreciation. Under these circumstances, the Commissioner of Income Tax disallowed the claims for depreciation altogether. An appeal to this Court was dismissed by Angers J. and his judgment was affirmed by the Supreme Court of Canada, with Duff C. J. and Davis J. dissenting. Its judgment was reversed by the Judicial Committee of the Privy Council, which adopted the dissenting opinion in the Court below, expressed by Davis J., speaking for the Chief Justice and himself. The Court had to consider section 5 (*a*) of the Income War Tax Act, reading as follows:—

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, ...

and the question before it was whether the Commissioner had been right in disallowing altogether the claims for depreciation made under the circumstances mentioned. It was held that he had been wrong in two respects. In the first place, he had misconstrued the effect of section 5 (*a*); while he had a discretion as to the amount to be allowed for depreciation, his discretion did not extend to deciding whether any depreciation should be allowed or not; the taxpayer had a statutory right to an allowance in respect of depreciation and the Minister had a duty to fix a reasonable amount in respect of such allowance. The second ground of error assigned was that he had acted on wrong legal principles in that he had disregarded the fact that the appellant had a separate legal existence from that of its shareholders and that it was the appellant company, and not its shareholders, that was the taxpayer. The Judicial Committee accordingly set the assessment aside and referred the matter back to the Minister. The judgment must, I think, be taken as a decision that the Minister in failing

to act on proper legal principles had not exercised the discretion contemplated by the Act at all, and that in such a case the proper course for the Court to take is to refer the matter back to the Minister for the exercise of his discretion in the manner required by law, namely, its exercise on proper legal principles. This view of the decision makes it one of continuing important effect.

Counsel for the respondent submitted that the *Pioneer Laundry Case* (*supra*) had decided the question now under review. There are, undoubtedly, statements in that case which lend support to the view that if the Minister exercises his discretionary powers under the Act on proper legal principles his exercise of them is not open to review by the Court. Counsel for the appellant submitted that the questions raised by him in this appeal, such as whether the appeal from the assessment involves an appeal from the Minister's determination in his discretion, and whether the appeal to this Court is in the nature of a trial *de novo* enabling it to go into all the facts that were before the Minister, draw a conclusion from them and substitute its own opinion for the determination of the Minister, were not before either the Supreme Court of Canada or the Judicial Committee and were not argued before either of them; and contended that, under the circumstances, many of the statements in the case were *obiter dicta* and that it should not be regarded as an authority against him. In the main, I agree with his contentions; a number of the statements are clearly *obiter dicta* and have no binding authority; but, although that is so, they are not without persuasive effect. The misunderstanding of the case to which I have referred is in part due to some of these statements which, unfortunately, are not couched in the precise and accurate terms that might have been expected if the questions now under review had been argued, and some discussion of them is required.

In the Supreme Court of Canada, Davis J., after stating that section 5 (*a*) placed upon the Minister "an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles", went on to say, at page 5:—

> Section 60 of the Act entitles a taxpaper, after receipt of the decision of the Minister upon appeal from an assessment, if dissatisfied therewith,

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to appeal to the Court. The decision is appealable; but the exercise of the discretion will not be interfered with unless it was manifestly against sound and fundamental principles.

Sound and fundamental principles must mean the same thing as proper legal principles. If the purported exercise of discretion is "manifestly against sound and fundamental principles" it is not the exercise of discretion as contemplated by law at all and the interference by the Court is not really interference with the exercise of the discretion, but rather a finding that it has not been exercised. Later, Davis J. said, at page 8:—

> *The Income War Tax Act* gives a right of appeal from the Minister's decisions and while there is no statutory limitation upon the appellate jurisdiction, normally the Court would not interfere with the exercise of a discretion by the Minister except on grounds of law.

The introduction of the word "normally" is confusing for it makes the statement seem to qualify the earlier one and suggests that there might be cases in which the Court would interfere with the exercise of the discretion, otherwise than on grounds of law, without indicating the kind of cases in which it would do so. If the statement implies that the Act gives a right of appeal from the Minister's decision on the exercise of his discretion, it is clearly not in accord with the Act, which expressly makes the appeal an appeal from the assessment. Davis J. clarified the position when he held that the Commissioner, acting for the Minister, had exercised a discretion upon what he considered to be wrong principles of law and said, at page 8:—

> it is the duty of the Court in such circumstances to remit the case, as provided by sec. 65 (2) of the Act, for a re-consideration of the subject matter, stripped of the application of these wrong principles.

It would, I think, be a reasonable inference from his statements as a whole that Davis J. was of the opinion that, if the Minister on his reconsideration of the matter exercised his discretion on proper legal principles, the quantum of his allowance for depreciation would not concern the Court, but this is a matter of inference of his opinion only, since the question was not before him for judicial decision.

Some of the remarks of Lord Thankerton in the Judicial Committee also require comment. After deciding that the taxpayer had a statutory right to a depreciation allowance,

and that the Minister was under a duty to fix a reasonable amount of such allowance, he went on to say, at page 136:—

> so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpaper; but it is equally clear that the Court would not interfere with the decision unless—as Davis J. states—"it was manifestly against sound and fundamental principles."

In this passage Lord Thankerton seems to speak of the right of appeal as being from the decision of the Minister and the only decision to which reference is made is that of the Minister in fixing a reasonable amount for depreciation allowance. I confess that I am unable to reconcile the two statements contained in the passage, having regard to their respective implications. It must follow, I think, from the second statement that if the Minister's decision was not "manifestly against sound and fundamental principles" but was made on proper legal principles the Court would not interfere with it; in such a case the decision of the Minister would be final, since the Court would not interfere. Conversely, if the Minister's decision is not final since there is a right of appeal from it, it must be contemplated that the Court may interfere with the discretion for, otherwise, the right of appeal would be meaningless. The two statements are thus in conflict with one another. Two explanations are possible. One is that Lord Thankerton meant that the Minister's decision was not final if it was against sound and fundamental principles. The other is that the first statement in the passage must be modified in view of the fact that the right of appeal conferred on a dissatisfied taxpayer is a right of appeal from the assessment, as analysis of the Act would have shown if the exact nature of the appeal conferred by the Act had been before the Court. If the first statement is modified, as it should be, then the second can stand unaltered with its necessary implication as it was clearly intended it should do. That this is so is made clear by the course taken in remitting the matter back to the Minister for the exercise of his discretion on proper legal principles with the implication involved therein that such exercise would not be interfered with.

After the Judicial Committee had referred the matter back to the Minister the Commissioner fixed the depreciation allowance to the appellant at the sum of $1 and the

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matter came before this Court again in *Pioneer Laundry & Dry Cleaners Limited* v. *Minister of National Revenue* (1). Robson J. held that such allowance was not the exercise of discretion at all. At page 180, he said:

> I cannot think that this mere allowance of a nominal sum was a possibility within the contemplation of the learned Lords when they referred the question back to the Minister. I have to say, with deference, that I think the course pursued was not a consideration of a reasonable amount for depreciation within the intention of the Act. I have not the benefit of any explanation, simply the Minister's decision.

He allowed the appeal and referred the matter back to the Minister for further consideration of reasonable allowance within the Act. It is suggested that the last sentence in the passage cited implies a right in the Court to review the amount of the allowance to determine whether it was reasonable or not if there had been more facts before the Court by way of explanation. I am unable to read any such view into the judgment. It is clear that Robson J. considered that the allowance of a merely nominal sum was not the exercise of the discretion contemplated by section 5 (*a*) at all. If any inference is to be taken from the judgment, a fair one would be that if the allowance made had been other than a nominal one the amount of it would not have been questioned.

The action taken by the Courts in the two *Pioneer Laundry Cases* (*supra*) in sending the matter back to the Minister for the exercise of his discretion on proper legal principles is, in my opinion, even more important than the statements in them which I have discussed. It is clear from such action that the Court assumed that the proper person to exercise the discretion called for by section 5 (*a*) was the Minister himself—and not the Court, even under its appellate jurisdiction. If the Court did not consider it proper to exercise discretion where the Minister had failed to exercise his in the manner contemplated by law, surely it would not be proper to do so where the Minister has exercised the discretion vested in him on proper legal principles. The reason for the action taken is sound; the exercise of the discretion vested in the Minister is his function in the course of his administrative duties; it is the duty of the Court to supervise the manner of its exercise, but there its function stops; with the quantum of such

(1) (1942) Ex. C.R. 179.

exercise the Court is not concerned. When the judicial or quasi-judicial requirements of the Minister's duty have been satisfied all that remains is administrative. The Court is a judicial body, not an administrative one; it must keep within the confines of its own jurisdiction and be careful not to arrogate to itself functions which Parliament has clearly entrusted to the Minister.

Such careful consideration as I have been able to give to the *Pioneer Laundry Cases* (*supra*) strengthens me in the conclusion that I have reached in this appeal that when the Minister has determined in his discretion under section 6 (2) of the Income War Tax Act the amount of excessive expense to be disallowed to a taxpayer as a deduction from his income and has exercised his discretion on proper legal principles, the amount so determined is not open to review by the Court; and an assessment in which a disallowance so determined has been included cannot, to the extent of such inclusion, be successfully attacked as incorrect either in fact or in law in an appeal to the Court under the Act.

If there is any suggestion in the first *Pioneer Laundry case* (*supra*) that the Court, while it will not interfere with the exercise of the discretion vested in the Minister except on certain grounds, has the right of such interference except on certain grounds but will not exercise it, then the conclusion I have reached goes farther, for it is that, if the requirements of section 6 (2) are fully met, the Court has no right to interfere at all, under the Act as it now stands.

In this connection reference may be made to the decision of the Supreme Court of New South Wales in *Dobinson* v. *Federal Commissioner of Taxation* (1). This is the only case, of which I am aware, in which the Court on an appeal from an income tax assessment has substituted its own opinion for that formed by the Commissioner under his statutory powers. In that case the Commissioner was of the opinion that a partnership which the appellant had entered into with his wife had been formed for the purpose of relieving him from a liability to which he would have been otherwise subject and, on the basis of such opinion, assessed the partnership as if it were a single person. He had statutory authority for forming his opinion and making

(1) (1935) 3 Australian Tax Decisions 150

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the resulting assessment under section 29 (2) of the Commonwealth of Australia Income Tax Assessment Act, 1922-1933. At the hearing of the appeal from the assessment, the appellant, his wife and their accountant gave evidence that the partnership was not entered into for the purpose of relieving the husband of any liability to taxation to which he would otherwise have been subject. Jordan C. J. accepted this evidence, came to a conclusion different from the opinion formed by the Commissioner and allowed the appeal. This decision was made under quite a different state of law from that which obtains in Canada. While sections 50, 51 and 51A of the Commonwealth of Australia Income Tax Assessment Act, 1922-1933, contained provisions for appeal by a dissatisfied taxpayer from the assessment made by the Commissioner, in several respects similar to those in the Canadian Income War Tax Act, there was also a special section, enacted in 1930, for which there is no counterpart in the Canadian Act. This was section 51B which read as follows:—

> 51B. Notwithstanding anything contained in this Act a taxpayer who is dissatisfied with any opinion, decision or determination of the Commissioner under section twenty-one A, paragraph (n) of sub-section (1) of section twenty-three, or subsection (2) of section twenty-nine of this Act (whether in the exercise of a discretion conferred upon the Commissioner or otherwise) and who is dissatisfied with any assessment made pursuant to or involving such opinion, decision or determination shall, after the assessment has been made, have the same right of objection and appeal in respect of such opinion, decision or determination and assessment as is provided in sections fifty, fifty-one and fifty-one A of the Act.

It is clear from the judgment of Jordan C. J. that it was only because of this special section that the Court was able to review the opinion of the Commissioner and substitute its own opinion for that formed by him under section 29 (2), and that without such section it could not have done so. At page 151, he said:

> In certain special cases, however, the fact that the Commissioner entertains a particular opinion is made the criterion of the existence of liability. In such cases there can, obviously, be no appeal from his opinion unless the Act gives an appeal, although the opinion can be examined within certain limits.

Jordan C. J. is here clearly referring to the opinion of the Commissioner under section 29 (2) and its binding effect in the absence of an appeal from it. Then he continued:—

> Section 51B provides in terms that a taxpayer shall have the same right of appeal in respect of any opinion of the Commissioner under s. 29

(2) and in respect of any assessment made pursuant to or involving such opinion as is provided in ordinary cases. I think it follows from this that the appellate tribunal must consider for itself such material as is placed before it with respect to matter as to which the Commissioner's opinion was formed, and that it is intended that the opinion of that tribunal should be substituted for that of the Commissioner as a criterion of liability if it forms an opinion different from his.

In my judgment, the *Dobinson Case* (*supra*) supports the conclusion that, since the Income War Tax Act provides specifically for an appeal from an assessment and makes no provision for any appeal from the Minister's determination under section 6 (2), there is no appeal from the latter, and that, before the Court could try *de novo* the facts that were before the Minister prior to his determination and substitute its own opinion as to the amount of excessive expense to be disallowed, if any, for the amount determined by the Minister in his discretion under section 6 (2), there would have to be specific statutory authority enabling it to do so, similar in effect to that given by section 51B of the Australian Act. There is no such authority in the Income War Tax Act, as it now stands.

It was not argued before me that the Minister in making his determination under section 6 (2) had not exercised his discretion on proper legal principles and there is nothing in the case to indicate or suggest that he did not do so. The determination cannot be challenged on any such ground. Counsel for the appellant argued on the facts that the Minister did not correctly exercise his discretion in that he did not give proper consideration to the increase in the appellant's business and profits and did not make a fair allowance for overtime work by the directors. The appellant had the fullest opportunity of placing its case before the Minister and the facts were all before him before he made his determination. The matters referred to by counsel are among the very considerations that Parliament has left to the discretion of the Minister. The conclusion which he reached after exercising his discretion on proper legal principles is not open to review by the Court.

The appellant has failed to show that the assessments under appeal were incorrect either in fact or in law and its appeal must be dismissed with costs.

Judgment accordingly,

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Jun. 4, 5
Oct. 3

BETWEEN:

SAINT JOHN TUG BOAT COMPANY, LIMITED ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Shipping—Collision in Harbour at Saint John, New Brunswick during fog—Whether proper signals given—Articles 15 and 28 of International Rules—Failure of both vessels to reverse in time—Fault in equal degrees—Liability under s. 19 (c) of Exchequer Court Act—Section 640 Canada Shipping Act—Liability to make good damage in proportion to degree in which each vessel at fault—Fault equal damages divided—Where only one vessel damaged the other bears half the loss.

The tug *Ocean Hawk I* and tow and H.M.C.S. *Beaver* collided in the harbour at Saint John N.B., during a fog.

Held: That the failure to reverse in time on the part of both vessels was, under the circumstances, negligence and the direct cause of the collision.

2. That the damage to the *Ocean Hawk I* was caused by the fault of both vessels and that the fault was in equal degrees.

3. That the liability of the Crown is to be determined by the law that was in force on the 24th day of June 1938, the date upon which the amendment 19 (*c*) imposing liability for such negligence upon the Crown, came into effect: *Tremblay* v. *The King* (1944) Ex. C.R. 1 followed.

4. That Section 640 of the Canada Shipping Act 1934, Statutes of Canada, Chapter 44, was in force on the 24th day of June 1938, and the provision that, where by the fault of two or more vessels damage is caused to one or more, the liability to make good the damage shall be in proportion to the degree in which each vessel was at fault, is therefore applicable.

5. That the fault being in equal degree, the damage is divided, and where only one ship is damaged, the other bears half the loss sustained: *The Iroquois* 18 B.C.R. 76 and *The Hiawatha* 7 Ex. C.R. 446 followed.

PETITION OF RIGHT by suppliant to recover from the Crown damages for loss resulting from a collision between the suppliant's tug *Ocean Hawk I* and H.M.C.S. *Beaver* owned by the Crown, due to the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

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The action was tried before the Honourable Mr. Justice O'Connor, at Saint John, N.B.

C. F. Inches, K.C., and *N. B. Tenant,* for suppliant.

H. A. Porter, K.C., for respondent.

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

O'CONNOR J. now (October 3, 1945) delivered the following judgment:

The action is for damages arising out of a collision which occurred in a dense fog about 8.00 A.M., Atlantic Daylight Saving Time, on the 17th of September, 1942, on the east side of the harbour of Saint John, New Brunswick, between the tug *Ocean Hawk I* and tow, owned by the suppliant, under Captain Hurley, proceeding down the harbour, and H.M.C.S. *Beaver,* belonging to His Majesty in the right of Canada, under Commander Swansburg, proceeding up the harbour.

In a dense fog, at 7.55 A.M., Atlantic Daylight Saving Time, on the day of the collision, the *Ocean Hawk I* left the Dominion Coal Company's wharf on the northeast side of the harbour with a tow attached, to go down the harbour and across to a steamer at Berth No. 10, which berth is on the southwest side of the harbour. The tow was a converted steamer equipped with an endless crane and loaded with six to eight hundred tons of coal, and was attached stern first and parallel to the starboard side of the tug. The stern of the tow was approximately 125 feet ahead of the bow of the tug.

The tug and tow travelled down the harbour, keeping the loom of the wharves on the east side of the harbour in sight, to assist in navigating. The tug was sounding one prolonged blast followed by two short blasts in accordance with Article 15 of the International Regulations for Preventing Collisions at Sea, being Annex II of the Canada Shipping Act, Chapter 44 of the Statutes of Canada, 1934, and this signal would indicate that a tug and tow were under way in the harbour. When opposite McAvity's wharf, the captain of the tug heard one prolonged blast which indicated to him a steam vessel under way, and he

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stated that the sound came from "down ahead of me on the port bow". He answered with one prolonged and two short blasts and stopped his engines, and they remained stopped until he actually saw the steamer, which turned out to be H.M.C.S. *Beaver*. He gave evidence that the water was "slack" and that the engines remained stopped until the vessels were within approximately 40 feet of each other.

He heard the prolonged blast from the *Beaver* two or three times and he answered each time with one prolonged and two short blasts.

He stated that when he first saw the *Beaver* she was 400 feet away and that he then altered his course to starboard, without putting on his engines, and sounded one short blast to indicate that he had done so, as required by Article 28 of the International Regulations, and that he did not get an answer from the *Beaver*.

He stated that the *Beaver* seemed to be swinging to port as he was "going down along" and that as the *Beaver* got so close to him, about 40 feet, he put his helm aport and went full speed ahead to throw the stern of the tug clear of the *Beaver* and called to the captain of the *Beaver* and asked him if he was going astern and received the reply that the *Beaver* was going astern. The bow of the *Beaver* came in contact with the tug aft of midship on the port side. The tug was brought up standing, causing the hawsers to part and the lines went adrift and the tow went down the harbour.

At 8.08 A.M., Atlantic Daylight Saving Time, H.M.C.S. *Beaver* slipped its mooring from Reed's wharf, which is also on the east side of the harbour, to proceed to the C.P.R. wharf, which adjoins Reed's wharf on the north. Commander Swansburg was the captain of the *Beaver* and he proposed to proceed to a point slightly north of the C.P.R. wharf, pivot the *Beaver* on her stern by means of her engines, and bring her into the jetty on her port side. There were two officers and two ratings on the bridge of the *Beaver* and one officer and four ratings in the bow of the *Beaver*. After clearing the jog at the south end of the C.P.R. wharf, the *Beaver* proceeded alongside the wharves, and as they cleared the jog Commander Swansburg heard for the first time the one prolonged and two short blasts from the *Ocean Hawk I.*

He gave evidence that he then stopped both engines and put the engines astern, and he then went ahead on the port engine, going very slowly with just steerage way, while attempting to get some idea of the course of the tug and tow and her distance from him, which he stated was "very near ahead". Skipper Foster on the bow of the *Beaver* reported, "He is getting close", so Commander Swansburg gave the order "Full speed astern" and the helm order "Starboard 30" and right at that instant the ship came out of the fog, and the captain of the tug called to him to go astern and he replied that the engines were going full speed astern.

His evidence was that he was then about 168 feet from the jetty and when the ships came in sight of each other they were approximately 150 feet apart. He stated that the *Beaver* did not have any more headway than was necessary for steering and to keep her under control, and that at the moment of collision the way was practically off his ship; that only four minutes elapsed from the time they slipped the jetty until the collision took place and that he heard the tug's blast of one prolonged and two short "two or three times".

His evidence showed also that the tug and tow appeared to him as if the tide had control of her and she was coming down on him across his bow "bodily", "out of control". And that at the time the ships sighted each other there was nothing that the tug could do to avoid the collision.

He swore that when the ships sighted each other he did not hear the tug sound one short blast and his evidence was confirmed by Commander Rooney, the Quartermaster, who was on the bridge, and by Skipper Lieutenant Foster, who was in the bow.

Commander Rooney stated that when the collision took place "the tow left the tug fairly rapidly and disappeared in the fog quickly down or out the harbour".

I accept the evidence of Pilot Ronald V. Cobham as to the currents that would be operating in the harbour at 8.12 A.M. on the 17th of September, 1942, and the fact that when the tow broke from the tug it disappeared quickly in the fog, down the harbour, appears to confirm his evidence.

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The estimates given in the evidence as to the distance between the point of collision and the jetty on the east side of the harbour vary from 168 feet to 400 feet, and the distance between the vessels when they first saw each other varies from approximately 100 feet to 400 feet. These estimates of distance are made in good faith but because of the difficulty of judging distance in fog they must frequently be inaccurate.

This is clearly shown by the evidence of the mate of the tug who on examination estimated the distance between the ships as, "I don't know—it was around I suppose 400 or so feet". Under cross-examination as to the distance he replied, "I can't just say. You cannot swear how far because she was coming through the fog. At a rough guess ...I was just going to say I don't know whether 100 yards or 200 yards or 300 yards, you know what I mean, through the fog you cannot exactly tell." He went on to say that it was very hard to estimate distance through fog, and that a fellow finds that all his lifetime going to sea.

I find that the visibility was approximately 200 feet, and I find that the ships were approximately 200 feet apart at the time when they sighted each other, and I find that the impact took place approximately 200 feet from the jetty. Both captains were navigating by keeping the loom of the wharves within sight, and as I have already found, the visibility did not exceed 200 feet.

I find that the captain of the tugboat in putting the helm aport and full speed ahead on the engines took this action in an effort to try and avoid the collision and that it was not negligence and was done in the "agony of collision".

The suppliant alleges negligence on the part of the servants of the respondent as follows:

(1) Failure to give three short blasts, meaning "My engines are going full astern," pursuant to the provisions of Article 28 of the International Regulations, as soon as the vessels sighted each other.

I hold that the failure to sound three short blasts was not the cause or part of the cause of and did not contribute to the collision.

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I find that at the time the vessels came in sight of each other the distance between them was so short that it was too late for either of them to take any action that would have avoided the collision.

(2) Failure to give the fog signal on leaving the wharf until it got opposite the C.P.R. wharf.

The failure to do so was not negligence and did not in any way cause the collision. When the two ships first exchanged signals and each knew that the other was there, they were approximately 1,500 feet apart, so each had ample warning of the presence of the other.

(3) Failure to draw into the nearest wharf on hearing the fog signal of the tug.

I find that this was not negligence and that the *Beaver* was not required to go into the nearest wharf on hearing the fog signal from the tug and tow.

(4) While it is not contained in the amended particulars of negligence, the petition of right alleges that when the vessels sighted each other, the tug put its helm to starboard and sounded one short blast indicating that it was altering its course to starboard, but the *Beaver* failed to go to starboard and to signal that she had done so.

There is a very sharp conflict between the evidence of those on the tug and tow and those on the *Beaver* as to this. Captain Hurley swears positively that as soon as he saw the *Beaver* he put his helm to starboard and sounded one short blast indicating that he was going to starboard. The three officers on the *Beaver* swore that they did not hear this signal. The ships at that time would be approximately 200 feet apart and this makes it difficult to understand.

The captain of the tug and the three officers on the *Beaver* are all experienced men and appeared to me to be credible witnesses. I find that Captain Hurley sounded the signal, one short blast, but that at the time he did so, the officers on the *Beaver* had not yet picked up the loom of the tug and tow. The explanation of this may be that the fog allowed the men on the tug and tow to see the bow of the *Beaver* and the number "110" and yet hid

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the tug and tow from the view of the officers and ratings on the *Beaver*. This is probable, because in the evidence of the men on the tug they emphasized that they saw the number "110" on the bow of the *Beaver*. The correct number was "S10". Skipper Foster on the *Beaver* was the first one to see the tug and tow, and his evidence was that he saw the "loom" of the tug and tow.

In any event I accept the evidence of Captain Hurley that he did sound the signal, and the officers of the *Beaver* that they did not hear the signal after they saw the tug and tow. If the officers of the *Beaver* heard the short blast, after they had sighted the tug and tow, they should have directed their course to starboard and signaled one short blast, as required by Rule 28, but if they were not able to see the tug and tow, at the time the short blast was sounded, then Rule 28 would not apply.

Marsden's (9th Edition) Collisions at Sea at page 45 discusses the weighing of credible evidence from witnesses on board a ship A, that they were listening but heard no fog signal from ship B, against the credible evidence from B that the signal was properly sounded when the ships were in the same neighbourhood and subsequently came into collision. He points out that the atmospheric conditions under which sounds are readily transmitted are peculiar; the attention of scientific men has been directed to the subject only in recent years, and the subject is at present imperfectly understood, and he sets out in a footnote some interesting conclusions reached by Professor Tyndall based upon elaborate experiments at sea and on shore in the neighbourhood of the fog siren at the South Foreland.

He goes on (page 47) to point out that in collision cases the court will not impute perjury to the witnesses if any other conclusion is reasonably possible, based on the judgment of Evans P. in *Olympic* and *H.M.S. Hawke* (1).

(5) Failure to do anything whatever to avoid the collision after the vessels hove in sight of each other.

I have already held that at that time nothing whatever could have been done.

(6) Not giving free room to the tug and tow. I will deal with (6) and (7) together.

(1) [1914-15] 31 T.L.R. 54

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(7) After stopping her engines pursuant to the provisions of Article 16, in putting the engines ahead again before ascertaining the position of the barge and tug.

Because of the fog, both vessels were proceeding close to the east side of the harbour, so as to use the loom of the wharves in navigating and when the first signals were exchanged the ships were only approximately 1,500 feet apart, and within approximately three minutes the collision took place.

Each knew he was approaching the other and getting closer and closer, and the four men on the tug and tow and nine men on the bridge and bow of the *Beaver* were keeping a proper lookout, they were peering intently through the dense fog, all on the alert. There is no suggestion by either side that the other failed to keep a proper lookout.

Both sounded the proper fog signals two or three times. The witnesses on both sides use that expression, "two or three times".

A steamship in a fog so dense that a vessel could not be seen her own distance off, hearing the whistle of another continually approaching, was held in fault for not reversing until the other vessel was seen. Marsden's Collisions at Sea (9th Edition) p. 384, citing *The Dordogne* (1); *The Bremen* (2).

The length of the *Beaver* was 247 feet. The tow was 200 feet in length and the tug projected 25 feet behind the tow, so the over-all length of the tug and tow was 225 feet. The visibility was approximately 200 feet, so that in this case the fog was so dense that neither vessel could see or be seen her own distance off. They heard the signals of each other getting closer and closer and yet they both failed to reverse their engines. The captain of the *Ocean Hawk* states that he stopped his engines on hearing the first signal and kept them stopped, and that the water was "slack". But he does not explain why the tug and tow in approximately three minutes travelled 1,000 feet, and it is clear that when he sighted the *Beaver* there was nothing that he could do to avoid the accident.

(1) [1885] 10 P.D. 6 (2) [1931] 47 T.L.R. 505

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The captain of the *Beaver* states that his ship was moving with only sufficient way on it to keep it under control. But when he sees the tug and tow at a distance of 200 feet it is too late for him to do anything.

The *Ocean Hawk's* failure to reverse at all and the *Beaver's* failure to reverse until just a moment before it saw the tug and tow was, under the circumstances, negligence, and was the direct cause of the collision.

I find that the damage and loss to the *Ocean Hawk I* was caused by the fault of both vessels and that the fault was in equal degree.

I find that Commander Swansburg, who was in command of *H.M.C.S. Beaver,* was a member of the naval forces of His Majesty in the right of Canada and is, by virtue of the amendment of the Exchequer Court Act, Statutes of Canada, 1943, Chapter 25, deemed to be a servant of the Crown.

Where a claim is made against the Crown under section 19 (*c*) of the Exchequer Court Act, as amended in 1938, for loss or injury resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law that was in force on the 24th day of June, 1938, the date upon which the amendment imposing liability for such negligence upon the Crown came into effect.

That where a claim is made against the Crown under s. 19 (*c*) of the Exchequer Court Act, as amended in 1938, for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on June 24, 1938, the date upon which the amendment imposing liability for such negligence upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section itself. *The King* v. *Armstrong* (1908) 40 Can. S.C.R. 229 and *Gauthier* v. *The King* (1918) 56 Can. S.C.R. 176 at 180, followed and applied.

Tremblay v. *The King* (1), Thorson P. at page 2.

Section 640 of the Canada Shipping Act, being Chapter 44 of the Statutes of Canada 1934, was in force on the 24th of June, 1938.

(1) [1944] Ex. C.R. 1

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O'Connor J.

This section provides that where by the fault of two vessels damage or loss is caused to one or more of the vessels, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault.

These provisions are in my opinion applicable, and in view of my finding that the fault was in equal degree, the damage will be equally divided.

I fix the damage to the *Ocean Hawk* at $2,367.00 and the loss of her earnings at $1,400.00.

No evidence was given of damage to *H.M.C.S. Beaver* and so the respondent must bear half the loss sustained by the *Ocean Hawk I. The Iroquois* (1); *The Hiawatha* (2).

There will be judgment for the suppliant in the sum of $1,883.50 and the costs of the action.

Judgment accordingly.

1945

Sep. 12

Oct. 10

BETWEEN:

YAMASKA GARMENTS, LIMITED.... APPELLANT,

AND

THE REGISTRAR OF TRADE MARKS

AND

RELIANCE MANUFACTURING COMPANY ..... RESPONDENTS.

Trade-Marks—The Unfair Competition Act, 1932, Sec. 2, pars. (k) and (l)—Similar wares—Similar marks—Evidence as to likelihood of confusion—Wholesalers and retailers—Words common to the trade—Test of similarity of marks—Method of applying test.

Appeal from refusal of the Registrar to register the appellant's word mark "The Big Y Line" on the grounds that it was confusingly similar to the word mark of objecting company, namely "Big Yank". The appellant had used its word mark only in Canada and only since 1936. The objecting company's word mark had been used for 25 years principally in the United States and Canada, and was registered in Canada on the 12th February 1934. It was admitted that the wares of both companies were similar and the contemporaneous use of both marks in the same area in association with wares of the same kind was not in dispute.

(1) (1913) 18 B.C.R. 76. (2) (1902) 7 Ex. C.R. 446.

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Held: That the evidence of a witness that in his opinion the marks were not similar and that they did not create confusion was inadmissible. *British Drug Houses Limited* v. *Battle Pharmaceuticals* (1944) Ex. C.R. 239 followed.

2. That evidence from the public and dealers who deal with the public is more important as to confusion, than the evidence of wholesalers who deal only with the retail dealers. *Havana Cigar & Tobacco Factories Ltd.*, v. *Oddenino* (1923) 40 R.P.C. 229.

3. That where there is no evidence of confusion either actual or probable, the test should be made not by placing the marks side by side but by asking whether, under the relevant surrounding circumstances, the appellant's mark as used is similar (as defined by the Act) to the registered mark of the objecting company as it would be remembered by persons possessed of an average memory with its usual imperfections. *Coca-Cola* v. *Pepsi Cola* (1942) 2 D.L.R. 657 applied and followed.

4. That a word mark under Section 2 (*o*) depends for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups. The ideas or sounds suggested by the sequence of the letters and their separation into groups of these two marks are not similar.

5. That the appellant's trade-mark "The Big Y Line" was not similar within the meaning of the Unfair Competition Act 1932 to the registered word mark "Big Yank" and the Registrar's decision refusing to register it, was set aside.

APPEAL by appellant from the refusal of the Registrar of Trade Marks to register the appellant's word mark "The Big Y Line".

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

C. C. Gibson, K.C., for appellant.

W. P. J. O'Meara, K.C., for Registrar.

Christoper Robinson for Reliance Manufacturing Company.

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

O'CONNOR J. now (October 6, 1945) delivered the following judgment:

This is an appeal from the refusal of the Registrar to register the appellant's work mark "The Big Y Line" on the grounds that it is confusingly similar to the word mark of Reliance Manufacturing Company of Chicago, namely "Big Yank". Notice under Section 38 of the Unfair Competition Act was given by the Registrar to the Reliance Manufacturing Company and this company objected to the

appellant's registration. Notice of appeal was filed and served but the objecting company failed to appear and a certificate of default was registered against it.

Counsel for the objecting company appeared at the trial and moved to add the objecting company as a respondent and advised the court that he would not offer any evidence. His motion was not opposed by counsel for the appellant and the objecting company was added as a party respondent.

The appellant has used its work mark "The Big Y Line", only in Canada, and only since 1936 and during that time has sold approximately two million garments in Canada.

The objecting company's word mark "Big Yank" has been used for 25 years, principally in the United States and Canada and was registered in Canada on the 12th day of February 1934. Its sales in Canada amount to more than $15,000.00 annually.

Counsel for the Registrar pointed out that if the Registrar was in doubt as to the registration the provision of Section 38, "he *shall* by registered letter request the owners, etc.", was mandatory and that there was in this case a reasonable and logical basis for doubt and that the Registrar was quite justified in his opinion that the reasons for the objections were not frivolous. Counsel for the appellant agreed that this was so.

Similarity of wares, namely men's and boys' work and dress shirts, underwear, pyjamas, overalls, and jackets, is admitted and the contemporaneous use of both marks in the same area in association with wares of the same kind is not in dispute.

The question for determination is whether the word marks are similar as defined by the Act.

2. (*k*) "Similar", in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

The appellant filed affidavits from a number of wholesalers doing business in Canada from Montreal to Winnipeg stating that they had been aware of the sale of garments

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O'Connor J.

by the appellant under the mark "The Big Y Line" and by the objecting company under its mark "Big Yank" for periods ranging from six to nine years and that they had both bought and sold the garments of each company under the respective marks of each and that at no time had any confusion arisen in the trade or on behalf of the buying public as a result thereof.

The deponents went further and gave their opinion that the marks were not similar and that they did not create confusion. This was objected to by counsel for the objecting company as being inadmissible and his objection is sound and well taken. Counsel for the appellant agreed that this portion was inadmissible. Those portions of the affidavits are inadmissible. This had been laid down in *The British Drug Houses Lmited* v. *Battle Pharmaceuticals* (1) following *The North Cheshire and Manchester Brewery Company Limited* v. *The Manchester Brewery Co. Ltd.* (2).

Counsel for the Registrar pointed out that the affidavits used by the appellants were all from wholesalers and that the retailers dealing directly with the public would be in a much better position to report on any confusion or on the absence of it, on the part of the public. The point is well taken and there is no doubt that the public and dealers who deal with the public are more important, in this connection, than wholesalers who deal only with the retail dealers. See *Havana Cigar & Tobacco Factories Ltd.* v. *Oddenino* (3) per Russel J. *John Jaques & Son Ltd.* v. *Chess* (4).

That is a matter of degree however, and in this case no evidence of confusion actual or probable was submitted and I hold the affidavits are sufficient.

The appellant filed an affidavit showing that in addition to the appellant's application for registration of the word mark "The Big Y Line" there were 19 registrations and applications containing the word or letters "Big". Of these only one appears to be still pending. The following are a few: "Big Horn", "The Big 4", Big Chief", Big 3", "Big B Brand", "Big Bob", "Big Jack", "Big Swede". The majority of these apply to similar wares to those manufactured by both the appellant and the objecting company,

(1) [1944] Ex. C.R. 239
(2) [1899] A.C. 83
(3) [1923] 40 R.P.C. 229.
(4) [1939] 56 R.P.C. 415 at 426.

namely overalls, shorts, pants, work clothing, etc. Clearly the word "Big" is common to this trade. The proper comparison must be made with that fact in mind.

Where there is no evidence of confusion either actual or probable, the test and the manner in which the test should be made are described by Lord Russell of Killowen in *Coca-Cola Company* v. *Pepsi-Cola Company* (1) at page 661:

> not placing them side by side, but by asking itself whether, having due regard to relevant surrounding circumstances, the defendant's mark as used is similar (as defined by the Act) to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections.

When tested in this manner the marks are not similar.

Under section 2 (*o*) a word mark depends for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, independently of the form of the letters or numerals severally or in series.

The ideas or sounds suggested by the sequence of the letters and their separation into groups, of these two marks are not similar.

I have fully considered all the submissions put forward by Counsel for the objecting company based on his careful and exhaustive review of the authorities, but I am of the opinion that the word mark used by the appellant and the registered mark of the objecting company are not word marks so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

The word mark in my opinion is registrable; the Registrar's decision refusing to register it is accordingly set aside.

There will be no costs against the Registrar. The appellant to have the costs of the appeal as against the objecting company but which, under the circumstances, will be limited to a counsel fee which I fix at $50.00.

Judgment accordingly.

(1) [1942] 2 D.L.R. 657

1945
Jun. 6 & 7
Sep. 27

BETWEEN:

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

AND

IRVING OIL COMPANY LIMITED... DEFENDANT.

Expropriation—Owner compensated for loss of value of property by receiving its equivalent value in money—Such equivalent to be estimated on value to owner—Basis of valuation is its fair market value at date of expropriation—Fair market value to be based on all potentialities including special good purpose to which land can be put—Owner not entitled to loss of profit of business carried on—Evidence as to income derived is not material except in so far as it throws light on the fair market value.

Plaintiff expropriated a service station in the City of Saint John, New Brunswick. The action is to determine the value of the expropriated property and the claim of the defendant for loss of profits caused by the closing of the filling station.

Held: The owner of expropriated property is compensated for the loss of the value of the property by receiving its equivalent value in money; the value of the property is the value to the owner. The value must be measured by its fair market value at date of expropriation, but all potentialities of land must be taken into account in arriving at the fair market value. *The King* v. *W. D. Morris Realty Ltd., (1943) Ex. C.R. 140; In re Lucas and Chesterfield Gas and Water Board (1909) 1 K.B. 16 followed.*

2. That the owner is not entitled to a claim for loss of profits. *The King* v. *Richards 14 Ex. C.R. 365*, and *Dussault* v. *The King (1929) Ex. C.R. 8* followed.

INFORMATION by the Crown to have certain property expropriated in the City of Saint John, New Brunswick, for public purposes valued by the Court.

The action was tried before the Honourable Mr. Justice O'Connor, at Saint John, N.B.

P. J. Hughes, K.C., and *R. D. Keirstead* for plaintiff.

C. F. Inches, K.C., and *H. A. Porter, K.C.*, for defendant.

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

O'CONNOR J., now, (September 27, 1945), delivered the following judgment:—

The information exhibited by the Attorney General herein, shows that the property of the defendant described in the information was taken under the provisions and authority of the Expropriation Act, R.S.C. 1927, Chapter 64, for the purposes of the public works of Canada and that a plan and description thereof were deposited on the 8th day of July, 1943, with the Registrar of Deeds for the City of Saint John, Province of New Brunswick.

The information shows that His Majesty the King was willing to pay the defendant the sum of $4,750.00 in full satisfaction for the property and in discharge of all its claims for damage occasioned by the expropriation. The defendant by its statement of defence claimed the sum of $16,544.30 by way of compensation and amended the same by adding a claim for $5,000.00 for loss of five years' business at $1,000.00 per year.

The evidence for the defendant showed that it had paid $3,000.00 for the lot and had erected the building used as a service station thereon at a cost of $3,947.58. Evidence was given showing that the 1943 replacement cost, less depreciation of the building, would be approximately $5,000.00. No record had been kept of the cost of moving the equipment but it was estimated that this would cost $120.00 and the equipment would depreciate in value by reason of the move in the sum of $300.00, and the cost of re-installing the equipment elsewhere was estimated at $313.00. No evidence was given by the defendant as to the fair market value of the property at the time of the expropriation.

The evidence on behalf of the defendant consisted of assessed values of adjoining lands and of sales by adjoining owners to the Department of National Defence. In addition one Lawton, a real estate agent in Saint John, valued the lot in 1943 at $1,000.00, estimated the cost of making the necessary fill at $200.00, and valued the building at $3,000.00, and placed the cost of removing the equipment at $400.00.

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It was clear from the whole of the evidence that the area, in which the property in question is situated, had, over a period of years, depreciated in value, and a portion has been taken over by the City of Saint John for taxes.

It was submitted by counsel for the plaintiff that the company had paid $3,000.00 for the lot because of absurd competition between oil companies. The location had some advertising value and one of the company's competitors had already erected a service station nearby.

The compensation to be paid has been set out by Thorson J., President of the Exchequer Court, in *The King* v. *W. D. Morris Realty Ltd.* (1) at p. 147 as follows:—

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

and he quotes with approval the words of Fletcher Moulton L. J. In re *Lucas and Chesterfield Gas and Water Board* (2).

> The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

While the fair market value to any one other than an oil company might be in the neighbourhood of $4,000.00, the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant. The price that another oil company would pay would certainly be based on the yearly gallonage of gasoline passing through the station and the evidence showed that over a five year period this was small.

The defendant contends that because of the existing oil regulations it could not get a permit to erect a new station and that it is entitled to be compensated for the loss of profits for a period of five years. The only evidence before me as to this was a statement by the Secretary-Treasurer

(1) [1943] Ex. C.R. 140 (2) [1909] 1 K.B. 16 at 30

that the company made a profit of five cents (5c.) on every gallon of gasoline that passed through the outlet. No evidence was given as to how this was arrived at nor were the books or annual statements of the company produced. Some of the business which this particular outlet had would undoubtedly go to other stations of the same company.

In *The King* v. *Richards* (1) Audette J. at p. 373, following the decisions in *The King* v. *London Dock Co.* (2) and *Ricket* v. *Metropolitan Railway Co.* (3), said:

> The damages for loss of business purely and simply are too remote and depend on the commercial ability and industry of the individual, are and not an element inherent to the land.

He points out that the only case where damages for loss of business could be allowed would be where the whole of the defendant's land and property is taken and where a business site which is part of the value of the land is taken away—forcing the owner to abandon a locus upon which he had established a business—as in the cases of *The King* v. *Rogers* (4), *McCauley* v. *City of Toronto* (5), and *The King* v. *Condon* (6). But he points out that in this latter class of cases it must be noticed that it is not damages of a personal nature that is allowed, but damages for the loss of a good business site, having its market value over and above the inherent value of the land itself, taking into consideration the special good purposes to which it can be put.

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

Evidence as to the income derived is not material except in so far as it throws light on the market value. In *Dussault* v. *The King* (7) Audette J., in approving the statement at p. 662 of Nichols on Eminent Domain (Second Edition) said:

> If the owner of a property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes

(1) [1912] 14 Ex. C.R. 365.
(2) [1836] 5 Ad. & E. 163
(3) [1867] L.R. 2 H.L. 175
(4) [1907] 11 Ex. C.R. 132
(5) [1890] 18 O. R. 416
(6) [1909] 12 Ex. C.R. 275
(7) [1929] Ex. C.R. 8 at 11

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no test of the value of the property. It is accordingly well settled that evidence of the profits of a business conducted upon land taken for public use is not admissible in proceedings for determination of the compensation; but evidence of the character and amount of the business conducted upon the land may, however, be admitted as tending to show one of the uses for which the land is available.

And at p. 10 he said:

> The land is looked upon as so much land, entirely apart from the personality of its owner and care must be taken to distinguish between income from the property and income from the business conducted upon the property. It might be that two rival farmers held adjacent farms, of the same nature of soil and buildings, similar in all respects, upon which they cultivated. One of them, by reason of his shrewdness, foresight and good fortune might be deriving a large return and would doubtless be unwilling to sell for a sum considerably in excess of its market value—while the owner of the adjacent farm may find himself losing money and hardly making a living on it, and he would be pleased to dispose of it at a sacrifice. Yet if the two farms were taken by eminent domain or expropriation, the measure of damages would be the same in each case.

For these reasons I make no allowance to the defendant for loss of profits.

I find that the amount of compensation money to which the defendant is entitled is the sum of $6,000.00.

There will therefore be judgment declaring that the property described in paragraph 2 of the information is vested in His Majesty the King and that the defendant is entitled to the sum of $6,000.00 together with interest at the rate of 5 per cent from the 8th day of July, 1943, to the date of judgment, subject to the usual conditions as to all necessary releases and discharges of claims.

The defendant will also be entitled to its costs of these proceedings throughout.

Judgment accordingly.

BETWEEN:

1943
June 17

1945
Oct. 25

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, LIMITED ..... } APPELLANT,

AND

THE REGISTRAR OF TRADE MARKS RESPONDENT.

AND

BETWEEN:

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, LIMITED ..... } APPELLANT,

AND

THE REGISTRAR OF TRADE MARKS RESPONDENT.

Trade Mark "Sunnybrook Brand"—Word mark "Sunnybrook"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap 38, secs. 21, 29, 35, 44 (2).—The Trade Mark and Design Act, R.S.C. 1927, chap. 201, secs. 15, 36—Nature of trade mark right—Trade mark symbol of good will—Trade mark not assignable in gross—Goodwill of business carried on in Canada by registered owner of trade mark in association with wares for which it has been registered not divisible —Partial or territorial assignment of registered trade mark for use in Canada not permitted—Registration of word mark to be used in association with wares only in a particular territorial area in Canada not authorized.

The Registrar of Trade Marks refused to record a partial or territorial assignment to the appellant by Jacob Halpern of the trade mark "Sunnybrook Brand" as applied to butter, eggs, cheese, fish and provisions, for that part of Canada lying to the east of Lake Superior, on the ground that there was no provision under The Unfair Competition Act, 1932, for recording partial or territorial assignments. He also refused to grant the appellant's application to register "Sunnybrook" as a word mark to be used on eggs only in that part of Canada lying east of the west end of Lake Superior on the grounds that there was no provision in The Unfair Competition Act, 1932, for the registration of a trade mark the use of which was to be restricted to a defined territorial area in Canada and that the proposed mark was confusingly similar to the trade mark "Sunnybrook Brand". From these decisions the appellant appealed.

Held: That if a person has registered a trade mark for use in Canada in association with certain wares, he cannot validly assign such trade mark unless he also assigns the whole of the good will of the business carried on by him in Canada in association with such wares.

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THE GREAT ATLANTIC & PACIFIC TEA CO. v. REGISTRAR OF TRADE MARKS

2. That under section 44 (2) of the Unfair Competition Act, 1932, there cannot be a partial assignment of a registered trade mark for use in Canada by the assignee either in respect of some of the wares for which it has been registered or in respect of all of them for a particular area in Canada. A registered trade mark cannot in Canada be validly assigned by partial or territorial assignments.

3. That there is no authority in the Unfair Competition Act, 1932, for the registration of a word mark such as that proposed by the appellant to be used in association with wares only in a particular territorial area in Canada.

APPEALS from the Registrar's refusal to record a partial or territorial assignment to the appellant of the trade mark "Sunnybrook Brand" as applied to butter, eggs, cheese, fish and provisions for that part of Canada lying to the east of Lake Superior and his refusal to register "Sunnybrook" as a word mark to be used on eggs only in that part of Canada lying east of the west end of Lake Superior.

The appeals were consolidated and heard together before The Honourable Mr. Justice Thorson, President of the Court at Ottawa.

O. M. Biggar, K.C., for appellant.

W. P. J. O'Meara, K.C., for respondent.

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

The PRESIDENT, now (October 25) delivered the following judgment:

These two appeals were heard together pursuant to an order for their consolidation. The first is from the Registrar's refusal, dated December 3, 1942, to register "Sunnybrook" as a word mark to be used in connection with eggs in a specified territorial area in Canada; the second is from his refusal, dated October 9, 1942, to record a partial or territorial assignment from one Jacob Halpern to the appellant of the trade mark "Sunnybrook Brand" as applied to butter, eggs, cheese, fish and provisions.

The facts are not in dispute. On February 26, 1915, Jacob Halpern of Toronto applied, under the Trade Mark and Design Act, R.S.C. 1906, Chap. 71, for the registration

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THE GREAT ATLANTIC & PACIFIC TEA CO. v. REGISTRAR OF TRADE MARKS

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of a specific trade mark consisting of the words "Sunnybrook Brand" to be applied to the sale of butter, eggs, cheese, fish and provisions and the mark was duly registered on March 23, 1915, in "The Trade Mark Register No. 84, Folio 20619". On March 9, 1922, Woodland Dairy Limited, of Edmonton, a company incorporated under the laws of the Province of Alberta, applied for the registration of a specific trade mark consisting of a design picturing a creek or brook with trees and the rising sun coming up behind the trees together with the words "Sunny Brook Brand Creamery Butter" worked into the design. This application was refused on April 17, 1923, because of the prior registration of "Sunnybrook Brand" by Jacob Halpern. Woodland Dairy Limited then obtained from Jacob Halpern a partial assignment of his trade mark No. 84/20619 to be used in connection with the sale of dairy products in all that part of the Dominion of Canada lying to the west of Lake Superior and also in connection with the oriental trade. This partial assignment, dated November 15, 1923, was registered on January 4, 1924. Woodland Dairy Limited then assigned its interest in the trade mark to Woodland Dairy Limited, a company incorporated under the laws of the Dominion of Canada. This assignment, dated January 10, 1930, was recorded on September 30, 1933, and the name of Woodland Dairy Limited was entered on the register as the owner of the trade mark as applied to dairy products only in the territory specified.

On November 20, 1941, Jacob Halpern executed another partial or territorial assignment of the trade mark "Sunnybrook Brand" in favor of the appellant, in which he recited its original registration on March 23, 1915, and the first partial assignment of it to Woodland Dairy Limited on November 15, 1923. By this assignment Jacob Halpern assigned, sold and transferred to the appellant all his right, title and interest in and to the said trade mark and the good will of the business connected therewith in all that part of the Dominion of Canada lying to the east of Lake Superior. On December 24, 1941, the Registrar advised the appellant's solicitors that the document being a partial assignment could not be recorded and also took the position that the rights of Jacob Halpern had expired by reason of his failure to pay the renewal fee. On January

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28, 1942, Jacob Halpern executed a fresh assignment which differs from the previous one only in that there is no reference in it to the territory "in all that part of the Dominion of Canada lying to the east of Lake Superior". On October 9, 1942, the Registrar notified the appellant's solicitors that "the assignment.....may not be recorded, since there is no provision under The Unfair Competition Act, 1932, for recording partial or territorial assignments". From this decision the appellant gave notice of appeal on March 10, 1943.

On March 19, 1942, the appellant applied for registration of "Sunnybrook" as a word mark, to be used on eggs but only in that part of Canada lying east of the west end of Lake Superior. With its application the appellant, claiming to be the owner of the trade mark "Sunnybrook Brand" in all that part of Canada lying east of Lake Superior, filed a request that the registration of the said mark be cancelled so far as it affects the said part of Canada, the cancellation to be effective upon a new registration being made in the appellant's name. On December 3, 1942, the Registrar rejected this application on the ground that there was no provision in The Unfair Competition Act, 1932, for the registration of a trade mark the use of which was to be restricted to a defined territorial area in Canada. It was also considered that the word mark applied for was confusingly similar to registration No. 84/20619. On January 14, 1943, the appellant gave notice of appeal from this decision.

The circumstances under which a trade mark may be assigned are stated in section 44 (2) of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, as follows:

44. (2) A registered trade mark shall not be assigned or transmitted except in connection and concurrently with an assignment or transmission of the good will of the business carried on in Canada in association with the wares for which such mark has been registered, and in any case such trade mark shall be determinate with such good will; provided however that any registered owner of a trade mark whose headquarters are situate in Canada and who is entitled to its exclusive use in connection with a business carried on in Canada may assign the right to use such trade mark in any other country, in association with any wares for which such trade mark is registered, in connection and concurrently with his assignment of the good will of the business carried on in such other

country in such wares, provided that the grant of such right is forthwith recorded by the grantor of such right in the register maintained pursuant to this Act.

Section 44 (2) up to the first proviso is similar in effect to the first sentence of section 22 of the Trade Marks Act, 1905, of the United Kingdom, which read as follows:

22. A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that goodwill.

This goes back to section 70 of the Patents, Designs, and Trade Marks Act, 1883, and section 2 of the Trade Marks Registration Act, 1875, by which provision was first made for the registration of trade marks.

Prior to the coming into force of The Unfair Competition Act, 1932, section 15 of the Trade Mark and Design Act, R.S.C. 1927, chap. 201, provided as follows:

15. Every trade mark registered in the office of the Minister shall be assignable in law.

This goes back, through the revisions of 1906 and 1886 to section 14 of The Trade Mark and Design Act of 1879 and section 5 of The Trade Mark and Design Act of 1868. It has been the subject of judicial comment. In *Smith* v. *Fair* (1) there is a suggestion by Proudfoot J. that there could be an assignment of a trade mark independent of good will. But a different view was taken in *Gegg* v. *Bassett* (2), where Lount J. held that a trade mark could not be seized and sold by itself. At page 264, he said:

I am clearly of opinion that a right to a trade mark is not exigible under execution and therefore that no title passed to the plaintiff. The sheriff could seize and sell only goods and chattels or an interest therein, and the right to a trade mark is something quite different. The right is assignable it is true, but only, I think, in connection with the goodwill of the business, general or specific, in which the trade mark has been used.

And in this Court in *In re Vulcan Trade Mark* (3) Cassels J. stated that he had no hesitation in adopting the view of Mr. Justice Lount. The weight of Canadian judicial opinion supports the view that under the Trade Mark and Design Act while a trade mark was assignable it was not assignable in gross. That being so, section 15 is merely declaratory of the position reached at common law.

(1) [1887] 14 O.R. 729 at 739
(2) [1902] 3 O.L.R. 263
(3) [1914] 15 Ex. C.R. 265 at 272

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At common law no one assumed at first that a trade mark could be assigned at all for it was not then regarded as property. But as the function of the trade mark developed a different view prevailed. An interesting discussion of the origin of trade marks and the attitude of the courts in dealing with them is to be found in Schechter-Historical Foundations of Trade Mark Law.

Originally there were two classes of marks affixed to goods. One was proprietary; this was the "merchant's mark" and its purpose was to indicate ownership of the goods. The other was regulatory; this was a production mark that had to be placed on goods to indicate their source of origin or manufacture so that the person whose mark it was might be held responsible for any inferiority of quality that might exist in them. These marks, although their purposes were quite different, are the source of the idea of the identification of trade marks with the ownership or origin of the goods on which they appear. But they were not regarded as property. Even as late as 1857 it was stated by Vice-Chancellor Sir W. Page Wood in *The Collins Company* v. *Brown* (1) that "it is now settled law that there is no property whatever in a trade mark". He did recognize, however, that "a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it", but the basis for intervention by the Court was that the use of the mark by such other person would be a fraud on the first user. The common law action for infringement of a trade mark was originally an action in deceit or an action on the case for deceit. Since no right of property in the trade mark was recognized there could be no assignment of it.

It is obvious that there has been a great change in the function of the trade mark. The consumer of goods bought under a trade mark is now not primarily concerned with any particular owner or origin of them; and the owner of the mark who is injured by its infringement is not concerned with whether the buyer knows who he is or where the goods come from or not. The consumer buys the goods under a mark with which he becomes familiar and is entitled to know that when he buys similar goods

(1) [1857] 3 K. & J. 423 at 426

again under such mark they will be as satisfactory as the previous goods had been; now it is the trade mark that "sells the goods", as Lindley L. J. put it in *Powell* v. *The Birmingham Vinegar Brewery Company Ltd.* (1). The trade mark has become an important factor in creating and sustaining the good will of the owner's business in the goods for which the mark was registered and on which it is used. Indeed, it is the symbol of such good will and inseparable from it.

Increasing realization of this association between a trade mark and the good will of the owner's business in the goods on which it is used has resulted in much clarification of the true nature of a trade mark, although it cannot yet be said to be fixed. Schechter's book develops this theme in an interesting manner. The original common law action gave the owner of a trade mark quite inadequate protection against piracy of it. He was injured even although fraud on the part of the infringer could not be proved and even although there had been no such fraud, and the common law remedy of damages only did not give him sufficient relief. But before the equitable remedies could be applied it was necessary to deal with the trade mark right as property. This was done by Lord Chancellor Westbury in 1863 in *Hall* v. *Barrows* (2) where he said:

> a trade mark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture or vendible commodity, and such exclusive right is property.

And in the same year in the famous case of *The Leather Cloth Company Limited* v. *The American Leather Cloth Company Limited* (3) Lord Westbury refused to accept the view expressed in other cases that there is no property in a trade mark. At page 142 he said:

> It is correct to say that there is no exclusive ownership of the symbols which constitute a trade mark apart from the use or application of them; but the word "trade mark" is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle therefore would seem to be, that the jurisdiction of the Court in the protection given to trade-marks rests upon property, and that the Court interferes by injunction because that is the only mode by which property of this description can be effectually protected.

(1) [1896] 13 R.P.C. 235 at 250
(2) [1863] 4 De G.J. & S. 150 at 158
(3) [1863] 4 De G.J. & S. 137; [1864] 11 H.L. 523

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Lord Westbury's recognition of a trade mark as property marked a great change in the attitude of the courts on the protection of trade mark rights for the owner's right of action against an infringer was no longer based on fraud by him. But it is important to note that a trade mark was regarded as property only when applied to a vendible commodity; and that apart from such use and application there was no property in it at all. If there cannot be a trade mark in gross, there obviously cannot be an assignment of it in gross. Lord Westbury discussed the question of the assignability of a trade mark in a general way, but when the case went to the House of Lords, Lord Cranworth laid down the following principle, at page 534:

> the right to a trade mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser.

This case may be regarded as authority for the statement that neither at law nor in equity could there be an assignment of a trade mark in gross. There has been general acceptance of this view.

When, therefore, section 15 of the Trade Mark and Design Act speaks of a trade mark as being assignable in law, I think it is reasonable to construe the section as meaning that it is assignable under the conditions laid down by the law, that is to say, that it is assignable only with the business in the goods on which the trade mark is used and cannot be assigned in gross. That being so, then there is no substantial difference in effect between section 15 of the Trade Mark and Design Act and the first part of section 44 (2) of The Unfair Competition Act, 1932.

The Leather Cloth Company Case (*supra*) was followed in *Pinto* v. *Badman* (1). Fry L. J. there dealt with the assignability of trade marks and regarded the statement of Lord Cranworth, to which I have referred, as conclusive authority. Then he went on to refer to the Statutes of 1875 and 1883 and said, at page 195:

> Now another indication that that is the law is to be found in this, that both the Statutes of 1875 and 1883 have regulated the right of transfer after registration, and in both cases they have confined it to assignment or transfer with the goodwill of the business in the article in respect of which the trade mark is registered. It is obvious that the

(1) [1891] 8 R.P.C. 181

Legislature in so enacting are intending to confine the right of assigning the trade mark after registration within the same limits by which it is confined at law and in equity before registration.

Fry L. J. thus regarded the Statutes of 1875 and 1883 as being declaratory in respect of registered trade marks of the existing law regarding the assignability of trade marks prior to provision having been made for their registration. His remarks afford strong support for the statement by Fox on the Canadian Law of Trade Marks and Industrial Designs, at page 153, that the effect of section 44 (2) of The Unfair Competition Act, 1932, has been merely to place the principles of the common law on the subject of assignability of trade marks in statutory form.

The good will of the business concerned in the goods for which the trade mark has been registered is indivisible; the whole of such good will must be assigned in order to make the assignment of the trade mark valid under section 22 of the Trade Mark Act, 1905, of the United Kingdom. This was settled in *John Sinclair Ld's Trade Mark* (1). In that case a trade mark had been registered for tobacco whether manufactured or unmanufactured. The trade mark was assigned but the assignee used it on cigarettes only and the assignor continued its tobacco business. Since it was not intended by the parties that the good will of the business in manufactured and unmanufactured tobacco should pass to the assignee of the trade mark the assignment of it was ordered to be expunged as not being in compliance with the requirements of section 22. The trade mark having been registered for tobacco whether manufactured or unmanufactured and there being only one business concerned in such goods, there could not be an assignment of the trade mark for use only on cigarettes. Since the whole of the good will of the business concerned in the goods for which the trade mark has been registered must be assigned to make the assignment of the trade mark valid, it follows that in the absence of statutory authority there cannot be a partial assignment of the trade mark either in respect of some of the goods for which it has been registered or in respect of all of them for any particular area in which the business concerned in the goods has been carried on.

(1) [1932] 49 R.P.C. 123

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The principle of the decision in *John Sinclair Ld's Trade-mark* (*supra*) is as applicable in Canada as it was in the United Kingdom. Section 44 (2) of The Unfair Competition Act, 1932, distinguishes between a business carried on in Canada and a business carried on in any other country. Where a person is entitled to the exclusive use of a trade mark in connection with a business carried on in Canada and also carries on business in any other country, he may assign the right to use the trade mark in such other country in association with any wares for which such trade mark is registered provided he also assigns the good will of the business carried on in such other country in such wares and there may be as many assignments as there are businesses in other countries. But in respect of the business carried on in Canada in association with the wares for which the trade mark has been registered, its good will cannot be subdivided. Section 44 (2) contemplates that the registered trade mark shall carry with it all of the good will of the business carried on in Canada in association with the wares for which it has been registered. Under the section as it stands such good will is indivisible and the mark cannot be disassociated from it. Consequently if a person has registered a trade mark for use in Canada in association with certain wares, he cannot validly assign such trade mark unless he also assigns the whole of the good will of the business carried on by him in Canada in association with such wares. It follows that under section 44 (2) of The Unfair Competition Act, 1932, there cannot be a partial assignment of a registered trade mark for use in Canada by the assignee either in respect of some of the wares for which it has been registered or in respect of all of them for a particular area in Canada. A registered trade mark cannot in Canada be validly assigned by partial or territorial assignments.

In my opinion, the law was the same under The Trade Mark and Design Act. The Act drew a sharp distinction between trade marks and industrial designs in the matter of their assignability. While section 15 merely provides that every trade mark shall be assignable in law, section 36 dealing with the assignability of industrial designs specifically provides for their partial assignment. It reads as follows:

36. Every design shall be assignable in law, either as to the whole interest or any undivided part thereof,...

(2) Every proprietor of a design may grant and convey an exclusive right to make, use and vend and to grant to others the right to make, use and vend such design within and throughout Canada or any part thereof for the unexpired term of its duration or any part thereof.

This difference in the Act leads to the conclusion that while there could be a partial assignment of an industrial design the Act did not allow the partial assignment of a trade mark. There are other sections in the Act supporting this view. Section 36 of The Trade Mark and Design Act still remains in effect.

Under these circumstances, although the validity of the partial assignment from Jacob Halpern to Woodland Dairy Limited, dated November 15, 1923, is not before the Court, it is difficult to see what authority there was for its registration.

The view that section 44 (2) of The Unfair Competition Act, 1932, does not permit partial or territorial assignments of a trade mark in Canada is in accord with the general scheme of the Act. Section 35 is one of its governing sections. It reads as follows:

35. An application for the registration of a trade mark shall be deemed to assert a claim on the part of the applicant to be registered as owner of the mark throughout Canada.

It is intended as a matter of policy that a registered trade mark shall have currency throughout Canada and that there shall be only one registration in Canada in respect of it. This purpose would be defeated if the owner of the mark were allowed to sell it piecemeal, so that there would be one registered owner of it for British Columbia, another for Alberta and so on. The same idea of one registered trade mark for Canada shows itself in many other sections of the Act such as sections 3, 4, 5, 7, 8 etc. There are two exceptions to this general policy. Section 29 allows the Exchequer Court of Canada, under certain circumstances, to specify whether the registration which it authorizes by declaration should extend to the whole of Canada or be limited to a defined territorial area in Canada, but it has no application in the present case. The other exception is set out in section 21, which provides as follows:

21. Notwithstanding any other provision of this Act, if in any action or proceeding in the Exchequer Court of Canada it appears that prior to the date of the coming into force of this Act two or more persons have

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adopted the same or a similar trade name, or have adopted the same or a similar trade mark or distinguishing guise for use in connection with similar wares, and that neither would be entitled to a judgment forbidding the other from continuing to use his trade name, trade mark or distinguishing guise in any territorial area within Canada, the Court shall, so far as, having regard to the evidence adduced, it is possible to do so, define the territorial area within which each of the persons concerned may so continue and shall give judgment between the parties accordingly, or may, if the parties agree or the circumstances permit, specify the conditions, by way of difference or otherwise, under which each of the parties may continue to use his trade name, trade mark or distinguishing guise throughout Canada.

Section 21 has, I think, no application to a case such as this where there was originally only one registered trade mark and, if the first partial assignment to Woodland Dairy Limited was improperly recorded, it is difficult to see how it could apply at all, but even without so deciding it seems clear to me that the Court could act under it only when the parties interested in the mark were all before the Court. While notice of the appeals herein was served on Woodland Dairy Limited, whose name appears on the register, it was not made a party to these proceedings, and the Court cannot, therefore, make any order as between it and the appellant.

In my opinion, the assignment from Jacob Halpern to the appellant cannot meet the requirements of section 44 (2). The certificate of registration shows that the trade mark was registered "to be applied to the sale of Butter, Eggs, Cheese, Fish and Provisions". To make it assignable there must also be an assignment of the good will of the business carried on by Jacob Halpern in Canada in association with such wares. Counsel for the appellant argued that the registration should be allowed in order to give a common sense operation to the Act; that the alternative would be a vacancy for the word mark "Sunnybrook Brand" in Eastern Canada which could not have been contemplated; and that to allow such a vacancy would be to fly in the face of common sense and the purpose of the Act. I am unable to agree with this view. In the first place it is based upon the assumption that the first partial assignment was a proper one, which, to say the least, is not established. Secondly, as I see it, the assignment under review is not permissible under the plain terms of section 44 (2). It is contrary to the general scheme of the Act

that there should be divisibility of a registered trade mark in Canada, except in the special circumstances mentioned, and section 44 (2) clearly contemplates only one assignee for a registered trade mark in Canada. Jacob Halpern by reason of his own separate dealings with his trade mark and his separate partial assignments of it has so acted as not to be able to comply with the requirements of the section. In my opinion, the Registrar was clearly right in his refusal to record the assignment and the appeal from his decision must be dismissed.

The second appeal likewise fails. There is, in my opinion, no authority in The Unfair Competition Act, 1932, for the registration of a word mark such as that proposed by the appellant to be used in association with wares only in a particular territorial area in Canada. Certanly the Registrar could make no such registration; nor can I find any authority for the Court to order it. The application to register "Sunnybrook" as a word mark to be used in association with eggs only in that part of Canada lying east of the west end of Lake Superior runs counter to section 35 and the general scheme of the Act as it stands and does not come within any of the exceptions to it. Moreover, the proposed word mark "Sunnybrook" is clearly confusingly similar to the trade mark "Sunnybrook Brand" as registered by Jacob Halpern on March 23, 1915, as No. 84/20619 and is consequently barred from registration by section 26 (*f*). The Registrar was right, in my opinion, in refusing the appellant's application and the appeal from his decision is dismissed.

In accordance with the usual practice, under which, as I understand it, costs are not awarded either to or against the Registrar on appeals from his decisions, the appeals herein are dismissed without costs.

Judgment accordingly.

1945
Oct. 17
Oct. 23

BETWEEN:

BURNS AND JACKSON LOGGING COMPANY LIMITED..... } APPELLANT;

AND

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

Revenue—Income—Income War Tax Act R.S.C. 1927, c. 97, s. 5 (1) (a) —Minister's exercise of discretion—Logging "operators"—Logging "operations"—Exception from special allowance for exhaustion of timber limits.—Appeal dismissed.

Appellant is a logging operator and sells on the open market the logs produced by it. For some years part of such logs were sold by it to the B.C. Pulp and Paper Company Limited for pulp-wood purposes.

On February 19, 1942, the Minister of National Revenue by means of a letter addressed to the B.C. Loggers Association decided to make a special allowance for the exhaustion of timber limits for the 1941 taxation year. Such special allowance was not to be granted in respect of pulp-wood and fuel wood operations.

Appellant claimed an allowance for all logs produced by it regardless of the ultimate use of such logs. The Minister disallowed part of this claim on the ground that Appellant was not entitled to any allowance on logs sold for conversion into pulp-wood. An appeal was taken to this Court.

Held: That the discretion vested in the Minister by the Income War Tax Act, R.S.C. 1927, c. 97, s. 5 (1) (*a*) was exercised by him in the manner indicated in his letter of February 19, 1942, and such discretion was properly exercised.

2. That a logger engaged in general logging operations is not entitled to the special allowance for exhaustion of timber limits for that portion of his output sold to a pulp-mill.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver, B.C.

C. H. Locke, K.C. and C. M. O'Brian, K.C. for Appellant.

W. S. Owen, K.C. and J. G. McEntyre for Respondent.

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

SIDNEY SMITH, Deputy Judge, now (October 23, 1945) delivered the following judgment:

The controversy in this appeal falls within a very narrow compass: the conclusions I have reached and my reasons therefor may be stated with corresponding brevity.

Under Sec. 5 (1) (*a*) of the Income War Tax Act, R.S.C. 1927, ch. 97, and amendments, the Minister of National Revenue is empowered in determining income derived from timber limits, to "make such an allowance for the exhaustion of. . . . . .timber limits as he may deem just and fair." Upon representations made to him by the logging industry of British Columbia, with the avowed object of obtaining a concession in income tax in return for increased depletion of their timber reserves, the Minister decided to make a special allowance for the 1941 taxation year. This decision was embodied in the terms of a letter from the Minister to the B.C. Loggers Association, dated 19 February, 1942. The letter in question simply adopted certain recommendations made in a report by the Timber Depletion Committee set up to study the matter. One such recommendation was to the effect "that the special allowance be not granted in respect of pulp-wood and fuel wood operations."

The Appellant is a logging operator producing its logs from Crown Granted and Crown owned timber lands in British Columbia, and selling them on the open market. It has for some years past sold part of its logs to the B.C. Pulp & Paper Company Limited for pulp-wood purposes. In its return for the taxation year 1941 it claimed an allowance of $8,398.40 for all logs produced, regardless of the ultimate use of the logs. Of this amount the Minister disallowed $2,096.63 upon the ground that the Appellant was not entitled to any allowance on logs sold to the B.C. Pulp & Paper Company Limited during the aforesaid taxation year, such logs so sold being for conversion into pulp-wood. These figures are not disputed.

The sole questions before me are whether the Min-

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ister exercised his discretion as to this allowance in the terms of his letter of 19 February, 1942; and if so, whether he is right in his contention that the Appellant is not entitled to the special allowance for such of its logs as were sold to the B.C. Pulp & Paper Company Limited.

I have no doubt that the Minister exercised, and properly exercised, his discretion in this matter in the manner indicated in his letter of 19 February, 1942. It was argued by the Respondent that such letter was nothing more than an indication of the way in which the discretion would be exercised, and that the final exercise of the discretion was not, and could not be made until returns from the individual logging companies had been filed, and the circumstances of each particular case came for decision before the Minister. In my opinion this view is untenable. Indeed, the contrary seems to be the case; for in *Gardner* v. *Jay* (1) quoted in support of it, Bowen L.J. refers to the undesirability of laying down any particular grooves in which discretion should run, and I take this also to mean the time when it should be exercised. That the Minister himself thought that he was exercising his discretion in his letter of 19 February, 1942, is, I think, clear from the concluding words, viz.: "Assessments will be reported and approved on the above basis."

The question then is simply this—does the provision that the special allowance will not be granted " in respect of pulp-wood.....operations" disentitle a logger from the benefit of the special allowance for so much of his output as he may sell to a pulp-mill? The issue between the parties rests on these few words.

There is not much guidance to be had from the context. Para. 1 says "that in respect of timber cut in the taxation year.....operators be given a special allowance". Para. 5 says "that the special allowance be not granted in respect of pulp-wood..... operations". Para. 1 uses the word "operators"; para. 5 the word "operations". It is evident that out of general logging operations an exception of pulp-wood operators is made. But it seems to me that the contrast is not in

(1) (1885) 29 Ch. D. 50 at 58.

the nature of the operations, but in the nature of the product. Out of the generic term timber, the exception pulp-wood is carved.

I do not know precisely what is meant by a pulp-wood operation, and have been unable to find any clear guide from the evidence in this regard. Important clauses, such as these before me, do not find their way into such reports casually or by accident. They are usually the fruit of negotiation, consideration, compromise. None the less, I think the words "pulp-wood operations" were used herein in a general sense, perhaps even loosely, and are not to be construed too literally or too technically. If they were intended to mean operations which produced logs exclusively for pulp, then I doubt whether there are any such operations in British Columbia. Even in the case of pulp licences and wood-pulp leases owned by pulp companies, timber, other than that used for pulp, is logged and gathered in. Because I take it from the evidence that stands of timber are not all of a piece, but are composed of many kinds of lumber. Hemlock is used for pulp and may also be used for saw-logs; the other species are converted into saw-logs. If, then, a pulp-wood operation produces logs for timber, as well as logs for pulp, I think the more reasonable construction is that the allowance is not intended to apply to logs that are converted into pulp-wood, and that this is so irrespective of the operation whence they originate.

There was evidence led with respect to the general atmosphere in which the negotiations took place, as an available guide to the general policy of the Minister in framing this provision. It was pressed upon me that this evidence indicated an intention on the part of the Minister to accelerate the production of logs generally, by the grant of this special allowance to all operators producing logs and selling them on the open market for whatever purpose; that the only exception was in the case of wood-pulp operations. I need not speculate too closely upon this. But a re-reading and a reconsideration of this portion of the evidence leads me to think that the purpose of the Minister was to expedite the production of logs for lumber; that he was not concerned with the production of logs for pulp; and that his intention

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was to grant the special allowance only to producers of the former, to the extent of their production thereof, and quite regardless of whether they were general logging operators, pulp-wood operators, or otherwise. I think that this is the plain common-sense of the matter, and that it ought to have been apparent that it was so, to all those engaged in the logging industry, from a consideration of the language used in the light of the surrounding circumstances.

The appeal must be dismissed with costs.

Judgment accordingly.

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Oct. 12, 13
Oct. 27

BETWEEN:

BESSIE MAY SNELL AND THE WORKMEN'S COMPENSATION BOARD OF BRITISH COLUMBIA. } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Workmen's Compensation Act, R.S.B.C. 1936, c. 312—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Liability of Crown to Workmen's Compensation Board for damages due to death of workman caused by negligence of a servant of the Crown—Subrogation—Right of action not barred by assignment of claim against Crown—Acceptance of compensation not a bar to recovery—Damages—Disposition of amounts received.

By virtue of the Workmen's Compensation Act, R.S.B.C. 1936, C. 312, when a workman is injured in an accident under such circumstances as entitle him or his dependents to an action against some person other than his employer, such workman or his dependents, if entitled to compensation under the Act, may claim such compensation or bring such action, and if compensation is claimed the Workmen's Compensation Board shall be subrogated to the rights of the workman or dependents against such other person for the whole or any outstanding part of the claim of the workman or dependents against such other person.

The Suppliant, Bessie May Snell, now seeks to recover from Respondent compensation on behalf of herself and her infant son for the death of her husband as the result of a collision between a motor truck driven by him and one driven by a member of the armed forces of the Crown whose negligence was admitted by the Respondent. Suppliant Snell had applied for and been granted compensation by the Workmen's Compensation Board of British Columbia, which

Board had obtained from her an assignment of all her claims against the Respondent in respect to the death of her husband. No notice of the assignment was given to Respondent and the Board now brings its Petition of Right against the Respondent in the name of suppliant Snell by virtue of its right of subrogation and also by virtue of the assignment.

Held: That the Workmen's Compensation Act R.S.B.C. 1936, C. 312, does not affect the liability of the Crown as created by the Exchequer Court Act, R.S.C. 1927, C. 34, S. 19 (*c*) and Suppliant's action is not barred by acceptance of compensation from the Board.

2. That the Petition of Right is brought by the Workmen's Compensation Board in the name of suppliant Snell in the exercise of its statutory right of subrogation and it is of no consequence in this case whether recovery is had under such right of subrogation or under the assignment.

3. That the Respondent is responsible in damages to the suppliant Snell and her child and that they have individual rights.

4. That the amount received by the suppliant Snell should be paid to the Board to be dealt with by it in due course, and the amount received by the child should also be paid to the Board to be repaid to suppliant Snell on behalf of the child.

ACTION by Suppliants to recover from the Crown damages for the death of the husband of suppliant Snell caused by the negligence of a servant of the Crown.

The action was tried before The Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver.

C. H. Locke, K.C. and K. L. Yule for Suppliant.

B. M. Isman for Respondent.

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

SIDNEY SMITH, Deputy Judge now (October 27, 1945) delivered the following judgment:

In this Petition of Right, the Suppliant, Mrs. Bessie May Snell, seeks to recover from His Majesty the King compensation on behalf of herself and her infant son under the provisions of the "Families' Compensation Act" of British Columbia, R.S.B.C. 1936, ch. 93. This compensation is sought for the death of her husband which occurred on the 29th of September, 1943, in consequence of a collision between motor trucks on that day near the City of Nanaimo, British Columbia. The collision in question took place between a truck owned by one Sidney

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Dines, driven by the husband of the Suppliant, and an army motor truck, the property of the Respondent, which was being driven by a member of the armed forces of the Crown. The Respondent does not deny that the said collision was occasioned by the negligence of the last mentioned driver. On this phase of the matter therefore, subject to the defence presently to be mentioned, the only question before the Court is the amount of the compensation that should be paid by the Respondent.

On 27th of October, 1943, Mrs. Snell made an application under the provisions of the Workmen's Compensation Act of British Columbia, R.S.B.C. 1936, ch. 312, and amendments, for payment to her of appropriate compensation. Her husband's employment fell within Part 1 of the said Act, and the Board thereupon became obligated to pay to Mrs. Snell and is now paying to her the sum of $40 per month during her life-time, together with a monthly payment of $10 for her child until the child shall have reached the age of 16 years, and thereafter a monthly payment of $12.50 between the ages of 16 years and 18 years, provided the child shall then regularly attend an academic, technical or vocational school.

The Workmen's Compensation Act contains the following provisions as Section 11 (1) and (3):

> 11. (1) Where an accident happens to a workman in the course of his employment in such circumstances as entitle him or his dependents to an action against some person other than his employer the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action.
>
> (3) If any such workman or dependent makes an application to the Board claiming compensation under this Part, the Board shall be subrogated to the rights of the workman or dependent against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person.

The Board thus acquired a statutory right of subrogation in addition to whatever similar right it might have at common law. But apart from this the Board thought it well to obtain, and did obtain from Mrs. Snell on the 13th of March, 1934, an assignment of all her claims against His Majesty the King and other parties in respect of the death of her husband. Notice of this assignment was not given to the Respondent, and so it remains an equitable assignment only. The Board now brings this Petition of Right against the Crown in the name of Mrs.

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Snell by virtue of its right of subrogation and also by virtue of the said assignment which, being equitable only, requires the filing of this Petition in the name of the assignor. *Union Assurance Company et al* v. *B.C. Electric Railway Company Limited* (1).

The ground having been cleared by the position on liability taken by the Respondent as above mentioned, I think the foregoing short statement of facts contains all that is necessary for the exposition of the questions which must be answered by the Court.

The Respondent disputes liability upon three grounds, (1) that Mrs. Snell, having elected to claim compensation from the Workmen's Compensation Board, and having accepted the same, is barred from maintaining this action against His Majesty, (2) that she has assigned her right of action against the Respondent, and as a result thereof is not entitled to maintain this action, (3) that the provisions of the Workmen's Compensation Act are not applicable to the Respondent, and that the Board can acquire no right of action against the Respondent by subrogation under the said Act. I am unable to find support for any of those contentions.

Section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, ch. 34, as amended, imposes a liability upon the Crown (Dominion) for the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, where such negligence has resulted in death or injury to the person, or to property. As pointed out in an informing judgment of the learned President of this Court in *Tremblay* v. *The King* (2), the language of this section not only gives jurisdiction to the Exchequer Court but imposes a liability upon the Crown which did not previously exist; and further (at p. 12) that the provincial law applicable to circumstances such as these in the present case is the law that was in force in this Province on the 24th of June, 1938, when the amendment to Section 19 (*c*), which first imposed liability upon the Crown in this type of case, came into effect. At that date the relevant provisions of the Workmen's Compensation Act were in force in this Province.

(1) (1914) 21 B.C.R. 71 at 76. (2) (1944) Ex. C.R. 1 at 8.

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The Interpretation Acts, R.S.C. 1927, ch. 1, s. 16, and R.S.B.C. 1936, ch. 1, s. 35, both read as follows:

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

It seems to me that the Workmen's Compensation Act in no way affects the liability of the Crown (Dominion) as created by Section 19 (*c*) aforesaid. It neither adds to it, detracts from it, or varies it in any manner whatsoever. *Dominion Building Corporation Limited* v. *The King* (1). All it seeks to do in sec. 11 is to deal with the disposition of the damages as between the Board and the dependents of the deceased. That this is so is evident from the language of Duff, J. (as he then was) in *Toronto Railway Company* v. *Hutton* (2), when dealing with sec. 9 of the Ontario Workmen's Compensation Act which is comparable to sec. 11 of the British Columbia Act:—

> In sum my view of sec. 9 is this: Its subject matter is the reciprocal rights of the claimant on the one hand and the employer and Compensation Board on the other. The effect of the section may perhaps be more conveniently considered with reference to the case of the employer. As between the employer and the claimant then, the claimant is entitled to choose one of two alternatives. He may claim compensation or he may elect to pursue his remedy against the third party. If he elects to claim compensation, the employer becomes subrogated to the claimant's rights against the third person; in other words, he becomes entitled to enjoy the benefit of them and may enforce them in the name of the claimant. But all this is intended to be and is a disposition as to the rights of the employer and the claimant *inter se*. A dispute may arise upon the point whether or not an election has taken place within the meaning of the enactment, but that is a matter to be settled as between employer and claimant. No other party is interested except, of course, a party claiming through one of them.

On the question of election, I was referred by counsel for the Crown to certain dicta of the late learned President of this Court in *The Ship Catala* (3), which would seem to indicate that the President was of the opinion that an election to accept compensation barred any right of recovery from a wrongdoing third party. His observations, though admittedly made obiter, would of course be extremely weighty in the present case; but I think it clear that the learned President is there directing his

(1) (1933) A.C. 533 at 548.
(2) (1919) 59 S.C.R. 413 at 420.
(3) (1928) Ex. C.R. 83 at 95.

remarks to recovery from the same employer by way of compensation under the Act, and also by way of subsequent action at common law. He is not speaking of a case like the present where, after payment by the Board to a dependent, recovery is sought by the Board by virtue of its right of subrogation from a third party.

I respectfully agree with Mr. Justice Angers when he says in *Rochon* v. *The King* (1) when dealing with similar questions under the kindred Workmen's Compensation Act of Quebec whose provisions in this respect are not materially different:—

> The fact that the suppliant exercised his recourse against his employers, under the Workmen's Compensation Act of Quebec as he did .....does not, in my opinion, deprive him of his right of action against the Crown, if such right exists under the provisions of subsection (*c*) of section 19 of the Exchequer Court Act.

See also *McNicoll* v. *The King* (2); *Yukon Southern Air Transport Limited et al* v. *The King* (3); and *Zakrzewski* v. *The King* (4).

Moreover, it seems to me that it is not open to the Crown to adopt the position that it may take the benefit of the Act by arguing that Mrs. Snell has received compensation under its provisions, and is thus not entitled to further compensation from the Crown; and at the same time deny to the Board the right of subrogation given by the Act as against the person responsible, in this case the Crown. I think this follows from such cases as *re Excelsior Electric Dairy Machinery Ltd.* (5); and *Attorney-General of British Columbia* v. *Royal Bank of Canada et al* (6), on other grounds. See also the authorities referred to in an interesting article on this topic by Mr. D. M. Gordon of Victoria, B.C., in Vol. 18, Canadian Bar Review (1940) p. 751.

The Petition of Right is essentially one filed by the Board in the name of Mrs. Snell in the exercise of its statutory right of subrogation. It seems to me to be a matter of indifference whether recovery is made under such right of subrogation or under the assignment before mentioned. Both parties (that is to say, Mrs. Snell on behalf of herself and her child on the one hand, and the

(1) (1932) Ex. C.R. 161 at 170.
(2) (1941) Ex. C.R. 104.
(3) (1942) Ex. C.R. 181.
(4) (1944) Ex. C.R. 163.
(5) (1923) 52 O.L.R. 225.
(6) (1936) 51 B.C.R. 241.

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Board on the other hand), are before the Court, and there is no dispute between them as to the disposition of any fund recovered.

For these reasons I find that the Crown is responsible in damages to Mrs. Snell and her child, and that they have individual rights. See *Avery* v. *London and North Eastern Railway Company* (1) *London Brick Company Limited* v. *Robinson* (2). Fortunately I am not concerned here with the difficult problems which arose in these two cases under the English Workmen's Compensation Acts. My duty is simply to assess the damages to which Mrs. Snell and her child are separately entitled.

At the date of the collision and of the death, the respective ages were as follows: the husband 36 years, the wife 33 years, the child 7 years. The deceased was earning an average salary of approximately $160 per month as a truck driver. He appears to have allowed his wife a sum of about $80 per month for housekeeping. Had he lived this would no doubt have continued. Taking all these various factors into consideration, and also the ups and downs of life, I think it fair to assess damages to Mrs. Snell in the sum of $13,500, and to the child in the sum of $3,500.

The amount recovered by Mrs. Snell "should be paid to the Board to be dealt with by them in due course", as was said in *Toronto Railway Company* v. *Hutton supra* at p. 416. It is true that sec. 9 (3) of the Ontario Act states expressly that any sum recovered from the third party by the Board under its right of subrogation "shall form part of the accident fund" of the Board. But I think the result is the same although these words are absent from the British Columbia Act.

The amount recovered by the child should also be paid to the Board to be repaid to Mrs. Snell on behalf of the child in accordance with the present scheme of payments, but in such increased monthly amounts as may be possible after deduction by the Board of such amounts as have already been paid on behalf of the child.

The Suppliants are entitled to their costs.

Judgment accordingly.

(1) (1938) A.C. 606.

(2) (1943) 1 All E.R. 23.

1943
Apr. 27
1945
Nov. 12

BETWEEN:

SISCOE GOLD MINES LIMITED.. APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, chap. 97, secs. 6 (a), 6 (b)—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Legal expenses incurred in defending attacks on title to property or claims connected with financing arrangements not deductible—Expenditures made for purpose of determining whether assets should be acquired not deductible.

The appellant was engaged in the business of gold mining. Appeals from income tax assessments for the years 1929, 1931, 1932, 1933, 1935, 1936, 1937 were brought because certain disbursements and expenses made and incurred by it were disallowed. Some of these consisted of legal expenses incurred by the appellant in defending actions in which attacks were made on its title to its mining property or in which claims were made arising out of transactions connected with its early financing arrangements. Other expenditures that were disallowed related to certain mining claims. The appellant had entered into an agreement under which it had an option to buy such claims and the right to do exploration, development and diamond drilling on them. After making a number of payments under the agreement and doing considerable diamond drilling the appellant decided not to take up the option. Two other disbursements, one to one of its directors and the other in connection with the distribution of gold medals, were also disallowed.

Held: That legal expenses incurred by a taxpayer in maintaining the title to his property or protecting his income when earned, or in connection with the financing of his business are not expenditures directly related to the earning of his income and are not allowed as deductions in computing the gain or profit to be assessed. *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1941) S.C.R. 19 and *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (1944) A.C. 130 followed. *Southern* v.. *Borax Consolidated, Ltd.* (1940) 4 All E.R. 412 not followed.

2. That an expenditure incurred for the purpose of enabling a taxpayer to decide whether a capital asset should be acquired is an outlay or payment on account of capital and, as such, is excluded as a deduction by section 6 (*b*).

APPEAL under the provisions of the Income War Tax Act.

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

J. G. Ahern, K.C. for appellant.

D. L. Desbois, K.C. and *H. H. Stikeman* for respondent.

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

THE PRESIDENT, now (Nov. 12, 1945) delivered the following judgment:

The appellant carries on the business of gold mining. In the income tax assessments levied against it for the years 1929, 1931, 1932, 1933, 1935, 1936 and 1937 certain disbursements and expenses made and incurred by it were disallowed as deductions from its income. The appeals from these assessments were brought because of such disallowances.

The items disallowed consisted of certain legal expenses; expenditures relating to certain mining claims; and two other disbursements, one to one of its directors and the other for the distribution of gold medals.

The disbursements and expenses were disallowed under section 6 (*a*) of the Income War Tax Act, R.S.C. 1927, chap. 97, which reads as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

but consideration must also be given to section 6 (*b*) which prohibits the deduction of:

> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act;

It will be convenient to deal with the disallowed items under the heads mentioned. Of these the most important is that of legal expenses paid by the appellant in 1932, 1933, 1935 and 1936 in connection with actual or threatened litigation. The facts relating to the various claims are complicated but only the salient ones need be given. The appellant's mining property was originally staked by a syndicate of 11 persons, called the Siscoe Mining Syndicate, and the letters patent for it were issued in the name of the syndicate. In 1921 the members of the syndicate executed a deed of sale and conveyance to S. E. Melkman. In 1923 a deed to the appellant was executed by Walter Glod, one of the members of the syndicate, acting on his own behalf and also for the other members under power of attorney from them,

and also by S. E. Melkman. Several attacks on the appellant's title to its property followed. In 1933 action was brought by Janiec Estate Corporation Limited, which had acquired the rights of the heirs of Albert Janiec, one of the members of the syndicate, alleging that the appellant had never acquired his interest in the property and claiming an undivided 1/11th interest in the mining property, an accounting of the profits and 1/11th share therein. The action was contested but was settled. The legal expenses of this litigation came to $45,115. The next three actions centred around Stanley Hadish, another member of the syndicate. In 1934 action was brought by the widow of Michael Shultz alleging that Stanley Hadish had assigned his interest in the syndicate to her husband, that Walter Glod had no authority to act for him and that her husband's interest in the mining property had never passed to the appellant, and claiming that she and her children, as the heirs of Michael Shultz, were the undivided owners of the property. This action was not proceeded with. Subsequently in 1935 action was brought by Michael Shultz Estate Corporation Limited, through the heirs of Michael Shultz, claiming that the assignment from Joseph Hadish to Michael Shultz was valid and that the appellant had never acquired Michael Shultz's interest in the property. Later an amended declaration was filed by Michael Shultz Estate Corporation Limited making a similar claim. The claims were essentially the same as in the Janiec litigation, namely for an undivided 1/11th interest in the property. The Hadish claims were settled with $11,397.22 spent in legal expenses. The claim of Joseph Pluto, another member of the syndicate, was somewhat similar. This related to a certain mining claim which the appellant had acquired from H. J. Burkhardt who had acquired it from Joseph Pluto. In 1933 Pluto brought action claiming that the transfer from himself to Burkhardt and from Burkhardt to the appellant be set aside and that he be declared the owner of the claim and subsidiarily for $1,000,000 damages or 666,666 shares of fully paid up capital stock. The action was abandoned but $5,130 was paid out in legal expenses in contesting it. The Janiec, Hadish and Pluto actions were similar in that in each of them an attack was made on the appellant's

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title to its mining property. If they had succeeded the appellant's capital assets would have been substantially impaired. The other claims against the appellant were connected with certain financing arrangements made by it. When Walter Glod transferred the mining property of the Siscoe Mining Syndicate to the appellant approximately one-third of the shares issued in payment were transferred to the Eastern Trust Company to be used in financing the appellant to production. Several years later actions were brought by Mining Assets Realization Limited representing five members of the syndicate alleging that Walter Glod had no authority to transfer any shares to the Eastern Trust Company and claiming that each of the five members of the syndicate was entitled to 1/11th of the shares issued and that the appellant was indebted to them for the shares they had not received or their value. The first and second actions were withdrawn and the third was settled. The legal expenses incurred in this litigation amounted to $1,811.32. Then there was the litigation by Felix Bijakowski, another member of the syndicate. The shares transferred to the Eastern Trust Company were not sufficient to enable the appellant to finance itself to production and several of the shareholders were called upon to transfer some of their shares to the appellant for additional financing purposes. Bijakowski was one of these. Some ten years later he brought action alleging that he and two others, who had transferred their right to him, had lent 30,000 shares to the appellant and claiming the return of the shares or their value. He succeeded in his claim, which was carried as far as the Supreme Court of Canada. This litigation cost the appellant the sum of $11,360.76. The action brought by W. R. Baillie was related to this financing operation. He alleged that he had been promised a commission of cash and shares for finding a person willing to subscribe $75,000 for capital stock of the appellant and claimed 65,000 shares or $65,000. The appellant successfully contested this claim but incurred $13,728.15 of legal expenses in so doing. Finally, the appellant paid $529 as its contribution towards settling an action brought by the Eastern Trust Company, its transfer agent, against Andrew Bowers,

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to whom it had made an over-issue of 3,000 shares in error. Bowers refused to return these shares and also threatened action similar to that taken by Bijakowski, since he had been one of the persons who had transferred 10,000 shares to enable the appellant to finance.

From this statement of the facts it will be seen that all the legal expenses under review were incurred by the appellant either for the purpose of maintaining its title to its mining property and protecting its right to the profits already earned or in connection with the arrangements made for financing its property into production; they were not related to the appellant's business of gold mining or the earning of its income therefrom.

There is nothing in the Income War Tax Act to warrant the assumption that legal expenses are a special class of disbursements or expenses or that they are generally deductible and that it is only in exceptional cases that their deduction is disallowed. The tests to be applied in determining their deductibility are the same as those applicable to any other disbursements or expenses.

The determination of whether a disbursement or expense is deductible does not depend solely upon whether it is attributable to capital or to revenue. If it is an outlay or payment on account of capital its deduction is prohibited by section 6 (*b*), but it is not sufficient in order to make it deductible merely to show that it is not excluded by section 6 (*b*); if that were the only section to be considered this would be sufficient, but section 6 (*a*) clearly implies that there may be disbursements or expenses, that are not of a capital nature and, therefore, not covered by section 6 (*b*), that are, nevertheless, not deductible for, otherwise, there would be no need for section 6 (*a*) at all. Section 6 (*a*), in my judgment, prohibits the deduction of all disbursements or expenses, even if they are of a revenue nature, that are "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income", and the test to be applied in each case is whether the disbursement or expense falls within the exclusions specified.

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The kind of disbursement or expense that is deductible was defined by the House of Lords in *Strong & Co.* v. *Woodifield* (1) in dealing with the corresponding English section. There Lord Davey said, at page 453:

> It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

This relation between the disbursement or expense and the earning of the profits is of vital importance in construing the meaning of section 6 (*a*). Some caution must be exercised in applying an English decision in the construction of this section because of the differences between it and the section upon which the decision is based. Section 6 (*a*) contains the word "necessarily" which does not appear in the corresponding English section; moreover, section 6 (*a*) uses the expression "for the purpose of earning the income" while the English section contains the expression "for the purposes of the trade". Without now determining what effect, if any, this difference in language may have, it is, I think, safe to say that the English section is more generous in its allowance of deductions than is the Canadian one, and it may, therefore, be said generally that, while English decisions disallowing deductions may be applicable, those allowing them are not necessarily so. The statement of Lord Davey in *Strong & Co. Ltd.* v. *Woodifield* (*supra*) is in my judgment, clearly applicable in the present case, for section 6 (*a*) prohibits the deduction of disbursements or expenses that are not laid out or expended for the purpose of "earning" the income. This excludes, in my opinion, the legal expenses incurred by the appellant for they were laid out for purposes other than the earning of its income.

Lord Davey's statement was approved by the Lord President (Clyde) of the Scottish Court of Session in *Robert Addie & Sons' Collieries, Limited* v. *Commissioners of Inland Revenue* (2), where the following test was laid down:

> What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend

(1) (1906) A.C. 448.

(2) (1924) S.C. 231 at 235.

to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?

This test was approved by the Judicial Committee of the Privy Council in *Tata Hydro-Electric Agencies, Bombay* v. *Income Tax Commissioner, Bombay Presidency and Aden* (1) and was adopted by the Supreme Court of Canada in *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (2). In that case the respondent company had incurred legal expenses in defending its right to supply gas in the City of Hamilton and sought to deduct such expenses from its income. The Supreme Court of Canada, reversing the judgment of this Court, held that it was not entitled to do so. All the judges were agreed that the expenditure did not meet the test laid down by Lord President Clyde in the *Addie* case (*supra*). Duff C.J., for himself and Davis J., held the legal expenses to be not deductible on two grounds; one, that they were not expenses incurred in the process of earning "the income", and the other, that the expenditure was a capital expenditure incurred "once and for all" for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit". Crocket J. considered the test laid down in the *Addie* case (*supra*) and approved in the *Tata* case (*supra*) binding and held that the expenditure did not fall within the test. Kerwin J., speaking for Hudson J. as well, also held that the test referred to was applicable and that the payment of the costs was not an expenditure laid out as part of the process of profit earning. His view was that it was a "payment on account of capital" made "with a view of preserving an asset or advantage for the enduring benefit of a trade".

In my opinion, the legal expenses incurred by the appellant are not distinguishable in principle from those held to be not deductible in the *Dominion Natural Gas Company* case (*supra*). They do not meet the test laid down in the *Addie* case (*supra*). The business of the appellant was that of gold mining and it earned its income from that business. The legal expenses incurred had nothing to do with the business of gold mining or with the earning of income therefrom. In my opinion,

(1) (1937) A.C. 685 at 696. (2) (1941) S.C.R. 19.

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they fell within the exclusions of section 6 (*a*). There is a further reason for holding them not deductible. If the litigation attacking the appellants's title had succeeded the appellant would have suffered a substantial loss of its capital assets. The legal expenses incurred in the actions relating to the financing arrangements of the appellant may properly be regarded as further costs of the additional capital obtained by such arrangements. The legal expenses may, therefore, be considered as capital outlays or payments on account of capital. As such, they are within the prohibitions of section 6 (*b*).

The matter is, I think, settled beyond dispute by the judgment of the Judicial Committee of the Privy Council in *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (1). In that case the appellant company had redeemed certain bonds prior to their maturity and had issued other bonds at reduced rates of interest, with a resulting increase in its net revenues, and sought to deduct the expenses of these financial operations from its income. The Judicial Committee, affirming the judgment of the Supreme Court of Canada, which in turn by a majority had affirmed the judgment of this Court, held that such expenses were not deductible. At page 133, Lord MacMillan said:

> If the expenditure sought to be deducted is not for the purpose of earning the income, and wholly, exclusively and necessarily for that purpose, then it is disallowed as a deduction.

and later, on the same page:

> Expenditure, to be deductible, must be directly related to the earning of income. The earnings of a trader are the product of the trading operations which he conducts. These operations involve outgoings as well as receipts, and the net profit or gain which the trader earns is the balance of his trade receipts over his trade outgoings. It is not the business of either of the appellants to engage in financial operations. The nature of their businesses is sufficiently indicated by their titles. It is to those businesses that they look for their earnings. Of course, like other business people, they must have capital to enable them to conduct their enterprises, but their financial arrangements are quite distinct from the activities by which they earn their income. No doubt the way in which they finance their business will, or may, reflect itself favourably or unfavourably in their annual accounts, but expenditures incurred in relation to the financing of their business is not, in their Lordships' opinion, expenditure incurred in the earning of their income within the statutory meaning.

(1) (1944) A.C. 130.

This statement of the law clearly excludes all the legal expenses incurred by the appellant. They were not directly related to the earning of its income from its gold mining business.

Counsel for the appellant relied strongly upon the decision in *Southern* v. *Borax Consolidated, Ltd.* (1). In that case the respondent company for the purposes of its business had acquired certain property near Los Angeles in California. The City of Los Angeles brought action claiming that the title to this property was invalid. The company defended this action and incurred legal expenses in so doing. It contended that these expenditures were deductible as being wholly and exclusively for the purposes of its trade. The Revenue officers argued that the action concerned the capital assets of the company and was contested to preserve the existence of those assets and were not deductible. The Commissioners for the General Purposes of the Income Tax Acts found on the evidence that the expense was wholly and exclusively laid out by the company for the purposes of its trade and was allowable as a deduction. Lawrence J. held that the decision of the Commissioners was right. In view of the principles laid down in the *Dominion Natural Gas Company* case (*supra*) and the *Montreal Coke Company* case (*supra*), which are binding upon this Court, the decision in *Southern* v. *Borax Consolidated Ltd.* (*supra*), should not, in my opinion, be regarded as an authority to be followed in construing section 6 (*a*) of the Income War Tax Act. 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 expenditures directly related to the earning of his income and are not allowed as deductions in computing the gain or profit to be assessed.

The next expenditures to be considered related to the House mining claims. There were twelve of these to the east of the appellant's mining property, two being contiguous to it. There were indications that ore veins in the appellant's property continued eastward into the House

(1) (1940) 4 All E.R. 412.

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claims. On July 23, 1936, the appellant entered into an agreement whereby, on the payment of $10,000, it acquired the sole and exclusive right and option to purchase the claims and during the life of the option to enter upon and take possession of them and do exploration, development and diamond drilling on them. The agreement provided for annual payments to keep the option to purchase and the right to work on the claims alive, up to a certain period, when the appellant could give notice of its intention to purchase the claims and become bound to pay the further price provided. The mining claims were not to vest in the appellant until such price was paid in full and it was provided that if it did not make the annual payments its rights under the agreement would lapse. The appellant made the initial payment of $10,000 in 1936 and a further payment of the same amount in 1937. In these years it did a considerable amount of exploration and diamond drilling work but on the advice of its manager decided to drop the option. It sought to deduct from its income for the year 1936 the sum of $18,069.82 and for the year 1937 the sum of $26,861.40, each of which sums included an option payment, the balance having been spent on exploration and diamond drilling work. I am quite unable to see by what right the appellant can deduct these expenditures. It is quite clear that they were incurred for the purpose of determining whether the claims should be acquired as capital assets. If the option had been taken up, additional capital assets would have been acquired and the expenditures made would clearly have been capital outlays or payments on account of capital and could not have been deducted. The fact that it was decided to abandon the option and not to acquire the claims cannot change the character of the disbursements. They were losses incurred in connection with a capital venture. Counsel argued that they should be regarded as an operating expense for the right to go in and do diamond drilling. Even on this view of the expenditures the judgment of the Supreme Court of Canada in *Roseberry-Surprise Mining Co.* v. *The King* (1) is strongly against the appellant. The expenditures made were not laid out or expended in the process of earning the income

(1) (1924) S.C.R. 445.

within the test laid down in the *Addie* case (*supra*) and were certain not directly related to the production of the appellant's income from its gold mining business within the meaning of the judgment in the *Montreal Coke Company* case (*supra*). Moreover, I think it is clear that an expenditure incurred for the purpose of enabling a taxpayer to decide whether a capital asset should be acquired is an outlay or payment on account of capital and, as such, is excluded as a deduction by section 6 (*b*). The expenditures of the appellant in connection with the House claims were of that character and were, in my opinion, properly disallowed.

In 1933 the appellant paid Mr. T. H. Higginson, one of its directors, the sum of $2,500 pursuant to a resolution passed by the directors by which "it was unanimously resolved the sum of $2,500 be granted to Mr. T. H. Higginson for past services rendered during the early days of the company, and for his untiring efforts during recent years in connection with the company's fire insurance". If this correctly states the basis for the payment, it is obviously not deductible as an expense for there was no obligation to make it—*vide In* re *Salary of Lieutenant-Governors* (1). In reality the expenditure, although put on the basis of payment for past services, was made in repayment for stock loaned to the appellant in connection with its financing under circumstances similar to those in the Bijakowski litigation. That being so, the amount paid to Mr. Higginson was clearly not deductible for the same reasons as apply in connection with the legal expenses.

Finally, in 1931 the appellant distributed gold medals, at a cost of $1,690.85, to its past and present directors and other persons, as a token of appreciation, and sought to deduct this as an operating expense. It is obvious, in my judgment, that this disbursement was not within the tests laid down in the cases referred to. It was not "necessarily" laid out or expended and it had nothing to do with the earning of the appellant's income. It was, in my opinion, properly disallowed.

All the disbursements and expenses in question having been properly disallowed, it follows that these appeals must be dismissed with costs.

Judgment accordingly.

((1) (1931) Ex. C.R. 232.

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CROWN—*Petition of Right—Injury to minor child through negligence of army officers in leaving live explosives in a field after manoeuvres—Presumption of negligence under Article 1054 C.C. arises only when the damage has been caused by a dangerous article itself and not because of the conduct of the person injured—Doctrine of contributory negligence applicable when cause of action arises in Quebec Province—Division of negligence—Liability of Crown.*—During the evening of October 10, 1942, a detachment of officers and non-commissioned officers of a Canadian regiment, under the authority of the Minister of National Defence, carried on military exercises partly on the course of the old Kent Golf Club and partly on the neighbouring farm of one Giroux. During these manoeuvres some seventy-five thunderflashes were used. On October 31, in the afternoon one live thunderflash was found on the Giroux property by two boys aged about ten years each who had been looking for golf balls. The boys opened the thunderflash, took out some of its contents and burnt them. They then came home for supper, with the understanding that they would meet after supper on one of the streets of the town. As a matter of fact these two boys with several others, among whom was Gaston Laperriere, gathered on the street in the evening. After taking a small quantity of the powder left in the thunderflash and burning it, the two boys who had found the explosive and Gaston decided to set fire to what remained of the thunderflash. Gaston with one of the boys, namely, Marcel Dubeau, thinking that the explosive had not been properly lighted went to pick it up; at this moment the explosion occurred with the result that Gaston had the thumb and three first fingers of his right hand torn away. Shortly after the accident he had to have his right hand amputated. The Suppliant in his quality of tutor to his minor son Gaston by his Petition of Right claims from His Majesty the King damages for the injuries suffered by his son. *Held:* That the injury to Gaston Laperriere resulted from the negligence of the officer in charge of the manœuvres in leaving in a field used for these manœuvres a live explosion and in his failure to look for unexploded thunderflashes in the field after the manœuvres were finished and from the negligence on the part of the quartermaster in not exacting from the officers to whom he had given thunderflashes to account for them and surrender those that had not exploded. 2. That there is no presumption of negligence in the present case, even if Article 1054 C.C. applied, because the presumption of responsibility for the damage caused by a thing under one's care only arises when the damage has been caused by the thing itself, not when it is ascribable to the conduct of the person by whom it is manipulated. 3. That the cause of action having arisen in the Province of Quebec the doctrine of contributory negligence is applicable; that a child of ten years of age, of normal intelligence and development as the injured boy was, should have been more prudent and should have foreseen to a certain degree the probable consequence of his action and he is accordingly liable for contributory negligence, estimated in the present case at one-third. ALFRED LAPERRIERE v. HIS MAJESTY THE KING..... *53*

2.——*Workmen's Compensation Act, R.S.B.C. 1936, C. 312—Exchequer Court Act, R.S.C. 1927, C. 34, S. 19 (c)—Liability of Crown to Workmen's Compensation Board for damages due to death of workman caused by negligence of a servant of the Crown—Subrogation—Right of action not barred by assignment of claim against Crown—Acceptance of compensation not a bar to recovery—Damages—Disposition of amounts received.*—By virtue of the Workmen's Compensation Act, R.S.B C. 1936, C. 312, when a workman is injured in an accident under such circumstances as entitle him or his dependents to an action against some person other than his employer, such workman or his dependents, if entitled to compensate under the Act, may claim such compensation or bring such action, and if compensation is claimed the Workmen's Compensation Board shall be subrogated to the rights of the workman or dependents against such other person for the whole or any outstanding part of the claim of the workman or dependents against such other person. The Suppliant, Bessie May Snell, now seeks to recover from Respondent compensation on behalf of herself and her infant son for the death of her husband as the result of a collision between a motor truck driven by him and one driven by a member of the armed forces of the Crown whose negligence was admitted by the Respondent. Suppliant Snell had applied for and been granted compensation by the Workmen's Compensation Board of British Columbia, which Board had obtained from her an assignment of all her claims against the Respondent in respect to the death of her husband. No notice of the assignment was given to Respondent and the Board now brings its Petition of Right against the Respondent in the name of suppliant Snell by virtue of its right of subrogation and also by virtue of the assignment. *Held:* That the Workmen's Compensation Act, R.S.B.C. 1936, C. 312, does not affect the liability of the Crown as created by the Exchequer Court Act, R.S.C. 1927, C. 34, S. 19 *(c)* and Suppliant's action is not barred by acceptance of compensation from the Board.

EXPROPRIATION—*Owner of expropriated property to be compensated by receiving its money equivalent in value—Fair market value to be based upon most advantageous use for which property is adapted and might in reason be applied, but only present value of such advantages to be taken into account—Evidence of assessment value admissible as check against excessive valuations—Evidence of sales of comparable property made near the time of expropriation useful—Evidence of awards in other expropriation proceedings or settlements in such proceedings made to avoid litigation not admissible—Valuation of subdivision lands on lot by lot basis subject to substantial reduction.*—Plaintiff expropriated certain property in the City of Halifax, Nova Scotia, for a wartime housing project. The land had been subdivided into lots for building purposes. The action is to determine the value of the expropriated property. *Held:* That the former owner of expropriated property is to be compensated for the property taken from him by receiving its money equivalent in value; he had no right to make any profit out of the expropriation; neither is he obliged to suffer any loss of value; the form of his property is changed by the expropriation, but its total money value should remain the same. He loses his land and all his rights in it, but, in its place, he receives its money value, which is its fair market value. *The King* v. *W. D. Morris Realty Limited* (1943) Ex. C.R. 141, followed. 2. That the market value of the expropriated property should be based on the most advantageous use for which it is adapted and to which it might in reason be applied, present or prospective, but it is only the present value, as at the date of the expropriation of such advantages that may be taken into account. *The King* v. *Elgin Realty Company Limited* (1943) S.C.R. 49 at 52, followed. 3. That while evidence of

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assessment value is admissible its usefulness is often confined to the check which it affords against excessive valuations. 4. That evidence of sales of property near the expropriated property affords an excellent basis for arriving at its fair market value, provided such sales were of property comparable with the expropriated property and were made at a time near the date of the expropriation. 5. That evidence cannot be given in expropriation proceedings of awards made in other expropriation proceedings or of settlements in such proceedings made with a view to avoid litigation. 6. That in determining the value of expropriated property subdivided into lots for building purposes a valuation made on a lot by lot basis is subject to substantial reduction; account must be taken of such items as interest on the investment involved, taxes paid, expenditures for improvements, cost of installing water and sewer services and making street improvements, selling costs such as advertising and commissions and a proportion of the owner's overhead, and regard must be had to the probable length of time it would take to sell the property in lots. HIS MAJESTY THE KING v. EASTERN TRUST COMPANY..... *115*

2.——*Owner compensated for loss of value of property by receiving its equivalent value in money—Such equivalent to be estimated on value to owner—Basis of valuation is its fair market value at date of expropriation—Fair market value to be based on all potentialities including special good purpose to which land can be put—Owner not entitled to loss of profit of business carried on—Evidence as to income derived is not material except in so far as it throws light on the fair market value.*— Plaintiff expropriated a service station in the City of Saint John, New Brunswick. The action is to determine the value of the expropriated property and the claim of the defendant for loss of profits caused by the closing of the filling station. *Held:* The owner of expropriated property is compensated for the loss of the value of the property by receiving its equivalent value in money; the value of the property is the value to the owner. The value must be measured by its fair market value at date of expropriation, but all potentialities of land must be taken into account in arriving at the fair market value. *The King* v. *W. D. Morris Realty Ltd., (1943) Ex. C.R. 140, in re Lucas and Chesterfield Gas and Water Board (1909) 1 K.B. 16 followed.* 2. That the owner is not entitled to a claim for loss of profits. *The King* v. *Richards (14 Ex. C.R. 365),* and *Dressaut* v. *The King ([1929] Ex. C.R. 8)* followed. HIS MAJESTY THE KING v. IRVING OIL COMPANY LIMITED *228*

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REVENUE—*Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 5 (1) (a)—Minister's exercise of discretion—Logging "operators"—Logging "operations"—Exception from special allowance for exhaustion of timber limits—Appeal dismissed.*—Appellant is a logging operator and sells on the open market the logs produced by it. For some years part of such logs were sold by it to the B.C. Pulp and Paper Company Limited for pulp-wood purposes. On February 19, 1942, the Minister of National Revenue by means of a letter addressed to the B.C. Loggers Association decided to make a special allowance for the exhaustion of timber limits for the 1941 taxation year. Such special allowance was not to be granted in respect of pulp-wood and fuel wood operations. Appellant claimed an allowance for all logs produced by it regardless of the ultimate use of such logs. The Minister disallowed part of this claim on the ground that Appellant was not entitled to any allowance on logs sold for conversion into pulp-wood. An appeal was taken to this Court. *Held:* That the discretion vested in the Minister by the Income War Tax Act, R.S.C. 1927, c. 97, s. 5 (1) *(a)* was exercised by him in the manner indicated in his letter of February 19, 1942, and such discretion was properly exercised. 2. That a logger engaged in general logging operations is not entitled to the special allowance for exhaustion of timber limits for that portion of his output sold to a pulp-mill. BURNS AND JACKSON LOGGING COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE..... *246*

2.——*Petition of right—Income Tax—Income War Tax Act, R.S.C. 1927, Chap. 97, secs. 5 (a), 6 (b), 33, 53, 54, 58, 69—Nature and purpose of depreciation allowance—No right to depreciation allowance where no claim made—Beneficiaries of estate entitled to income not entitled to depreciation allowances—Taxpayer's return may be basis of jurisdiction to assess—Right to refund of overpayment of tax if disclosed by examination of returns—Mistake in making returns—Taxpayer barred from relief if appeal not taken from assessment within time prescribed.*—Suppliant was executor of his father's estate. After the death of his mother he became entitled to one-half the estate in his own right. The corpus of the other half was to be held for the issue of the suppliant but he was entitled to the income from it subject to an annuity to his brother. Suppliant filed two returns each year, a T-3 return as executor of the estate and a T-1 return as an individual taxpayer. In the T-3 return he gave particulars of the income of the estate, the interest paid on borrowed money, the taxes paid on properties, the expenses for maintenance and repairs and the amounts claimed for depreciation and also showed the amounts of income accruing to beneficiaries. In his T-1 return he included as his income the same amount as that shown on the T-3 return as accruing to him as beneficiary. Suppliant received assessment notices in due course and filed no appeal from any of them. Suppliant claims that he made overpayments of income tax for each of the years 1917-1934 by mistake in failing to deduct from income from the estate amounts allowed to it for depreciation, that such mistake was known to the taxing authorities and that he had a statutory right to refund of the overpayments made. *Held:* (1) that where no claim for depreciation was made by a taxpayer there was no duty on the part of the Minister under section 5 *(a)* to make any allowance of depreciation to him and the taxpayer had no statutory right to any allowance. (2) That the beneficiary of an estate, in so far as he is entitled only to income from it, is not entitled to deduct any amount of depreciation in respect of such income, since it is not his assets but those of the estate that have been used in the production of such income. Any amount that may be allowed for depreciation being an item of capital enures to the benefit of the estate and those entitled to its corpus. (3) That an examination based upon the taxpayer's own return of his taxable income cannot be said to be an assessment made without jurisdiction to assess. (4) That the term "such examination" in section 53 (2) means the examination not only of the taxpayer's T-1 return but also of any other return that would normally be looked at in the course of the examination and that in the present case it would include the T-3 return made by the suppliant as executor of the estate. (5) That section 53 (2) was meant to cover cases where it is clear from the examination of the returns that there has been an overpayment of income tax by the taxpayer and where the exact amount of such overpayment is clearly ascertainable, as, for example, where the overpayment was due to an error in computation of rates or calculation of amounts or failure to make or subtract specified deductions. It does not cover cases involving an adjudication as to rights. (6) That the suppliant having failed to take advantage of the provisions of the Act by way of appeal from the assessment is now barred from relief by section 69. FREDERIC J. A. DAVIDSON v. HIS MAJESTY THE KING..... *160*

3.——*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, sec. 5 (1) (a)—"Derive"—"Income derived from mining"—One who receives dividends from a mining company derives such dividends from mining and in*

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9.——*Income Tax—Income War Tax Act, R.S.C. 1927, chap. 97, secs. 6 (a), 6 (b)—Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income—Legal expenses incurred in defending attacks on title to property or claims connected with financing arrangements not deductible—Expenditures made for purpose of determining whether assets should be acquired not deductible.*—The appellant was engaged in the business of gold mining. Appeals from income tax assessments for the years 1929, 1931, 1932, 1933, 1935, 1936, 1937 were brought because certain disbursements and expenses made and incurred by it were disallowed. Some of these consisted of legal expenses incurred by the appellant in defending actions in which attacks were made on its title to its mining property or in which claims were made arising out of transactions connected with its early financing arrangements. Other expenditures that were disallowed related to certain mining claims. The appellant had entered into an agreement under which it had an option to buy such claims and the right to do exploration, development and diamond drilling on them. After making a number of payments under the agreement and doing considerable diamond drilling the appellant decided not to take up the option. Two other disbursements, one to one of its directors and the other in connection with the distribution of gold medals, were also disallowed. *Held:* 1. That legal expenses incurred by a taxpayer in maintaining the title to his property or protecting his income when earned, or in connection with the financing of his business are not expenditures directly related to the earning of his income and are not allowed as deductions in computing the gain or profit to be assessed. *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* ((1941) S.C.R. 19) and *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* ((1944) A.C. 130) followed, *Southern* v. *Borax Consolidated, Ltd.* ((1940) 4 All E.R. 412) not followed. 2. That an expenditure incurred for the purpose of enabling a taxpayer to decide whether a capital asset should be acquired is an outlay or payment on account of capital and, as such, is excluded as a deduction by section 6 *(b)*. SISCOE GOLD MINES LIMITED v. MINISTER OF NATIONAL REVENUE.... *257*

10.——*Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 9 (a), 9 (b), 47—Meaning of terms "residing", "ordinarily resident", "sojourns", "during"—Person must reside somewhere—Constant personal presence not essential to residence—Person can have more than one residence—Whether a person was residing or ordinarily resident in Canada is a question of fact—Where word may have two meanings Court should reject that which would render Act nugatory or lead to absurd results—Appeal from assessment dismissed.*—The appellant, a British subject, born at Saint John, N.B., lived there and carried on business until 1921 when he moved to the nearby village of Rothesay. There he had a dispute over personal property tax and declared his intention of giving up residence in Canada. In 1923 he went to Bermuda, rented a house, made an affidavit of intention to establish his home and domicile there and obtained a passport. Thereafter he declared himself a resident of Bermuda, although he never made use of the house, was there for only a few days in 1926, 1928 and 1933 and never owned any property or had any assets or bank account there. Between 1923 and 1930 he spent most of his time at Pinehurst, North Carolina in rented houses, but in 1930 he built a $90,000 house there which was his chief place of abode in the United States. He kept a man looking after it all the year round. Between 1923 and 1932 he spent only a few days in Canada in any one year, and in some years was not there at all. In 1932, 1933 and 1934 he rented a summer place at St. Andrews, N.B., not far from Saint John, because his wife wanted to come there, having relatives and friends at Saint John. In 1934 he built a $90,000 house at East Riverside, near Rothesay, adjacent to the Golf Course, and bought about $16,000 worth of furniture. He built the house so that his wife could be nearer her relatives and friends than St. Andrews. The house was a large one of 15 to 20 rooms. Since 1934 and up to 1942 he spent the summer months there with his wife and family and staff of servants. He thought that if he spent less than 183 days in any year in Canada he would not be liable for income tax and his stay never exceeded that number of days. After building these two houses his routine of life was established. His main activity in life was playing golf. After it was too cold to play golf at East Riverside he went south to his home at Pinehurst and then to Florida but when it got too hot to play there he went back north to Pinehurst and then back to East Riverside. As he moved he took his wife and family, his motor cars and his staff of servants with him. He paid the annual taxes and annual maintenance of the East Riverside house and kept a housekeeper and his wife there each winter, the servants' quarters being open all the year round. In 1940 he entered Canada as a tourist from Bermuda, although he came from Boston, and spent 159 days at East Riverside in the usual way. In 1941 he was requested to file an income tax return for 1940, but on his refusal to do so on the ground that his domicile was in Bermuda and that he was visiting Canada as a tourist, an assessment was levied against him on an assumed income of $50,000. He appealed to the Minister who confirmed the assessment on the ground that the facts disclosed that he was resident or ordinarily resident during the year 1940. An appeal to the Exchequer Court was then lodged. *Held:* That

TRADE MARK—*Word mark "Sea-lect"—The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, secs. 2 (c), 2 (m), 2 (o), 26 (1) (c), 26 (1) (d), 29, 52—First registration prevails over first user—Distinctiveness—"Adapted to distinguish"—Descriptive words may by user acquire secondary meaning and become adapted to distinguish—Laudatory epithets cannot be or become word marks—Not permissible to find distinctiveness in a word mark from the appeal which its form makes to the eye—Corruption or misspelling of a word cannot change its character.* —In 1940 petitioner commenced using the word "Sea-lect" on canned fish and lobster and sold such goods under such mark widely and extensively throughout Canada, but did not apply for registration of it. In 1941 respondent with no knowledge of the petitioner's use of the word used it on fresh and frozen fish and obtained registration of it as a word mark for fish and fish products, either canned or fresh or frozen. On the respondent's refusal to cancel the registration the petitioner brought these proceedings for an order to expunge the respondent's registration and to obtain a declaration that he was himself entitled to registration for canned fish and lobster. *Held:* That the petitioner cannot succeed in attacking the registration on the ground that the respondent was not the first user of it. *Canada Crayon Company Limited* v. *Peacock Products Ltd.* (1936) Ex. C.R. 178) followed. 2. That distinctiveness is an essential requirement of a trade mark. 3. That the word "Select" as applied to goods is a laudatory epithet that is incapable of distinctiveness; it cannot become adapted to distinguish the goods of one person from those of another; and it should not be registered as a word mark. 4. That it is not