1969

CANADA

LAW REPORTS

RAPPORTS JUDICIAIRES

DU CANADA

Exchequer Court of Canada

Cour de l'Échiquier du Canada

PAUL A. RAYMOND, C.R.

M. I. PIERCE, B.A., LL.B.

Official Law Editors

Arrêtistes

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91305—1

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE WILBUR ROY JACKETT
(*Appointed May 4, 1964*)

PUISNE JUDGES:

THE HONOURABLE JACQUES DUMOULIN
(*Appointed December 1, 1955*)

THE HONOURABLE ARTHUR LOUIS THURLOW
(*Appointed August 29, 1956*)

THE HONOURABLE CAMILIEN NOËL
(*Appointed March 12, 1962*)

THE HONOURABLE ANGUS ALEXANDER CATTANACH
(*Appointed March 27, 1962*)

THE HONOURABLE HUGH FRANCIS GIBSON
(*Appointed May 4, 1964*)

THE HONOURABLE ALLISON ARTHUR MARIOTTI WALSH
(*Appointed July 1, 1964*)

THE HONOURABLE RODERICK KERR
(*Appointed November 1, 1967*)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.

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

The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.

The Honourable GEORGE ERIC TRITSCHLER, Manitoba Admiralty District—appointed October 19, 1962

GORDON R. HOLMES, Q.C., Prince Edward Island Admiralty District—appointed May 24, 1963.

The Honourable HAROLD GEORGE PUDDESTER, Newfoundland Admiralty District—appointed June 4, 1963.

The Honourable JAMES DOUGLAS HIGGINS, Newfoundland Admiralty District—appointed May 28, 1964.

The Honourable LOUIS MCCOSKERY RITCHIE, New Brunswick Admiralty District—appointed February 15, 1968. (Retired Sept. 12, 1969.)

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The Honourable CHARLES WILLIAM TYSOE, British Columbia Admiralty District—appointed January 31, 1963.

The Honourable YVES BERNIER, Quebec Admiralty District—appointed November 17, 1965.

The Honourable ANDRÉ DEMERS, Quebec Admiralty District—appointed February 14, 1967.

The Honourable GORDON S. COWAN, Nova Scotia Admiralty District—appointed April 6, 1967.

The Honourable ARTHUR MIFFLIN, Newfoundland Admiralty District—appointed March 7, 1968.

SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

ATTORNEY-GENERAL OF CANADA:

THE HONOURABLE JOHN TURNER, Q.C.

SOLICITOR GENERAL OF CANADA:

THE HONOURABLE G. J. MCILRAITH

JUGES

DE LA

COUR DE L'ÉCHIQUIER DU CANADA

en fonctions au cours de la période de publication de ces rapports:

PRÉSIDENT:

L'HONORABLE WILBUR ROY JACKETT

(*nommé le 4 mai 1964*)

JUGES PUÎNÉS

L'HONORABLE JACQUES DUMOULIN

(*nommé le 1er décembre 1955*)

L'HONORABLE ARTHUR LOUIS THURLOW

(*nommé le 29 août 1956*)

L'HONORABLE CAMILIEN NOËL

(*nommé le 12 mars 1962*)

L'HONORABLE ANGUS ALEXANDER CATTANACH

(*nommé le 27 mars 1962*)

L'HONORABLE HUGH FRANCIS GIBSON

(*nommé le 4 mai 1964*)

L'HONORABLE ALLISON ARTHUR MARIOTTI WALSH

(*nommé le 1er juillet 1964*)

L'HONORABLE RODERICK KERR

(*nommé le 1er novembre 1967*)

JUGES DE DISTRICT EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

L'honorable VINCENT JOSEPH POTTIER, district d'admirauté de la Nouvelle-Écosse—nommé le 8 février 1950.

L'honorable ROBERT STAFFORD FURLONG, district d'amirauté de Terre-Neuve—nommé le 8 octobre 1959.

L'honorable DALTON COURTWRIGHT WELLS, district d'amirauté d'Ontario—nommé le 28 janvier 1960.

L'honorable GEORGE ERIC TRITSCHLER, district d'amirauté du Manitoba—nommé le 19 octobre 1962.

GORDON R. HOLMES, C.R., district d'amirauté de l'Île du Prince-Édouard—nommé le 24 mai 1963.

L'honorable HAROLD GEORGE PUDDESTER, district d'amirauté de Terre-Neuve—nommé le 4 juin 1963.

L'honorable JAMES DOUGLAS HIGGINS, district d'amirauté de Terre-Neuve—nommé le 28 mai 1964.

L'honorable LOUIS MCCOSKERY RITCHIE, district d'amirauté du Nouveau Brunswick—nommé le 15 février 1968. (en retraite le 12 septembre 1969.)

JUGES ADJOINTS EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

Son honneur REGINALD D. KEIRSTEAD, district d'amirauté du Nouveau-Brunswick—nommé le 28 février 1957.

L'honorable CHARLES WILLIAM TYSOE, district d'amirauté de la Colombie-Britannique—nommé le 31 janvier 1963.

L'honorable YVES BERNIER, district d'amirauté de Québec—nommé le 17 novembre 1965.

L'honorable ANDRÉ DEMERS, district d'amirauté de Québec—nommé le 14 février 1967.

L'honorable GORDON S. COWAN, district d'amirauté de la Nouvelle-Écosse—nommé le 6 avril 1967.

L'honorable ARTHUR MIFFLIN, district d'amirauté de Terre-Neuve—nommé le 7 mars 1968.

JUGE SURROGÉ EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

ALFRED S. MARRIOTT, C.R., district d'amirauté d'Ontario—nommé le 21 février 1957.

PROCUREUR GÉNÉRAL DU CANADA:

L'HONORABLE JOHN TURNER, C.R.

SOLLICITEUR GÉNÉRAL DU CANADA:

L'HONORABLE G. J. MCILRAITH

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EN SA JURIDICTION DE COUR DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

91302—1

Winnipeg 1968 Dec. 16-20 — Ottawa 1969 Feb. 18

FIRST TORLAND INVESTMENTS LTD. *et al*[1] ..... APPELLANTS;

AND

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

Income tax—Trading profit or capital gain—Investment company—Sale of farms leased to tenants—Whether business or realization of investment.

During the depression years after 1930 a mortgage loan company acquired by foreclosure and quit claim a large number of farms which were then leased back to their former owners on a crop share basis under the supervision of farm managers and on the understanding that the tenants would have the first opportunity to purchase their farms. In 1952 the loan company, having obtained wider investment powers and with a view to qualifying as an investment company under the *Income Tax Act,* sold 156 farms in Manitoba to the three appellants, all wholly-owned subsidiaries incorporated to carry on an investment business, the sale price being the book value of the farms on the vendor's books, which was much less than their market value. Appellants continued to carry on in the same manner as their parent, employing farm managers who were remunerated by commission on rents collected and on the sale price of farms sold. During the years 1953 to 1963 appellants derived rents from the farms and in each year sold a number of farms to the tenants. In the four years 1960 to 1963 appellants sold 75 farms compared with 21½ sold in the five preceding years and 31 in the two years before then Appellants were assessed to income tax on their profits from sales in the four years 1960 to 1963. The court found on the evidence that appellants' policy from their inception was to dispose of farms at the maximum gain.

Held, affirming the assessments, the inference to be derived from the evidence was that the gains made by appellants on the sales of the farms were not merely enhanced values from the realization of investments but were gains made in dealing with such investments as a business.

Californian Copper Syndicate (Limited and Reduced) v. Harris (1904) 5 T.C. 159; *Anderson Logging Co. v. The King* [1925] S.C.R. 45; *Noak v. M.N.R.* [1953] 2 S.C.R. 136; *Thew v. The South West Africa Co* 9 T C 141; *Scottish Investment Trust Co. v. Forbes* 3 T C. 23, referred to

INCOME TAX APPEAL.

S. E. Edwards, Q.C. and *R. J. Fraser* for appellants.

D. G. H. Bowman and *R. D. Janowsky* for respondent.

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[1] The other appellants are Second Torland Investments Ltd. and Third Torland Investments Ltd.

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CATTANACH J.:—The appeals of the three appellants[2] are from assessments to income tax for their respective 1960, 1961, 1962 and 1963 taxation years and all appeals were heard together on common evidence because the identical considerations and principles are applicable in each instance.

There is no dispute about the accuracy of the amounts included in the assessments but rather the dispute lies in whether those amounts are taxable as income of the appellants. Neither is there any dispute about the basic facts involved in these appeals. The controversy between the parties is in the proper deduction to be drawn from those facts.

In assessing the appellants on the profits from the sale of a number of farms by each of them in the taxation years in question, the Minister did so on the assumption that certain farm properties acquired by them were so acquired with a view to dealing in, turning to account or otherwise realizing profits and accordingly the profits so realized were income from a business or adventure in the nature of trade within the meaning of sections 3 and 4 and section 139(1)(*e*) of the *Income Tax Act* which reads as follows:

> 3 The income of a taxpayer for a taxation year for purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
>
> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employment.
>
> 139. (1) In this Act,
>
> . . .
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;
>
> . . .

On behalf of the appellants it is contended that the disposition of the farm lands was the realization of an investment and that the attendant profits were received on capital account and accordingly were not income within the meaning of the above quoted section of the *Income Tax Act*.

[2] See footnote [1].

The distinction between profits that are subject to income tax and those that are not, together with the test to be applied in determining on which side of the dividing line they fall, was clearly stated in the classical case of *Californian Copper Syndicate (Limited and Reduced) v. Harris*[3] which was, of course, cited to me and will bear repeating. Lord Justice Clerk said at page 165:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

It is well settled that each case must be considered according to its facts. Accordingly the facts in the present appeals are set forth.

The three appellants are private companies incorporated by Federal letters patent dated March 13, 1952. The particulars of the letters patent incorporating the three appellants are identical in all respects excepting the corporate names.

The purposes and objects of all three appellants read as follows:

> to invest the capital of the Company, accretions to capital and the income of the Company or such part thereof as the directors of the Company may from time to time determine in real estate, mortgages, bonds, debentures, stock, shares and other securities and commodities and from time to time to change said investments by sale, exchange or otherwise, and to invest the proceeds of any such sale or sales in other investments of a like nature.

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[3] (1904) 5 T.C 159.

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Cattanach J.

The head office of each appellant is in Winnipeg, Manitoba and the capital stock of each consists of 50,000 shares without nominal or par value. Each of the appellants is a wholly owned subsidiary of Toronto and London Investment Company Limited formerly known as The Trust and Loan Company of Canada.

The Trust and Loan Company of Canada was incorporated by an Act of the Province of Canada, being chapter 63, Statutes of Canada 1843 as amended by subsequent acts of the Parliament of Canada and carried on the business of lending money on the security of mortgages on farm lands in Saskatchewan and Manitoba. In the course of its carrying on this business, this company acquired by way of quit claim or foreclosure numerous farm properties upon the security of which money had been lent. This was particularly so during the depression years of 1930 and those immediately following. If my recollection of the evidence is correct an excess of 800 farm properties were so acquired.

As a loan company, The Trust and Loan Company of Canada was subject to the *Loan Companies Act,* now chapter 170, R.S.C. 1952 and the predecessors of that statute, all of which contained a section in language similar to section 76 of the present Act which permits a company to hold real estate that having been mortgaged or hypothecated to it is acquired by it for the protection of its investments with authority to sell, mortgage, lease or otherwise dispose thereof. However, by the same section no parcel of land so acquired is to be held for a period longer than seven years after its acquisition, but shall be sold so that the company no longer retains any interest therein unless by way of security. The period of seven years might be extended by order-in-council to a period not exceeding twelve years in the total. Her Majesty, on six month's notice, may claim forfeiture of any land held beyond the prescribed period.

The Trust and Loan Company of Canada was financed by English capital, its head office was in London, England and its affairs were conducted by a board of directors resident in England.

In 1951 the directors gave consideration to an offer received from the Canada Permanent Mortgage Corporation to purchase the Canadian assets of the company at a price of $7,250,000.

Even prior to the receipt of this offer from the Canada Permanent Mortgage Corporation the directors had been giving consideration to the future of the company. The company's business of lending on mortgages was meeting increasing competition from competitors in Canada who had the advantage of ample facilities for cheap borrowing not available to companies controlled from England as well as from life insurance companies entering this field with income tax advantages over companies such as The Trust and Loan Corporation of Canada. Further, since the *Loan Companies Act* did not permit the permanent retention of real estate holdings by a mortgage company, as the lands which came into the company's possession around 1930 were sold off the relative disadvantage of the company would be compounded.

The directors were therefore considering (1) the continuation of the business on the same basis as it was then conducted which was not considered advantageous, (2) removing the control to Canada which would be beneficial for administrative reasons but would still be subject to the disadvantages outlined immediately above, (3) liquidation, which in addition to its cost would deprive the stockholders of their participation in Canadian business, or (4) to remove control to Canada coupled with the establishment of the business on a new basis as an "investment company" by the sale of its assets and the "investment" of the proceeds on the basis of a wider field in selected Canadian securities.

The offer from Canada Permanent Mortgage Corporation made possible the implementation of an arrangement along the lines of the fourth possibility being considered by the directors.

The directors considered that such arrangement would enable their stockholders to retain their interest in Canada, but it would be spread over a broader field than hitherto. The directors also concluded that the head office of the company should be removed to Canada and that the board of directors should be reconstituted so that the majority of the directors would be resident in Canada.

Accordingly the offer of Canada Permanent Mortgage Corporation was accepted and an agreement dated May 9, 1951, was entered into by the parties whereby The

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Cattanach J.

Trust and Loan Company of Canada agreed to sell, *inter alia,* all freehold and leasehold properties belonging to it.

To implement the arrangement and decisions of its directors The Trust and Loan Company of Canada petitioned the Parliament of Canada to enact a private Act which was granted, being chapter 74, Statutes of Canada 1951 entitled an Act respecting the Trust and Loan Company of Canada.

By section 4 of that Act the corporate name was changed to Toronto and London Investment Company Limited. By section 6 the head office of the company was fixed at the city of Toronto subject to change as therein provided, and by section 7 the board of directors was fixed at five also subject to change of that number as therein provided.

The reorganization of the capital of the company was set out in Schedule I to the Act and the agreement dated May 9, 1951, between the company and Canada Permanent Mortgage Corporation was annexed as Schedule II to the Act which was confirmed and declared to be operative and effective.

The objects and powers of the company were set out in section 5 of the Act which reads as follows:

> 5. The objects and powers of the company shall be to carry on the business of an investment company and in connection therewith the company may:
>
> (*a*) acquire and hold shares, stocks, debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities issued or guaranteed by any individual, partnership, association, company or corporation, public or private, constituted or carrying on business in Canada or elsewhere and debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities issued or guaranteed by any government, sovereign ruler, commissioner, public body or authority, supreme, municipal, local or otherwise, whether in Canada or elsewhere;
>
> (*b*) underwrite, subscribe for, purchase, invest in or otherwise acquire and hold any such shares, stocks, debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities and hold the same absolutely as owner or by way of collateral security or otherwise and sell, exchange, pledge or otherwise dispose of and deal in any such shares, stocks, debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities and while the owner or holder thereof exercise all rights, powers and privileges of ownership including all voting rights, if any, with respect thereto;

(*c*) purchase or otherwise acquire and hold and deal in real and personal property and rights and in particular lands, buildings, hereditaments, business or industrial concerns and undertakings, mortgages, charges, contracts, concessions, franchises, annuities, patents, licences, securities, policies, book debts and any interest in real or personal property, any claims against such property or against any person or company and any privileges and choses in action of all kinds;

(*d*) do all or any of the above things as principals, agents, attorneys, contractors or otherwise and either alone or in conjunction with others;

(*e*) take part in the management, supervision or control of the business or operations of any company or undertaking in which the Company holds any shares, bonds, debentures or other securities and for that purpose appoint and remunerate any directors, accountants or other experts or agents;

(*f*) employ any individual, firm or corporation to manage in whole or in part the affairs of the Company and employ experts to investigate and to examine into the conditions, prospects, value, character and circumstances of any business concerns and undertakings and generally of any assets, property or rights.

The contemplated future policy of the company was that the funds available might be invested, broadly, 25% in land, and 75% in debentures, preferred and common shares, the latter percentage being made up by 20% in public utility companies, 20% in oil and natural gas companies, 10% in textile and engineering companies and the balance of 25% in companies in other fields including mining. However it was recognized that such a broad policy would be subject to revision from time to time, as circumstances varied but such was the broad policy as envisaged.

In order to implement the policy of investing 25% of its funds in land, the agreement dated May 9, 1951, contained a provision whereby the vendor, The Trust and Loan Company of Canada, now Toronto and London Investment Company Limited (which for convenience will hereafter be referred to as T. & L. Investment Co.) could repurchase the farm lands situate in the Province of Manitoba for the sum of $1,431,864. (See paragraph 14 of Schedule II to S. of C. 1951 c. 74.) The sum of $1,431,864 was the price at which the farm lands had been sold to Canada Permanent Mortgage Corporation and was the value at which they were carried in the books of The Trust and Loan Company of Canada. The book value was also the cost of acquisition to the vendor under its original name.

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When considering the sale of the Canadian assets to Canada Permanent Mortgage Corporation and the future policy of T. & L. Investment Co. to acquire farm lands, there was a divergence of opinion among the directors as to the advisability of retaining the Manitoba farm lands. The option to repurchase the farm lands was included in the agreement dated May 9, 1951, to facilitate the acquisition of such lands in the event that the directors should decide it was expedient to do so.

Canada Permanent Mortgage Corporation was quite agreeable to the inclusion of such an option in the agreement because it was contemplated that Canada Permanent Trust Company, its subsidiary, would undertake the management of those farm lands on behalf of T. & L. Investment Co. at a commission of 20% on the revenue received from the farms and a commission of 5% on any farm lands sold. The staff of The Trust and Loan Company of Canada which had been managing the farm lands in possession of that company were to be engaged as employees of Canada Permanent Trust Company in which capacity they would continue to perform the identical functions that they had performed previously for The Trust and Loan Company of Canada.

On or about August 1, 1951, The Trust and Loan Company of Canada, under its new name of Toronto and London Investment Company Limited exercised the option in the agreement dated May 9, 1951, and repurchased the Manitoba farm lands for the sum of $1,431,864 which sum was, of course, identical to the price at which the farm lands had been sold to Canada Permanent Mortgage Corporation.

T. & L. Investment Co. wished to qualify as an investment company under the provisions of section 62 of the *Income Tax Act*, chapter 52, Statutes of Canada 1947-48, (now section 69(2)). In order to so qualify a company must meet the conditions, amongst others, that 80% of its property is shares, bonds, marketable securities or cash and that no more than 10% of its property consists of shares of any one corporation.

Accordingly to meet these conditions T. & L. Investment Co. caused the three appellants to be incorporated and the appellants became its wholly owned subsidiaries.

Of the 156 individual Manitoba farm properties then owned by T. & L. Investment Co.:

1. 53 were sold to the appellant, First Torland Investments Ltd. for a consideration of $456,050, being the book value thereof payable by,
   (i) $400,000 by the issue and delivery of debentures of First Torland to T. & L. Investment Co. in that principal amount;
   (ii) $49,997 by the issue and allotment of 49,997 fully paid shares of First Torland Investments to T. & L. Investment Co. and
   (iii) the balance of $6,053 in cash.

2. 54 farms were sold to Second Torland Investments Limited, the second appellant herein, for a consideration of $453,948, again being the book value thereof, payable by
   (i) the issue and delivery to T. & L. Investment Co. of $400,000 principal amount debentures of Second Torland Investments Limited;
   (ii) $49,997 by the issue and allotment of 49,997 fully paid shares of Second Torland Investments Limited; and
   (iii) the balance of $3,951 in cash.

3. 49 farms were sold to the third appellant herein, Third Torland Investments Limited by T. & L. Investment Co. for the sum of $453,096, being the cost thereof to T. & L. Investment Co. and the book value thereof, payable by,
   (i) the issue and delivery to T. & L. Investment Co. of $400,000 principal amount debentures of Third Torland Investments Limited;
   (ii) $49,997 by the issue to T. & L. Investments Co. of 49,997 fully paid shares of Third Torland; and
   (iii) the payment of the balance of $3,099 in cash.

The foregoing sales were effected by agreements dated March 31, 1952.

There is no question that the cost at which the farm lands were acquired by The Trust and Loan Company of Canada and as carried in its books was considerably less than the market value thereof in either 1951 or 1952.

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The greater bulk of the farms were acquired in the depression years of 1930 and following, from mortgagors who were so hopelessly involved in debt that they were willing to execute quit claims to extricate themselves from their overwhelming burdens or consent to foreclosure proceedings where the farms were also encumbered by other mortgages ranking after the first mortgages held by The Trust and Loan Corporation of Canada.

The almost invariable practice of The Trust and Loan Corporation was to lease back the farms so acquired by it to the former owners who were, in almost every instance, good husbandmen, on a one-third crop share basis.

The functions of the farm managers employed by the company were to render every assistance within their expert competence to the tenants by advice as to proper methods of cultivation, crop rotation, seed selection and general farm management. In many instances repairs were made by the company to buildings at the request of the tenant or voluntarily by the landlord and buildings such as granaries were supplied. The tenants were encouraged to bring more land under cultivation by clearing and breaking. They were offered and accepted advice on crop spraying, weed control and fertilization. The advice so proffered as a matter of corporate policy served a two-fold purpose, (1) to increase the revenue of the company through better crops, and (2) to rehabilitate the tenant so that in time he would have accumulated sufficient funds to repurchase the farm and in that event to enable him to make a substantial cash down payment.

The 166 farms held by The Trust and Loan Company and which were repurchased from Canada Permanent Mortgage Corporation by T. & L. Investment Co. of which 156 were subsequently sold to the three appellants, had been categorized by the farm managers employed by The Trust and Loan Company, as follows:

(A) 11 farms
(B) 81 farms
(C) 72 farms
(D) 2 farms

Within the four main categories there were intermediate categories such as B plus and B minus. The categories are self-explanatory and were broadly that farms categorized as A were excellent, B were good, C were fair and D poor. These categories were arrived at by the farm managers in consultation and applying their best judgment taking into account such factors as the quality of the soil, number and condition of the buildings, the state of cultivation and the desirability of location. On cross-examination of two of the farm managers, it was suggested that a factor in determining into which category the farms would be placed would be the returns produced by the farms. It was agreed that such would be the case but that it was subject to so many variables that the returns from a farm were not the sole determining factor. I should have thought that when the quality of the soil of a particular farm was excellent that it would follow logically that the returns from such a farm would naturally be greater than those from a farm on which the soil was of an inferior quality barring such catastrophe as prolonged drought. However it was explained that an outstanding tenant on a lower categorized farm might well produce greater returns than an inferior tenant on a superior farm.

During the years 1953 to 1963 inclusive the appellants sold the following number of farms:

	First Torland	*Second Torland*	*Third Torland*	*Total*
1953	8	7	5	20
1954	5	4	2	11
1955	1	1	3	5
1956	1	2	1	4
1957	3	1½	0	4½
1958	1	1	1	3
1959	2	1	2	5
1960	2	3	8	13
1961	6	6½	6	18½
1962	9	4	6½	19½
1963	9	9	6	24
Total	47	40	40½	127½

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It would follow that after the 1963 taxation year the 28½ remaining farms were held by the three appellants, 6 by First Torland, 14 by Second Torland and 8½ by Third Torland.

Since 166 farms were repurchased from Canada Permanent Mortgage Corporation by T. & L. Investment Company and 156 farms were purchased by the appellants from T. & L. Investment Company, it follows that during the interval 10 farms had been sold by T. & L. Investment Company.

From document 124 in Vol. II of the respondent's exhibit book, I have extracted the following information.

In the year ending March 31, 1951, T. & L. Investment Co. sold a total of 6 farms, 1 class A, 2 class B and 3 class C. In the year ending March 31, 1952, it sold 4 class C farms.

Between the years ending March 31, 1953, and March 31, 1959, the three appellants sold the number of farms of the classes indicated below.

Year ending March 31	*Class A.*	*B.*	*C.*	*D.*	*Total*
1953		1	15	1	17
1954		2	9		11
1955			6		6
1956		4	2		6
1957		1	1½		2½
1958		2	1		3
1959		2	2	1	5
	nil	12	36½	2	50½

The above sales were disclosed in their income tax returns for the years in question but the Minister did not assess the appellants upon the gain realized upon those sales.

During the taxation years now under review the appellants sold the number of farms of the classes indicated hereunder:

	Class A.	B.	C.	D.	Total
1960	2	7	4		13
1961	1	8	6½		15½
1962	5	15	4½		24½
1963	1	15	8		24
	9	45	23	nil	77

Of the 28½ farms on hand after 1963 one was a class A farm, 22 were class B farms and 5½ were class C. farms.

As intimated before, during the period The Trust and Loan Company carried on the business of lending money on the security of farm lands, it was obligated under the provisions of the *Loan Companies Act* to dispose of the lands acquired by it for the protection of its loans within a maximum period of twelve years. Farm managers were employed by it to increase the returns from the farms when held by the company by way of rentals on a crop share basis from tenants who, in most instances, had been formerly the owner of the farm. Surprisingly the farm managers enjoyed cordial relationship with the tenants without exception. It was the practice of the farm managers to encourage the tenant to take a "proprietory interest" in the land by which it was meant that the tenant was to treat the land as his own and it was made known to the tenants that when the time came for a farm to be sold the tenant thereof would be given first opportunity to purchase it. In doing this the farm managers were implementing the policy adopted by the company.

When The Trust and Loan Company became Toronto and London Investment Company Limited by chapter 74 of the Statutes of Canada 1951 by reason of the change in objects and powers as outlined in section 5 thereof the company was no longer subject to the provisions of the *Loan Companies Act.* Toronto and London Investment Company Limited exercised its option in the agreement with Canada Permanent Mortgage Corporation to repurchase 166 farms.

Because the ownership of 166 farms would entail considerable management an agreement was made with Canada Permanent Trust Company to undertake that management at a guaranteed minimum fee of $12,000 per annum, 1969 FIRST TORLAND INVESTMENTS LTD et al v. MINISTER OF NATIONAL REVENUE Cattanach J.

a commission of 20% on the first $150,000 of rents collected during the year and a commission of 15% of rents in excess of $150,000 collected during the year. It was also provided that Canada Permanent Trust Company should receive a commission on the sale price of farms at the rates of 5% on sales up to $6,000, on sales between $6,000 and $20,000, 5% on the first $6,000 and 4% on the excess and on sales over $20,000, 5% on the first $6,000, 4% on the next $14,000 and $3\frac{1}{2}$% on the excess over $20,000.

The rate of commissions with respect to farm management was considered eminently fair by the parties because of the intensive management provided.

When 156 farms were sold by T. & L. Investment Co. to the appellants, they adopted the above agreement between T. & L. Investment Co. and Canada Permanent Trust Company.

The farm managers formerly employed by The Trust and Loan Corporation were employed by Canada Permanent Trust Company and those employees conducted their functions in the same manner as they had when they were employees of The Trust and Loan Corporation. They continued to encourage good husbandry and held out to the tenants the prospect of them being given the opportunity of purchasing the farms. Because of their intimate knowledge of the farms and the tenants thereof, the farm managers were in the best position to recommend which farms might be sold and to assess each tenant as a prospective purchaser.

The Canada Permanent Trust Company had prepared in late 1951 a standard form of offer to purchase to be completed by those tenants who wished to make such an offer.

It is my understanding of the evidence that all sales made by T. & L. Investment Co. in the years 1951 and 1952 being 10 in number and the $127\frac{1}{2}$ sales made by the appellants from 1953 to 1963 were in every instance to tenants who wished to purchase. One reason for doing this, as was explained in evidence by the farm managers, was little or no adjustment was required to be made in the sale price for improvements made by the tenant and accordingly a higher price was obtained than if the sale was made to an outside purchaser. The only instances, which were very few in number, when sales were made to purchasers other than the tenant were when the tenant was not interested in purchasing. In this event the farm managers would approach farmers in the area. Only in one instance was a farm advertised for sale or listed with a real estate agent and that was in circumstances peculiar to one sale. The particular tenant made an offer which the farm manager considered to be ridiculously low. In order to force a more realistic offer the farm manager advertised this farm for sale and received offers in accordance with the market price. The ruse was successful because the tenant met the competing offers and became the purchaser.

The reason for not advertising farms for sale was consistent with the policy of affording the tenant the first opportunity to purchase because advertising farms for sale would deter the tenant from taking a "proprietory interest" in the land with a corresponding reduction in crop and rental returns.

The average profit to the appellants on class A farms sold was approximately 48%, on the class B farms approximately 51% and on the class C farms approximately 47%, making an average profit on all farms sold of approximately 49%.

As previously stated the Minister added the profits realized from the sale of 77 farms in the taxation years 1960 to 1963 to the appellants' income for those years as being profits from a business, which assessments the appellants dispute contending that the gains were merely enhancements in value realized upon the sale of capital assets.

In support of his contention that the profits from the sales of the farm properties by the appellants were income from a business, counsel for the Minister submitted that the sale of the farms was an integral part of the activities of the appellants from their inception and that the great number of sales is an indicia of business. Further he submitted that the policy of the appellants throughout, by its then program of intensive farm management, was not only to increase rental income but to place the tenants in a position to buy. There was a close relationship between good crop returns and the sales program because when the crops were good the tenants were ready to purchase and the farm managers were in an ideal position to encourage

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the tenants to make offers to purchase. From the foregoing he submitted that the conclusion is irrebuttable that the farms were acquired by the appellants with a view to their resale, which is what the appellants actually did having embarked upon a continuous deliberate sales program with the object of generating profits.

As indicative of the appellants' intention as from their inception he pointed to the fact that standard forms of offer to purchase were prepared and available when the farm lands were held by T. & L. Investment Co. and that an agreement to pay commission on sales was entered into with Canada Permanent Trust by T. & L. Investments Co. at the outset which agreement was continued by the appellants.

Specifically he referred to exchanges of correspondence as early as September 8, 1951, that the farm managers should recommend farms that should be sold and that any good offers for any farm of whatever category should be submitted to T. & L. Investment Co. and later to the appellants, which would then be considered.

In 1952, which was a good crop year, T. & L. Investment Co. acknowledged a recommendation from the farm managers that 22 farms selected by them might be sold. The company expressed its willingness to do so if satisfactory offers were received.

Correspondence in a similar tenor continued to be exchanged between Canada Permanent Trust Company, Canada Permanent Mortgage Company and the appellants, T. & L. Investment Co. and its directors in England and Canada until 1959.

Counsel for the Minister also pointed to a minute of the meeting of the directors of T. & L. Investment Co. dated June 5, 1952, with respect to the land sale policy when "it was agreed that in the present favourable market the farms should be sold at the rate of about 20% per year" and a minute of a meeting of the directors of T. & L. Investment Co. dated October 6, 1953, (which is a date subsequent to the incorporation of the appellants and the transfer of the farm lands to them both of which events occurred in March 1952) stating that with respect to the farm sale policy "after a review of the policy of the sale of farms set forth in the Minutes of the Meeting of June 5, 1954, it was moved by Mr. Griffin (later the president of T. & L. Investment Co. and of the appellants) and seconded by Col. Frank, (a director resident in England), that the policy as to the sale of farms as set forth in the Minutes of the Meeting of June 5, 1952 be confirmed, and that the policy of selling Class C farms be continued, and that any offers for the sale of Class A and Class B farms, should be carefully considered."

On the other hand, counsel for the appellants submitted that there was a single purchase of farm lands which was basically an investment in accordance with the objects and purposes for which T. & L. Investment Co. and the appellants were incorporated and that other than the initial purchase of the farm lands there were no other purchases. He further pointed out that the farms always produced revenue and no farm was ever sold at a loss. The appellants carried on the farming operations for rental revenue and when that revenue ceased to be attractive the directors took the decision on March 12, 1959, to dispose of all farms then held by the appellants by an accelerated and aggressive sales program. This decision, he submitted, was done for valid reasons consistent with an investment and the appellants' objects and purposes which permit of the variation of their investments. He said that the sales which occurred between 1952 and 1959 (when the ultimate decision was taken to sell all farms) were made to improve the quality of the investment and thereby improve the revenue by the policy adopted to dispose of the inferior farms, i.e. Class C category and that no concerted effort was made to sell the Class A and B farms. During 1956, 1957 and 1958 he argued that the directors were reappraising their policy which culminated in the decision of a March 12, 1959, to sell all farms. He therefore submitted that the appellants' business was that of investment and that all actions of the appellants were consistent with that business and further there was nothing in the way of business in converting one type of capital asset into another type.

At this point I should mention that neither T. & L. Investment Co., nor the appellants recorded in their books the revenue received from individual farms, nor did Canada Permanent Trust Co., but that they did so on a total basis. The farm managers did keep a record of the returns

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from individual farms but they did so for their own purposes. Undoubtedly this information was used by the farm managers in recommending what farms would be sold.

I would add that the appellants retained the mineral rights on all farms sold where they held those rights. The appellants derived income from oil leases.

On behalf of the appellants a number of charts in graphic and written form prepared by a chartered accountant were introduced in evidence to show the rate of the aggregate of farm revenue. Exhibit A5 was a schedule showing the aggregate return to all three appellants on farm investment as percentage of average book value (i.e. cost) for the years 1953 to 1963 as follows:

1953	—	11.12%	1958	—	3.68%
1954	—	6.94%	1959	—	5.20%
1955	—	4.60%	1960	—	4.77%
1956	—	5.10%	1961	—	6.72%
1957	—	8.10%	1962	—	3.29%
			1963	—	11.15%

It should be borne in mind that these charts were prepared from the financial statements after the event and for the purpose of showing that the declining rate of return justified the decision of the directors to dispose of the farms and invest the proceeds in securities which would yield an equal or greater return with less inconvenience. By way of example, document 71 in Vol. I of the appellants' Exhibit Book shows the average interest rates on long term Canada bonds as being 3.65% in 1952; 3.79% in 1953; 3.32% in 1954, 3.19% in 1955; 3.59% in 1956; 4.13% in 1957; 4.02% in 1958; 4.96% in 1959; 5.16% in 1960; 5.11% in 1961; 5.06% in 1962 and 5.07% in 1963.

Percentages based on the book value of the farms as shown in Exhibit A5 are less than the average rates of return on long term Canada Bonds in the years 1958, 1960 and 1961 and slightly higher in the other years. I should think that a prudent investor would look at the return based on the current market value of the assets rather than their cost. The market value of the farms was much higher at the time of their acquisition by T. & L. Investment Co. and the appellants, than their cost to them, which was the costs of acquisition by the Trust and Loan Company and in the interval the market value continued to increase. Therefore, based on the market value the rate of returns would be less than that shown in Exhibit A5.

The directors did not have the benefit of the charts produced in evidence but they did have the financial statements upon which the charts were based and they would be aware of the then current interest rates.

The Minister called as an expert witness a chartered accountant who completed an affidavit in accordance with Rule 164B attached to which were charts showing (1) the number of farms sold by each of the appellants in the years 1963 to 1965 and (2) charts showing the percentage profit on the disposition of individual farms by the appellants, based upon the excess of the proceeds over book value. Such profits in the years 1953 to 1959 range from 18% to 177% and in the years 1953 to 1964 from 15% to 308%. The average rate of profit from sales during the years 1953 to 1959 was approximately 46% and for the years 1953 to 1964 approximately 50%.

In the opinion of this witness there was no co-relation between the revenue from the farms and their category, nor in the percentage of the returns thereon. That is to say, the revenue from the Class C farms was the approximate equivalent from those on the Class A and B farms on a percentage basis. It seems to me that this would be explained by the fact that the book value of the Class C farms would be less and the revenue therefrom would not need to be as great so as to result in a percentage return equivalent to that in the Class B and Class A farms but this does not alter the fact that the percentage rate of return would be approximately the same from which it would follow that there would be no advantage in the policy of disposing of the Class C farms first and then proceeding through the Class B and Class A farms on the basis of their categories.

The question to be decided in these appeals is whether the gains realized by the appellants upon the sales of farm lands in question were profits from a "business" within the meaning of that word, which as defined in the *Income Tax Act*, includes "a trade, manufacture or undertaking of any kind whatsoever".

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As has been repeatedly stated, the question is one of fact and as scores of reported decisions demonstrate, the conclusion to be drawn from the facts is often balanced upon a knife edge.

The difficulty in these appeals is compounded by the fact that the nature of the subject matter of the transactions is not such that would preclude the possibility that its sale was the realization of an investment or otherwise of a capital nature or that it could have been disposed of otherwise than in trading transactions.

In these appeals the subject matter of the transactions was real property which is equally capable of being held as an investment. The fruits of the property in the form of crop share rentals had been gathered by the appellants and there is no question that the revenue by way of rental returns is properly subject to income tax but the salient question remains whether the gains realized by the appellants upon their sales of farm lands were merely enhanced values obtained from a realization or change of investments as contended by them or gains made in dealing with such investments as a business as contended by the Minister.

The incorporation of a company raises the presumption of an intention to carry on business. Duff J., as he was then, said in *Anderson Logging Co. v. The King*[4] that the sole *raison d'être* of a company is to have a business and carry it on and that if the transaction in question belongs to a class of profit-making operations contemplated by its objects, then, *prima facie*, at all events, the profit derived from that transaction is a profit derived from the business of the company. However that presumption may be rebutted by the evidence as was done in the case of *Sutton Lumber and Trading Co. v. M.N.R.*[5]

The objects of the appellants are not helpful in determining what their business was to be. They are "to invest the capital of the Company, accretions to capital and the income of the Company . . . in real estate, mortgages, bonds, debentures, stock shares and other securities and commodities and . . . to change said investments by sale exchange or otherwise and to invest the proceeds of such sales in other investments of a like nature", or to para-

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[4] [1925] S.C.R. 45.

[5] [1953] 2 S.C.R. 77.

phrase those objects, as has been the practice to state them in numerous object clauses, e.g. those of T. & L. Investment Co., "to carry on the business of an investment Company". The proceeds from the sales of farms were used by the appellants to reduce or discharge their debenture obligations, to make an interest free loan to an associated company and to purchase stocks and bonds. But because they did this does not answer the question whether such "proceeds" were "accretions to capital" or "income" of the appellants.

The subject matter in which the appellants are authorized by their letters patent to invest their capital, accretions to capital and income are the normal subject matter of investment with the possible exception of "commodities".

But what is the business of investing?

I should think that there are two senses in which the word "investing" can be used, viz: (1) purchasing articles or property for the income that can be obtained from them, and (2) purchasing articles or property with a view to their resale at a profit. Admittedly because an article is purchased with the view to its resale is not sufficient to constitute such a transaction as carrying on a business but if a company embarks upon an enterprise of purchasing property for the purpose of realizing an enhanced value, I cannot see why it cannot be said to be engaged in the business of realizing "capital" gains (except that the use of the word "capital" is a contradiction in terms). To put it another way the "investments" (an ambiguous term) are, in reality, its stock-in-trade or inventory, rather than "capital assets".

I do not attach particular significance to the objects set out in the appellants' letters patent because, as I see it, the question to be determined is what did the appellant companies do and whether what they did was a business.

Here each of the appellants, in a single purchase, bought a large number of farms at a price, to the knowledge of and agreeable to both the vendor and purchaser, because of the circumstances outlined above, which was well below the market value at that time, so that a profit was certain and with a rising market, prospects were good for an even greater profit. In the meantime revenue rental was also assured.

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In my opinion the evidence clearly indicates that the policy of the appellants from their inception was to dispose of farms (as they did dispose of the farms) of any category at the maximum gain. I draw this inference from their readiness to consider offers for any category of farm and their policy of embarking upon a program of selling Class C farms in the first instance. The policy of the appellants was inherited from their parent, T. & L. Investment Co., under whose control and direction they were, through boards of interlocking directors.

The policy of the parent is unequivocally set out in its minutes of the board of T. & L. Investment Co. that the farms (without any reference to category) should be sold at the rate of 20% per year. This policy was confirmed by the minute of the board of T. & L. Investment Co. of October 6, 1953, and that the policy of actively encouraging the sales of Class C farms should be continued and offers for Class A and B farms should be considered.

The policy of the parent so set forth was adopted by the appellants and implemented. I have listed the sales by the three appellants in the years 1953 to 1963, which total 127½, of which the sales which occurred in the years 1960 to 1963 inclusive have attracted the assessments appealed against. It is an impressive list and on a *prima facie* view it looks like trading whatever label the appellants seek to attach to it. Added to this is the fact that in the year 1953, the same year in which the appellants were incorporated and acquired the lands, there were 20 sales which total was not equalled or surpassed until 1963. In a decision as to whether an appellant was carrying on a "business" as used in the *Excise Profits Tax Act*[6], Kerwin J. as he was then, said in *Noak v. M.N.R.*[7] at page 137:

> The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale of the property indicates that she was carrying on a business and not merely realizing or changing investments. . . .

It is true, that apart from a single instance, to which special circumstances applied, the appellants' agents, the Canada Permanent Trust, never advertised the land for sale. It did not have to do so because the avowed policy of the

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[6] S. of C. 1940, c. 32.

[7] [1953] 2 S.C.R. 136.

appellants to sell to the tenants created a very special and ready market. The arrangement between the appellants and Canada Permanent Trust created the most efficient organization to carry the policy directions into effect. While those policy directions were the responsibility of the appellants, they were undoubtedly affected by the recommendations of the farm managers of Canada Permanent Trust, all of whom had been former employees of the appellants' parent. Their recommendations as to what farms could be sold, what price could be obtained, and which tenants could make down payments were certainly heeded. They were also in the best possible position to encourage the tenants to make offers to purchase. Further I fail to follow how any of the sales can be said to be fortuitous in the circumstances outlined.

Considerable emphasis was placed by the appellants on the fact that the farms were revenue producing assets. It does not follow from the fact that a property may be revenue producing that the property cannot also be the subject matter of trade.

Similar emphasis was also placed upon the fact that the policy of the appellants to sell off the inferior farms first was consistent with a policy of investment because that policy improved the quality of the investment. It should be borne in mind, however, that there were only 11 Class A farms and 2 Class D farms. The bulk of the farms were classified B and C, there being 81 Class B farms and 72 Class C farms. Only the Class D farms were classified as "dogs" one of which was sold in 1953 and the other in 1959. The Class A, B and C farms all produced well. In assessing the evidence to the best of my ability, it seemed to me that the percentage of the rental returns was the same in all three categories and that the percentage of profit on the sale of Class C farms exceeded that in Class A and B farms. Accordingly, I cannot attribute any special significance to the categorization of the farms.

On March 12, 1959 the decision was made by the appellants to sell all farms on hand. Between 1953 and 1959 the appellants had sold 50½ farms, of which total included 2 D's, 36½ C's and 12 B's slightly under one-third of the total farms acquired. Between 1959 and 1963, 77 farms

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were sold, of which 9 were Class A, 45 Class B and 23 Class C, which is slightly under one-half of the farms held, leaving about one-sixth undisposed of.

It was the submission of the appellants that the decision to sell their farms made on March 12, 1959, as a prelude to placing the proceeds into different and more satisfactory investments, was a change in policy. In view of the fact that sales in considerable numbers were made prior to March 12, 1959, I do not construe that decision as being a change in policy but rather the adoption of a more aggressive implementation and an acceleration of an already existing policy of selling farms when acceptable prices were obtainable therefor. In this respect the fact that no farm was at any time sold at a loss has a bearing. They were not going to divest themselves of their farms in any event, but only when that divestment could be effected at a satisfactory gain.

The fact that, apart from the original acquisition of the farms, the appellants never acquired further farms, is not conclusive (see *Thew v. The South West Africa Co.)*[8]

The various individual facts above outlined, considered separately, are indeterminate but their cumulative effect leads me to the conclusion that the business of the appellants was part of a single, though multiform business.

In this conclusion I am supported by the decision in *Scottish Investment Trust Co. v. Forbes*[9].

The Lord President pointed out at page 234 that:

> As its name indicates, this is an Investment Company, and the Memorandum makes it plain that its profits are to be derived from various operations relating to investments.

This company had power "to vary the investment of the company and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any assets of the company". I can see no fundamental distinction between that power and the objects of the appellants herein.

The Lord President then continued:

> . . . it appears that the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business.

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[8] 9 T.C. 141.

[9] 3 T.C. 231.

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With considerable hesitation, after finding the issue to be a narrow one, I find myself unable to conclude that the appellants have discharged the onus which is upon them to rebut the assumption of the Minister that the farm properties acquired by the appellants were so acquired with the view to dealing in them or turning them to account by sale or otherwise and that accordingly the profits from the sales of the farms were profits from a business.

Before concluding this matter I should point out that counsel for the appellants mentioned that in the appellants' taxation years, prior to 1960, the profits from the sale of farms were not assessed by the Minister as income. His purpose in directing attention to this fact was that it might be a cogent factor in the determination of a similar point in a following year.

However, as I pointed out in *Admiral Investments Ltd. v. M.N.R.*[10] a concession made in one year in the absence of any statutory provisions to the contrary, does not preclude the Minister from taking a different view in a later year. An assessment is conclusive as between the parties only in relation to the assessment for the year which it was made.

The appeals are, therefore, dismissed with costs.

SUSAN HOSIERY LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Toronto 1968 Oct. 15

Ottawa 1969 Feb. 19

Discovery—Evidence—Solicitor-client privilege—Communications between solicitor and client's accountant—Extent of privilege.

The privilege which protects from disclosure at trial or on discovery (1) confidential communications between a client and his legal adviser for the purpose of giving or obtaining legal advice, and (2) documents obtained for the lawyer's brief for litigation, covers communications between a legal adviser and an accountant used as the client's representative. The privilege, moreover, applies to any questions on discovery as to the contents of such communications and documents.

Lyell v. Kennedy No. 2 (1883) 9 App. Cas. 81; *Wheeler v. Le Marchant* (1881) 17 Ch.D. 675, applied.

10 [1967] 2 Ex. C. R. 308.

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MOTION.

Benzion Sischy for appellant.

G. V. Anderson for respondent.

JACKETT P.:—This is a motion on behalf of the respondent for an order.

(*a*) requiring the Appellant to produce for inspection the memorandum prepared by the Appellant's solicitor, and referred to in question number 163 of the Examination for Discovery of Alexander Slomo Strasser;

(*b*) requiring the Appellant to produce for inspection the letter from its auditor, Mr. A. Pal to its solicitor, W. Goodman, dated the 1st day of December 1964, and referred to in question number 175 of the Examination for Discovery of Alexander Slomo Strasser;

(*c*) requiring the Appellant to produce the letter of the 2nd day of December 1964 from W. Goodman to Spenser, Pal & Co., and the memorandum of the 4th day of December 1964, both of which are referred to in the answer given to question number 189 of the Examination for Discovery of Alexander Slomo Strasser;

(*d*) requiring that Alexander Slomo Strasser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

The motion came on for hearing before me at Toronto on October 15, 1968, at which time I rejected the motion in so far as paragraph (*a*), *supra,* was concerned and gave the parties leave to file further material and to make written submissions concerning the remainder of the motion. Since the parties indicated, by letter dated January 20 last, that they had completed their submissions, I have read the decisions cited by them and have considered their arguments.

I shall consider first the problem raised concerning the documents referred to in paragraph (*b*) and (*c*) of the portion of the notice of motion quoted above. Two affidavits have been filed on behalf of the appellant from which the nature of these documents may be determined. The first is an affidavit of a Marshall A. Cohen, sworn October 21, 1968, and reading as follows:

1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.

2. I have inspected the four documents referred to in the Notice of Motion, brought by the Respondent, returnable on the 15th day of October, 1968, and dated the 19th day of September, 1968. The said documents can be briefly described as follows

(*a*) Typewritten memorandum of three pages dated the 10th day of November, 1964, and being a memorandum of a meeting between Mr. W. D. Goodman, Mr. Harry Wolfe and Mr. Andrew Pal.

(*b*) Typewritten letter of three pages dated December 1st, 1964, from Mr. Andrew Pal to Mr. W. D. Goodman.

(*c*) Typewritten copy of a letter of one page dated December 2nd, 1964, from Mr. W. D. Goodman to Mr. Andrew Pal.

(*d*) Typewritten memorandum of one page dated December 4th, 1964, relating to a telephone conversation of December 3rd, 1964, between Mr. Andrew Pal and Mr. W. D. Goodman.

3 From advice received from Mr. W. D. Goodman, Mr. Andrew Pal and Mr Harry Wolfe, from my own knowledge including therein my inspection of the aforesaid documents I verily believe the following statements set out in paragraphs 4 to 8 inclusive to be true.

4. At all material times at which such documents aforesaid came into existence, Mr. W. D. Goodman was a member of the law firm of Goodman, Cooper, Cohen & Farano, and the said law firm and in particular Mr. W. D. Goodman was retained to give specific advice to the Appellant herein and the principal shareholders thereof.

5. At all material times at which such documents aforesaid came into existence, Mr. Harry Wolfe was a member of the law firm of Lorenzetti, Mariani and Wolfe and the said law firm and Mr. Harry Wolfe in particular were the general solicitors to the Appellant herein and it was with the concurrence of and at the suggestion of the said Mr Harry Wolfe that Mr. W. D. Goodman was consulted as aforesaid to give specific advice to the Appellant herein and to consult with Mr. Harry Wolfe with respect to the legal problem, for which such legal advice was sought.

6 Mr. Andrew Pal is a member of the Institute of Chartered Accountants of Ontario, and at that time and now was a member of a firm of Chartered Accountants bearing the name Spencer, Pal and Company.

7. At all material times at which such documents aforesaid came into existence Mr. Andrew Pal was retained by the Appellant herein as its agent for the purpose of communicating to Mr. Wolfe and to Mr Goodman, certain information concerning the Appellant and for the further purpose of receiving from Mr. Wolfe and Mr. Goodman certain advice and opinion for transmission by him to the Appellant herein.

8 The aforesaid documents consist solely of professional communications of a confidential character or the later written recording of oral professional communications of a confidential character between the Appellant or the Appellant's agent and its solicitors and counsel for the purpose of obtaining or giving legal advice and assistance and confidential communications or the later written recording of oral confidential communications at the instance and at the request and for the use of the Appellant's solicitors and counsel for the aforesaid purposes.

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The second is a further affidavit of Mr. Cohen sworn on November 20, 1968, and reading as follows:

1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.

2 This Affidavit is made in supplement to my Affidavit filed in this action and sworn to on the 21st day of October, 1968.

3. I am informed by Mr. Pal and verily believe the following facts set out hereunder.

4. That for some years prior to the meeting of November 10th, 1964, from which the typewritten memorandum referred to in paragraph 2(*a*) of my Affidavit sworn to on the 21st day of October, 1968, arises Mr. Pal, in addition to his other duties as a public accountant to Susan Hosiery Limited, the Appellant herein, had been acting as financial adviser to the said Appellant and its principals.

5. That on the instructions of the principals of Susan Hosiery Limited, Mr. Pal was instructed to meet with Mr. Goodman and Mr. Harry Wolfe to discuss certain matters pertaining to the business affairs including future business affairs and "activities" of the Appellant and of the principals thereof and to obtain the advice of Mr. Goodman thereon.

6. That such meeting took place on November 10th, 1964, and that such discussion was had at such meeting and certain advice was obtained from Mr. Goodman on that day and that by reason of such advice it was decided by Mr. Pal, Mr. Wolfe and Mr. Goodman that further suggestions as to how the Appellant and its principals might wish to conduct their business affairs, including certain legal steps to be taken on their behalf should be given Mr. Goodman to enable him to advise thereon.

7. Mr. Pal thereafter and prior to December 1st, 1964, communicated to the Appellant through its principals and to the said principals the gist of the advice of Mr. Goodman and after discussion with such principals wrote on their behalf and on behalf of the Appellant to Mr. Goodman setting out suggested courses of action and giving Mr. Goodman certain instructions thereon. The said writing to Mr. Goodman is contained in the typewritten letter referred to in paragraph 2(*b*) of my Affidavit sworn to on the 21st day of October, 1968.

8. Mr. Goodman on receipt thereof wrote to Mr. Pal, firstly commenting upon the letter of December 1st, 1964, and asking Mr. Pal to speak to him, Mr. Goodman, about one aspect of the matters dealt with in the letter of December 1st, 1964. The said letter of Mr. Goodman is that referred to in paragraph 2(*c*) of my Affidavit sworn to on the 21st day of October, 1968.

9. Mr. Pal on receipt of such letter telephoned Mr. Goodman to give Mr. Goodman certain additional information required and answering the request to Mr. Goodman to speak to him as set out above. Such telephone conversation occurred on the 4th day of December, 1964, and is referred to in paragraph 2(*d*) of my Affidavit sworn to on the 21st day of October, 1968.

10 I verily believe that to describe the subject matter of the communications and advice above in other than general terms of "business affairs", "courses of action" and other similar terms would disclose the privilege hereby sought to be maintained.

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The basic principles on which the appellant relies for his objection to the production of these documents are, in effect, as I understand them, unchanged from the time when they were authoritatively enunciated by Lord Blackburn in *Lyell v. Kennedy* (No. 2)[1], where he said:

> . . . the law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him.
>
> This further rule has been established, that the other side is not entitled, on discovery, to require the opponent to produce as a document those papers which the solicitor or attorney has prepared in the course of the case, and has sent to his client. . . . He may shew it if he pleases; but it is a good answer to a discovery to say, "It was prepared for me by my legal adviser, my attorney, confidentially, and it is my privilege to say that you shall not read it;" and I think that it is hardly disputed that on a discovery of documents you could not discover that brief.

The principles had been discussed in an illuminating way in an earlier decision of the Court of Appeal in *Wheeler v. Le Marchant*.[2] In that case, it was accepted as clear

(*a*) that confidential communication between a client and his legal adviser were privileged, and

(*b*) that documents obtained by a legal adviser for the purpose of preparing for litigation, actual or anticipated, were privileged;

but an attempt to extend the privilege concerning documents obtained by a legal adviser to documents obtained in situations where litigation was not contemplated was rejected. In that case Jessel, M. R. said at page 682:

> . . . The actual communication to the solicitor by the client is . . . protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of

[1] (1883) 9 App. Cas. 81 [2] (1881) 17 Ch. D. 675.

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litigation, provided it be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants.

and Cotton L.J. said at pages 684 and 685:

> Their case is put, as I understand it, in this way: It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives". If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these.

None of the decisions concerning solicitor and client privilege to which I have been referred seem to me to have changed or added to the law, in so far as it is relevant to what I have to decide on this motion, as I find it laid down in the two leading decisions from which I have quoted.

In an attempt to avoid misunderstanding as to the effect of the decision that I propose to deliver, it may be well for me to attempt to put in my own words the law, as I understand it, on the understanding that, except in so far as is necessary for the decision of this case, I reserve the right to reconsider the precise extent of the doctrines that I am attempting to describe.

As it seems to me, there are really two quite different principles usually referred to as solicitor and client privilege, *viz*:

(a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and

(b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.

In considering the ambit of these principles, it is well to bear in mind the reasons for them.

In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist if what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing.

Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the

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court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them. This appears clearly from the following passage in the judgment of Lord Blackburn in *Lyell v. Kennedy* (No. 2) *supra,* where he said at pages 86 and 87:

> But then it is argued that though that is so you may, as has been repeatedly said, search the conscience of the party by inquiring as to his information and belief from whencesoever derived, and that it consequently follows from that (this I think was the argument which was put) that although a brief has been refused, and it has been said, "You must not inspect that brief," you are nevertheless entitled to ask the party himself, "Did not you read the brief, and when you had read it what was your belief derived from reading that brief?" That, I think, was the position which was taken; and it was argued in support of it, if I understood and followed the argument rightly, that inasmuch as nobody had ever actually raised the point, and inasmuch as in all the different books of pleading and other things, where they very frequently do discuss what is the extent of discovery, nobody had hitherto discussed this point either one way or the other, the silence of people implied that it should be so, and that you ought to be able to put that question. Now as to that I believe that there is no authority, and I think that Cotton L.J. says that there is no authority; but as it seems to me the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have

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a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action," or "in the course of litigation" That would be no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone or a pedigree in a particular place—if the man went there and looked at it and saw the thing itself I do not think that he would be privileged at all in that case: because it is no answer to say, "I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information" That is not within the meaning of privilege But when the interrogatory is simply "what is the belief which you have formed from reading that brief?" it seems to me (and I think that that is the effect of what Cotton L J. says at the end of his judgment (23 Ch D at p 408)) to follow that you cannot ask that question. It is a new point; it has never been raised before; but it seems to me that that is right.

In my view, it follows that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.

Applying these principles, as I understand them, to materials prepared by accountants, in a general way, it seems to me

(a) that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and

(b) that, where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an account-

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ant in carrying out such task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer; and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.

Turning to the application of these views to the facts here, and reading the allegations of fact in the notice of appeal in the light of the allegations in the reply together with what is said in Mr. Cohen's affidavits, I have no difficulty in concluding that the balance of probability is that Mr. Pal and Mr. Wolfe were acting as representatives of the appellant for the purpose of obtaining legal advice on behalf of the appellant from Mr. Goodman concerning the setting up of some arrangement such as that, according to the allegations referred to, the appellant in fact entered into. I think the court may take judicial knowledge of the fact that corporations of all kinds are continuously faced with problems as to what arrangements are advisable or expedient having regard to the intricacies of the tax laws and that, while huge corporations have staffs of lawyers and accountants of their own through whom they seek advice of counsel learned in such special areas of practice, smaller corporations employ lawyers and accountants in general practice to act for them in obtaining special advice in connection with such matters. I have no doubt as to the inherent probability of Mr. Cohen's statements that Mr. Wolfe and Mr. Pal were so acting for the appellant in obtaining Mr. Goodman's advice. While, therefore, I should have had some doubt as to whether Mr. Cohen's affidavits, based only on information and belief, would have been acceptable evidence if they had been objected to, as they have not been objected to, I reject the motion in so far as paragraphs (*b*) and (*c*) of the notice of motion are concerned.

I turn now to the order sought by the motion for an order

> (*d*) requiring that Alexander Slomo Strasser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

To appreciate what is being sought here, it is necessary to refer to more of the examination for discovery of Alexander Slomo Strasser (who was examined as an officer of the appellant company) than the questions mentioned. The following portions seem to be relevant to the order sought:

BY MR. AINSLIE:

155 Q. There was a meeting held then on the 10th of December, 1964?
A. Yes.

156 Q. And am I correct that at that meeting was Mr. W. Goodman?
A. No.
MR. GOODMAN: Yes.

BY MR. AINSLIE:

157 Q. Mr W. Goodman, Mr. Pal, and Mr. H. Wolfe?
A. Yes.

158 Q. And am I correct that Mr Pal is your auditor and accountant?
A. Yes.

159 Q. And that Mr. Wolfe is your general solicitor?
A. Yes.

160 Q. And that Mr. Goodman was also your solicitor?
A. That is correct.

161 Q. And at that meeting am I correct that a memorandum was prepared as to the purport of the discussion by Mr. Goodman?
A. Yes.

162 Q. And that a copy was sent to the appellant?
A. Yes.

163 Q I would ask you to produce the memorandum setting forth the meeting of the 10th of December, 1964.

MR. GOODMAN: No, I think it is privileged

MR. AINSLIE: Mr. Goodman, my position is that it is not a privileged document.

MR. GOODMAN: I appreciate you take that position.

MR. AINSLIE: Well, for the purpose of the record—

MR. GOODMAN: And your department would be very quick to claim a similar privilege in connection with memoranda passing between a lawyer and his client in a matter your department was interested in.

MR. AINSLIE Let me just speak for the purpose of the record, my position is the document is not privileged, it is not a document for which privilege has been claimed in the affidavit on production and therefore I am demanding production of the document.

MR. GOODMAN: No. That is not so. There is a reference in part II of the affidavit on production to various communications in respect to which privilege is claimed and this is one of them.

BY MR. AINSLIE:

164 Q. In other words, am I correct that on the 10th of November, 1964, you were seeking legal advice in anticipation that difficulty would arise from this plan?

MR. GOODMAN: I do not think you are obliged to answer that question.

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MR. AINSLIE: The witness is instructed not to answer that question—is that correct?

MR. GOODMAN: The witness is instructed not to answer that question.

BY MR. AINSLIE:

165 Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:

"Since the Ontario Pension Benefit Act will come into force January 1st, 1965, there are decided advantages in having lump sums past service contributions made before that date into a new pension plan for benefit of key executives. Payments made after that date may not be withdrawn as freely by reason of the Act; however, payments made into a pension plan will now be subject to rigid statutory rules regarding investments whereas the parties would prefer that the monies simply be re-invested in the business. Accordingly I have suggested that any lump sum payments into the new pension plan before December 31st, 1964, be withdrawn before that date by the beneficiaries and immediately transferred by the beneficiaries into a deferred profit-sharing plan which will immediately be set up for their benefit."

MR AINSLIE I wonder if you could just read the introductory part back.

THE REPORTER:

"Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:"

MR. GOODMAN: The answer is "no".

Q. The answer is no because in fact—

MR. GOODMAN: No.

* * *

BY MR. AINSLIE

171 Q. Mr. Strasser, after the 10th of November did the officers of the appellant have any further discussions with their auditor as to the advisability of entering into the pension plan?

A. It is possible

172 Q. And am I correct that the auditor in December wrote to your solicitor setting forth certain recommendations that should be taken in regard to the financial affairs of the appellant and its tax position?

MR. GOODMAN: No, he made certain suggestions for consideration and they are considered to be of a confidential nature.

BY MR. AINSLIE:

173 Q. And those suggestions were contained in a letter which was sent to your solicitor?

A. Yes.

174 Q. And that letter is dated—could you tell me the date of the letter, please?

A. December 1st.

175 Q. I wonder if you would produce that letter, please?

MR. GOODMAN: No, we consider that it is privileged.

MR AINSLIE: Again, Mr. Goodman, I would say that it is not privileged because in my submission it is not a letter between a solicitor and client and it is not a letter in respect of which privilege has been claimed in the affidavit on production and I ask the witness to produce it.

MR. GOODMAN: The witness declines to produce it on advice of counsel.

MR. AINSLIE: Very well. I will adjourn the discovery on this portion and also on the portion of the memorandum of the 10th of November until after we have had an opportunity of having this matter decided by the courts.

BY MR. AINSLIE:

176 Q. And, Mr Strasser, am I correct that one of the suggestions that the accountant, that your accountant made to your solicitor, was that the appellant should wind up the pension plan and transfer to a deferred profit-sharing plan the assets in the plan?

MR. GOODMAN: Decline to answer.

THE DEPONENT: I refuse to answer.

The respondent's position, in so far as Questions 164 and 165 are concerned, is clearly set out in that part of the submission of counsel for the respondent filed October 25, 1968, which reads as follows:

3 By Notice of Motion dated September 19, 1968, the Respondent made an application to this Honourable Court requesting, *inter alia,* that Alexander Slomo Strasser be required to reattend the examination for discovery and answer Question No. 165 and such further questions as may arise from the answer given. Question No. 165 pertains to an extract of a certain memorandum, the said extract being marked Exhibit "A" for identification on the examination for discovery and found at page 94 of the Booklet being Exhibit "A" to the Affidavit of Murray Alexander Mogan filed in support of this application.

4. The extract was obtained by the Respondent in the following manner (see Affidavit of Raymond Sim, filed):

(*a*) Mr Raymond Sim, employed as an assessor with the Department of National Revenue in its Toronto District Office, did in the year 1964, attend at the office of the Appellant, Susan Hosiery Limited, and was given permission by a Mr. Alexander Strasser to look at a number of documents contained in a filing cabinet.

(*b*) Mr Raymond Sim found among the documents contained in the filing cabinet what appeared to be a memorandum dated November 10, 1964, relating to a meeting between Mr. W. Goodman, Mr. A Pal and Mr. H. Wolfe.

(*c*) Mr. Raymond Sim made a handwritten copy of certain portions of this memorandum and has subsequently had the handwritten copy typed and placed in the Department of National Revenue, Toronto District Office, file relating to the Appellant.

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5 On examination for discovery of Mr. Alexander Slomo Strasser, as an officer of the Appellant, Mr Strasser was asked by counsel for the Respondent to confirm the accuracy of a portion of the said typewritten extract and Mr. Strasser, through his solicitor, refused to answer

See Examination for Discovery, p. 51, Q. 165 and pp. 52-53, Q. 166.

6. Mr. Pal is the auditor and accountant for the Appellant.

Examination for Discovery, p. 49, Q. 158.

Mr Wolfe is the general solicitor for the Appellant.

Examination for Discovery, p. 49, Q. 159.

Mr Goodman is also the solicitor for the Appellant.

Examination for Discovery, p. 49, Q. 160.

RESPONDENT'S POSITION·

The respondent submits that secondary evidence as to the contents of a privileged document is admissible at trial; accordingly, the Respondent can use the extract from the memorandum as evidence at trial The Respondent therefore submits that he is entitled on examination for discovery to verify the accuracy of the extract from the memorandum.

REASONS:

1. While the original memorandum of November 10, 1964 may be privileged from production on the basis of solicitor-client privilege, privilege does not encompass the extract from that memorandum which is in the possession of the Respondent.

Calcraft v. Guest [1898] 1 Q B. 759 at 764 per Lindley M.R.:

> "'. . . Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?' The matter dropped there; but the other members of the Court (Lord Abinger, Gurney B., and Rolfe B) all concurred in that, which I take it is a distinct authority that secondary evidence in a case of this kind may be received."

Delap v Canadian Pacific R W. Co. (1914) 5 O.W N. p. 667 at 669 per Middleton, J.·

> "It is suggested that the correspondence contains matter going to shew that the claim is not made in good faith. . . . In *Calcraft v. Guest,* [1898] 1 Q B 759, it was held that the use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented even by fraud in the obtaining of the copies—a much stronger case than this, where the copies were not obtained fraudulently, but by the mere inadvertence of the solicitor."

Richard C.W. Rolka v M N.R. [1963] Ex C.R. 138 at pp. 154-155 per Cameron, J.·

> ". . . The fact is that the originals did come into the hands of the Minister's representative by the voluntary act of the solicitor and such privilege as may have previously existed

in regard thereto has been lost. Reference may be made to *Phipson on Evidence,* 9th ed, at p. 202, where on the authority of *Calcraft v. Guest,* [1898] 1 Q B. 759 (C.A.), the principle is stated thus:

> 'But, unlike the rule as to affairs of State, if the privileged document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for it has been said that the Court will not inquire into the methods by which the parties have obtained their evidence.'"

Holmested & Langton's Ontario Judicature Act 5th Edition, at p. 1032·

> "*Secondary Evidence.* In *Calcraft v. Guest* [1898] 1 Q B. 759, it was held, in effect, that though documents are privileged from production, secondary evidence of them may be given And see per Cozens-Hardy, M.R., in *Ashburton v. Pape* [1913] 2 Ch. 469, at 473; *Delap v. C.P.R.* (1914) 5 O.W.N. 667, at 669. But the actual decision in the *Calcraft* case seems to go no further than that a copy of a privileged document, obtained by accidental transfer of possession, may be admitted; see the principle stated by Wigmore, Evid., sec 2325(3); and see the general principle, stated by Ferguson, J A, in *Re United States of America v. Mammoth Oil Co.* (1925) 56 O L.R. 635, at 646, that the privilege of communications between solicitor and client is one which the Court must enforce unless its enforcement is waived by the client."

Canadian Encyclopedic Digest (Ontario) 2nd Edition, Vol. 6, at pp. 16-17:

> "The use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented"

The Annual Practice 1966, Vol. 1 at p 526:

> "*Secondary evidence or copies of privileged document.*—Secondary evidence as to the contents of a privileged document is admissible as against the party resisting its production (*Calcraft v. Guest,* [1898] 1 Q B 759, C.A.). Thus if a party has an opportunity of taking or getting a copy of such a document he can use it as secondary evidence (ibid.)."

Wigmore on Evidence, 3rd Edition, Vol. VIII at p. 629:

> "S. 2326. Third Persons Overhearing. The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is

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Jackett P.

> not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy."

Halsbury's Laws of England, 3rd Edition, Vol. 12 at p. 41:

> "Particulars may be ordered of a privileged document referred to in a pleading, and secondary evidence may be given of a privileged document despite the privilege attaching to the original, although, if a copy is obtained improperly, an injunction may be granted restraining the use of that copy."

Whether an injunction may be obtained by the Appellant restraining the use of the extract is not relevant to this application since the Appellant has not commenced proceedings for an injunction.

Assuming that the respondent may (and I am not to be taken as expressing any doubt with regard thereto) adduce evidence as to the communications that took place between the appellant and its solicitors if it has such evidence available at the trial and it is relevant to the material facts, the appellant is none the less entitled to rely on its privilege not to disclose such communications either by itself or its solicitors either on discovery, or at trial, or otherwise. Having come to the conclusion that the balance of probability is that the meeting between Mr. Pal, Mr. Wolfe and Mr. Goodman on December 10, 1964, was part of the process whereby Mr. Pal and Mr. Wolfe, as representatives of the appellant, were obtaining legal advice for the appellant from Mr. Goodman, and that the appellant is therefore entitled to a privilege against producing a memorandum of what occurred at that meeting, it seems clear to me that the same privilege extends to answering any questions as to what was or is contained in that memorandum.

Finally, with regard to Questions 175 and 176, it follows from my conclusion that Mr. Pal was one of the representatives of the appellant for obtaining legal advice that the appellant is privileged from producing, or giving evidence as to the contents of, a letter written by Mr. Pal as part of the process of obtaining such advice.

The application is dismissed with costs payable by the respondent to the appellant in any event of the cause, which costs are hereby fixed at $300.

Ottawa
1969
Feb. 10-11
Feb. 20

DONALD APPLICATORS LTD *et al*[1] APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Associated companies—Control—What constitutes—Voting rights to elect directors of subsidiaries not held by parent company—Power of parent to dominate shareholders' meetings—Whether de jure control—Income Tax Act, s. 39.

Each of the ten appellant companies was incorporated in Alberta by memorandum of association with an authorized capital of 200 class A shares having the exclusive right to elect directors and 19,800 class B shares having voting rights on all other matters. Under each company's memorandum of association the transfer of shares was prohibited without the directors' consent and annual net profits were required to be divided each year; each company's articles of association required the unanimous consent of shareholders to the issue of any shares. Only two class A shares of each company were issued, in each case to residents of the Bahamas (never the same two for more than one company), who elected themselves its directors; only 498 class B shares of each company were issued, in each case to SM Ltd, and the latter's controller was appointed manager of each company by its directors, who themselves performed only perfunctory duties. The purpose of these arrangements was to spread the profits of SM Ltd's business amongst several companies which would not be associated within the meaning of s. 39 of the *Income Tax Act,* and thus obtain the benefit of the lower rate of tax.

Held, SM Ltd had *de jure* control of the ten appellants which were therefore associated with one another within the meaning of s 39 of the *Income Tax Act.* A shareholder who, though lacking immediate voting power to elect directors, has sufficient voting power to pass any ordinary resolution at a meeting of shareholders and, as well, a special resolution to take away the powers of the directors and reserve decisions to his class of shareholders, dismiss directors from office, and ultimately even secure the right to elect directors, is a person of whom it cannot be said that he does not *in the long run* have the control of the company. Such a person has the kind of *de jure* control contemplated by s. 39: the *de facto* control which SM Ltd exercised through the appointment of its controller as manager of appellants was irrelevant

M N R. v. Dworkin Furs Ltd et al [1967] S.C.R. 223; *Vina-Rug (Canada) Ltd v M N.R.* [1968] S C R. 193; *Buckerfield's Ltd et al v. M N.R.* [1965] 1 Ex C R. 299; *M N.R. v. Aaron's Ladies Apparel Ltd* [1967] S C.R. 223, distinguished. *British American Tobacco v. I R.C* [1943] 1 All E R. 13, distinguished and applied.

[1] The other appellants are: Godfrey Building Products Limited; Whitemud Building Supplies Ltd; Graham Excavating & Equipment Ltd; Sawyer Building Supplies Ltd; McKinney Plumbing & Heating Ltd; Cyprus Building Products Ltd; Higgs Cement & Masonry Ltd; Boreas Building Supplies Ltd.

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DONALD APPLICATORS LTD *et al* *v.* MINISTER OF NATIONAL REVENUE

INCOME TAX APPEAL.

H. Heward Stikeman, Q.C. and *Maurice A. Regnier* for appellants.

M. A. Mogan and *R. D. Janowsky* for respondent.

THURLOW J.:—The issue in each of these appeals, which are from re-assessments of income tax, in some cases for the years 1961 and 1962 and in others for the year 1962 alone, is whether in these years the ten appellant companies were "associated" with each other within the meaning of section 39 of the *Income Tax Act* and thus liable to tax at the higher rate prescribed by that section rather than at the lower rate which would otherwise be applicable. The basis relied on for treating the appellant companies as "associated" was that each of them was controlled at the relevant times by another corporation, viz. Saje Management Limited, later re-named MacLab Enterprises Limited, and was thus associated with that corporation, from which it followed from the statutory provisions that all eleven corporations were associated with each other.

All ten appellant companies were incorporated in 1961 under *The Companies Act*[2] of the Province of Alberta. While their objects, as expressed in their memoranda of association, differed somewhat from company to company all had objects concerned with some phase of the construction or construction supply business. In other relevant respects the memoranda and articles of association of the appellant companies can be treated as alike. Each had two classes of common shares, consisting of 200 Class A shares, each of the par value of $1.00, which carried the right to vote on any question and the exclusive right to vote on the election of directors, a right which could not be altered without the unanimous consent of the Class A shareholders, and 19,800 Class B no par value shares which carried the right to vote on all questions except the election of directors. In each case the memorandum of association further provided that no share or shares might be transferred without the consent of the directors and that the net yearly profits of the company should in each year be divided among the shareholders in dividends payable in cash. Each company adopted Table A of the First Schedule of *The*

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[2] R S A, 1955, c. 53.

Companies Act as its articles of association with certain amendments among which was one providing that no share should be issued to any person without the unanimous consent of the existing shareholders of the company.

In each company during the relevant period two Class A shares had been issued and were held by two unrelated persons resident in Nassau in the Bahamas consisting of a solicitor and one of his partners or employees or of two of such persons other than the solicitor himself. In no case, however, did the same two persons hold the shares in more than one of the companies. In each case the Class A shareholders had elected themselves to be the directors of the company. In each case, as well, 498 Class B shares had been issued, at 10 cents per share, to Saje Management Limited. Each company thus had a nominal issued capital of $51.80. The directors of each appellant fixed the registered office of the company at 502 MacLeod Building, Edmonton, Alberta and appointed Mr. James G. Greenough, the controller of Saje Management Limited, as the company's manager. Mr. Greenough was not acquainted with the directors and received no instructions from them but in each case they ultimately approved charges in the company's accounts for management services supplied to the company by Saje Management Limited who paid Mr. Greenough's salary. In fact the only functions carried out by the directors as such were to sign financial statements and minutes of directors' and shareholders' meetings all of which were prepared from time to time in Edmonton and brought to Nassau by Mr. Sandy MacTaggart or his associate Mr. Jean de la Bruyere for the directors' signatures.

That these companies were incorporated and these arrangements were made for the purpose of securing that profits realized from the construction and construction supply activities carried out by Saje Management Limited, which carried on its business in Edmonton, Alberta, would be realized by several corporations who were not associated within the meaning of the Act and thus attract less tax was not merely not disputed but was frankly stated by the appellants' counsel in his opening and by Mr. MacTaggart, the principal witness called on behalf of the appellants who, with his associate, Mr. de la Bruyere, were the holders of all the shares of Saje Management Limited. However, no case was made out of any trust or other arrangement

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by which Saje Management Limited or its shareholders might be said to be in a position to exercise *de jure* control of the voting rights of the Class A shares of the appellant companies held by the Nassau solicitor or his several partners or employees and the evidence negatives the existence of any such arrangement. Nor was any attempt made to establish the case as one of dummy corporations whose fictitious legal personalities could be ignored. On the contrary the very foundation of the taxation appealed from is the assumption of the reality of these corporations and of their having made the profits in respect of which they have been assessed. The case therefore fails to be decided, despite the stark unreality of the situation, as disclosed by the evidence, on the basis that these appellants were corporations which in fact engaged in business and thereby realized the profits in question.

The question for determination, thus, as I see it, is simply whether Saje Management Limited by reason of its holding of 498 Class B shares, in each case, controlled the corporation. The appellants' position, as I have apprehended it, was basically that the Class A shareholders, by reason of their exclusive right to elect the directors, in each case controlled the corporation from which it followed that Saje Management Limited did not control it. I do not think, however, that it is necessary to reach a conclusion either on the broad question "who controlled the company" or on the narrower question whether the Class A shareholders controlled it since the answer would not necessarily be conclusive in either case. What the appellants require in order to succeed is, as I see it, in each case a determination that Saje Management Limited did not control the corporation.

Counsel for the Minister on the other hand took two alternative positions. He submitted first that, notwithstanding the exclusive right of Class A shareholders to elect the directors, in the somewhat peculiar set up of the appellant companies, the *de jure* control of each of the companies rested in the ownership by Saje Management Limited of its 498 Class B shares. Alternatively, he submitted that even if there was an element of control vested in the Class A shareholders by reason of their exclusive right to elect directors there was also an element of control vested in the Class B shareholder since that shareholder had

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overwhelming voting power on any other question that might come before a shareholders' meeting and since the directors of the appellant companies did not have all the powers commonly exercised by directors, in that they had no authority to accumulate profits or to issue the unissued shares. He went on to submit that in this situation the court should take into account the *de facto* control which, in respect of each of these appellants, was admittedly and undoubtedly exercised entirely by Saje Management Limited through its employee Mr. Greenough under the direction of its two shareholders, and should hold that Saje Management Limited controlled the appellant corporations.

I can deal with the alternative submission by saying that in my opinion *de facto* control is not to be taken into account, that *de jure* control is what is contemplated by the statute[3] and that in determining association for the purposes of the statute control itself and not some mere element or fragment of it is required to support a conclusion that corporations are in fact associated. This submission, in my opinion, accordingly fails.

The first submission, however, calls for closer examination. In the *Dworkin Fur*[4] and other cases and in the *Vina-Rug (Canada) Ltd. v. M.N.R.* case[5], as well as in the *Buckerfield's Ltd. et al v. M.N.R.* case[6] and the *British American Tobacco v. I.R.C.* case[7] therein referred to the problem presented and considered was essentially one of the quantity of voting power required to afford control of the particular corporation. As the votes in these cases were all exercisable in respect of any question that might arise no question of the quality or characteristics of voting power attaching to different classes of shares was involved. This

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[3] *Vide M.N.R. v. Dworkin Furs Ltd. et al* [1967] S C R. 223 per Hall J , at page 227:

> The word *controlled* as used in this subsection was held by Jackett P. to mean *de jure* control and not *de facto* control and with this I agree.

and at page 229:

> The arrangement or agreement between Wagenaar and Jagar, while it might be said to give Wagenaar *de facto* control, did *not* give him *de jure* control, which is the true test...

See also *Vina-Rug (Canada) Ltd. v. M.N.R.* [1968] S.C R 193 per Abbott J at page 196

[4] *ubi supra.*

[5] [1968] S C.R. 193.

[6] [1965] 1 Ex C R 299.

[7] [1943] 1 All E R. 13

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applied as well in the *Aaron's Ladies Apparel Ltd.*[8] case where unanimity rather than a majority vote was required. Nor was there involved in these cases any question as to the functions and authority of directors when elected, it having been, I think, assumed that the directors had the usual general authority to exercise the powers of the company. It therefore appears to me that while these cases afford principles by which one may be guided they offer no foregone conclusion for a case such as the present. Thus, while in an ordinary situation control may reside in the voting power to elect directors such power to choose directors in my opinion would not afford control of a company in which, by the memorandum and articles, the directors had been shorn of authority to make decisions binding upon the company and such decisions had been reserved for the shareholders in general meeting. If, therefore, in an ordinary situation control of a company rests in the voting power to elect directors but in the suggested situation does not rest in such voting power it seems to me that when the situation is not ordinary the question of *de jure* control of the company must be resolved as one of fact and degree depending on the voting situation in the particular company and the extent and effect of any restrictions imposed by the memorandum and articles on the decision making powers of the directors.

The statement of the President of this court in *Buckerfield's* case[9], when he said "I am of the view, however, that in section 39 of the *Income Tax Act*, the word 'controlled' contemplates the right that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors" should, I think, be read and understood as applying to a case where the directors when elected have the usual powers of directors to guide the destinies of the company.

In the present situation, as I see it, the authority of the directors of the appellant companies has been only slightly restricted or modified from that ordinarily applicable in companies which have adopted Table A of the First Schedule of the *Companies Act* as their articles and I should not have thought that such restrictions as have been imposed had any serious effect on the authority of the directors to

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[8] [1967] S.C.R. 223 at 231. [9] *ubi supra* at p. 303.

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Thurlow J

govern the business of the company and generally to direct its affairs.[10] The directors of these companies, as I see it, had, for example, ample authority to commit them to contracts for the supply of materials or the construction of buildings anywhere in the world or to discharge Mr. Greenough and make other arrangements for the conduct of the companies' businesses whenever they might have seen fit to do so. I would not, therefore, on this account alone conclude either that control of these companies did not rest in the owners of the Class A shares or that control rested in the voting power of the Class B shareholders.

There is, however, another aspect of the situation in each of these companies which appears to me to require consideration and which was not involved in any of the cases cited. Here, in the case of each appellant company, Saje Management Limited as the holder of 498 Class B shares, had ample voting power, not merely to pass or to defeat any ordinary resolution (other than one electing directors), but to pass or defeat any special resolution or any extraordinary resolution that might be proposed. That shareholder thus had the voting power to change the articles of the company[11]. As I see it, it had the power to repeal Article 55 and any other article conferring upon the directors authority to bind the company, and thus to reduce the directors to the status of errand boys, while reserving all decision making power not specifically conferred on the directors by the statute or by the memorandum of associa-

[10] *Vide* Article 55 of Table A which reads:

55 The business of the Company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the Company, and may exercise all such powers of the Company as are not, by *The Companies Act,* or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by ordinary resolution, whether previous notice thereof has been given or not; but no regulations made by ordinary resolution shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

[11] R S A 1955, c 53, s 52(1)

(1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made is as valid as if it were originally contained in the articles, and is subject in like manner to alteration by special resolution.

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tion for the shareholders as a whole, or of Class B shares only, in general meeting. It had the voting power to remove the directors from office. It had as well the voting power to pass a special resolution to eliminate the need for unanimous consent of all shareholders to the issue of additional shares and to vest in the Class B shareholders authority to issue additional Class A shares in sufficient numbers to outvote the two shares held by the Nassau residents.

In these circumstances can it be said that Saje Management Limited did not have *de jure* control of the appellant companies? So far as I am aware there is no decided case in which such a situation has been considered but there is, I think, some guidance to be found for the decision in the *British American Tobacco* case where Lord Simon L.C. said:[12]

> I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make *the ultimate decision* as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company
>
> As to what may be the requisite proportion of voting power, I think a bare majority is sufficient. The appellant company has, in respect of each of the foreign companies referred to in the case, the control of the majority vote I agree with the interpretation of "controlling interest" adopted by *Rowlatt, J*, in *Noble v. Commissioners of Inland Revenue,* when construing that phrase in the Finance Act, 1920, s. 53(2)(*c*). He said at p. 926 that the phrase had a well-known meaning and referred to the situation of a man
>
> .. *whose shareholding in the company is such that he is more powerful than all the other shareholders put together in general meeting.*
>
> The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes. It is true that for some purposes a 75 per cent majority vote may be required, as, for instance (under some company regulations) for the removal of directors who oppose the wishes of the majority; but the bare majority can always refuse to re-elect and so *in the long run* get rid of a recalcitrant board. Nor can the articles of association be altered in order to defeat the wishes of the majority, for a bare majority can always prevent the passing of the necessary resolution. (underlining added).

While the present is a converse case in that a particular shareholder has the voting power to pass a special resolution but no immediate right to elect directors, it seems to

[12] [1943] 1 All E R 13 at page 15

me that the same guiding principle can be applied. A shareholder who, though lacking immediate voting power to elect directors, has sufficient voting power to pass any ordinary resolution that may come before a meeting of shareholders and to pass as well a special resolution through which he can take away the powers of the directors and reserve decisions to his class of shareholders, dismiss directors from office and ultimately even secure the right to elect the directors is a person of whom I do not think it can correctly be said that he has not *in the long run* the control of the company. Such a person in my view has the kind of *de jure* control contemplated by section 39 of the Act. It follows that Saje Management Limited had control of all ten appellant companies at the material times and that they were all "associated" with one another within the meaning of section 39.

The appeals will be dismissed with costs.

Toronto 1969
Jan. 14-15
Ottawa
Feb. 24

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

THOMAS RODMAN MERRITT, JR. and RICHARD BREDIN STAPELLS, EXECUTORS OF THE ESTATE OF THOMAS RODMAN MERRITT .... RESPONDENTS.

Estate tax—"Arm's length", meaning—Debentures issued decedent by company controlled by his children—Valuation—Estate Tax Act, s. 29(1)(b).

Because of *M's* improvidence a plan for supervising his assets was devised by an accountant consulted by *M's* son. Under the plan, which was concurred in by *M*, his son and daughter, and carried out by the accountant and a solicitor, assets of *M* valued at $317,000 were transferred to a newly-incorporated company controlled by *M's* son and daughter *M's* only stipulation was that he receive $1,000 cash per month and he was assured of this sum through the purchase of an annuity at a cost of $110,000 and the issue to him of 3% debentures of the new company of the face value of $207,000 On *M's* death his executors valued the debentures for estate tax purposes at 85% of their face value

Held, s. 29(1)(*b*) of the *Estate Tax Act* required that debentures be valued at their face value because *M* and the company were not

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dealing at arm's length when the debentures were issued. Where the same person dictates the terms of a bargain on behalf of both parties thereto it cannot be said that those parties are dealing at arm's length. It was immaterial that the plan was devised by *M's* professional advisers and that *M* never completely absorbed its details· it was solely on his instructions that the plan was carried out, and the company, although not controlled by *M,* was bound to issue the debentures in accordance with that plan

M N R v Sheldon's Engineering Ltd [1955] S C R. 637, applied

APPEAL from estate tax assessment.

M. A. Mogan and *J. M. Halley* for appellant.

R. B. Stapells, Q.C. for respondents

CATTANACH J.:—This is an appeal from a decision of the Tax Appeal Board dated November 7, 1967, whereby an appeal from an assessment by the Minister under the *Estate Tax Act,* S. of C. 1958, c. 29, was allowed.

The Minister, in computing the aggregate taxable value of the estate of the late Thomas Rodman Merritt increased the valuation of debentures of Thombille Investment Limited (hereinafter referred to as Thombille) owned by the deceased at the time of his death by an amount of $31,050. The debentures had a face value of $207,000.

In completing the prescribed estate tax return the executors of the estate in computing the aggregate net value valued the debentures at 85% of their face value resulting in a declared valuation of $175,950 to which was added interest of $203.61 bringing the total to $176,153.61.

The amount of $31,050 added by the Minister resulted in the face value of the debentures of $207,000 being included to compute the aggregate net value of the estate of the property passing on the death of Thomas Rodman Merritt, Sr. in accordance with section 3 of the Act.

In assessing the estate as he did the Minister did so on the assumption that immediately prior to the death of the deceased there was a debt owing to him by Thombille, namely the debentures with a face value of $207,000 and that at the time of the issue of the debentures to the deceased, in return for assets transferred to Thombille, the deceased and Thombille were not persons dealing with each other at arm's length.

Thombille was caused to be incorporated in August 1960, for the purpose of acquiring certain of the assets of T. R.

Merritt, Sr., by his son T. R. Merritt, Jr. and his daughter, Marigold S. Young. The issued and outstanding shares of Thombille were held as follows:

Marigold S Young (deceased's daughter) .	5,000
Thomas Rodman Merritt, Jr (his son) . .	4,998
W. A. Lyttle (a chartered accountant) .	1
R B Stapells (a barrister and solicitor)	1

The shares held by Messrs. Lyttle and Stapells were held for the benefit of T. R. Merritt, Jr. and in order to qualify them as officers and directors of Thombille.

There is no dispute that the shares held by T. R. Merritt, Jr. and Mrs. Young, the only living children of the deceased, vested control of Thombille in them.

The Minister, therefore, says that, since immediately prior to the death of the deceased there remained a debt owing him by a corporation controlled by one or more persons connected with him by blood relationship, the value of the debt is to be determined as though the amount thereof outstanding became due and payable to him at that time and accordingly, the face amount of the debentures must be included in computing the aggregate net value of the estate, the whole in accordance with section 29 of the *Estate Tax Act* which reads as follows:

> 29 (1) Where, immediately prior to the death of a deceased, there remained outstanding a debt owing to the deceased
>
> (a) by any person connected with him by blood relationship, marriage or adoption, or
>
> (*b*) by any corporation that, at that time, was controlled, whether directly or indirectly and whether through holding a majority of the shares of the corporation or of any other corporation or in any other manner whatever, by the deceased, by one or more persons connected with him by blood relationship, marriage or adoption, by the deceased and such one or more other persons or by any other person on his or their behalf,
>
> the value of the debt shall, unless it is established that at the time of the creation of the debt the deceased and such debtor were persons dealing with each other at arm's length, be determined for the purposes of this Part as though the amount thereof outstanding immediately prior to the death of the deceased had, at that time, become due and payable to him.
>
> (2) In this section, "debt" means a debt of any kind whatever, whether secured or unsecured and whether under seal or otherwise, and includes a bill of exchange or promissory note, whether negotiable or otherwise

The debentures qualify as a debt within the definition of a debt in section 29(2) and, for the purposes of the Act,

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Cattanach J

persons are connected by blood relationship if *inter alia* one is the child or other descendant of the other (see section 58(3)(*a*). T. R. Merritt, Jr. and Mrs. Young, who controlled Thombille, were so related to the deceased.

The obvious purpose of section 29 is to prevent the value of a debt owed to a deceased by a person connected with him by blood relationship, marriage or adoption, or by a corporation which he or persons so connected with him control, from being reduced by reason of its due date having been set in the future.

However, the respondents seek to take advantage of the saving provision in section 29 reading, "unless it is established that at the time of the creation of the debt the deceased and such debtor were persons dealing with each other at arm's length".

Thus the issue becomes a clearly defined and narrow one of whether, in the circumstances of the transaction between the deceased and Thombille, a corporation controlled by his son and daughter, the parties were dealing with each other at arm's length.

No issue was raised in the pleadings as to the accuracy of the appellant's valuation of the debentures at 85% of their face value as the value of the property passing on death. In the course of the trial counsel for the Minister indicated he was prepared to accept that evaluation if the transaction should be held to be one at arm's length between the parties thereto.

The Estate Tax Act does not contain a provision similar to that in section 135(5)(*a*) of the *Income Tax Act* wherein it is provided that for the purposes of that Act, "related persons shall be deemed not to deal with each other at arm's length". The meaning of the expression "dealing at arm's length" as used in the *Estate Tax Act* must therefore be determined without any such aid.

The facts which gave rise to the transaction in question follow.

The deceased was a member of one of the oldest and most respected families in St. Catharines, Ontario, where he always resided. His annual net income of approximately $15,000 derived from inheritances he had received. He was never employed full time. His occupation was described as that of a gentleman by which I assume is meant that he was content to live on the income of investments he owned. His annual net income which I intimated above to be approximately $15,000, but which varied from year to year, was for 1960, made up of about $6,900 in dividends from securities, $1,700 interest from bonds, $833 interest from notes and other securities, $9,700 from the estate of Emily Merritt, a great cousin of the deceased, and $585 from income from investments administered by Canada Trust over which the deceased had no control, which total $19,718. From this total there must be deducted an amount of $5,000 which was payable to his wife under a separation agreement. The funds which generated the amount of $5,000 came from the proceeds of the sale of real property known as Park Place which were invested and administered by the Canada Trust. Any surplus over the $5,000 payable to Mrs. Merritt was paid to the deceased. The above figures which I have taken from the 1960 income tax return varied from year to year and are set forth as illustrative of the sources and nature of the deceased's annual income.

The deceased was well known and respected in the community. He was active in the church of the denomination of his choice having served as warden. He had also served as treasurer and director of Niagara Lower Arch Bridge Company.

After being separated from his wife, at a time when his son and daughter had been married and were living their own separate lives, the deceased lived alone in the family home known as Rodman Hall set in an estate of 15 acres.

He was not a prudent business man and exhibited no interest in the management of his affairs. He was considered to be a "soft touch" and was likely to engage in ventures with dubious prospects of returns.

He had served with distinction in the First World War and was particularly generous to any "old sweat" who might importune him. He was prone to make outright gifts to them, loans on worthless promissory notes and loans on mortgages, the collateral for which was worthless.

The normal imprudence of the deceased was compounded by alcoholism which had extended over a number of years. He was frequently obliged to enter Homewood Sanatorium at Guelph, Ontario, for treatment of this affliction. The

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admittances of the deceased to this institution were arranged by his son without the necessity of commitment because he entered voluntarily.

His handling of his financial affairs was a cause of concern to his family and friends. He made highly speculative investments. When he made investments it was his habit to place the share certificates in a safety deposit box and promptly forget their existence. He gave no thought to whether those investments should be realized or changed.

Because of his lack of interest in his own affairs he arranged for a friend, Miss Farmer, an employee of the Imperial Bank, to prepare his personal income tax returns, to pay his personal accounts and to keep track of records.

The relationship between T. R. Merritt, Jr. and his father was always cordial but the son never proffered nor asked for advice from his father on financial and personal affairs. In fact the son never professed any knowledge of investments, but rather an ignorance thereof. His interests lay elsewhere. He was a graduate of the University of Toronto. In 1960 he was head master of Appleby College at Oakville. Later he operated a farm near Guelph. His income from his profession and later from his successful farming operations was ample in addition to which his wife had a substantial income.

The deceased's daughter, Mrs. Young, was married to an electrical engineer. The couple lived in England and were in comfortable financial circumstances.

Mr. Merritt Jr.'s visits to his father were not frequent but occurred when some emergency arose. He never interfered in his father's affairs except when required to do so by dire necessity and then he did so by reason of his father's physical condition.

Mr. Merritt, Sr. sought to derive rental income from Rodman Hall but the venture was a losing one from its inception. He then considered subdividing and selling the property. However in order to preserve the estate intact, perhaps for sentimental reasons, he sold it to the St. Catharines Art Council. The proceeds were used to supplement the funds administered by the Canada Trust for the separation allowance payable to Mrs. Merritt which, in the meantime, had been increased from $5,000 to $6,000.

Mr. Merritt, Jr. took no part in his father's decision to sell Rodman Hall, but he did come to his assistance in disposing of and distributing the many household effects. If my recollection of the evidence is correct, Mr. Merritt, Sr. lapsed into an alcoholic bout following the sale of the family home and was again confined to Homewood Sanatorium.

Shortly after this incident, Mr. Merritt, Jr. received a telephone call from Miss Farmer advising him that his father again needed help. He had undertaken to donate an organ at a cost of between $25,000 and $30,000 to the church of which he was a member, to be installed in a new church building being erected. He had always been generous to the church making many donations usually about $1,000 but never before had he made a donation of this magnitude. As both Miss Farmer and Mr. Merritt, Jr. knew, his income was not sufficient to make this undertaking.

This incident was climactic. Mr. Merritt, Jr. was desperate. At the suggestion of Miss Farmer he sought the advice of W. A. Lyttle, a chartered accountant practising his profession in St. Catharines.

Mr. Lyttle had known Mr. Merritt, Sr. when he was a warden of the church. Later, as a student accountant, he had business connections with the deceased when he was treasurer of the Niagara Lower Arch Bridge. Still later the deceased engaged Mr. Lyttle to prepare statements of revenue and expenditures with respect to the rental of Rodman Hall. He was also consulted by the deceased with respect to tax aspects involved in the sale of Rodman Hall.

On being consulted by Mr. Merritt, Jr. in January 1960, Mr. Lyttle suggested the incorporation of a company to which all assets under the control of Mr. Merritt, Sr. would be transferred to ensure a supervision of those assets and management of his affairs.

The plan was devised by Mr. Lyttle on his own initiative without suggestions or criticism from Mr. Merritt, Jr. Mrs. Young came to Canada for the express purpose of participating in the arrangement of her father's affairs. She was agreeable to the plan and offered no criticism of it.

The matter was broached to Mr. Merritt, Sr. by Mr. Lyttle. At that time he had just been discharged from Homewood Sanatorium. He was, therefore, "dried out" and in full possession of his faculties. He recognized the advisability of such a plan to which he readily agreed, his sole concern and stipulation being that he should be guaranteed a cash income for his exclusive use of $1,000 per month.

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In skeleton form the plan amounted to this.

All securities owned by the deceased and under his control (which excluded assets invested and administered by Canada Trust), which had a value of $317,000, were to be transferred to the company to be incorporated (i.e. Thombille).

In exchange therefor he was to receive, *inter alia,* a single payment life annuity yielding $868 per month to be purchased at a cost of $110,000 from the Manufacturers Life Insurance Company. This annuity was negotiated by Mr. Lyttle and was the best obtainable.

After the purchase of an annuity for $110,000 the value of the securities then remaining would be $207,000. As further consideration for the assets to be transferred to Thombille, Mr. Merritt, Sr. was to receive 25 year debentures of Thombille having the face value of $207,000 and bearing interest at the rate of 3%.

To ensure that the deceased would have $1,000 a month to use as he wished, which was in accordance to his desire and the condition that he laid down, there would be required an annual amount of $30,000 which was needed for the following purposes:

Cash for Mr Merritt's untrammelled use . ..	$12,000
Payment of income tax	4,000
Payment of the separation allowance to Mrs Merritt	5,000
Payment of premiums on life insurance taken out on his life with his son and daughter as beneficiaries	6,000
Payment for a premium for an insurance policy carried on his life	3,000
Total...	$30,000

The sources from which this amount were to be derived were two-fold. The first sources were as follows:

From the annuity to pay $868 a month	$10,400 00
Income from the assets administered by Canada Trust surplus to the separation allowance of $5,000 payable to Mrs Merritt, those funds being the proceeds of the sale of Park Place and Rodman Hall, and	2,200 00
From the estate of Emily Merritt	11,041 56
	$23,641.56

The second source, to make up the total of $30,000, would be the interest on the debentures.

The interest rate on the debentures of the face value of $207,000 was struck at 3% to yield $6,210 which when added to the total of $23,641.56 of funds from the first source would bring the total to $29,810.56 which would be sufficiently approximate to the $30,000 needed to meet the requirements of the deceased.

As intimated before, the plan, of which Mr. Lyttle was the author, was acceptable to Mr. Merritt, Sr. and his son and daughter.

The son's only concern, which was shared by his sister, was that his father's assets would be carefully administered to meet his fixed obligations and that he would be generously provided with funds for his immediate needs and to spend according to his whim but in moderation. The son, upon whom the burden of responsibility normally fell, would be relieved of personal involvement of his father's affairs.

The father, in full possession of his faculties and a knowledge of his weaknesses, recognized the benefits of the plan to him and agreed to it. He would receive a certain and regular monthly income equivalent to that he had previously enjoyed but the assets he had previously controlled would be beyond his control. He would receive for the assets he would surrender to Thombille its debentures to the face value of the assets. The debentures constituted a first charge on those assets.

If the situation, as it existed, had been allowed to continue there was every likelihood that the assets owned and controlled by him would be dissipated.

The plan, being agreed upon, R. B. Stapells, Q.C., the son of the deceased's life long friend and solicitor, was engaged to take the necessary legal steps to implement the plan. Mr. Lyttle also took steps to bring the plan to its completion.

Although Mr. Lyttle was consulted in this regard by Mr. Merritt, Jr. he considered Mr. Merritt, Sr. as his client and billed him for professional services which accounts were paid by Mr. Merritt, Sr. However, when Thombille was incorporated in August 1960, the bills for his services were rendered to and paid by Thombille.

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Messrs. Stappells and Lyttle were the only professional advisers involved and I cannot escape the conclusion that they were advisers to both Mr. Merritt, Sr. and Thombille as well as to Mr. Merritt, Jr. and Mrs. Young. I hasten to add that I have no reason to doubt the integrity of either and that their conduct throughout was completely honest and morally irreproachable.

The assets were valued at $317,000 as at August 31, 1960, by two expert appraisers.

The securities, which were registered in the deceased's name, were delivered to Mr. Lyttle in negotiable form who received them as agent for Thombille and transferred them to Thombille.

There was no such thing as a closing date determined upon, although it was understood that $110,000 would be realized and the annuity purchased within 30 days. The annuity was purchased on September 30, 1960. Therefore I assume that the securities were delivered to Mr. Lyttle about August 31, 1960. They were kept in a safety deposit box rented by Thombille.

The by-law creating the debentures was enacted by Thombille on October 28, 1960, so that the debentures were not issued until after that date and the first payments of interest on the debentures and the annuity were made to Mr. Merritt, Sr. shortly after that date.

While the governing factor in fixing the rate of 3% on the debentures was to bring the returns to Mr. Merritt, Sr. up to the estimated $30,000 necessary to meet his obligations and requirement of $1,000 cash per month, Thombille could not pay a higher rate and still meet the obligations (other than the monthly cash payment of $1,000 to Mr. Merritt, Sr. which was covered by the annuity) unless the securities were varied. In the greater part they consisted of shares of Imperial Bank. There was nothing to prevent Thombille from changing the securities. The deceased had not exacted or demanded that the securities to be held should be of any particular type. His condition was that Messrs. Lyttle and Stapells, in whom he placed confidence and trust, should be directors of Thombille. There was no express undertaking, but a tacit understanding that Thombille should hold only trust type securities which understanding the directors rigidly honoured. No independent advice was sought to advise upon an appropriate rate of interest on the debentures.

The Minister called as an expert witness an investment consultant who testified that in August the level of government of Canada bonds, the best security in the country to which all other bonds were related, was 4.83%. He expressed the opinion and would so advise a lender who consulted him that the debentures of Thombille should command an interest rate of 6½% or 7%.

When the plan was put into operation the tension and concern eased. Mr. Merritt, Sr. lived his life without causing dire emergencies which required the intervention of his son for a period of four years. He was then stricken with his fatal illness and was confined to a local hospital where he died in 1964.

In *M.N.R. v. Sheldon's Engineering Ltd.*[1] Locke J., delivering the judgment of the Supreme Court of Canada, had occasion to comment upon the expression "dealing at arm's length" as it appeared in a provision in the *Income Tax Act*. He said at page 643:

> The expression is one which is usually employed in cases in which transactions between trustees and *cestuis que trust*, guardians and wards, principals and agents or solicitors and clients are called into question The reasons why transactions between persons standing in these relations to each other may be impeached are pointed out in the judgments of the Lord Chancellor and of Lord Blackburn in *McPherson v. Watts* (1877) 3 App Cas. 254)

He went on to say, however, that "These considerations" i.e., the reasons why transactions between persons standing in such relations as trustee and *cestuis que trust* may be impeached "have no application in considering the meaning to be assigned to the expression in s. 20(2)".

Having thus put aside the principles that had been developed concerning transactions between persons standing in the relationship of trustee and *cestuis que trust* and other relationships giving rise to an implication of undue influence, Locke J. went on to reject the argument that the provision in the *Income Tax Act* at that time whereby certain defined classes of persons were deemed not to deal

[1] [1955] S C R 637

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with each other at arm's length was exhaustive of the classes of persons who could be regarded as not dealing with each other at arm's length for the purposes of that Act. He said:

> I think the language of s. 127(5), though in some respects obscure, is intended to indicate that, in dealings between corporations, the meaning to be assigned to the expression elsewhere in the statute is not confined to that expressed in that section.

While, therefore, the facts in the *Sheldon's Engineering (supra)* case did not fall within any of the specially enumerated classes of cases where persons were *deemed* not to deal with each other at arm's length, Locke J. concluded that it was still necessary to consider whether, as a matter of fact, the circumstances of the case fell within the meaning of the expression "not dealing at arm's length" within whatever meaning those words have apart from any special deeming provision.

In this appeal, the question is whether the circumstances are such as to fall within the words "persons dealing with each other at arm's length" in section 29(1) of the *Estate Tax Act*. In my view, these words in the *Estate Tax Act* have the same meaning as they had in the income tax provision with which Locke J. was dealing in *Sheldon's Engineering* when those words were considered, as Locke J. had to do, apart from any special "deeming" provision.

It becomes important, therefore, to consider what help can be obtained from the judgment in *Sheldon's Engineering* as to the meaning of the words "persons dealing at arm's length" when taken by themselves. The passage in that judgment from which, in my view, such help can be obtained, is that reading as follows:

> Where corporations are controlled directly or indirectly by the same person, whether that person be an individual or a corporation, they are not by virtue of that section deemed to be dealing with each other at arms length Apart altogether from the provisions of that section, it could not, in my opinion, be fairly contended that, where depreciable assets were sold by a taxpayer to an entity wholly controlled by him or by a corporation controlled by the taxpayer to another corporation controlled by him, the taxpayer as the controlling shareholder dictating the terms of the bargain, the parties were dealing with each other at arms length and that s. 20(2) was inapplicable.

In my view, the basic premise on which this analysis is based is that, where the "mind" by which the bargaining is directed on behalf of one party to a contract is the same "mind" that directs the bargaining on behalf of the other party, it cannot be said that the parties are dealing at arm's length. In other words where the evidence reveals that the *same* person was "dictating" the "terms of the bargain" on behalf of *both* parties, it cannot be said that the parties were dealing at arm's length.

Applying to this case that view of the tests to be applied, it becomes necessary to consider whether the appellant has discharged the onus of showing that, at the time when the debenture debt was created, the deceased and Thombille were persons dealing with each other at arm's length.

What the respondent has shown is, in effect, that, as a result of advice given to him by a lawyer and an accountant, which advice he accepted, the deceased issued instructions which were, in effect, that a corporation was to be set up in which his son and daughter would own practically all the shares, and that his property was then to be transferred to the corporation on terms that part of it was to be used to buy him a certain annuity and that the corporation would issue to him debentures of specified terms.

In my view, it is immaterial that the whole arrangement was the "brain child" of the professional advisers. It would have been of no effect if the deceased had not accepted their advice, made the scheme his own, and given instructions that it be carried out. It is also immaterial whether he ever completely absorbed the details of the plan. He stipulated the result that he required from the scheme and, in effect, he instructed the carrying out of a scheme so devised as to accomplish that result. The situation is therefore that the corporation was created pursuant to those instructions as the instrumentality to carry out the scheme. Regardless of who had "control" of the corporation at the time that the debentures were authorized and issued, there could have been no dealing between the deceased and the corporation at that time because by that time, having accepted the deceased's property in accordance with the scheme adopted by the deceased, the corporation had no alternative to issuing the debentures as contemplated by the scheme. It cannot therefore be said, in my view, that the deceased and the corporation were at that time persons dealing with each

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other at arms' length. The only time when any decision was taken was when the instructions for the scheme as a whole were given, and the decision to give such instructions was a unilateral decision by the deceased. From that time on, everything that was done was done to implement those instructions and there was no part of the arrangement that involved bargaining between parties with independent interests. (I do not overlook the transactions whereby the shareholders acquired their shares or the purchase of the annuity, which were, of course, transactions between parties dealing with each other adversely, but they do not affect the reasoning concerning the creation of the debentures.)

The appeal is, therefore, allowed with costs.

Ottawa 1969

Feb. 18-19

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OTTAWA VALLEY POWER COMPANY ..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Capital cost allowances—Pleadings—Ontario Hydro paying cost of converting supplier's plant—Whether supplier entitled to capital cost allowances—Whether "assistance from public authority"—Factual position not taken in notice of appeal—Leave to amend—Income Tax Act, s. 20(6)(h).

Appellant had a contract to supply 25 cycle power to the Ontario Hydro Commission until 1971 at $100,000 a month In 1956, following Hydro's decision to convert to 60 cycle, appellant agreed to supply 60 cycle power on the same terms, and Hydro agreed to pay the cost of converting appellant's plant to 60 cycle, the additions to the plant to be appellant's property Hydro paid $1,932,150 to convert appellant's plant, which amount was less than it would have cost Hydro to transform 25 cycle power to 60 cycle power. In its balance sheets appellant showed the cost of converting its plant as capital surplus, and for the taxation years 1959 to 1962 claimed capital cost allowance on that sum The allowance was refused on the ground that appellant incurred no capital cost In its notice of appeal appellant took the position that the cost borne by Hydro was appellant's consideration for giving up the right to deliver 25 cycle power for 14 years In argument however appellant took the position that by the 1956 agreement with Hydro it gave up a bargaining position worth the cost of the additions to its plant

Held, appellant was entitled to succeed neither on the factual position taken in its notice of appeal nor on that taken in argument (even if the latter, not having been pleaded in the notice of appeal, was open to appellant).

Appellant should however have time to apply for leave to amend its notice of appeal to put forward another factual position, *viz* that in agreeing to supply 60 cycle power for 25 cycle power at the same price in consideration of being provided with the very substantial capital additions to its plant appellant from a commercial point of view gave full value for the new capital assets. If appellant applied for leave to amend its notice of appeal as suggested respondent should have the right to apply for leave to amend its reply to raise the question whether part or all of the value of the additions to appellant's plant should have been included in appellant's revenues for any of the years under appeal.

Corp. of Birmingham v. Barnes (1935) 19 T.C. 195 (H.L.); *Detroit Edison Co. v. C.I.R.* (1942) 319 U.S. 98; *Curran v. M.N.R.* [1959] S.C.R. 850; *City of London Contract Corp. v. Styles* (1887) 2 T.C. 239; *John Smith & Son v. Moore* (1921) 12 T.C. 266; *Canada Starch Co. v. M.N.R.* [1969] 1 Ex. C.R. 96; *Van Den Berghs Ltd v. Clark* [1935] A.C. 431; *Henriksen v. Grafton Hotel, Ltd* [1942] 1 All E.R. 678, referred to.

Held also, the payment by Hydro of the cost of the additions to appellant's plant was not "assistance from a...public authority" within the meaning of s. 20(6)(*h*) of the *Income Tax Act* and therefore excluded from the capital cost of those assets. Section 20(6)(*h*) has no application to an ordinary business arrangement between a public authority and a taxpayer.

INCOME tax appeal.

J. H. Laycraft, Q.C. for appellant.

Gordon V. Anderson and *I. Pittfield* for respondent.

JACKETT P.:—This is an appeal from the assessments of the appellant under Part I of the *Income Tax Act* for the 1959, 1960, 1961 and 1962 taxation years. The sole question involved is whether the appellant is entitled to capital cost allowance in respect of additions and improvements to its production plant made in the period from 1956 to 1960 at a total cost of $1,932,150.

The respondent's position is, in effect, that there was no capital cost of the additions and improvements "to the taxpayer" (*i.e.*, to the appellant) because such additions and improvements were made by Ontario Hydro at its own expense or, alternatively, any deduction of capital cost allowance is prohibited by section 20(6)(*h*) of the *Income Tax Act* because the appellant had received, from a public

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authority, assistance in respect of the additions and improvements in question equal to the capital cost thereof.[1]

Putting the facts in very simple terms, as I understand them, they may be summarized as follows:

1. Prior to a period in the 1950's, the Hydro-Electric Power Commission of Ontario (herein referred to as "Ontario Hydro"), in its business of producing or otherwise acquiring and distributing electrical power, utilized two different kinds of electrical power which may be referred to as 25 cycle power and 60 cycle power. These two different kinds of electrical power could not be used in the same lines or equipment.

2. During the 1950's, Ontario Hydro changed the part of its system that had operated on 25 cycle power so that it would operate on 60 cycle power;[2] and, to do so, had to carry out a very substantial programme of transformation in its own generating and distribution properties, and had to make consequential arrangements with its suppliers and the consumers of its power.

3. The appellant had a plant that was capable of producing 25 cycle power and had a contract under which it was entitled, and bound, to supply such power to Ontario Hydro for a period ending in 1971, and to receive therefor $100,000 per month; and it could have continued, with its then plant, to carry out that contract for the balance of the term.

4. If, after the change to 60 cycle power, Ontario Hydro had continued to take 25 cycle power from the appellant for the balance of the term of the appellant's contract, it would have cost Ontario Hydro, to transform that power so as to make use of it in its 60 cycle power system, at least $2,500,000 more than it would have cost it to use the same amount of power received as 60 cycle power.

5. For the appellant to deliver to Ontario Hydro, for the balance of the contract term, an amount of 60 cycle power equal to the amount of 25 cycle power that it was bound by the contract to deliver, involved a change in its generating equipment that would have cost it between $1,900,000 and $2,000,000.

6 After negotiations between the appellant and Ontario Hydro that lasted approximately a year, on October 22, 1956, Ontario Hydro and the appellant entered into two contracts. By one of those contracts, the existing contract between the appellant and Ontario Hydro for the supply of 25 cycle power was changed to a contract whereby the power to be supplied was to be 60 cycle power, but all other terms

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[1] Counsel for the respondent did not press other alternatives based upon sections 12(2) and 137(1) of the *Income Tax Act,* although they appear in the reply to the notice of appeal, because his position based on them depended on his succeeding in his contention that there was no capital cost of the additions and improvements to the appellant. If he is right in contending that there is no such capital cost, obviously he succeeds without relying on either section 12(2) or section 137(1).

[2] Some small parts continued to operate on 25 cycle power, but these were too remote from the appellant's plant to have any effect on the situation in this case.

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were to remain the same. The other contract executed on the same day was a contract whereby, after a recital referring to the first of the two contracts and a recital that the parties had agreed "that this change in periodicity in alternations of current from 25 cycles per second to 60 cycles per second will make it necessary to alter... replace or do whatever may be necessary to permit frequency standardization at 60 cycles of the Company's existing 25 cycle generating units and facilities", the parties agreed that the Commission "at its own expense" would do such work. Paragraph 8 makes the intention clear. It reads:

> 8. The general intent of this Agreement is that the Commission itself and at its own expense shall perform or cause to be performed all the work required to change over the Company's existing generating units and facilities from 25 cycles to 60 cycles and that the Company shall not be put to any expense whatever in connection with the actual change-over operation.

Paragraph 4 makes it clear, also, that what is being done under the agreement is intended to add to the appellant's property rights. It reads:

> 4. The work and all materials and equipment necessary therefor and/or incorporated therein shall become and thereafter remain the property of the Company and the provisions of Clause 9 of the Power Contract shall not apply thereto, and the Commission shall furnish the Company with all details of the cost thereof and particulars of all materials and equipment retired and any salvage arising therefrom under Clause 3, hereof, so that the cost of the work and all adjustments necessary to give effect to this Agreement may be properly recorded in the Company's accounts.

7. What was done under the second of the two contracts executed on October 22, 1956, was done by Ontario Hydro at a cost of $1,932,150.

8. The appellant's balance sheet as of December 31, 1959, as attached to the appellant's 1959 income tax return, contains an item on the "Liabilities" side, reading

> Capital Surplus arising from the conversion of generating plant facilities from 25 to 60 cycle $1,857,575.00

and bears a note reading

> Note: The Property account includes $1,857,575.00, cost to date of conversion of generating plant facilities from 25 cycle to 60 cycle paid for by Hydro Electric Power Commission of Ontario under agreement with the company dated October 22, 1956.

The 1960 balance sheet contains the same item and note and the 1961 balance sheet contains the same item and note except that the amount of $1,932,150.00 has been substituted in them for the amount of $1,857,575.00 in the item and note on the two earlier balance

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sheets. On the 1962 balance sheet, the item has disappeared and the note that was on the 1961 balance sheet is reproduced with an additional sentence reading

> The capital surplus arising from such transaction was distributed as a dividend in 1962.

The question that has to be decided is whether the appellant is entitled to capital cost allowance in respect of the additions and improvements so effected to its plant by Ontario Hydro.

The relevant provisions of the law are:

(1) Section 11(1)(*a*) of the *Income Tax Act*

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*a*) such part of the capital cost[3] to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

(2) Regulation 1100(1) of the Regulations made under the *Income Tax Act*

> 1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to
>
> (*a*) such amounts as he may claim in respect of property of each of the following classes in Schedule B not exceeding in respect of property
>
> (i) of class 1, 4%,
> (ii) of class 2, 6%,
> (iii) of class 3, 5%,
> (iv) of class 4, 6%,
> (v) of class 5, 10%,
> (vi) of class 6, 10%,
> (vii) of class 7, 15%,
> (viii) of class 8, 20%,
> (ix) of class 9, 25%,
> (x) of class 10, 30%,
> (xi) of class 11, 35%,
> (xii) of class 12, 100%,
> (xiii) of class 16, 40%,
> (xiv) of class 17, 8%,
> (xv) of class 18, 60%,
> (xvi) of class 22, 50%, and
> (xvii) of class 23, 100%.
>
> of the amount remaining, if any, after deducting the amount, determined under section 1107 in respect of the class, from the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

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[3] There has been no suggestion that there is any difference between "cost" and "capital cost" in the circumstances of this case. I should have thought that where property is *acquired* as capital assets of a business there is probably no difference between the ideas of "cost" and "capital cost". The situation may be different where capital assets, such as goodwill or the supply contract in this appeal, arise as a result of the current operations of a business. If such a problem ever arises, it may become important to consider the French version of section 11(1)(*a*).

(3) Section 20(5)(*e*) of the *Income Tax Act*

(5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

* * *

(*e*) "undepreciated capital cost" to a taxpayer of depreciable property of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of

(i) the total depreciation allowed to the taxpayer for property of that class before that time,

(ii) for each disposition before that time of property of the taxpayer of that class, the least of

(A) the proceeds of disposition thereof,

(B) the capital cost to him thereof, or

(C) the undepreciated capital cost to him of property of that class immediately before the disposition, and

(iii) each amount by which the undepreciated capital cost to the taxpayer of depreciable property of that class as of the end of a previous year was reduced by virtue of subsection (2).

(4) Section 20(6)(*c*) and (*h*) of the *Income Tax Act*

(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:

* * *

(*c*) where a taxpayer has acquired property by gift, bequest or inheritance, the capital cost to him shall be deemed to have been the fair market value thereof at the time he so acquired it;

* * *

(*h*) where a taxpayer has received or is entitled to receive a grant, subsidy or other assistance from a government, municipality or other public authority in respect of or for the acquisition of property, the capital cost of the property shall be deemed to be the capital cost thereof to the taxpayer minus the amount of the grant, subsidy or other assistance;

According to the evidence, there was, with one exception, no significant difference between the appellant's position after the change-over and its position before the change-over except that its sole activity after the change-over consisted in delivering 60 cycle power from a plant capable of producing such power, which it owned, whereas before that time its sole activity consisted in delivering 25 cycle power from a plant capable of producing such power, which it owned. Its revenues under the contract remained unchanged and its operating expenses and capital charges remained the same. Moreover, the cost of converting its plant had been paid by Ontario Hydro and had not cost the

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appellant a cent. The exception was that it had a plant that would, after 1971, produce power for which there would be a market whereas the plant that it had prior to the change-over would have had no economic utility after 1971.

By the notice of appeal, the basic position taken by the appellant, on the above facts, was as follows:

> 17. The Appellant says that the sum of $1,932,150 00 expended by The Hydro-Electric Power Commission of Ontario on work and material which became the property of the Appellant was not received by the Appellant as a grant, subsidy or other assistance but was consideration for the valuable capital right given up by the Appellant, namely a right to deliver a minimum of 96,000 Horse power of electrical energy at a periodicity of 25 cycles per second for the 14 years remaining in the term.
>
> 18. The Appellant says that by reason of the valuable right given up by it, the sum of $1,932,150 00 represents the true capital cost to it of the property within the meaning of paragraph (*a*) of subsection (1) of section 11 of The Income Tax Act.

By the reply, the respondent took the basic position that the appellant had not incurred any capital cost in respect of the additions and improvements in question.

During argument, the respondent's first position, as I understood it, was that there was no capital cost to the appellant of acquiring such capital additions and improvements to its plant and that the cost incurred by Ontario Hydro in making such additions and improvements to the appellant's plant could not serve as a basis for a reduction by the appellant under section 11(1)(*a*).

The appellant's position during argument, on the other hand, as I understood it, was that, when it embarked on negotiations with Ontario Hydro, it had a "bargaining position", that had a value to it, consisting of the fact that, if it insisted on its right to deliver 25 cycle power to Ontario Hydro, Ontario Hydro would be put to very substantial expense to make use of it and, as I understood the argument, when it gave up this bargaining position and agreed to deliver 60 cycle power in consideration of Ontario Hydro agreeing to effect the capital additions and improvements to its plant, it gave a consideration for the additions and improvements that was worth what it got for giving up that bargaining position. As will have been seen, this is different from the position set out in the notice of appeal, which was that the consideration given by the appellant for the additions and improvements was the surrender of "a valuable capital right", namely, "a right to deliver . . . electrical energy at a periodicity of 25 cycles . . . "

Before attempting to reach a conclusion as to whether there was a capital cost to the appellant of the additions and improvements, it is convenient to express my conclusion about the application to the facts of this case of section 20(6)(*h*) which, for convenience, I repeat:

> 20. (6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:
>
> * * *
>
> (*h*) where a taxpayer has received or is entitled to receive a grant, subsidy or other assistance from a government, municipality or other public authority in respect of or for the acquisition of property the capital cost of the property shall be deemed to be the capital cost thereof to the taxpayer minus the amount of the grant, subsidy or other assistance;

What this rule appears to contemplate is the case where a taxpayer has acquired property at a capital cost to him and has also received a grant, subsidy or other assistance from a public authority "in respect of or for the acquisition of property" in which case the capital cost is deemed to be "the capital cost thereof to the taxpayer minus . . . the grant, subsidy or other assistance". That rule would not seem to have any application to a case where a public authority actually granted to a taxpayer capital property to use in his business at no cost to him. Quite apart from the fact that the rule so understood would have no application here, I do not think that the rule can have any application to ordinary business arrangements between a public authority and a taxpayer in a situation where the public authority[4] carries on a business and has transactions with a member of the public of the same kind as the transactions that any other person engaged in such a business would have with such a member of the public. I do not think that the words in paragraph (*h*)—"grant, subsidy or other assistance from a . . . public authority"—have any application to an ordinary business contract negotiated by both parties to the contract for business reasons. If Ontario Hydro were used by the legislature to carry out some legislative scheme of

[4] I assume, for purposes of this discussion, that Ontario Hydro is a public authority within paragraph (*h*) without deciding that question.

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distributing grants to encourage those engaged in business to embark on certain classes of enterprise, then I would have no difficulty in applying the words of paragraph (*h*) to grants so made. Here, however, as it seems to me, the legislature merely authorized Ontario Hydro to do certain things deemed expedient to carry out successfully certain changes in its method of carrying on its business and the things that it was so authorized to do were of the same character as those that any other person carrying on such a business and faced with the necessity of making similar changes might find it expedient to do. I cannot regard what is done in such circumstances as being "assistance" given by a public authority *as a public authority*. In my view, section 20(6)(*h*) has no application to the circumstances of this case.

I turn now to section 20(1)(*c*) of the *Income Tax Act*, not because either party urged me to apply that provision to this case, because neither of them did so urge, but because I regard it as important to give some thought to that provision in attempting to get this particular type of problem in perspective. Section 20(6)(*c*) reads as follows:

> 20. (6) For the purpose of this section and regulations made under paragraph (a) of subsection (1) of section 11, the following rules apply:
>
> * * *
>
> (*c*) where a taxpayer has acquired property by gift, bequest or inheritance, the capital cost to him shall be deemed to have been the fair market value thereof at the time he so acquired it;

The obvious application of the word "gift" in this paragraph, particularly in association with the words "bequest" and "inheritance" is to gifts between individuals made for personal reasons.[5] Whether the *ejusdem generis* rule applies so to restrict it, I do not have to decide. I would have grave doubts, however, about applying paragraph (*c*) to capital equipment supplied free of charge by one business man to another for business reasons, even if the particular transaction were legally a "gift". If, for example, a soft drink manufacturer "gives" to retailers cabinets specially designed to hold his product and his alone, I should have no doubt that he would be able to reflect one way or another in

[5] Compare *Corporation of Birmingham v. Barnes*, (1935) 19 T.C. 195 per Lord Atkin at Pages 217-18.

his accounts the cost to him of such a programme of "gifts" carried on by reason of its commercial utility to him, and I should have grave doubt that the retailers would be able to get capital cost allowance on the "fair market value" of the articles given. The typical sort of case that paragraph (c) has in contemplation is where a father or other benefactor makes over to a son, or other similar object of benevolence, capital assets to be used in a business. It does not have for its object the giving of capital cost allowance to both of two business men when only one of them has had to incur the cost of acquiring them.

As I have already indicated, I have mentioned section 20(1)(*c*) to show why I do not think that it applies here even if it were a fair appraisal of the situation that Ontario Hydro had made a "gift" of the additions and improvements to the appellant.

My appraisal of the agreements made by the appellant with Ontario Hydro on October 22, 1956, does not result in a conclusion that Hydro made a "gift" to the appellant. It would be quite unrealistic to consider those two contracts as representing separate bargains by which, on the one hand, the appellant had gratuitously agreed to deliver 60 cycle power to Ontario Hydro until 1971 for a price of $100,000 per month instead of 25 cycle power, although delivering 60 cycle power would involve it in a capital expenditure of about $1,900,000 and, on the other hand, Ontario Hydro had gratuitously agreed to make capital improvements to the appellant's property that would cost about $1,900,000. So to regard the contracts as being independent of each other is to disregard the obvious commercial realities of the situation. On the one hand, the appellant only agreed to alter its supply contract from 25 cycle power to 60 cycle power because Hydro agreed to incur the cost of the capital improvements that had to be made to its production plant if it were to take on such an obligation and, on the other hand, Hydro only agreed to make such changes in the appellant's property at a cost to it of about $1,900,000 because the appellant agreed to deliver to it 60 cycle power instead of 25 cycle power.

However, such an appraisal of the bargain between the appellant and Hydro, represented by the two contracts of

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October 22, 1956, does not solve the problem as to whether there was a capital cost of the additions and improvements *to the appellant.*

The respondent says, with great force, that an analysis of the appellant's position before and after the change-over shows that the additions and improvements to its plant that enabled it to produce 60 cycle power instead of 25 cycle power cost it exactly nothing. The respondent might have added that this view is reinforced by the appellant's treatment of the acquisition on its own books. I find it very difficult to escape either the logic or the justice of the respondent's contention. The appellant did not have to make an expenditure of a single cent on capital account in connection with the change-over and, with exactly the same expenditures on revenue account after the change-over as it was making before, it had exactly the same revenues as it had before, and, in addition, it had a plant that would be a revenue producer to itself after 1971 whereas, before the change-over, it had a plant that would have been practically speaking valueless after 1971.

From the point of view of common sense and justice, I would have little hesitation in dismissing the appeal on the above analysis of the appellant's position.

Nor am I able to recognize any basis for taking a different view in the appellant's contention during argument that, by giving up its "bargaining position" it gave a consideration that involved a "capital cost" to it of about $1,900,000, even if this factual position had been pleaded in the notice of appeal so as to be open to the appellant. With great respect, it seems to me that this contention is based on a confusion of thought. I may have a good "bargaining position" when bargaining for a sale or other contract, but I do not sell or otherwise use this "bargaining position" as consideration. I use the "bargaining position" as a means of persuading the other party to give me more than he otherwise would for the property or other consideration that I have to dispose of. Here, as I see it, what the appellant had to offer as consideration was

(*a*) a surrender of its contract to supply 25 cycle power at a certain price until 1971, and

(*b*) the undertaking of an obligation to supply 60 cycle power on the same terms for the same period.

It certainly could not, as a business matter, have bound itself on these two matters unless it received in cash, or in some other form, the amount that it would cost to change its capital assets so that it could do what would be required if it did so bind itself. Its "bargaining position", on the other hand, as I see it, was that it would cost Ontario Hydro even more than the $1,900,000 odd if the appellant did *not* so bind itself.

Furthermore, I cannot accept the view of the facts that is put forward by the notice of appeal, which is:

> The Appellant says that the sum of $1,932,150 00 expended by The Hydro-Electric Power Commission...on work and material which became the property of the Appellant...was consideration for the valuable capital right given up by the Appellant, namely a right to deliver...electrical energy at a periodicity of 25 cycles...

which view of the facts was not relied on at the hearing or, at least, was not pressed with any vigour. It seems perfectly clear to me that Ontario Hydro would not have made the expenditure of almost $2,000,000 on the appellant's plant if all that it had received in consideration therefor was a surrender of the contract under which it had to take 25 cycle power. What Hydro got for the expenditure was a right to receive 60 cycle power instead of the 25 cycle power.

Having rejected both positions put forward on behalf of the appellant, it would seem that I might be satisfied that the appeal should be dismissed. However, even though no other case on the facts has been raised by the notice of appeal, I feel constrained to consider further what is the proper view of the facts, as they appear on the evidence that has been put before me, as I am not satisfied with the respondent's view that the appellant received the assets in question without cost to it.

The straightforward sort of bargain that might have been expected when the appellant was approached by Hydro in 1955 was that Ontario Hydro would pay to the appellant, for the desired amendment to the supply contract, whatever it might cost the appellant to effect the necessary change in its plant. Had that been the bargain that the appellant made with Ontario Hydro, the appellant would have incurred the capital cost of the additions and improvements and, even though it had been reimbursed

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by Hydro, it would have been entitled to capital cost allowance in respect of the capital cost it had so incurred.[6]

I see no escape from the position that, as I have indicated, would have flowed if the appellant had received the cost of the capital additions and improvements from Hydro as a consideration for amending the supply contract and had itself incurred the cost of the change-over in its plant, although I recognize that, superficially, it seems anomalous that, on an overall appraisal of what would have happened, it would have been able to pass on those capital costs to someone else.[7] In my view, the explanation is that, from a commercial point of view, if that had happened, there would be two aspects of the matter, *viz*,

(*a*) the appellant would have incurred capital costs for which it should have capital cost allowance, and

(*b*) the appellant would have received a payment from the purchaser of its power which should be taken into its revenues if it is part of the payment for which it has sold in the course of its business[8] or should be regarded as a capital receipt if, in the circumstances, it should be so characterized.

The next question is whether, assuming that I am right in concluding that the appellant would have been entitled to capital cost allowance if it had received the cash from Hydro and expended it on the capital additions and improvements itself, it is in any different position because the bargain took the form of Hydro undertaking to make

[6] Compare *Corporation of Birmingham v. Barnes,* (1935) 19 T.C. 195 (H.L.). The opposite result was reached in a similar case in *Detroit Edison Co. v. C.I.R.,* (1942) 319 U.S 98, but it seemed to have been based on the fact that the payments were not taken into revenue even though "The payments were to the customer the price of the service". If the payments had been taken into revenue, it would seem that the Court might have reached the opposite result. This does not, therefore, seem to be a case where the actual point was decided on principle.

[7] The apparent anomaly disappears, of course, when one stops to consider that, if a business is well and successfully financed, all of the costs of the business, both revenue and capital, are, over the course of the business, recouped out of the charges to customers in one way or another.

[8] For a similar sort of problem where the lump sum payment was for services, see *Curran v. M.N.R.,* [1959] S.C.R. 850.

the expenditures in such a way that the additions and improvements would be made to the appellant's assets and belong to the appellant.

The transaction that actually took place and the transaction that might have taken place (under which the appellant would have been entitled to capital cost) come to the same thing from a commercial point of view. The question is whether this is a case where the result from a tax point of view depends on the way in which the result was achieved. I find it very difficult to reach a conclusion on that question where one has the complication of an existing supply contract that is to continue for a term being amended in consideration of a transfer of assets to be used as capital assets in the supplier's business.

It seems a little easier to analyze if one considers the somewhat simpler case of a supplier entering into a term contract with a purchaser under which the purchaser agrees to provide the supplier with his physical plant and to pay a fired price per unit for the commodity purchased instead of paying a larger price per unit without providing the supplier with his plant. In that case, my first impression is

(*a*) that what the purchaser is paying for what he is acquiring is the value of the plant supplied plus the price per unit paid and that the whole amount would have to go into the supplier's revenue account; and

(*b*) that the supplier is not getting his plant for nothing, but is paying for it by entering into the low-priced supply contract and that, *prima facie*, what he pays for the plant is the value of the plant.

If that be a correct analysis of the situation in the case of a new supply contract, it seems to me that the latter part of the analysis may have some application to the present problem. If the appellant had been pressed by Hydro to accept a revision of its supply contract from 25 cycle power to 60 cycle power, it would have had, normally, to insist on retaining its existing right to deliver 25 cycle power, which it could supply with its existing plant, or to

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insist on receiving a higher price per unit of the 60 cycle power because of the very substantial capital additions and improvements to its plant that would have been involved in producing the 60 cycle power. When it agreed to continue to accept the lower price for the more expensive power in consideration of being provided with the capital additions and improvements, it was, in effect, getting the additions and improvements in consideration of surrendering its right to deliver 25 cycle power and agreeing to provide 60 cycle power at a price lower than would otherwise have been economic. In the absence of evidence to the contrary, I am inclined to the view that what the appellant thus gave for the new capital assets is *prima facie* worth what the appellant got for it, that is, the value of the capital additions and improvements, or $1,932,150. However, I am not in a position to make any finding along these lines as this view of the facts was not raised by the notice of appeal.

Neither am I in a position to come to any conclusion on the question that was not raised as to whether the value of what was so received by the appellant should have been regarded in whole or in part as a revenue receipt. In so far as it was received in consideration for the surrender of its existing supply contract to supply 25 cycle power, it would seem that it might be regarded as having been received for surrender of a capital asset. Compare *City of London Contract Corp. v. Styles*[9] and *John Smith & Son v. Moore.*[10] I should have thought that that might be so even where the contract arose by virtue of the current operations of the business and was not acquired by virtue of a capital expenditure.[11] If the contract was a capital asset, such part, if any, of what was received as may properly be regarded as being merely the consideration for its surrender was presumably not received on revenue account. Compare *Van Den Berghs Ltd. v. Clark.*[12] In so far, however, as the capital additions and improvements were received as consideration for agreeing to deliver 60 cycle power at a price that was lower than would otherwise have been economic, I should be inclined to think that it was probably received

[9] (1887) 2 T.C. 239.

[10] (1921) 12 T.C. 266.

[11] Compare the views that I expressed in *Canada Starch Co. v. M.N.R.* 1969—1 Ex. C.R. 96.

[12] [1935] A.C. 431.

on revenue account in accordance with the ordinary principles of commercial trading.[13]

The position is therefore that, having regard to the notice of appeal and the reply, and to the course that the matter took during the hearing, the appeal must be dismissed because the appellant has failed to establish that there was a capital cost to it of the assets in question on either of the two factual cases advanced by it.

However, in view of the alternative position or positions that, as it seems to me, might have been taken on the evidence before me and that, as far as I can appraise the matter, may have some merit, I will not pronounce judgment immediately, but will allow the appellant time during which it may, if it is so advised, apply for leave to amend its notice of appeal. If such an application is made, I will hear the parties as to whether an amendment, if granted, should be subject to terms as to further discovery or evidence or whether the court already has before it all evidence that might aid in determining the matter. If such an application is made by the appellant, it will also be open to the respondent to apply for leave to amend his reply to raise, as an alternative basis for supporting the assessments appealed from, the question whether some part or all of the value of the additions and improvements to the appellant's plant should have been included in the appellant's revenues for any of the taxation years under appeal.

If no such application is made within a period of thirty days, or if the appellant advises the Registry by letter earlier that it does not intend to make any such application, I shall render judgment dismissing the appeal with costs.[14]

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[13] I recognize that it is difficult to distinguish from such a receipt the case of a premium for a low-rental lease or a payment for a "monopoly" right which, at least in some circumstances, is treated as a receipt on capital account. Compare *Henriksen v. Grafton Hotel, Ltd.,* [1942] 1 All E.R. 678. Where such a payment is the consideration for the disposition of a property right such as a lease, I have no difficulty in regarding it as a capital receipt even though other payments, such as rent, arising out of the property, by virtue of their nature, are regarded as revenue payments. Where, however, all that is being disposed of by a person receiving a lump sum plus periodic payments is the stock-in-trade of his business to be delivered in the ordinary course of business, I have difficulty, at the moment, in seing how any of the payments can be regarded as being received otherwise than on current account.

[14] No application for leave to amend its notice of appeal was made by appellant, and the appeal was accordingly dismissed with costs—ED.

Ottawa 1968 Oct. 2-4, 7-11, 16-18, 21-24, 28-30

1969 Mar. 11

ALADDIN INDUSTRIES, INCORPORATED .... APPLICANT;

AND

CANADIAN THERMOS PRODUCTS LIMITED and THE REGISTRAR OF TRADE MARKS .... RESPONDENTS.

Trade Marks—Application to expunge—"Thermos"—Whether generic word —Whether also distinctive—Registrability in 1907—Validity of in 1964—Expert evidence as to meaning, whether admissible—Newfoundland registration in 1908—Validity of—Parent company substituted for subsidiary—Whether "interested person"—Jurisdiction—Use of dictionaries—Laches, acquiescence—Trade Marks Act, s. 12, 18(1)(a) and (b).

In 1964 a company which competed with respondent in the manufacture and sale of vacuum bottles etc. in Canada applied under s. 56 of the *Trade Marks Act* to expunge respondent's trade mark, THERMOS, registered in Canada in 1907 and in 1960, and in Newfoundland in 1908, on the grounds that the word "thermos" was generic and not distinctive at the dates of registration and also at the date these proceedings were commenced, and that the registrations were therefore invalid under s. 18(1)(*a*) and (*b*). Subsequently the original applicant was liquidated and its parent company, which was also in competition with respondent, was, with respondent's consent, given leave to continue the proceedings; the style of cause was amended accordingly but the original pleadings remained unamended. Evidence was lacking as to usage of the word "thermos" in Canada and Newfoundland in 1907 and 1908 but it was established that by 1960 the word had come into common use as a generic word descriptive of the ordinary vacuum bottle and that it was also distinctive of respondent's vacuum bottle both to the trade and in a lesser degree to the public when purchasing vacuum bottles.

The application also contained a claim for expungement of the respondent's trade mark SUPER THERMOS registered in Canada in 1931.

Held, the application must be dismissed.

1. None of the Canadian registrations was invalid under s. 18(1)(*a*) as not being registrable when registered. In 1907 the word "thermos", taken from the Greek word for hot, was a new and freshly coined fancy word without obvious meaning to ordinary Canadians and it was therefore registrable under the *Trade Marks and Designs Act* R.S.C. 1906, s. 71 (see secs. 5(1), 11 and 13.). For the like reason the trade mark SUPER THERMOS was registrable in 1931: the addition of SUPER to THERMOS did not make the trade mark descriptive or non-distinctive. In 1960 the word "thermos", although commonly used in a descriptive sense for ordinary vacuum bottles, was not a merely descriptive word but was also distinctive of respondent's bottles and it was therefore registrable under the *Trade Marks Act*, 1952-53, c. 49 (see secs. 12, 2(*f*) and (*t*)(i)).

Bayer Co. v. American Druggists' Syndicate [1924] S C.R. 558; *General Motors Corp. v. Bellows* [1949] S C.R. 678; *In re Joseph Crosfield & Sons* [1910] 1 Ch. 130, applied. *American Thermos Products Co. v. Aladdin Industries Inc.* (1962) 207 F. Sup. at p. 9; 134 U.S P.Q. at 98, affirmed *sub nom. King-Seeley Thermos Co. v. Aladdin Industries Inc.* (1963) 321 F. 2d. 577; 138 U S.P.Q. 349; *Kodak, Ltd v. London Stereoscopic et al* (1903) 20 R.P.C. 337, referred to.

2. None of the Canadian registrations was invalid under s. 18(1)(*b*) as not being distinctive when these proceedings were commenced in 1964 Although the word "thermos" had become generic and descriptive by 1964 the trade marks were distinctive of respondent's bottles to a substantial portion of the consumer public throughout Canada in 1964. *Lightning Fastener Co. v. Canadian Goodrich Co.* [1932] S.C.R 189 at 196, referred to.

3. As to the Newfoundland registration in 1908, applicant had not satisfied the onus of establishing that the trade mark was not then registrable under the Newfoundland statute respecting trade marks, *viz* c. 112 of the Newfoundland Consolidated Statutes 1896 (2nd series). See s 65 of the *Trade Marks Act* S. of C. 1952-53, c. 49, *B N.A. Act* 1949 (U K.) c. 22; Terms of Union, Newfoundland and Canada, term 21; *Imperial Tobacco Co. (Newfoundland) v. Duffy* [1918] A.C. 181; *Orange Crush Co. et al v. Gaden Aerated Water Works Ltd Nfld* L R. 1921-26, 301, referred to.

4. In the interests of justice the proceedings should not be dismissed on the narrow technical ground that the present applicant was not an "interested person" within the meaning of s. 56 of the *Trade Marks Act* at the time these proceedings were commenced.

5. Having regard to s. 21 of the *Exchequer Court Act* and secs. 2(*n*), 54 and 56(1) of the *Trade Marks Act,* the Exchequer Court has jurisdiction to expunge the Newfoundland registration.

6. Whether a common word used in the ordinary way in the English or French languages is generic, and what it means, are not questions on which expert opinion evidence should be received *Home Juice Co. v. Orange Maison Ltd* [1968] 1 Ex. C.R. 163, followed; and *quaere* whether the judge must decide those questions solely on the evidence or may use his own knowledge of the word and of the way persons use and respond to it in conversation in ordinary society.

7. While the court may refer to dictionaries these do not always reflect accurately the true meanings of words.

8. Respondent's contention that a trade mark may lose distinctiveness only through the actions of its owner is incorrect. *Cheerio v. Dubiner* [1966] S.C.R. 206; *General Motors Corp. v. Bellows supra,* referred to.

9. Respondent's contention that the application should be dismissed because of laches and acquiescence by appellant in delaying the commencement of these proceedings until 1964 could not be upheld.

10. Appellant's contention that respondent's trade marks were "deceptively misdescriptive" of its non-vacuum insulated wares such as ice buckets and chests within the meaning of the quoted words in s. 12 of the *Trade Marks Act* was without merit: it had validity only if "thermos' were synonymous with "vacuum insulated" which it was not.

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ALADDIN INDUSTRIES, INC. v. CANADIAN THERMOS PRODUCTS LTD. et al.

ORIGINATING notice of motion for expungement of trade marks.

Miss Joan Clark, Paul M. Amos and *George B. Mauchan* for applicant.

Donald J. Wright, Q.C. and *Donald MacOdrum* for respondent Canadian Thermos Products Limited.

No one for the Registrar of Trade Marks.

KERR J.:—These proceedings were initiated by an originating notice of motion dated August 17, 1964, for the expungement of the following trade mark registrations:

> No. 50/12223, dated September 12, 1907, "THERMOS"; Newfoundland No. 264, dated January 8, 1908, "THERMOS"; No. 245/52994, dated September 12, 1931, "SUPER THERMOS"; and No. 118,050 dated May 13, 1960, "THERMOS".

The subsequent proceedings have been intermittent and protracted, due in part to illness of the counsel on each side who were originally retained and to the volume of the work of preparing the cases of the parties, which is indicated by the fact that the applicant introduced into evidence approximately one hundred affidavits and more than 40,000 letters, price lists and other documents.

The applicant and the respondent company are competitors in the manufacture and sale of their products in Canada, principally vacuum-insulated bottles used to keep liquids and foods hot or cold or at the temperature they had when put in the bottle. The main feature of such a bottle is its "filler", a double-walled glass container from which the air between the walls has been evacuated. The fillers have protective casings, corks or closures of various kinds and other improvements. Its forerunner was Sir James Dewar's vacuum flask of about 1893. Terms used by the public and in the trade to describe the bottles include "thermos"; "thermos bottle"; "vacuum bottle"; "vacuumware" and "bouteille isolante". The applicant contends that "thermos" and "thermos bottle" are generic and descriptive terms in Canada for such bottles and are synonymous with "vacuum bottle".

I shall deal first with an objection of the respondent company that the present applicant, Aladdin Industries, Incor-

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ALADDIN INDUSTRIES, INC. v. CANADIAN THERMOS PRODUCTS LTD. et al.

Kerr J.

porated, was not, as of the date when the proceedings were commenced, a "person interested" within the meaning of section 56(1) of the *Trade Marks Act,* S. of C. 1952-53, c. 49. This objection is in paragraph 3 of the respondent's reply, as follows:

> 3. This respondent says that the applicant, Aladdin Industries, Incorporated, was not as of August 17, 1964, a person interested within the meaning of Section 56(1) of the Trade Marks Act, S.C. 1952-53, c. 49, as amended, and accordingly, alleges that this Honourable Court has no jurisdiction to hear these proceedings.

Sections 56(1) and 2(*k*) of the *Trade Marks Act* are as follows:

> 56. (1) The Exchequer Court of Canada has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.
>
> 2(*k*) "person interested" includes any person who is affected or reasonably apprehends that he may be affected by any entry in the register, or by any act or omission or contemplated act or omission under or contrary to the provisions of this Act, and includes the Attorney General of Canada;

When the originating notice of motion was filed it was on behalf of Aladdin Industries (Canada) Ltd., hereinafter referred to as Aladdin (Canada), as applicant, but by order dated December 9, 1965, Aladdin Industries, Incorporated, was granted leave to continue the proceedings in lieu and stead of Aladdin (Canada). The order was made with the consent of the respondent company and upon an affidavit of Mr. Arthur Leslie Kingdon, president of Aladdin (Canada) and general manager for Canadian operations of Aladdin Industries, Incorporated, wherein he said that on July 5, 1965, it was resolved by the directors of Aladdin (Canada) that it liquidate its assets and surrender its charter, that the resolution was approved and confirmed by the shareholders of the company and was duly carried out on or about July 26, 1965; and that the company's debt to Aladdin Industries, Incorporated, was satisfied by a transfer by Aladdin (Canada) of all its physical assets, together with choses in action, registered trade mark and the application herein to have the word "Thermos" expunged as a trade mark; also that Aladdin Industries, Incorporated, was at all relevant times the only shareholder

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of Aladdin (Canada), except for directors holding qualifying shares; and that Aladdin Industries, Incorporated, has been carrying on business in Canada since July 26, 1965, utilizing the assets mentioned.

On this issue there was affidavit evidence by Kingdon that as of August 17, 1964, Aladdin (Canada) was a wholly-owned subsidiary of Aladdin Industries, Incorporated, and the latter company was exporting from the United States of America into Canada certain parts for vacuum bottles and certain vacuum bottles; that Aladdin (Canada) was incorporated on June 24, 1953, and following its incorporation it carried on in Canada substantially all the business which had previously been carried on by Aladdin Industries, Incorporated. At the hearing counsel for the respondent company contended that the present applicant came into the case as an assignee of Aladdin (Canada), that the application was not assignable, that when the present applicant was substituted for Aladdin (Canada) only the style of cause was amended, and there was nothing in the notice or pleadings alleging that the present applicant was a "person interested". Counsel for the present applicant submitted that it had an interest in the action when it was commenced, by reason of its ownership of the shares of Aladdin (Canada) and the fact that it was exporting vacuum bottles and parts for bottles to Canada at that time; that the objection is technical and the respondent is estopped from raising it, because of the decision and order granting leave to substitute the present applicant for Aladdin (Canada) and because the respondent consented to such substitution.

I will dispose of this objection now before moving on to deal with other issues that I regard as much more important. The proceedings, as I have said, have involved a great deal of preparation; and practically all of the preparation was in respect of those other issues. I have no reason to think that the factual situation in respect of those issues was not the same on December 9, 1965, when the present applicant was granted leave to continue the proceedings in lieu of Aladdin (Canada), as the factual situation was on August 17, 1964, when the proceedings were commenced. I also think that the present applicant was a "person interested" within sections 56(1) and 2(*k*) of the Act when these proceedings were commenced, because it was then the owner of the shares of Aladdin (Canada) and also as of that date was exporting its wares to Canada for sale in Canada. I regard as technical the objection of the respondent that, following the granting of leave to carry on the proceedings, only the style of cause was changed and the body of the originating notice did not state that the present applicant was an interested party. I feel that the other more important issues should be determined in these proceedings, in the interest of justice and to avert the institution of fresh proceedings raising essentially the same principal issues, and that the application should not be dismissed on the narrow ground on the objection set forth in paragraph 3 of the reply.

For convenience, the term "respondent" will be used hereinafter to designate Canadian Thermos Products Limited and its predecessors in title, and the term "applicant" will be used to designate Aladdin Industries, Incorporated, and its predecessors in title, the particular corporation or corporations referred to in each instance being indicated by the context. For convenience, also, and to avoid repetition of the date on which these proceedings were commenced, I may sometimes use the present tense when referring to the situation as it was on that date.

The grounds upon which the expungement of the trade marks is sought are set forth in the originating notice of motion, dated August 17, 1964, and they are as follows[1]:

> ...that at the date hereof the entries respecting the above trade marks as they appear on the register of Trade Marks do not accurately express or define the existing rights of the person appearing to be the registered owner of the said marks. The grounds upon which the relief aforementioned is sought are as follows:
>
> (1) The applicant is a Canadian federal company[2] with its head office at Toronto, Ontario. It deals in many wares including vacuum bottles.
>
> (2) The respondent, Canadian Thermos Products Limited, is a Canadian federal company with its head office at Scarborough, Ontario. It deals in many wares including vacuum bottles.
>
> (3) The respondent, Canadian Thermos Products Limited, is the registered owner of the word "THERMOS" as a trade mark under the registrations above set forth.

---

[1] The pleadings are too lengthy for full quotation, and I have paraphrased or summarized certain portions, and omitted portions.

[2] Aladdin Industries (Canada) Ltd.

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(4) The said word "THERMOS" as of the date hereof does not express or define any right of the respondent, Canadian Thermos Products Limited, thereto, being generic and descriptive of vacuum bottles.

The particulars of the grounds upon which expungement of the trade marks is sought run to forty-nine pages. They are mainly as follows:

A. The word "thermos" has been generic and descriptive in Canada of vacuum bottles since prior to the date of application for trade mark registration No. 50/12223, being already in the Oxford English Dictionary at that time.

B. The word "thermos", whether used alone or with such words as "bottle", "jug", "flask", "jar" or "bouteille", is both in English and French the name of the wares in connection with which it is used or is clearly descriptive or deceptively misdescriptive both in English and French of the character or quality of wares in association with which it is used, such character or quality being that such wares will keep liquids hot or cold for extended periods of time.

C. Vacuum bottles are generally known and have been generally known for the last sixty years in Canada by the name "thermos".

D. The word "thermos" appears in the following dictionaries and encyclopedias. Throughout the particulars, libraries where each work may be found are indicated. (And then the names of 128 dictionaries and encyclopedias are given, and in these and other particulars giving the names of books, the libraries in Canada where the books are found are also named).

E. The word "thermos" has been used generically and descriptively by the following authors of scientific books and textbooks, all of which are well known and used in Canada, and considered authoritative: (134 books).

F. References to the word "thermos" as generic and descriptive are to be found in the following works by philologists widely read and considered authoritative in Canada: (5 books).

G. The word "thermos" has been used generically and descriptively in the following works which are well known in Canada and considered authoritative in their respective fields: (15 books).

H. The word "thermos" has been used generically and descriptively by the following authors in the works hereinafter set forth, all of which have or have had wide Canadian circulation: (34 books).

I. The works listed in paragraphs D, E, F, G and H above are to be found in a great many libraries (public and private) in addition to those indicated, as well as in schools, colleges, universities and other educational institutions and in homes throughout Canada. Their language in either English or French and in particular their use of the word "thermos" is that of English-speaking and French-speaking Canadians respectively.

L. The word "thermos" has been used generically and descriptively in the following articles which have appeared in newspapers published in Canada or, where published elsewhere, widely circulated in Canada: (39 articles).

M. The word "thermos" has been used generically and descriptively in numerous obituaries concerning the death of Sir James Dewar which have appeared in newspapers published in Canada: (28 newspapers).

N. The word "thermos" has been used generically and descriptively in magazines published in Canada or, where published elsewhere, widely circulated in Canada: (84 magazines).

O. The word "thermos" has been used generically and descriptively in the Canadian patent literature in the face of Rule 28 under the Patent Act which prohibits the use of trade marks in patent specifications, except in unusual circumstances, or unless identified as such, and in the face of the constant practice of the Patent Office not to allow the use of trade marks in patent claims. The applicant will rely on the following documents: (11 patent documents).

T. The word "thermos" has been used generically and descriptively on innumerable occasions by the respondent Canadian Thermos Products Limited itself in its advertisements, correspondence both internal and external and otherwise....The respondent's corporate name, prior to its change in 1960, involved a generic and descriptive use of the word "thermos", such name being "Canadian Thermos Bottle Co. Limited".

In its reply, in addition to denying allegations in the originating notice and particulars and putting the applicant to proof, the respondent alleges, *inter alia:*

5.(*b*)...

(i) that the said trade mark "Thermos" was at the time of first use, has continued to be, and is an invented, coined and/or fancy word;

(ii) that the trade mark was at all material times, and in particular, as of August 7, 1964, distinctive within the meaning of the *Trade Marks Act* in that it actually distinguished the wares of the respondent from the wares of others;

(iii) that the trade mark was adapted to distinguish the wares of the respondent from the wares of others.

...

(*d*) that if the trade mark "Thermos" has been used generically or descriptively as alleged, such use was mere ignorant and careless misuse of the trade mark;

and also states that:

6. the respondent or its predecessors in title to the trade mark "Thermos" have continuously since prior to September 12, 1907, used and advertised that trade mark in association with wares of various kinds from time to time manufactured and sold by them.

7. the respondent or its predecessors in title to the trade mark "Thermos" have since prior to September 12, 1907, taken all reasonable steps to advise and educate the public in Canada that the respondent's trade marks are their registered trade marks

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and to persuade and compel others to refrain from using the trade marks other than in association with wares sold and manufactured by them.

...

9. since September 12, 1907, the trade mark "Thermos" has been the registered trade mark in Canada of the respondent or its predecessors in title and has been continuously and widely used in Canada by the respondent or its predecessors in title since prior to that date in association with its wares...and that the applicant is barred by laches and acquiescence from now alleging that the entries as they appear in the Register of Trade Marks did not as of August 17, 1964, accurately express or define the existing rights of the respondent.

...

11. this court has no jurisdiction to expunge the Newfoundland registration No 264; and the respondent pleads section 65 of the Trade Marks Act.

Three of the more important dates in this case are: *September 12, 1907,* the date of the first registration of the trade mark "Thermos" in Canada. This date is important because of the applicant's claim that the word "thermos" has been generic and descriptive in Canada of vacuum bottles since prior to the date of application for that first registration, and that it was not registrable then and is invalid under section 18(1)(*a*) of the present *Trade Marks Act.* There was dispute between the parties as to whether the applicant's pleadings include this ground that the respondent's trade marks were not registrable and are invalid under section 18(1)(*a*). I find that the pleadings do include this ground. It cannot be doubted that the respondent's counsel was amply informed that this was one of the grounds upon which expungement was sought and came to court prepared to meet a case made on that ground. *January 8, 1908,* the date of the first registration of the trade mark "Thermos" in Newfoundland. This registration presents special problems not common to the other registrations and I shall deal with it separately. *August 17, 1964,* the date of the originating notice of motion. This date is important because the main allegation upon which expungement of the marks is sought is that they were generic and not distinctive at the time these proceedings were commenced and are therefore invalid under section 18(1)(*b*) of the Act.

The respondent was incorporated by letters patent dated October 28, 1910, as Thermos Bottle Company Limited, and its name was changed on May 31, 1956, to Canadian Thermos Products Limited. A predecessor company, Canadian Thermos Bottle Company Limited, was incorporated on September 16, 1907. This last named company was the assignee of the first Trade Mark No. 50/12223, and in turn assigned it to Thermos Bottle Company Limited.

The trade mark "THERMOS" No. 50/12223 was registered in Ottawa on September 12, 1907, in accordance with the *Trade Mark and Design Act,* R.S.C. 1906, c. 71, by Thermos-Gesellschaft mit Beschrankter Haftung, of Germany, as applied to the sale of vessels and bottles and the like. The assignment of the trade mark by that company to Canadian Thermos Bottle Company Limited was registered on November 15, 1907. The assignment of the trade mark by the last named company to Thermos Bottle Company Limited was registered on August 8, 1931. The trade mark is now registered in the present name of the respondent.

The trade mark "THERMOS" was registered in Newfoundland on January 8, 1908, as No. 264, by Thermos Limited of London, England, to be applied to the sale of bottles, flasks and other vessels, culinary and other utensils . . . and their fittings, coverings or other appurtenances. The assignment of the trade mark by that company to Thermos (1925) Limited was registered on October 5, 1926. An assignment by the last named company to Thermos Bottle Company Limited was registered on September 30, 1949. The trade mark is now registered in the name of the respondent.

The trade mark "SUPER THERMOS", No. 245/52994, was registered on September 12, 1931, in Ottawa, in accordance with the *Trade Mark and Design Act,* R.S.C. 1927, c. 201, by Thermos Bottle Company Limited, and it is now registered in the name of the respondent. To be applied to the sale of vacuum insulated equipment, including bottles, carafes, jugs, jars, kits, etc.

The trade mark "THERMOS", No. 118050, was registered on May 13, 1960, in Ottawa, in accordance with the

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Trade Marks Act by Canadian Thermos Products Limited, the respondent. The application stated that it had been used in Canada since 1907 on wares marked (1), (2) and (3); since 1954 on wares marked (4); since 1949 on wares marked (5) and since 1957 on wares marked (6):

(1) vacuum laboratory vessels, vacuum bottles, vacuum jars, vacuum cooking jars, vacuum food jars, vacuum carafe sets, vacuum desk sets, vacuum water sets, vacuum coffee servers and vacuum ice bowls.

(2) workmen's lunch kits, school lunch kits, ladies' lunch kits, motor lunch kits and picnic lunch kits.

(3) corks, replacement caps, replacement inners, replacement barrels and paper discs.

(4) replacement parts, namely, plastic closures and plastic pouring lips.

(5) non-vacuum insulated vessels, namely, insulated ice chests, insulated coolers, picnic jugs and outing jugs.

(6) insulated ice tubs and ice bowls.

The applicant's affidavit evidence includes an affidavit by Mr. Kingdon, the applicant's general manager in Canada, one by Dr. Walter S. Avis, professor of English and lexicographer, one by Jean-Paul Vinay, a professor of languages, and upwards of 100 others by librarians, publishers and other persons. The respondent's affidavit evidence is an affidavit by John P. Parker, president of the company. There was cross-examination of Kingdon, Avis and Parker on their affidavits. There was also examination for discovery of Parker, portions of which were put in evidence. At the commencement of the hearing it was indicated that numerous objections would be made to the admission of various portions of the evidence and exhibits which were to be offered, and it was then agreed and decided that the evidence and exhibits would be received under reserve of objections which would be made and argued at the conclusion of the presentation of evidence. I will refer to such objections later. One objection of counsel for the respondent I disposed of before presentation of the evidence was completed. It was an objection to the admission of photocopies of specific pages of certain dictionaries, encyclopedias, novels and other books (for example, pages of dictionaries on which the words "Thermos" and/or "thermos" appear), without production of the entire dictionary or book itself. Numerous readily available dictionaries and books were produced complete and received in evidence as originals. On that objection I said that I had no reason to think that the pages are out of context or show anything different from what is in the books or that the picture would be different if the books themselves were produced, and that I thought the copies are adequate for the purposes of this case; and I received them in evidence. There was nothing suspect about the pages in question and I had no reason to think that the production of the whole dictionary (or encyclopedia, etc.) would be of material assistance to any of the parties or to the court or that non-production of it would be disadvantageous to the respondent. Insistence on production of the books might have entailed an adjournment of the hearing. The so-called "best evidence" rule has its place and purpose. But I did not think that a strict application of the rule was required in respect of the copies of the pages in question[3].

The respondent objected to the admission of the affidavit of Dr. Avis and asked that it be rejected in its entirety. The affidavit runs to 58 pages, not including exhibits. It is not divided into numbered paragraphs. It was dictated on tapes by Dr. Avis himself, which may explain its contents and form, but hardly excuses its presentation in that form in these proceedings. It contains matters of hearsay, statements of opinion and argumentative matters, and is not confined to such facts as Dr. Avis is able of his own knowledge to prove. To the extent that it offends in that respect, I rule it inadmissible. I also reject as inadmissible his conclusions on questions which fall for determination by the court. I also reject as inadmissible the opinion of Dr. Avis, expressed or implicit in the affidavit, that the word "thermos" is a generic term which has been established in common usage for at least two generations. The question whether a common word used in the ordinary way in the English or French languages is generic, and what it means,

[3] *Cf.* more recent judgment of Lord Denning, M.R., in *Garton v. Hunter* [1969] 2 W.L.R. 86 at p. 90.

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is not, in my opinion, a question on which expert opinion evidence should be received. The President of this court said in *Home Juice Company v. Orange Maison Limited*[4]:

> After the time for filing its affidavits had expired, the respondent applied *inter alis* for leave to file "expert evidence with respect to the meaning of the words Orange Maison". I rejected this application on the ground that, as I understand the rules of evidence, such evidence was clearly not admissible. As I understand the law, while the meaning of words having a special meaning in a particular trade, science, industry, or other particular element of society may be the subject matter of evidence in connection with a contention that the words have been used in a statute, contract or other context in that particular meaning, the meaning of words when used in the ordinary way as part of one of the official languages is a matter for the Court with such aids to interpretation as are available to it and cannot be the subject matter of opinion evidence. Otherwise, the Court could be inundated with expert testimony on every question of interpretation that arises. I therefore dismissed the application to adduce such expert evidence.

The affidavit of Professor Vinay follows along lines similar to the affidavit of Dr. Avis, and it is subject to like objections and exclusions. However, I do not reject their affidavits in their entirety, for I think that portions of them are relevant and useful, more particularly the portions respecting the way in which words come into common use and the factors which influence that course, the nature and characteristics of various kinds of dictionaries, dictionary practice in respect of the entry and use of words, the process by which proper names and trade marks enter the common domain, and the various recorded occurrences of the word "thermos" in dictionaries and other books.

In looking at the use of the word "thermos" in dictionaries one must bear in mind that the word is registered as a trade mark in England, the United States, France and many other countries, and that when it appears in a dictionary published in one of those countries it may indicate only the meaning and usage of the word there, which may not be the same as in Canada. However, dictionaries and books that are used and read in Canada, no matter where published, have an influence on the use of words in Canada.

Dictionaries and books of reference do not always reflect accurately the true meaning of words. Many of them have a preface which explains the use of capitals, trade mark

[4] [1968] 1 Ex C.R. 163 at pp. 164-65.

designations and other indications of the meaning or use of the words in the dictionary. However, the courts may refer to dictionaries. The Judicial Committee of the Privy Council said in *The Coca-Cola Co. of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd.*[5]:

> While questions may sometimes arise as to the extent to which a Court may inform itself by reference to dictionaries, there can, their Lordships think, be no doubt that dictionaries may properly be referred to in order to ascertain not only the meaning of a word, but also the use to which the thing (if it be a thing) denoted by the word is commonly put.

The following are excerpts from a number of dictionaries respecting the words "thermos", "thermos bottle", "vacuum bottle" and "bouteille isolante":

Oxford English Dictionary, Vol. IX of 1919 Edition:

> Thermos (a. Gr. warm, hot.)
>
> A registered trade term noting a flask, bottle, or the like capable of being kept hot by the device (invented by Sir James Dewar) of surrounding the interior vessel with a vacuum jacket to prevent the conduction of heat.
>
> Patented 1904, No 4421; not named. Name (Trade Mark No. 289,470) adv. in *Trade Marks Jrnl.* 20 March, 1907.
>
> 1907. *Eng. Mech.* 18 Oct. 246. This invention (of Sir James Dewar) is utilised in the thermos flask. 1909 *Ladies Field* 28 Aug. 511/2 A Thermos bottle filled with hot coffee was not forgotten. 1909 *Westm. Gaz.* 16 Sept. 5/2 Lieutenant Shackleton testified to the fact that the Thermos flask helped him to perform his wonderful feats in the Antartic. 1910 *Repts. Patent Cases* XXVII. 396 This was the *Dewar* vessel...In 1904 it occurred to a Mr. Burger that this vessel could be adapted for use as a flask...the result...was the production of the well known *Thermos* flask.

Neither vacuum bottle nor vacuum flask appeared in the 1919 Edition of the *Oxford English Dictionary*, but the *1933 Supplement* to that dictionary has the following:

> Vacuum. 4. Add: vacuum-bottle, flask, a bottle or flask with a double wall enclosing a vacuum, designed originally to keep liquids cold but now widely used to keep liquids hot;
>
> 1910 *Chambers's Jrnl.* June 413/2 The vacuum-bottle has entered so extensively into the domestic circle as to become regarded almost as indispensable.

Shorter Oxford English Dictionary, 1947:

> Thermos: A registered trade term noting a flask, bottle, or the like capable of being kept hot by the device (invented by Sir James Dewar) of surrounding the interior vessel with a vacuum jacket to prevent the conduction of heat.

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5 (1942) 59 R.P.C. 127 at p. 133.

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Vacuum flask: a flask with two walls separated by a vacuum, the existence of which keeps the contents of the inner receptacle at their original temperature for a considerable period;

Webster's New World Dictionary of the American Language, College Edition (The World Publishing Company) (1953):

thermos bottle (or flask, jug): a bottle, flask or jug for keeping liquids at almost their original temperature for several hours: it has two walls enclosing a vacuum and is fitted in a metal outer case: a trade-mark (Thermos).

vacuum bottle: a bottlelike container used to keep liquids hot or cold by means of a vacuum between its inner and outer walls.

Webster's Seventh New Collegiate Dictionary, 1963:

Thermos: *trademark*—used for a vacuum bottle.

vacuum bottle: a cylindrical container with a vacuum between an inner and an outer wall used to keep liquids either hot or cold for considerable periods.

Encyclopaedia Britannica, Vol. 22, 1954:

Vacuum Flask: A glass vessel with double walls, the space between which is evacuated. The only junction of the walls is at the neck of the vessel. It is also known as a Dewar vessel after its inventor Sir James Dewar; Thermos flask is a proprietary name applied to a form protected by metal casing.

A Dictionary of Americanisms on Historical Principles (Chicago, 1951):

thermos: A bottle so made that liquids may be kept at a desired temperature for a considerable time. Usu. Thermos bottle, a trademark name for a bottle of this kind.

1908 *Sat. Ev. Post* 15 Aug 21/1 The Thermos Bottle keeps baby's sterilized milk at feeding temperature day or night. 1948 *Nat. Geog. Mag.* Aug. 233/1 Our host walked down from his house with a gallon thermos of hot coffee. 1950 *Time* 3 April 24/3 Simon began to pack blankets and Thermoses for a fishing trip. Also thermos jug.

Dictionnaire Alphabétique et Analogique (Paul Robert):

thermos: (nom déposé): Récipient isolant qui maintient durant quelques heures la température du liquide qu'il contient...

Thorndike-Barnhart, High School Dictionary, 1957:

Thermos bottle: *Trademark.* bottle, flask, or jug having a case or jacket that heat cannot pass through easily. It will keep its contents at about their original temperature for hours.

vacuum bottle: bottle surrounded by a container, with a vacuum between, used to keep liquids hot or cold.

Dictionary of Canadian English, The Beginning Dictionary, 1962: (Based on Thorndike-Barnhart)

Thermos bottle: the trademark for a kind of bottle or jug that will keep its contents at about the same temperature for several hours.

Dictionnaire Usuel, Quillet Flammarion, 1963:

thermos: Marque déposée de récipients isolants à double paroi avec vide intérieur et argenture, pour conserver le contenu à sa température initiale.

Harrap's Standard French and English Dictionary (1962):

Thermos: Trade mark applied to vacuum flasks and other articles manufactured by Thermos (1925) Limited, Bouteille Thermos, Thermos flask.

Part II—English—French:

Thermos: Marque déposée désignant les articles fabriqués par Thermos (1925) Limited. Thermos flask, bouteille Thermos.

Funk and Wagnall's Standard College Dictionary—Canadian Edition, 1963:

thermos bottle: Sometimes cap. A glass bottle that keeps the contents hot or cold ...; also called vacuum bottle.

Petit Larousse, 1959:

BOUTEILLE—*Bouteille isolante,* bouteille à deux parois entre lesquelles on a fait le vide, et qui conserve longtemps la température de son contenu.

THERMOS: Nom déposé d'un récipient isolant, pour conserver les liquides à une température voisine de celle à laquelle on les a introduits.

Webster's Third New International Dictionary, 1964:

Thermos: *trademark*—used for a vacuum bottle.

Much information as to the use by the respondent of its trade mark "THERMOS" and its course of conduct is found in the evidence of Mr. Parker, its president, who has been with the company ever since 1935, and in catalogues, price lists, advertisements and other documents emanating from the respondent and put in evidence. I will reproduce some pages of the catalogues, for they speak for themselves better than any description I can give. Some of the documents go back to the early days of the company. However, it is unreasonable to expect that the respondent would preserve and still have a mass of correspondence and records from those early days showing the way in which its trade mark was used at that time and the situation in which its products were manufactured or marketed at that time. Moreover, a fire in 1957 destroyed much of the correspondence and records of the company prior to that date. Consequently, the documents of those early days are not in great volume.

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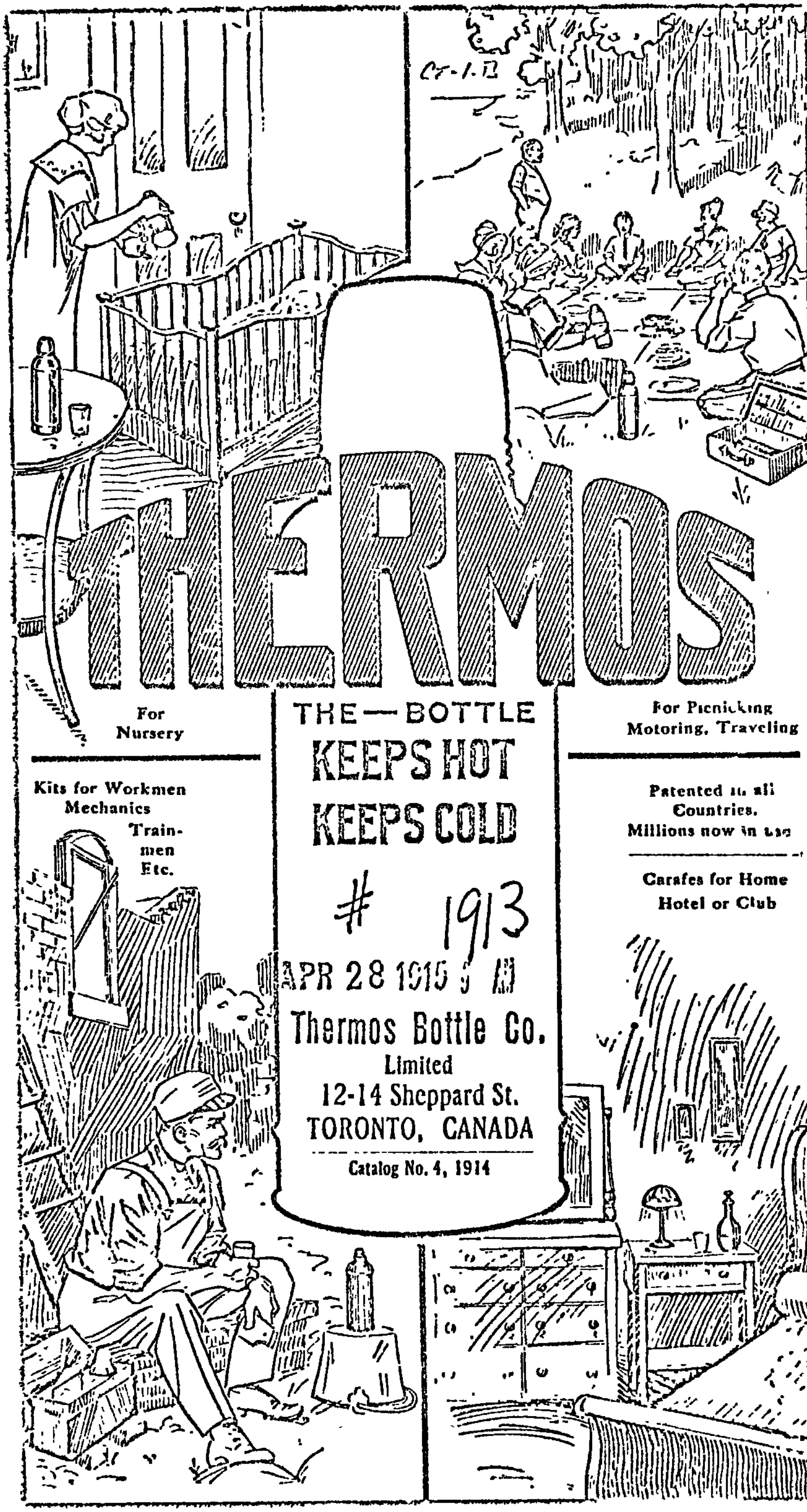
The business of the respondent was founded on the vacuum-insulated bottle. Its business initially consisted of marketing in Canada of vacuum bottles, vacuum carafes, lunch kits, picnic sets, desk jugs and associated articles. The respondent commenced its operations in Toronto in 1910, and was using German glass blowers to make its bottles around 1912 or 1913. Their activity stopped in the years of World War I, but assembly of bottles continued with parts obtained through other suppliers. The majority of vacuum bottles sold in Canada prior to 1951 were marketed by the respondent. Until 1949 its sales consisted mainly of insulated wares including vacuum bottles, replacement fillers and accessories. In 1949 it started to market non-vacuum insulated wares, such as coolers and ice chests. In 1955 it diversified its products and, by about 1962, was marketing tents, gasoline stoves, camping equipment and related articles under its trade mark "THERMOS". It was at about this time, on May 31, 1956, that the company changed its name to Canadian Thermos Products Limited. The following questions and answers appear in the transcript of the cross-examination of Parker taken on August 15, 1968:

> 153. Q And this diversification and this change of name were carried out in Canada as part of an effort to protect the Canadian trademark, is that not right?
> A. It could be right.
>
> 154. Q. You have no reason to doubt that?
> A. No.

Numerous catalogues, price lists, advertisements, forms and other documents were put in evidence as exhibits to Parker's affidavit as examples of documents used or put out by the respondent in connection with the marketing of its products. I shall now proceed to refer to some of them.

Documents of the respondent issued in its early days include Exhibits E1, E2, E3, E4 & E5 to Parker's affidavit. E1 is described on its cover page as Catalogue No. 4, 1914. I will deal with this first catalogue in some detail, and mention particular aspects of some of the others. The cover of E1 is reproduced next. It shows a picture of the bottle and a carafe and workmen and picnickers. It also has the words "Patented in all countries—Millions now in use".


THERMOS
For Nursery
For Picnicking Motoring, Traveling
THE — BOTTLE
KEEPS HOT
KEEPS COLD
1913
APR 28 1915
Thermos Bottle Co.
Limited
12-14 Sheppard St.
TORONTO, CANADA
Catalog No. 4, 1914
Kits for Workmen Mechanics Train-men Etc.
Patented in all Countries.
Carafes for Home Hotel or Club

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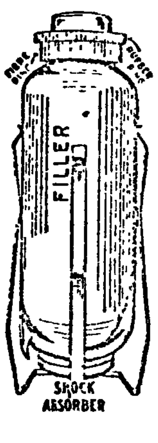
The inside of the cover page of E1 is reproduced next. It uses "Thermos" without the words "vacuum bottle" or other generic terms.

THERMOS

THE BOTTLE

The improved Thermos Products have made Thermos more popular with all classes. All models are now made cementless. paperless and padless. The protection afforded with the new shock absorber in all cases and the improved methods recently made in our new complete factory make Thermos more serviceable for carrying, motoring and use in kits and luncheon outfits. Ask to see the new models as shown in this catalog.



This sectional view of Models No. 15 and No. 16 Bottles in all sizes shows the construction and protection of the glass filler and has made the popular priced bottles more serviceable than heretofore. Note the protection on sides as well as at base.

NOTICE.

By the introduction of the new cementless, paperless and padless models in all Thermos Products, it is rarely profitable to return old bottles for repairs. We request that you write for information before incurring express charges. In most cases customers will profit by buying the new No. 15 or No. 16 Models, as illustrated on page 3.

Throughout Exhibit E1 are pictures of the battles, carafes, lunch kits, decanters, cups, corks and other products of the company; and the words "Thermos Bottle" frequently occur. In a Notice to Dealers in the catalogue are the words "Genuine Thermos Products" and the sentences "Thermos is patented the world over"; and "The Original Bottle".

Exhibit E2 is a price list in effect May 15, 1914. It has the same stylized "THERMOS" as on Exhibit E1. It refers to "Thermos Products" and "Thermos Bottles" and says that they are guaranteed to keep boiling liquids hot for 24 hours or ice-cold liquids cold for 3 days.

Exhibit E3 is another catalogue. It may have been issued about 1922. It says:

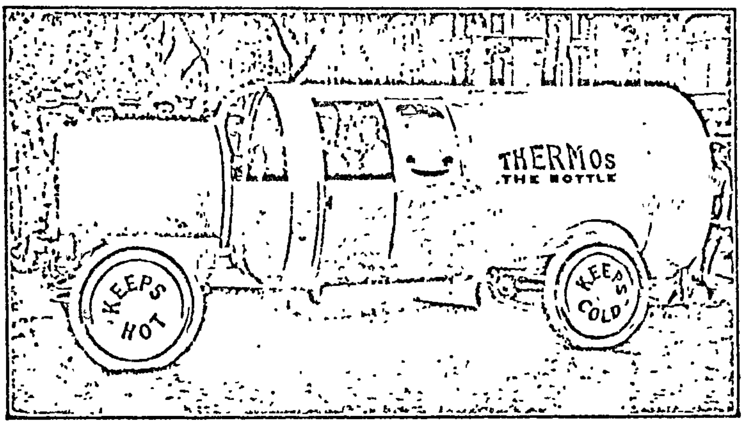
> A NEW FACTORY built and equipped expressly for the manufacture of Thermos Products makes Thermos at prices within the reach of all wage earners.
>
> We introduce an entirely new line of Thermos Bottles and Carafes with the long-desired improvement in construction, wherein no cement, corrugated paper, felt pad or other absorbent materials are employed, supporting the weight of the bottle and contents from the base, introducing at this point the new Thermos Shock Absorber, made possible by the new Walker-Burrows automatic machine process of manufacture, the glass base of the Thermos filler being seven times as heavy as in the hand-made models, making the filler practically unbreakable by ordinary usage.

This E3 catalogue, like the earlier catalogue, uses the terms "Thermos Bottle", "Thermos Food Jar", "Thermos Flask", "Thermos Carafe" and directions "How to use a Thermos Bottle". The outside back cover, reproduced next, shows a motor vehicle, used as a travelling advertisement, in the shape of a vacuum bottle. There is a picture of the respondent's bottle on page 4, and on the filler there is the word "THERMOS", and above it the words "Trade Mark", and below it the word "Patented".

THERMOS

THE BOTTLE

KEEPS HOT KEEPS COLD



Thermos Bottle $15,000 Advertising Car, which has toured the United States from Coast to Coast. One of the best Advertising mediums known.

THERMOS BOTTLE COMPANY, LIMITED

TORONTO, CANADA

Exhibit E4 is Catalogue No. 9, said to be about 1923. Here under the word "THERMOS" the words "REGISTERED TRADE MARK" appear. The catalogue continues to use the term "Thermos Bottle". Reproduced next are the first two paragraphs on page 2.

THERMOS is our registered trademark. It is plainly impressed on the many original and exclusive designs of temperature retaining vessels and accessories that constitute our extensive line of manufacture. It identifies, distinguishes and protects our product against imitation, for it cannot be legally applied to goods that are not produced by us.

It signifies and assures the trade and public of quality and efficiency, for not a single article manufactured by us and bearing this trade mark is permitted to leave our factories without first being subjected to the most thorough inspection and rigid tests. By adhering to these principles since the inception of this industry, linked with our extensive educational publicity campaigns, confidence has been established in the minds of the public that Thermos, the original temperature retaining vessels in the various designs, has become a necessary commodity and a boon to humanity.

Exhibit E5 is Catalogue No. 10 of about 1924. Here the words "vacuum bottle" and "genuine" appear, as is shown on page 3 of the catalogue reproduced next, and elsewhere in the catalogue the public is told to look for the mark of a genuine Thermos vacuum bottle—on the Bottom—and when buying replacement parts to be sure to get genuine Thermos vacuum fillers and parts, and that the best way to do this is to look for the name "THERMOS".

Exhibit E6 is a price list of about 1924 which refers to "Genuine Thermos Vacuum Bottles", "Reg. Trade Mark", "The Trade Mark of the Genuine—It is Advertised—Your Customers look for it".

Exhibit E9 is Catalogue No. 13 of 1929. It features the "Stronglas" registered trade mark of the respondent. A sectional picture shows the words "Thermos Stronglas Patent Filler" on the filler part. Other references are "Genuine Thermos Stronglas Bottles", "Genuine Thermos

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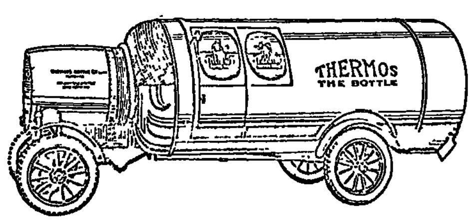
Vacuum Bottle Filler" and "Genuine Thermos Bottle Cases". The catalogue also contains directions to dealers, which include the following paragraphs in respect of Thermos and Stronglas: "You can depend on these trade marks on vacuum bottles..."; "In this connection let us emphasize again the risk that some dealers are taking in representing other vacuum bottles as 'Thermos' and in substituting other bottles when a customer asks for a 'Thermos' bottle"; "Sell the Genuine—your customer asks for THERMOS".

GENUINE THERMO VACUUM BOTTLES

Canadians have learned to put their faith in

Vacuum Bottles with the Genuine THERMOS *Trade Mark Stamped on the Bottom*

The Original Vacuum Bottles were THERMOS Vacuum Bottles. Very early in their history they gained the confidence of the Canadian public because Canadians appreciate comfort, and Genuine THERMOS Vacuum Bottles go one step further by combining comfort with dependable efficiency.



Thermos advertising car, which reminds your customers of Genuine Thermos Vacuum Bottles. Touring the country to assist in selling and advertising.

The Bottle For A Thousand Uses

A page of E13, Catalogue No. 15, is reproduced next.

THERMOS

CATALOGUE NUMBER 15

In 1907 the Thermos Bottle was introduced to the world as a new invention and promptly accepted because of its wonderful application to the need of the Home and Sports. Following the invention of the Thermos principle, this Company has developed every important achievement in the manufacture of vacuum products, which now includes Bottles, Carafes, Jugs, Desk or Bedside Sets, Jars, Lunch Kits for workmen and school children, Motor Outfits and Picnic Sets, Dispensing Urns and large Containers for all Kinds of Food Products, Ice Cream, etc. • Each piece of Thermos vacuum ware is plainly stamped, and purchasers who demand a quality product should look for the trade mark THERMOS • During the last ten years, a new glass for making Thermos fillers has been introduced called "Stronglas". This new product is much stronger and more serviceable than any other vacuum ware ever manufactured. It has allowed for a wider use of Thermos in Institutions, Hotels, Clubs and Railways. These items are stamped THERMOS STRONGLAS. • A New Super Bottle was introduced in 1933, called Super Thermos, and the method of manufacture in this new small mouth filler, makes it extra strong and serviceable. • Cooking Jars are the latest introduction to the Thermos line. • These make a wonderful saving in cooking many foods, such as cereals, fruits, vegetables, etc. A need in every home. • Peruse the following pages and learn of the new uses and new items for home and travel use.

Exhibit E15 is a supplement of 1938 and for the first time the word "Brand" appears in the documents put in evidence.

Exhibit E18 is Catalogue No. 16 and Price List of 1949 and the following appears on the back cover:

> The word "Thermos" is not a bottle name but a trade-mark—a brand name applying exclusively to products of Thermos Bottle Company Ltd., so branded, and to nothing else. It is the accepted standard of vacuum-insulated products. Show your customers the name "Thermos" on the bottom of vacuum ware.

Exhibit E21 is a Catalogue of about 1951 which contains a message to dealers which states "Today, more

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than ever before, 'Thermos' is a part of everyday living", and on the back cover "The Vacuum Ware Everybody asks for".

Exhibit N to Kingdon's affidavit is an advertisement in the *Star Weekly*, May 15, 1954, inserted by the respondent, which includes the following:

> But, remember, although almost everyone calls "vacuum" bottles, "Thermos" bottles, only those plainly marked Thermos are made by the Thermos Bottle Company Limited, Toronto, Ontario. Trade Mark Reg

After the respondent diversified its products it marketed its non-vacuumware, such as ice chests and ice preservers and jugs with fiberglass insulation, under its trade mark "Thermos".

Exhibit C1 is an example of numerous "Directions for Use" sent out by the respondent with its bottles. It is undated, Parker said it was prior to 1935. It contains the following paragraph:

> What is a THERMOS Bottle?
>
> A THERMOS Brand Bottle is a vacuum bottle manufactured by Thermos Bottle Company Limited. "THERMOS" is a coined word—a registered trade-mark belonging exclusively to Thermos Bottle Company, Limited, in Canada. If the Vacuum product is not marked "THERMOS", it simply is not THERMOS brand ware, and cannot be advertised or sold as such

Exhibit C2 is another such document and it states:

> Everyone knows there is only one Thermos...Be sure and look for the —THERMOS— Trade Mark on every Vacuum Bottle you buy.

Exhibit C3, sent out prior to 1935, refers to "GENUINE THERMOS VACUUM BOTTLES", as does Exhibit C4, sent out about 1935.

The first of the respondent's documents in French that were put in evidence is C6, sent out in the 1952-60 period. It is a French version of the respondent's English material. It has such expressions as "Bouteille Thermos", "Bouteilles 'vacuum' de marque THERMOS", and it states:

> "THERMOS" est une marque exclusive—une marque déposée propre à Canadian Thermos Products Limited du Canada. Tout article isolant non marqué "Thermos" n'est pas de notre Compagnie et ne peut s'annoncer ni se vendre comme tel.

In many letters from the trade, hotels, hospitals, governmental departments and individual users, to the applicant and to the respondent, the writers use the word "thermos" in a generic sense, synonymous with "vacuum bottle", but it also appears that in numerous instances the writers knew the word as a brand name, because, for example, they spelled it with a capital "T". It is reasonable to infer that those who were writing in respect of specific bottles in their possession, on which the brand name and the manufacturer's name were shown, had notice of the brand name for that reason. In many advertisements inserted in Canadian newspapers and magazines by persons other than the respondent, "thermos" has been used as a generic word. So also in magazine articles and novels circulated and read in Canada. As far back as 1923, in obituaries published in leading newspapers in Canada in that year respecting the death of Sir James Dewar, it was said that he brought forward the Dewar flask, "popularly known as the Thermos Flask", and that "il perfectionna aussi la bouteille Thermos" (quotation marks mine). It seems probable that the obituaries originated from a common source in England, for they follow generally the same form and use the expression "Thermos Flask".

I do not think that it is necessary to select and give examples from such advertisements, magazines and novels or from the many types of letters from the public in which the word "thermos" was used, either in lower case or with a capital "T". It was not used uniformly. In some letters it was used in a generic sense, in others it was obviously used as a brand name, and in some it was even used in both senses.

In the period 1951-64 the applicant collected and preserved letters, correspondence and advertisements in which the word "thermos" was used, having in mind the possibility of their use in litigation respecting the respondent's trade marks. As early as 1952 the applicant was contemplating the institution of proceedings to attack the marks. In appraising these letters and documents, and the volume of them, more than seven hundred, I realize that during the same period, and in accordance with its practice relating to the destruction of documents, the applicant was destroying correspondence which contained a reference to "vacuum bottle" or "bouteille isolante" or other generic terms, unless it also contained a reference to "thermos". The applicant's view was that references to the use of "thermos" as a generic term were relevant, but that references to

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"vacuum bottle" were not. In my view, the use of the term "vacuum bottle" is relevant when considering whether the words "thermos" and "thermos bottle" were synonymous with "vacuum bottle" in Canada at the dates concerned in these proceedings.

The applicant's vacuum bottles were marketed in Canada as early as 1931, at that time in limited quantities. In 1951 it established manufacturing facilities for production of its bottles in Canada.

It sold about five million vacuum bottles in Canada in the period 1954-64. It sells and markets its bottles through hardware stores, drug stores and other sales outlets in competition with the respondent and it also carries on extensive advertising and sales promotion endeavours in which the bottle is described as a "vacuum bottle" or "bouteille isolante", accompanied by pertinent registered trade marks.

Imported vacuum bottles have been on the market in Canada for many years. Numerous bottles, some manufactured in Canada, some imported from Japan, Germany and other countries, some bearing registered trade names, others bearing unregistered names, were received as exhibits in the case. It is clear that the respondent's trade mark "THERMOS" was recognized as such by competing manufacturers and that they adopted distinctive names of their own choosing for their bottles. The word "thermos" was not the only apt word available for the article. The generic term "vacuum bottle", coupled with particular brand names, has been in common, extensive and successful use in Canada.

Since the early part of 1950 the respondent employed a "clipping service" to note, clip out and send to the respondent all references to its trade mark in the major publications in Canada, in English or French, of newspapers, trade magazines, etc.

The respondent used such clippings to advise advertisers, publishers and other persons that the trade mark "Thermos" was its registered trade mark. To further protect its trade mark, the respondent instructed its employees, patent agents and solicitors, for many years before 1964, to watch for the use by others of trade marks and registrations and applications for registration of trade marks which might be confusing with the respondent's "THERMOS", and to take steps to stop such use, oppose such applications, and take remedial measures. Parker gave examples of action of that sort in the period 1956-64. The respondent's file No. 15, Exhibit No. 7 on Parker's examination for discovery, contains copies of form letters and correspondence used in that respect, including letters to newspapers. Some replies to the respondent accepted the respondent's advice, whereas others indicated that they had regarded "thermos" as a generic word.

The respondent has made substantial efforts, in greater measure during the past thirty years than previously, to impress upon the public that "THERMOS" is a registered trade mark and should not be used otherwise. These efforts increased considerably after it became apparent that there was a growing tendency to use the word in a generic sense. The applicant says that the suggestion in a decision[6] in the United States, in 1922, that "thermos" was then a descriptive word, was a reason for such increased efforts. The tendency was due, in part at least, to the respondent's course of conduct and its use of the word. The applicant says that by then the word had fallen into the public domain and the respondent's efforts were too little and too late to retrieve it or to reverse the trend of its use as a generic word. The respondent says that, in any event, its trade mark was and is distinctive of its wares, whether or not the word is used by some persons in a generic sense.

With respect to section 18(1)(*a*) of the *Trade Marks Act*, the question of the registration of a trade mark must be examined by reference to the statute under which it was registered. Section 18(1) of the *Trade Marks Act* is as follows:

> 18. (1) The registration of a trade mark is invalid if
> (*a*) the trade mark was not registrable at the date of registration;
> (*b*) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced; or
> (*c*) the trade mark has been abandoned;
> and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

[6] American Thermos Bottle Co. v. W. T. Grant Co. 279 Fed. 151.

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The registration of "THERMOS", No. 50/12223, was made in 1907 under the *Trade Mark and Design Act*, R.S.C. 1906, c. 71. The provisions of that Act pertinent for consideration in these proceedings are sections 5, 11 and 13. Section 5(1) defines what for the purposes of the Act shall be considered and known as trade marks, in the following terms:

> All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

By section 13 it is provided that after registration the proprietor:

> shall have the exclusive right to use the trade mark to designate articles manufactured or sold by him.

By section 11, however, registration may be refused:

> if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking.

The effect of this provision was that a word was not registrable under the Act as a trade mark which was merely descriptive of the character and quality of the goods in connection with which it was used.

In respect of the 1907 registration, the applicant contends that the respondent has held itself out as holding a patent on its vacuum-insulated bottle and that this is an admission by the respondent that there was such a patent; that the respondent introduced the bottle as a new product and had a monopoly on its manufacture and sale and gave the name "thermos" to it; and that, in consequence, "thermos" was the name of and was descriptive of the bottle and was non-distinctive when the word was registered as a trade mark in 1907 and, therefore, is invalid under section 18(1)(*a*) of the present Act[7].

The word "thermos" appears to have originated in Germany, about 1905, from a Greek word meaning hot or

[7] See the *Linoleum* case (1878) 7 Ch.D. 834, Fry J. at p. 836.

warm. But when it was originated and when it was first registered as a trade mark in Canada in 1907, such a derivation would have been known by few persons other than classicists and persons familiar with the Greek language, and in my opinion, it was a new and freshly coined fancy word which would not convey any obvious meaning to ordinary persons in Canada. In the *Frigidaire*[8] case, Rinfret, C.J.C. and Kerwin J. (dissenting on other points) quoted at p. 683 the remarks of Lord Macnaghten in the *Solio* case:

> If it is "new and freshly coined" (to adopt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods.

In *Kodak, Ltd. v. London Stereoscopic and Photographic Company, Ltd.*[9], Swinfen Eady J., said:

> ...It cannot be disputed since the case of the *Eastman Photographic Materials Company, Ld. v. The Comptroller-General* (L R. (1898) A.C. 571) that a word may be a perfectly good invented word although it has some reference to the character or quality of the goods, and even if the word "Kodak" as applied to films was to some extent descriptive, or had some reference to the character or quality of the films, it would not be a fatal objection to the validity of the Trade Mark.

As to the question of patent. Having regard to the work and research in this case on behalf of the applicant, I would expect that if there was a pertinent basic patent, an official record of it would have been presented in evidence. A patent on a covered insulated bottle was taken out in England in 1904 and was held invalid in 1910 in *Thermos Ltd. v. Isola Ltd.*[10].

The respondent's descriptions, from time to time, of its bottle as the "genuine Thermos" and the "original" bottle may have been ways of affirming its claim to the exclusive use of the trade mark in connection with its bottles, or it may have been inaccurate or laudatory puffing. The words infer, also, that there were other vacuum bottles not of the respondent's manufacture.

The evidence in respect of the situation in 1907 and prior thereto is scanty and not, in my opinion, sufficient

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[8] *General Motors Corp. v. Bellows* [1949] S.C.R. 679.

[9] (1903) 20 R.P.C. 337 at pp. 350-51.

[10] (1910) 27 R.P.C. Supplement 388. Referred to in Vol. 19 Oxford English Dictionary, *ante*.

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to warrant a finding that the trade mark "THERMOS", No. 50/12223, was not registrable at the time it was registered in 1907. The mark has stood unchallenged for more than half a century, until attacked in these proceedings.

The trade mark "SUPER THERMOS" was registered in 1931 under the *Trade Mark and Design Act*, R.S.C. 1927, c. 201, which is similar to the previous Act of the same name, R.S.C. 1906, c. 71. The applicant contends that this mark was descriptive and non-distinctive at the date of its registration and, consequently, was not registrable at that time and is therefore invalid under section 18(1)(*a*).

In my opinion, the word "THERMOS" is the dominant word in that trade mark, and the mere addition of the word "SUPER" does not make the trade mark descriptive or non-distinctive. The evidence does not satisfy me that the trade mark was not registrable when it was registered in 1931.

The attack under section 18(1)(*a*) of the *Trade Marks Act* on the 1907 registration of "THERMOS" and the 1931 registration of "SUPER THERMOS" therefore fails.

As to the 1960 registration of "THERMOS", one attack is under section 18(1)(*a*) of the present Act on the ground that it was not distinctive and not registrable under that Act when it was registered. Section 12 of the Act is as follows:

12. (1) Subject to section 13, a trade mark is registrable if it is not

(*a*) a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years;

(*b*) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French languages of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or their place of origin;

(*c*) the name in any language of any of the wares or services in connection with which it is used or proposed to be used;

(*d*) confusing with a registered trade mark; or

(*e*) a mark of which the adoption is prohibited by section 9 or 10.

(2) A trade mark that is not registrable by reason of paragraph (*a*) or (*b*) of subsection (1) is registrable if it has been so used in Canada by the applicant or his predecessor in title as to have become distinctive at the date of filing an application for its registration.

The word "distinctive" in the Act is defined in section 2(*f*), as follows:

> 2. In this Act,
>
> (*f*) "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them;

"Distinctive" thus means a trade mark that actually distinguishes or is adapted to distinguish.

Section 2(*t*)(i) reads as follows:

> 2. In this Act,
>
> (*t*) "trade mark" means
>
> (i) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,

A trade mark thus now means a mark that is used by a person for the purpose of distinguishing or so as to distinguish his wares or services from those of others.

The other attack on the 1960 registration, and on all the registrations except the Newfoundland registration, is under section 18(1)(*b*) on the ground that the word "thermos" was generic and not distinctive when these proceedings were commenced.

There is no doubt that to some extent the buying public identifies the word "thermos" particularly with the respondent's vacuum bottles, and that it would be very advantageous to the applicant if it could use the word in connection with the merchandising of its own bottles. Correspondence between Kingdon and the applicant's president, Mr. V. S. Johnson, in the United States, points this up very clearly. I quote the following excerpts from the correspondence.

Letter dated September 25, 1953, from Kingdon to Johnson:

> In line with my letter on the injection moulding and production difficulties of Thermos, I would like to again put before you the suggestion that we either attempt to have the word "Thermos" declared generic, or that we very quietly move in and use the name, anticipating any legal action that may result.
>
> The feeling that I have is that they are getting far more benefit from the use of the name than to which they are entitled and I am satisfied that our sales would take a very marked swing if we were able to take over the generic term. In discussing the question with the Mail Order division of the T. Eaton Company, they are thoroughly

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convinced that our products are far superior—but, to use their own terms, "the public see the name Thermos and immediately associate your company with the inferior products from Germany, England and Japan"

Comparative sales, for instance, on the 098 workmens' lunch kit, which is the kit with the one-pint bottle, indicate that the Mail Order received orders for 101 Aladdin kits, whereas the Thermos kit sold 1,290. This is strictly a matter that the name has been instrumental in creating the demand and no conscious choice has been made by the consumer apart from the recognition of the name.

In the question of childrens' lunch kits, the Thermos kit, which is a plain kit with a 7-ounce bottle, through the catalogue, sold 790 units. The Hop-a-long Cassidy kit which was displayed and described equally as well as Thermos and sells for 20 cents more, only sold 52 kits in the entire season.

The situation here is one, as you can appreciate, that the Mail Order do not want to devote catalogue space to a product that is not moving readily, and I am personally satisfied that this is the very best evidence of the power of the name "Thermos".

Reply dated September 28, 1953, from Johnson to Kingdon:

Of course, there are two considerations which must be answered affirmatively before we could proceed in Canada on the Trade Mark situation. First, we must be convinced that legally Thermos is no longer entitled to the exclusive use of the word "thermos" in this country. The nub of the matter would be whether the word "thermos" suggests to the purchasers a product specifically made by the Canadian Thermos Bottle Company. If it doesn't mean this to the purchaser, then Thermos is not entitled to the benefit of its protection. Secondly, we must make sure that if the word "thermos" could be declared in the public domain, that our initiative in the matter would not hurt us commercially either in this country or in your country. We must be unusually sensitive to this problem because of our own Trade Mark situation.

Your letter of the 25th would suggest that the public in Canada seems to identify "thermos" with the Canadian Thermos Bottle Company. Read over your paragraph 2 very carefully and see if that isn't the implication of it. Of course, we have letters from Charlie Edwards that the word "thermos" is generic, but I don't know how much weight that would carry.

Letter dated September 30, 1953, from Kingdon to Johnson:

This question has been posed in a fashion that requires a good deal of thought and, quite frankly, I think that it must be answered in two ways. The public, I do not believe, associate the name "thermos" specifically with the Canadian Thermos Bottle Company, but rather with the original vacuum bottle and, as such, it is recognized as a brand name. The reference made in the second paragraph of my letter with regard to the T. Eaton Company is in line with this thinking—that the term "thermos", whether it be the Canadian or the XYZ Thermos Bottle Company, is the thing that catches the public eye and, as a result, they place their order for a product bearing this name rather than for our products which, while they look identical, are not called "thermos" and there is a tendency for the public to associate our products with the inferior products from the foreign countries.

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The second thought that comes to mind in regard to this term is that I believe in the minds of the trade that they do themselves associate the word thermos with the Canadian Thermos Bottle Company. In other words, I do sincerely believe that they do not see any marked advantage in the term but, here again, there perhaps is reason for it as I am sure we have all had the experience in talking with either a jobber, departmental or retail store of finding them referring to our bottles as thermos bottles. My main concern is that in the eyes of the public the original thermos gives a definite advantage because of that one little word I am firmly convinced that were we able to call our bottles the Aladdin thermos bottles, that there would be a very definite and quick changeover from our competitor to ourselves; and it would seem to me that with the gains that have been made to this point that it would be highly advantageous.

...I feel that the trade and the public would accept Aladdin vacuum bottles more readily, were they referred to as the Aladdin thermos bottle.

Letter dated October 15, 1953, from Kingdon to Johnson:

The situation with this account is that we have obtained a small amount of business from them for the past year, which I have felt is unsatisfactory, and due to a co-operative advertising programme which they intend to conduct next month, it gave me an opportunity of discussing the entire situation at the higher level of the Supervisor, which we have not been able to do in the past. His expression was that certainly from a merchandising standpoint the eye appeal alone of our line should be sufficient to sell it—but, on the other hand, he raised the old question that while they recognize that a thermos bottle is a vacuum bottle exactly the same as ours, that in the minds of the public it poses quite a problem and operating on a self-serve basis, they feel that it gives a decided advantage to our competitor.

Kingdon said in cross-examination that the generic position of the word "thermos" was the same through the period 1949-64.

In my opinion, the evidence establishes two facts of major importance insofar as this case is concerned. The first is that at the date the proceedings were commenced the words "thermos" and "thermos bottle" had come into popular use in Canada and, when used in relation to the common kind of vacuum bottles, the kind found in the average home, were used and understood by persons of average education and intelligence in ordinary society as generic words descriptive of that class of bottle, and they had fallen into the day-to-day English and French languages of the Canadian people as synonymous with "vacuum bottle" in English and "bouteille isolante" in French, and as descriptive of the common household vacuum bottle.

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Before I state the second fact I will say that I am not convinced that on a question whether in Canada a particular word is a generic or descriptive word in the English or French languages, or as to what its meaning is, (other than technical words and words having special meaning in a profession, trade, etc.), a judge must decide the question solely on the evidence which is adduced and cannot use his own knowledge of the word and of the way persons use and respond to it in conversation in ordinary society. If I were to use my own knowledge and experience respecting the use of the word "thermos" in conversation, it would support my conclusion above stated. However, as I have the impression that counsel's view was that my findings should be based upon the evidence adduced, I have endeavoured to make my findings solely on that evidence and inferences therefrom, without being influenced by any personally subjective feelings I may have.

The second fact so established, in my opinion, is that as of the date the proceedings were commenced an appreciable portion of the population in Canada knew and recognized the respondent's trade mark "THERMOS" and its significance, and that to them it was distinctive of the respondent's vacuum bottles. They were influenced, no doubt, by the 20,000,000[11] of the respondent's bottles bearing the trade mark which were sold in Canada in the period 1935-64 in competition with imported and other bottles, and by the extensive advertising by the respondent and by the millions of "directions for use", etc., in connection with the respondent's bottles and trade mark, which reached the public and purchasers of vacuum bottles. The applicant's experience with the trade such as with Eaton's mail order business, where purchasers had a choice between brand names, and the correspondence between Kingdon and Johnson, provide evidence that, relative to vacuum bottles, the trade mark "THERMOS" was distinctive of the respondent's bottles, in the trade in great measure and to a lesser degree among members of the general public. Kingdon said that trade marks are an im-

[11] Parker's figure.

portant feature to the public when purchasing vacuum bottles. I think there can be little doubt that trade marks used in connection with articles sold in large volume over a long period usually have a reputation associated with them. The catalogue sales figures referred to in the Kingdon-Johnson correspondence show that the purchasers who had a choice of brand name bottles chose the "THERMOS" brand in preference to the other brands.

It is my opinion, also, that many of the public are aware of the dual use and meaning of the word "thermos" and that they use it in its generic sense or in its trade mark sense, as the case may be, as circumstances may call for. In day-to-day conversation such persons may use the word in a generic sense without adding "brand" or "vacuum bottle", and without having in mind a bottle of a particular manufacturer; but when they go to a store to buy a vacuum bottle they will have in mind that the name "THERMOS" on a bottle has a significance which distinguishes bottles made by the respondent and sold under that brand name from bottles bearing some other brand or no brand. They may have had experience with vacuum bottles or have been induced to regard bottles bearing the word "thermos" as bottles warranted by a reputable maker, although they do not know the manufacturer by name—people often look for brand name goods without knowing the name of the manufacturer.

Counsel for the respondent submitted that on the evidence the court cannot make a finding as to how many people or what percentage of the people in Canada use the word "thermos" descriptively or generically, and that it was not shown that the persons who used it in that way were representative of the general public. Certainly, there was in the evidence nothing in the nature of a Gallup poll or a sampling on a statistical basis, such as is used by the Dominion Bureau of Statistics, and I cannot put a percentage figure on the portion of people who use the word generically. But the evidence as a whole as to its widespread use, and especially the indication of its spontaneous use, satisfies me that it is used as I have found, *i.e.,* (a)

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generically and descriptively in popular usage in day-to-day language, and, (b) in a distinctive sense extensively in the trade, and to a lesser degree by the public when purchasing vacuum bottles.

Having concluded that the word "thermos" has come into common use as a generic word, in speech and in writing, I must go on to determine whether for that reason the respondent's registration of it should be expunged, as being not distinctive, notwithstanding that it is distinctive to a significant portion of the people who sell or buy vacuum bottles. The words of Maclean J. in *The Bayer Company, Limited v. The American Druggists' Syndicate, Limited*[12], in reference to the situation in that case, are pertinent here. He said at p. 598:

> The same section of the public in Canada, would no doubt today, identify aspirin as the Bayer production of acetyl salicylic acid and, to that extent at least, the word aspirin does not denote the name of the article. It was through the sale of acetyl salicylic acid in tablet form under the name of "Aspirin" first by manufacturing chemists and later by the Bayer Company itself, that the public began to purchase direct from retail druggists, instead of through the physician's prescription. Owing to this fact, possibly another section of the public, consumers of aspirin, gradually came to identify that word as the name of the article. But all this has occurred in recent years. Much advertising has brought this about and produced the strange situation, if the respondents' contention be sound, that the more successful the manufacturer of a product, identified by some registered word mark, is in inducing the public to consume his product, the nearer he approaches the end of the user of his trade-mark even though originally it was a proper entry. The implications from such a state of the law are considerable and serious, and even with statutory authority existing to expunge trade-marks in such a condition of facts, one can readily perceive the difficulties in justly resolving the many complex issues which might arise.

Rand and Locke JJ. said in *General Motors Corp. v. Bellows*[13], in reference to marks in issue in that case:

> No doubt there is a public interest against confusion of these marks, but on the other hand there is a like interest in the freedom of the individual trader in ordinary trade practices and in particular in using the main stock of the language. If the latter interest is disregarded, a single word might effect a wholesale appropriation of the only apt language available.

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[12] [1924] S.C.R. 558.

[13] [1949] S.C.R. 678 at p 691

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And at p. 688 they said:

> The first question is, then, whether the word "Frigidaire" was properly placed on the register in 1933. The rule quoted illustrates the conflict early recognized by the courts before the subject matter came under legislation, i.e between the appropriation by a trader of a word within the range of language that would ordinarily be used by traders to describe particular goods, and the right of other traders in the normal carrying on of their business to employ the same or similar words. In the technique of advertising, the more complex and expensive the goods are, the greater the imaginative seeking by those producing them for attractive and arresting words; but in fixing the limits of legislative protection the courts must balance the conflicting interests and avoid placing legitimate competition at an undue disadvantage in relation to language that is common to all.

There is ample authority for the proposition that, as a general rule, a word merely descriptive of the article to which it is applied cannot be used as a trade mark for that article, because everyone has the right to use the common appellatives of the language. For example, a dealer in flour cannot adopt that word as his trade mark, and prevent others from applying it to their packages of flour. I am satisfied that the word "thermos" has become a commonly used word descriptive of the ordinary vacuum bottles which the applicant and the respondent manufacture and sell, and, if the rule above mentioned were absolute and of unlimited application, the case of the applicant for expungement of the respondent's trade marks would be completely tenable. But the respondent registered its trade mark in 1907. It was a good trade mark then and has been recognized as such for many years. The competitors of the respondent have respected it. They had and have available the generic term "vacuum bottle", and have used it on millions of their bottles and, as already found by me, to many persons the trade mark is distinctive of the respondent's bottles.

Although the word "thermos" is now commonly used in a descriptive sense, I do not regard it as a merely descriptive word, in the sense that "shredded wheat" or "cellular cloth" were said to be merely descriptive in the cases in which their significance was the subject of judicial decision. As Fletcher Moulton, L.J., pointed out in *Re Joseph Crosfield & Sons, Ltd.*[14], there is no absolute incompatibility

[14] [1910] 1 Ch. 130 at p. 145.

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between what is descriptive and what is distinctive. A descriptive word can be distinctive when used in certain circumstances.

It is also recognized, at least in our neighbour, the United States, that a word registered as a trade mark may in fact retain its significance as a trade mark even after it has become *publici juris* and has become a part of the public domain as a generic descriptive designation for the class or type of goods. In 1962, in *American Thermos Products Co. v. Aladdin Industries, Inc.*[15], the United States District Court, District of Connecticut, found, on the evidence before it, that the word "thermos" had become a generic descriptive word in the English language as used in the United States and had become a part of the public domain, but that there is an appreciable, though minority, segment of the consumer public which knows, recognizes and uses the trade mark "Thermos" and, therefore, to eliminate confusion and the possibility of deceit of such consumers, the court decreed that the generic use of the word "thermos" by Aladdin Industries, Incorporated, in its literature and advertising and on its labels would be subject to certain restrictions and limitations set forth in the decision. The court declared the "Thermos" trade marks there in question to be valid, except that they will not be infringed by the generic and descriptive use of the word "thermos" when used in accordance with the provisions of the decision. The decision was affirmed by the United States Court of Appeals, Second Circuit, sub name *King-Seeley Thermos Co. v. Aladdin Industries Inc.*[16]. It appears from the decisions that the courts acted upon the following provisions of the law of the United States:

(1) A designation which is initially a trademark or trade name ceases to be such when it comes to be generally understood as a generic or descriptive designation for the type of goods, services or business in connection with which it is used.

(2) To the extent that a designation of the kind described in Subsection (1) retains its significance as a trade-mark or trade name,

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[15] (1962) 207 F. Sup. at p. 9: 134 U.S.P.Q. at p. 98.

[16] (1963) 321 F. 2d. 577: 138 U.S.P.Q. 349.

> its use as such is protected as far as it may be practicable without impeding the use of the designation by others in its generic or descriptive significance.

The situation in Canada in 1960 was much the same as when these proceedings were commenced, and it is my opinion that the trade mark "THERMOS" was registrable under the present *Trade Marks Act* when it was registered in 1960, and that it is not invalid under section 18(1)(*a*).

It is also my opinion that when the proceedings were commenced the trade mark registered in 1960, and the other trade marks whose expungement is sought, were distinctive of the respondent's bottles to a substantial portion of the consumer public throughout Canada, to many and not only to a few, although I cannot put percentage figures on the portion to which the trade mark was then distinctive and the portion to which it was not. Therefore, notwithstanding my conclusion as to the generic and descriptive use of the word "thermos", I do not think that the trade marks should be found to be invalid under section 18(1)(*b*).

Legislation concerning trade marks exists primarily in the interest of and for the protection of the public[17], and perhaps it is not out of place for me to deal with the argument of respondent's counsel that if the trade marks are maintained, no harm will be done, but if they are expunged there will be a danger that the public will be deceived into buying other bottles thinking that they are the respondent's.

There are conflicting interests among the manufacturers and sellers of vacuum bottles. There is the interest of the respondent to maintain its trade mark and to have the advantage of whatever good reputation is associated with that trade mark. There is the interest of the applicant to be allowed to use the generic term "thermos" in connection with its vacuum bottles so as to improve its competitive position. I am assuming that the applicant is under a disadvantage of not being able to use that generic term. How-

[17] *Lightning Fastener Co. v. Canadian Goodrich Co.* [1932] S.C.R. 189 at p. 196.

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ever, I do not preclude the possibility that the applicant might find it possible to use that term in its generic sense, with limitations or qualifications, in a way that would not mislead the public or infringe the respondent's trade marks or depreciate the value of the goodwill attaching to the trade marks. A way was found in the United States. I express no opinion as to whether it is possible to find a way in Canada.

The applicant contends that the continued registration of the word "thermos" as a trade mark puts it at a competitive disadvantage vis-à-vis the respondent, for prospective purchasers of vacuum bottles may and do ask for a "thermos" and they are consequently sold a "THERMOS" brand bottle, rather than an "Aladdin" brand bottle, even when they use the word in a generic sense and are not seeking only "THERMOS" brand bottle or a bottle of a particular manufacturer. I have no doubt that this occurrence is common. The fact that the buyer could have used the synonymous term "vacuum bottle" is of no great significance; he uses a term in common use.

There is the question whether the average purchasers of vacuum bottles, acting with normal caution, would be likely to be misled or confused if the respondent's trade marks are expunged and if, in consequence, bottles of the respondent's competitors, including imported bottles, are then marked and sold as "thermos" bottles without explanation, qualification or distinction. Might such purchasers be misled into buying those other bottles, thinking that they are buying the respondent's bottles? Vacuum bottles are inexpensive articles sold from shelves, across the counter and through mail order catalogues. I would not expect purchasers to exercise as much care in buying a vacuum bottle as in buying a more expensive article. Bottles of various origins look much alike. Ordinary persons might not look for the manufacturer's name. If the label says that it is a thermos bottle, they might assume that it is a bottle made by the same manufacturer whose bottles have carried the trade mark and the manufacturer's warranties, and that replacement parts would be obtainable if needed.

Counsel for the applicant argued that purchasers who do not know the significance of the respondent's trade marks would not be misled; and that those who know "thermos" as a generic term and also as a trade mark would not be misled either, because if they wanted a bottle made by a particular manufacturer they would know enough to look for the maker's name. This is an attractive argument, but, having regard to buying habits and the class of purchasers and the way in which the bottles are sold, it is my opinion that there is a real risk that an appreciable number of ultimate purchasers might be misled or confused if imported bottles and bottles of manufacturers other than the respondent are marked thermos bottles. Comparing and evaluating that risk vis-à-vis the above mentioned competitive disadvantage of the applicant, and endeavouring to balance the several conflicting interests involved, of which the public interest is paramount, I have come to the conclusion that expungement of the respondent's trade mark would involve the risk above mentioned and that the risk is sufficiently serious to override the disadvantage under which the applicant is labouring in not having the use of the word "thermos" in its business. That word is not the only apt or practical term. The applicant has the term "vacuum bottle". I agree that it is not used as frequently as "thermos".

I now turn to the question of the Newfoundland Registration "THERMOS", No. 264, dated January 8, 1908.

The *Trade Marks Act* contains special provisions in respect of trade mark registration under the laws of Newfoundland prior to April 1, 1949. Those provisions are in section 65, which reads as follows:

> 65. (1) The registration of a trade mark under the laws of Newfoundland prior to the 1st day of April, 1949, has the same force and effect in the Province of Newfoundland as if Newfoundland had not become part of Canada, and all rights and privileges acquired under or by virtue thereof may continue to be exercised or enjoyed in the Province of Newfoundland as if Newfoundland had not become part of Canada.
>
> (2) The laws of Newfoundland as they existed immediately prior to the expiration of the 31st day of March, 1949, continue to apply in respect of applications for the registration of trade marks

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under the laws of Newfoundland pending at that time and any trade marks registered under such applications shall, for the purposes of this section, be deemed to have been registered under the laws of Newfoundland prior to the 1st day of April, 1949.

Section 65 carried into the *Trade Marks Act* Term 21 of the Agreement containing Terms of Union between Canada and Newfoundland which was approved by the Parliament of Canada in Acts of 1949, Chapter 1, and confirmed by the *British North America Act*, 1949. Term 21 is as follows:

21. (1) Canada will provide that the registration of a trade mark under the laws of Newfoundland prior to the date of Union shall have the same force and effect in the Province of Newfoundland as if the Union had not been made, and all rights and privileges acquired under or by virtue thereof may continue to be exercised or enjoyed in the Province of Newfoundland as if the Union had not been made.

(2) The laws of Newfoundland existing at the date of Union shall continue to apply in respect of applications for the registration of trade marks under the laws of Newfoundland pending at the date of Union and any trade marks registered upon such applications shall, for the purposes of this Term, be deemed to have been registered under the laws of Newfoundland prior to the date of Union.

Appendix II to Volume V of the 1949 *Consolidation of Statutory Orders and Regulations* provides an accurate summary in respect of the Terms of Union, and for convenience I will repeat it here, as follows:

APPENDIX II

NEWFOUNDLAND

The agreement containing the Terms of Union of Newfoundland with Canada was approved by chapter 1 of the Statutes of Canada, 1949, and confirmed by *The British North America Act, 1949*. By paragraph (1) of Term 18 all laws in force in Newfoundland at or immediately prior to the date of Union continue therein as if the Union had not been made, subject nevertheless to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the Province of Newfoundland according to the authority of the Parliament or of the Legislature under the British North America Acts, 1867 to 1946. Paragraph (2) of Term 18 provides that Statutes of the Parliament of Canada in force at the date of Union, or any part thereof, shall come into force in the Province of Newfoundland on a day or days to be fixed by Act of the Parliament of Canada or by proclamation of the Governor General in Council issued from time to time. Paragraph (2) of Term 18 provides further that any such proclamation may provide for the repeal of any of the laws of Newfoundland that

(*a*) are of general application;

(b) relate to the same subject-matter as the statute or part thereof so proclaimed; and

(c) could be repealed by the Parliament of Canada under paragraph (1) of Term 18.

Proclamations of the Governor General in Council bringing certain statutes of the Parliament of Canada into force in the Province of Newfoundland and repealing certain statutes of Newfoundland were issued on April 1, 1949, May 9, 1949 and September 13, 1949. For convenience the schedules to these proclamations, listing the statutes brought into force and the statutes repealed, are set forth hereunder.

The First Schedule, namely, Statutes of the Parliament of Canada to come into force in the Province of Newfoundland on April 1, 1949, includes the *Exchequer Court Act*, the *Trade Mark and Design Act*, and *The Unfair Competition Act, 1932*.

The Second Schedule, Statutes of Newfoundland to be repealed on April 1, 1949, includes Chapter 154, Consolidated Statutes of Newfoundland (Third Series), *Of Trade Marks and the Registration Thereof*, and Act No. 39 of 1948 amending chapter 154.

The Newfoundland registration was made under Chapter 112 of the Newfoundland Consolidated Statutes, 1896 (2nd Series)[18]. The definition of "trade mark" in section 2 is as follows:

> The expression "trade-mark" means a trade-mark registered in the register of trade-marks kept under the provisions of this chapter, and includes any trade-mark which, either with or without registration, is protected by law in any British possession or foreign State, to which the provisions of the one hundred and third section of the Imperial "Patents, Designs, and Trade Marks Act, 1883," are under Order in Council for the time being applicable.

The Judicial Committee of the Privy Council said, in *Imperial Tobacco Co. (Newfoundland), v. Duffy*[19], that this Newfoundland statute was undoubtedly ill expressed.

The statute provides that a trade mark must consist of or contain at least one of certain essential particulars which include:

> . . .
>
> (c) A distinctive device, mark, brand, heading, label or ticket; or

[18] Later re-enacted as Chapter 154 of Consolidated Statutes of Newfoundland (Third Series).

[19] [1918] A.C. 181 at p. 183.

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(*d*) An invented word or invented words; or

(*e*) A word or words having no reference to the character or quality of the goods...

The Supreme Court of Newfoundland considered those essentials in *Orange Crush Co. and British Aerated Waters Co. v. Gaden Aerated Water Works Ltd.*[20]. Kent J. said at p. 308:

> The first four of these classes specify what a trade mark may consist of; the last what it may not consist of. It may not consist of a word or words having reference to the quality or character of the goods In other words, a trader may indicate his connection or dealing with goods by adopting any of the particulars falling within classes (*a*) to (*d*) which are neutral as to the character of the goods themselves, but he may not by adopting words having reference to the character or quality of the goods and thereby monopolize the use of words descriptive of the goods in question.

And at p. 309:

> ...Our Statute contains no provisions for rectification of the register, and the only way in which in an action for an infringement the question of the validity of a registered trade mark or its component parts may be questioned is by setting up that it is not duly registered. That this is so is suggested in the judgment of the Privy Council in the case of the *Imperial Tobacco Company vs. Duffy,* 87 L J, P.C. 50, in which Lord Wrenbury says on p. 51, "It is strange, but it is the fact, that the Newfoundland Statute contains no provisions for rectification of the register. Under these circumstances the defendant cannot, of course, be blamed for not taking proceedings for rectification. But it might be a defence to an action for infringement that the plaintiffs are not duly on the register."
>
> It remains to determine whether the words "Orange Crush", etc., are entitled to protection. If they refer to or are descriptive of the character or quality of the beverages, they are not "words having no reference to the character or quality of the goods" and may not be or form part of the essential particulars of which the trade mark is made up.

It was common ground on the argument before me that, having regard to the provisions of the Newfoundland statute and section 65 of the *Trade Marks Act,* any lack of distinctiveness of the Newfoundland trade mark when these proceedings were commenced does not afford a good ground for finding it invalid. The question is whether it was registrable when it was registered in 1908. The evidence respecting the situation in Newfoundland at and before that date is even more scanty than the evidence respecting the situation in Canada when the trade mark was registered

[20] Nfld. L R 1921-26 at p 301.

at Ottawa in 1907. If any doubt exists as to registrability, it must be resolved in favour of the trade mark. The applicant has not acquitted itself of the onus of showing that the trade mark was not duly registered in Newfoundland in 1908. The application to expunge the Newfoundland registration is therefore dismissed.

Counsel for the respondent also argued that even if the trade mark was not duly on the register in Newfoundland, this court has no power to expunge it, because of section 65 of the *Trade Marks Act* and because, so he argued, the "register" in section 56 is the register at Ottawa and does not include the register in Newfoundland.

Having regard to my finding respecting the trade mark when it was registered in Newfoundland, it is not essential for the determination of the application that I deal with this argument, but I will state my conclusion on it briefly.

As I construe section 65, its purpose and effect is to preserve in the Province of Newfoundland the rights and privileges acquired under or by virtue of the registration of a trade mark under the laws of Newfoundland prior to April 1, 1949. It is not a section dealing with the jurisdiction of the courts.

The *Exchequer Court Act* and the *Trade Marks Act* are in force in the Province of Newfoundland. Chapter 154 of the Consolidated Statutes of Newfoundland (Third Series) *Of Trade Marks and the Registration Thereof*, was repealed on April 1, 1949.

Section 21 of the *Exchequer Court Act* and sections 2(*n*), 54 and 56(1) of the *Trade Marks Act* are pertinent. Section 21 of the *Exchequer Court Act* is in part as follows:

> 21. The Exchequer Court has jurisdiction as well between subject and subject as otherwise,
>
> ...
>
> (*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade marks or industrial designs made, expunged, varied or rectified; and
>
> (*c*) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at common law or in equity, respecting any patent of invention, copyright, trade mark, or industrial design.

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Sections 2(*n*), 54 and 56(1) of the *Trade Marks Act* are as follows:

2. In this Act,

(*n*) "register" means the register kept under section 26;

54. The Exchequer Court of Canada has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or remedy conferred or defined thereby.

56. (1) The Exchequer Court of Canada has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

The *Trade Marks Act* provides for the appointment of a Registrar of Trade Marks. Various sections of the Act prescribe his duties, including section 26 (to keep a register); section 27 (to keep an index of registered trade marks, etc.); section 40 (amendments to the register); and section 47 (transfer of a registered trade mark).

I may mention here that the contention that the "register" defined in section 2(*n*) does not include the register in Newfoundland is hardly consistent with the respondent's prior conduct, for the application on behalf of the respondent by its Trade Mark Agents to amend the register by changing the name of the owner of the Newfoundland trade mark was made on January 27, 1960, to the Registrar of Trade Marks, Ottawa, and was granted there by that Registrar; and the request, dated September 30, 1949, to record the assignment from Thermos (1925) Limited to Thermos Bottle Company Limited, was made to the Registrar at Ottawa and was recorded in the Trade Marks Office there on September 30, 1949.

However, whatever jurisdiction the Exchequer Court has depends on the statutes, not on the conduct of the respondent.

In my opinion, this court has jurisdiction to expunge the Newfoundland registration on a showing of sufficient cause to expunge it.

In case I have failed to accurately appraise the factual situation or to recognize the legal consequences flowing from the fact that the word "thermos" has become a generic word, I shall deal briefly with certain other points argued by counsel for the respondent against the application to expunge.

The respondent contends that a trade mark may lose its distinctiveness only through the actions of its owner. I am unable to agree with that contention. Judson J. dealt with an issue of that kind in *Cheerio Toys and Games Ltd. v. Dubiner*[21]. The court decided the case on other grounds and did not deal with that issue, but Judson J. said at pp. 226-27:

> What the Court is concerned with under s. 18(1)(*b*) is the actual state of facts at the time of the commencement of the proceedings. Distinctiveness may have been lost many years ago for reasons and because of usage which cannot now be traced or ascertained. The mere fact that at times the proprietor or permitted user has identified the word "Yo-Yo" as a trade mark does not mean that there could not be a loss of distinctiveness, if, in fact, there is a loss of distinctiveness. Careless user or the permission of extensive piracy of the mark by others, two of the factors relied upon by the judge, are merely two possible ways in which distinctiveness may be lost. If the Court concludes that at the time of the proceedings the mark is not distinctive, it is error to hold that this conclusion must be wrong because those two particular causes mentioned by the trial judge are absent.

Also in *General Motors Corp. v. Bellows (supra),* Rand J., giving the judgment of himself and Locke J., said at p. 690, in reference to section 52(1) of *The Unfair Competition Act, 1932,* which is much the same as section 56(1) of the present *Trade Marks Act:*

> ...But I cannot interpret this language to do more than to allow the Court to deal with a properly registered mark as the exigencies of time may have affected it. In the other view, a retroactive validation would be given without restriction. A word mark may lose distinctiveness through, for instance, becoming the common name of the goods or from disuse or abandonment; and it is these changes leading to residual rights which the section envisages.

The respondent contends that the purpose of the applicant in these proceedings is to obtain the benefit of goodwill associated with the respondent's trade mark "THERMOS", and, therefore, the application should be dismissed. The evidence establishes that the applicant has diligently respected the respondent's trade marks. In taking these

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[21] [1966] S.C.R. 206.

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proceedings the applicant has followed a course which is legally available to it and seeks relief to which it *bona fide* believes it is entitled under the law. I must reject this contention of the respondent, even although some benefit of the goodwill heretofore associated with the respondent's trade mark would flow to the applicant if the respondent's trade marks are expunged.

The respondent also argues that there has been laches and acquiescence on the part of the applicant in delaying the commencement of proceedings against the respondent until 1964, and that, therefore, the application should be dismissed. I find little merit in this argument. The respondent was not misled or lulled into a false sense of security by the applicant. Nor was the respondent unaware of the possibility, even the probability, that it might have to defend its trade marks. The applicant was under no obligation to commence proceedings prior to 1964 and was not estopped from taking them when it did in that year.

Finally, I will deal with the applicant's contention that the respondent's "THERMOS" trade marks are "deceptively misdescriptive", within the meaning of section 12 of the *Trade Marks Act,* in respect, for example, of its non-vacuum insulated wares, such as ice buckets and chests with fiberglas insulation. This contention would have validity if "thermos" were synonymous with "vacuum insulated". I have not found that these terms are synonymous. I do not think that they are, even although some of the respondent's wares, besides ordinary household vacuum bottles, are vacuum-insulated, e.g., "THERMOS" carafes. As to such things as tents and stoves, there can be no question of deceptiveness. In my opinion, it has not been shown that the respondent's trade marks are deceptively misdescriptive of any of the wares to which they are applied.

In the result, the application to expunge the respondent's trade marks is dismissed with costs.

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ET 11 fév.

SA MAJESTÉ LA REINE .... INTIMÉE. Ottawa 26 mars

Couronne—Pétition de droit—Pénitencier—Détenu—Médecin du pénitencier—Faute médicale—Faute lourde—Moindre faute—Responsabilité du médecin—Responsabilité de la Couronne—Droit commun anglais—Droit civil—Loi sur la responsabilité de la Couronne 1952-53 S. du C., ch. 30, arts (3)(a), 4(2)

En s'évadant d'une prison en 1962, le pétitionnaire fit une chute et se blessa le pied gauche Une fois repris, il fut condamné à la détention au Pénitencier St-Vincent-de-Paul. Dès son entrée en octobre 1963 et à plusieurs reprises par après, il se serait plaint de très vives douleurs au pied. Suivant le diagnostic du médecin du pénitencier après examen des radiographies, ces douleurs étaient causées par les pieds plats du pétitionnaire et il prescrivit un support plantaire. Vu la persistance des douleurs, un nouvel examen médical eut lieu en 1965 et le diagnostic révéla, cette fois, l'existence d'arthrose dans le pied qui nécessita une intervention chirurgicale. Alléguant faute, incurie, incompétence et négligence grossière des représentants de l'intimée sous la garde desquels sont les détenus, le pétitionnaire poursuivit en recouvrement de dommages pour incapacité partielle permanente, douleurs, ennuis, diminution de jouissance de la vie, etc. Tout en niant en fait et en droit, l'intimée offrit un montant de $500 00 refusé par le procureur de la demande, à titre de compensation pour «douleurs, ennuis, inconvénients pendant deux ans».

Quant aux dommages la Cour les jugea minimes et les fixa à la somme de $300 00

Jugé: Contrairement au cas du malade qui se présente à un hôpital de son choix pour se faire traiter, le détenu dans un pénitencier, en cas de maladie, n'a d'autre choix que d'être vu et examiné par le médecin qui est à l'emploi et à la solde de l'institution. La Couronne dans un tel cas assume, quant à ce service, la responsabilité des actes ou omissions de ses préposés, professionnels ou non, pourvu toujours que le préposé lui-même puisse être poursuivi *in tort* personnellement. Ici, en acceptant la responsabilité de fournir des soins médicaux au pétitionnaire, la Couronne par l'entremise du médecin, et ce dernier, s'engagèrent envers le détenu de le soigner avec compétence et habileté.

Le droit commun anglais ne reconnaissant pas la «faute lourde» du droit civil français, ni même de degrés de faute, il suffit de la moindre faute du médecin pour engager sa responsabilité car celui-ci est tenu d'exercer diligence et prudence. Ici, l'imprudence du médecin du pénitencier, ayant 12 ans d'expérience en médecine générale mais sans expérience dans le domaine de la radiographie, consista à ne pas avoir jugé nécessaire de consulter, lors de son examen des radiographies, un radiologiste ou un orthopédiste, comme cela fut fait lors du diagnostic de 1965.

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ARRÊTS ET OUVRAGES CONSULTÉS PAR LA COUR:
Petit v. Hôpital Ste-Jeanne d'Arc (1940) 78 S.C 564; *Hôtel Dieu St-Vallier v. Martel* [1968] B.R. 389; *Cité de Verdun v. Thibault* (1940) 68 B R 1; *Nadeau: Traité de droit civil du Québec,* Vol. 8, p. 353; *Hillyer v. Governors of St. Bartholomew's Hospital* [1909] 2 K B. (C.A.) 820; *Roe v. Minister of Health* [1954] 2 W.L.R. (C.A.) 915 à la p. 923; *Crépeau: La responsabilité civile du médecin et de l'établissement hospitalier* éd. 1956, pp 150, 153; *Beausoleil v La Communauté des Sœurs de la Charité de la Providence* [1965] B.R. 37 à la p 43; *The Sisters of St. Joseph of the Diocese of London v. Fleming* [1938] R.C.S. 173 à la p. 192; *Vancouver General Hospital v. Fraser* [1952] 2 R C S. 36, 64; *Cardin v La Cité de Montréal et al.* [1961] R.C S. 655; *Grossman v. The King* [1952] 1 R C.S. 571; *The King v. Canada Steamship Lines Ltd.* [1927] R C.S 68; *The King v. Hochelaga Steamship Co.* [1940] R C.S. 153; *Gagné v. Sa Majesté la Reine* [1967] R C. de l'E Vol. 1, 263; *Salmond on the Law of Torts* (1953) 11è. éd. 493; *Nelligan v. Clement* (1939) 67 B R. 328 à la p. 332; *Halsbury* 2è. éd. Vol. XXII, no 601; *Elder et autres v. King* [1957] B R. 87; *Nesbitt v. Holt* [1953] 1 R C S 143; *G. v. C.* [1960] B R. 161; *Parent v. Lapointe* [1952] 1 R C.S. 376; *Wilson v Swanson* [1956] R C S. 804.

PÉTITION DE DROIT pour recouvrer certains dommages.

Jacques Laurier pour le requérant.

Pierre Delage et Raymond Roger pour l'intimée.

WALSH J.:—Le requérant allègue que le 16 octobre 1963 il fut confié au pénitencier St-Vincent-de-Paul et que dès son arrivée il informa les autorités qu'il ressentait de très vives douleurs à son pied gauche à la suite d'une fracture survenue lors d'une évasion et pour laquelle il fut condamné à un an de détention.

La pétition continue:

3. Le représentant médical de l'intimée à cette institution lui fit passer plusieurs radiographies et diagnostiqua que les douleurs étaient causées par les pieds plats du requérant que l'on contraignit à porter des supports;

4. A plusieurs reprises, le requérant se plaignit aux autorités de l'inefficacité de ce traitement mais les employés de l'intimée refusèrent de donner au requérant les soins exigés par son état, soit par malice, soit par négligence grossière, et ce pendant deux ans;

5. Le requérant étant en captivité et sous la garde des employés de l'intimée, il se trouvait dans l'impossibilité de voir lui-même aux soins nécessités par son état et qui lui causait d'indicibles souffrances;

6. Après son transfert à l'Institut Leclerc, soit vers le mois de mai 1965, le requérant obtint un nouvel examen médical à cette institution où l'on diagnostiqua l'existence d'une fracture du pied gauche considérablement aggravée par le manque de soin;

7. Ce diagnostic fut confirmé par un spécialiste mandé sur les lieux à cette fin et qui constata une paralysie partielle du pied blessé;

8. A la suite de ces circonstances, le requérant fut transféré à l'hôpital Reine-Marie, à Montréal, afin de lui prodiguer des soins immédiats et urgents;

9. Le requérant, par la faute, l'incurie, l'incompétence et la négligence grossière des employés de l'intimée a subi un préjudice considérable qui se détaille ainsi:—

— incapacité partielle permanente	$ 8,000 00
— douleurs, ennuis, inconvénients pendant deux ans	$ 3,000 00
— diminution de la jouissance de la vie, impossibilité de faire du sport, etc.	$ 4,000 00
	$15,000.00

10 Le requérant a droit de réclamer la somme de $15,000 00 de Sa Majesté la Reine aux droits du Canada;

11 Les employés, administrateurs, gardiens et médecins du Pénitencier de St-Vincent-de-Paul sont les employés de l'État Fédéral Canadien et les détenus qui s'y trouvent sont sous leur garde.

A la suite d'une motion de l'intimée pour détails, le requérant précisa que ce fut au D^{r} Lefebvre au pénitencier de St-Vincent-de-Paul et au D^{r} Harris à l'institut Leclerc qu'il se plaignit ainsi qu'à ses gardiens, et que ce sont les gardes et le D^{r} Lefebvre, médecin de l'institution pénale, auxquels il réfère dans le paragraphe 9 de sa pétition.

En défense, l'intimée admet que le requérant était en captivité et sous la garde de ses représentants mais nie la pétition quant au surplus.

L'intimée plaide aussi que lors de l'examen d'entrée que le requérant a subi quelques jours après son arrivée au pénitencier, il ne fit part d'aucune douleur qu'il aurait pu ressentir ou fracture qu'il aurait pu avoir au pied gauche, mais que le médecin de l'institution, le docteur J. Lefebvre, constata de lui-même que le requérant avait un léger abaissement de la voûte plantaire au pied gauche; que quinze jours après son entrée, lors d'une entrevue avec un officier préposé au classement des détenus, il déclara ne point ressentir ou conserver de séquelles sérieuses des quatre blessures subies antérieurement et ne parla que d'une fracture à l'épaule droite subie à son évasion de la prison de Joliette au cours de l'année 1962; que durant son séjour au pénitencier St-Vincent-de-Paul, du 16 octobre 1963 au 18 mars 1965, le requérant ne s'est plaint qu'une seule fois, soit le ou vers le 28 février 1964, au cours d'une visite au médecin de l'institution, le docteur J. Lefebvre, qu'il ressentait des

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douleurs au pied gauche, et à cette occasion ledit médecin lui recommanda de porter des supports plantaires qui lui furent fournis le ou vers le 9 avril; qu'après le 28 février 1964 et jusqu'au 18 mars 1965, date de son transfert à l'institut Leclerc, le requérant en aucune façon et à aucun moment ne s'est plaint de nouveau de douleurs ou aggravation de ses douleurs au pied gauche, nonobstant qu'il fit soixante-cinq demandes de toutes sortes à différents échelons du personnel de l'institution; que même après son transfert à l'institut Leclerc le 18 mars 1965, ce n'est que le ou vers le 27 mai 1965 qu'il se plaignit aux autorités de cette institution de ses douleurs au pied gauche, bien qu'il ait vu le médecin de l'institution le ou vers le 31 mars au sujet de la blessure qu'il avait déjà subie à l'épaule droite; que dans les jours qui suivirent le 27 mai 1965, les représentants médicaux de l'intimée firent subir au requérant une radiographie de la cheville gauche, le confièrent aux soins d'un orthopédiste et après une référence à la Clinique d'orthopédie de l'hôpital Reine-Marie de Montréal il y fut admis le 4 août 1965 à l'instance des autorités de l'institut Leclerc pour y subir, le 12 août 1965, une intervention chirurgicale au pied gauche; que le 8 septembre 1965 il fut libéré de l'hôpital et remis entre les mains des autorités de l'Institut Leclerc; que pendant son séjour à l'hôpital il fit preuve de manque de collaboration avec les autorités médicales et que même, quelques heures avant sa libération de l'hôpital, dans un moment de colère, il réussit à briser le plâtre recouvrant son pied gauche, ce qui nécessita d'autres soins.

La défense continue comme suit:

> 23. La condition physique actuelle du requérant et le préjudice qui peut en résulter pour lui sont dus uniquement à son seul fait, particulièrement en raison de son attitude négative à l'égard des autorités, son manque de collaboration et son défaut, soit par négligence ou de propos délibéré, à informer lesdites autorités de son état en temps utile;
>
> 24. Les préposés de l'intimée n'ont commis aucune faute, ont fait preuve de diligence et ont pris tous les moyens qui leur sont apparus les plus aptes à rétablir promptement le requérant dans la meilleure condition physique possible;
>
> 25. L'intimée ne doit rien au requérant et les dommages qu'il lui réclame sont d'ailleurs exagérés et totalement injustifiés;
>
> 26. Il n'y a aucun lien de droit entre le requérant et l'intimée.

Le dossier contient l'affidavit du D[r] Jean-Guy Harris en date du 3 février 1969, qui déclare qu'il est médecin en charge de l'institut Leclerc depuis 1960, que le 27 mai 1965 le requérant se présenta à son bureau et se plaignit de malaises à son pied gauche, et le même jour il fut radiographié à l'hôpital du pénitencier de St-Vincent-de Paul; les pellicules sont jointes à son affidavit. Le Dr Harris poursuit qu'il l'a fait examiner par un orthopédiste, le docteur Maurice l'Ecuyer, le 8 juin 1965, qui fit les mêmes constatations à l'égard dudit pied gauche, soit a) aucun mouvement d'abduction ou d'adduction, b) flexion limitée, et qu'alors ils en sont arrivés à la conclusion que le requérant devrait subir une intervention chirurgicale et que vers le 13 juillet 1965 le requérant fut envoyé à la clinique d'orthopédie de l'hôpital Reine-Marie à Montréal pour subir d'autres examens.

A l'audition, d'autres affidavits de témoins experts furent produits de consentement. L'affidavit du docteur André Mackay fut produit comme exhibit P-1, sous réserve du droit de le contre-interroger quand il témoignerait. Il récite ses qualifications comme «Fellow of the Royal College of Physicians of Canada» depuis 1950, et spécialiste en médecine interne. Il dit qu'il examina le requérant le 13 mars 1968 à son bureau et constata une douleur au pied gauche au repos et une limitation marquée des mouvements de ce pied; il déclare qu'à la marche il y a une douleur qui irradie jusqu'à la fesse et à la colonne vertébrale et le pied devient raide; il y a une atrophie musculaire d'un demi-pouce au niveau de la cuisse gauche et un quart de pouce au niveau du mollet gauche; la cheville gauche présente une ankylose quasi-complète et que, comme résultat d'un œdème rétro-malléolaire, il a de la difficulté à se tenir debout sur ce pied; une arthrodèse de la cheville avait évidemment été pratiquée; il donne une incapacité de 12.45% pour l'ankylose totale de la cheville en citant une autorité (McBride), et il dit que si on tient compte du métier de sableur de planchers cette incapacité doit être portée à 26%; il ré-examina le requérant le 29 janvier 1969. Il constata qu'il boite d'une façon assez prononcée, que l'atrophie musculaire du membre inférieur gauche a progressé et nota une diminution d'un pouce et demi à mi-cuisse et d'un pouce au tiers inférieur de la cuisse ainsi qu'au mollet; la cheville gauche présente une déformation avec saillie exagérée de la malléole interne; il n'y a aucun mouvement de latéralité et seulement un petit mouvement de flexion-extension de quinze degrés; en tenant compte des légers mouvements de flexion, il

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réduit l'incapacité partielle permanente à 9.15% de façon générale et à 23% pour l'occupation de sableur de planchers.

L'affidavit du docteur J. G. Shannon fut produit comme exhibit D-1 et le procureur du requérant abandonna le droit de l'examiner là-dessus.

Il se qualifie comme «Fellow of the Royal College of Physicians and Surgeons of Canada since 1962» et consultant en orthopédie à l'hôpital Reine-Marie à Montréal depuis 1946; il dit que sous sa direction on pratiqua une triple arthrodèse du pied gauche du requérant le 12 août 1965 et qu'il fut libéré de l'hôpital le 8 septembre; le 28 novembre 1968 il examina le pied, prit des radiographies et constata *a*) qu'il marchait avec un boitement protectif du côté gauche, *b*) qu'il était capable de marcher sur la pointe des pieds, *c*) qu'il n'y avait que quelques degrés de mouvement dans la jointure de la cheville mais non dans la jointure sous-astragale, *d*) que le pied se trouvait dans une attitude de 15 dégrés *valgus*, *e*) que les radiographies indiquaient une triple arthrodèse bien guérie, *f*) que les radiographies indiquaient un bloc d'os sur l'astragale qui limitait le mouvement de la cheville postérieurement; et enfin *g*) qu'il se trouvait une atrophie de $\frac{3}{4}$ de pouce du mollet et d'un pouce de la cuisse gauche en comparaison avec le côté droit.

L'affidavit du docteur Jacques Lefebvre fut produit comme exhibit D-2. Il dit qu'il est médecin depuis 1952 et surintendant médical du pénitencier St-Vincent-de-Paul depuis 1957. Il examina le requérant à quelques reprises durant son incarcération à l'égard de son pied gauche. A son examen d'entrée vers le 22 octobre 1963 il remarqua que l'arche plantaire du pied gauche était abaissée, avec présence d'orteils en marteau. Le ou vers le 27 février 1964, à la demande du requérant, il examina le pied gauche qui fut radiographié et les pellicules qu'il produit avec son affidavit ne révèlent aucune image de fracture; il recommanda donc au requérant de porter un support plantaire et il lui en donna un le ou vers le 6 avril 1964.

Un autre document désigné «Détermination du débat» fut produit comme exhibit D-3 par lequel les parties convinrent que les blessures du requérant sont la conséquence d'une chute au bas d'un mur de la prison provinciale de Joliette survenue le 5 décembre 1962 à l'occasion d'une évasion; que le 12 février 1963 il fut admis à l'hôpital St-Luc pour se faire faire une exérèse de l'extrémité externe de la clavicule droite; qu'il fut incarcéré au pénitencier St-Vincent-de-Paul le 16 octobre 1963, et qu'à sa demande son pied gauche fut examiné et radiographié le ou vers le 27 février 1964; qu'il fut recommandé qu'il portât un support plantaire qu'il reçut le 6 avril; que vers le 18 mars 1965 il était transféré à l'institution Leclerc, également une institution fédérale, et qu'après en avoir fait de nouveau la demande il fut de nouveau examiné au pied gauche et des radiographies furent prises le ou vers le 27 mai 1965; que comme résultat on décida de le faire examiner par un orthopédiste qui l'examina à l'institution le ou vers le 8 juin 1965, et l'on conclut qu'il devait être opéré; après un autre examen à la clinique d'orthopédie de l'hôpital Reine-Marie le 13 juillet 1965 il était admis à l'hôpital le ou vers le 4 août 1965 pour y subir une intervention chirurgicale audit pied gauche et le 8 septembre il retournait de l'hôpital au pénitencier St-Vincent-de-Paul.

Ce document tente aussi d'établir un montant de $500 de dommages, si l'intimée est déclarée responsable, pour l'item «douleurs, ennuis, inconvénients pendant deux ans» réclamé au paragraphe 9 de la pétition de droit, mais l'avocat du requérant en signant le document refusa d'accepter ce chiffre.

Ce document dit aussi que les parties ne s'entendent pas sur l'existence d'une faute d'un ou de plusieurs préposés ou officiers de Sa Majesté la Reine, ni sur l'existence d'une responsabilité de la Couronne pour quelque motif que ce soit, ni sur le quantum des dommages réclamés par les item premier et troisième du paragraphe 9 de la pétition de droit.

A l'audition le requérant déclara qu'il exerçait le métier de sableur de planchers et qu'avant son accident il travaillait à $3.15 de l'heure, 48 heures par semaine, surtout durant l'été. La machine est maintenant trop lourde pour lui, dit-il, et il ne peut travailler qu'une heure ou une heure et demie au plus par jour et cela en finissant les planchers avec une brosse. Son frère est contracteur et il est à son emploi. Il exhiba sa carte de compétence du Comité conjoint du métier de la construction de Montréal portant la date du 16 février 1968, qui le décrit comme «parqueteur-poseur de parquets» et il expliqua que les sableurs sont dans cette catégorie, mais qu'il a toujours

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travaillé à sabler les planchers en bois, et non à les poser. Il admit en contre-interrogatoire qu'il avait travaillé comme tailleur durant 18 mois au pénitencier, ajoutant qu'il n'avait fait que des pantalons.

Il déclare qu'il a souffert et souffre encore de douleurs au pied gauche. La nature de la douleur, dit-il, est un peu différente après l'intervention chirurgicale mais elle existe encore et il boite quand il marche. Il éprouve de la difficulté à bien dormir. Il était autrefois intéressé dans les sports mais ne peut participer maintenant. Il déclare avec insistance qu'il s'est plaint de ses douleurs au docteur Lefebvre à son premier examen et au moins 15 fois par la suite. Il dit avoir vu une notation «pas de traitement» écrite par le docteur Lefebvre sur sa carte.

Il admit qu'il était en liberté, après l'évasion pendant laquelle il s'est blessé le 5 décembre 1962 jusqu'au mois de février 1963, mais qu'il n'a pas fait de démarches pour faire traiter ses blessures parce qu'il voulait rester caché. Il admit aussi que lorsqu'il fut repris et envoyé à la prison provinciale de Bordeaux, il y a vu un médecin à sa demande qui, après l'avoir fait radiographier, lui déclara que tout était correct, bien qu'on s'occupa de pratiquer une intervention chirurgicale à son épaule à l'hôpital St-Luc.

Le docteur André Mackay répéta à l'audition les faits exposés dans son affidavit que j'ai résumé ci-haut. Il déclara que le requérant se plaignait de douleurs à la jambe et dans le dos. Il expliqua la différence entre l'arthrite et l'arthrose en disant que c'est plutôt d'arthrose que souffre le requérant et que ceci peut résulter d'un traumatisme même sans l'existence d'une fracture. L'intervention chirurgicale—l'arthrodèse—qui fut pratiquée pouvait être nécessitée par une fracture ou par l'arthrose. Il déclara qu'il est spécialiste en médecine interne et qu'il fait souvent des expertises pour les tribunaux, mais n'étant pas expert dans les radiographies, il se refusa à examiner les pellicules produites comme exhibits.

En défense, le docteur Jacques Lefebvre fit lecture de l'affidavit auquel j'ai fait allusion plus haut. Il déclara que c'est lui qui constata à l'examen d'entrée que le requérant souffrait d'un abaissement de l'arche plantaire, mais que ce dernier ne s'est plaint de douleurs au pied que le

27 février 1964 lorsqu'il fit prendre des radiographies et recommanda et obtint pour lui un support plantaire. Il ajouta qu'il se rend au pénitencier quand on l'appelle et qu'il lui est nécessaire d'y aller presque cinq jours par semaine. Il voit environ 30 prisonniers par semaine. Il reçoit un salaire mais il a aussi des patients privés à son bureau. Il a vu le requérant à peu près quinze fois mais pas en rapport avec son pied. En consultant ses notes il relata qu'il l'a vu le 12 juin 1964 concernant son épaule, le 16 octobre pour prendre une radiographie de sa vésicule biliaire, les 3, 9 et 16 septembre et les 9 et 20 novembre pour des symptômes de névrose, et le 3 janvier 1965 quand il a été admis à l'hôpital à St-Vincent-de-Paul dans un état demi-conscient, mais que durant toutes ces visites le requérant ne s'est jamais plaint de son pied.

Le Dr Murray McIntyre témoigna en anglais et son témoignage fut interprété par Me Raymond Roger, dûment assermenté à cette fin avec le consentement de l'avocat du requérant.

Il est spécialiste en orthopédie avec 25 ans d'expérience et est attaché à la clinique de l'hôpital Reine-Marie entre autres. C'est lui qui a examiné le requérant à l'hôpital Reine-Marie le 13 juillet 1965. Il constata que le requérant boitait de la jambe gauche, qu'il n'y avait pas d'articulation dans la jointure sous-astragale et une articulation limitée de la cheville. Il était évident, dit-il, qu'il devait être opéré à une date prochaine et il s'occupa de son admission à l'hôpital ainsi que de la prise de radiographies. Ces radiographies n'indiquaient aucune fracture, le problème résultant d'arthrose en conséquence de sa chute deux ans auparavant.

Il produisit comme pièce D-4 une copie du rapport du Dr J. G. Shannon qui contient les mêmes déclarations que son affidavit (exhibit D-1), et en plus le diagnostic d'arthrite dégénérative de la jointure sous-astragale et une estimation de l'incapacité permanente à 20 p. 100. Il dit qu'il était d'accord avec le diagnostic et avec l'incapacité de 20 p. 100, mais qu'il l'appellerait «arthrose» au lieu d'«arthrite». Il ajoute qu'après une triple arthrodèse il résultera toujours une incapacité d'au moins 12 p. 100 et dans le présent cas, se basant sur les affidavits et le témoignage des autres témoins qui avaient examiné le requérant après, ainsi

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que sur la faiblesse de la jambe qui reste encore, il est d'avis que l'intervention chirurgicale n'a pas été un succès complet. Il n'a pas eu l'occasion de le revoir lui-même.

Il examina les pellicules des radiographies prises au pénitencier le 27 février (produites avec l'exhibit D-2) et déclara qu'elles révèlent de l'arthrose dans deux des jointures, soit l'astragale scaphoïdienne et entre le calcanéum et le cuboïde. Il n'y a cependant aucune indication de fracture. Le seul moyen de soulager le boitement douloureux du requérant serait de faire une triple arthrodèse, la condition ne pouvant que détériorer et un support plantaire n'aiderait pas beaucoup. Il déclara d'autre part que les résultats de l'intervention chirurgicale auraient été les mêmes même si on l'avait pratiquée dans le temps parce qu'il s'agit de la même opération. Il dit que l'arthrose dégénérative résulte de la chute en décembre 1962. Si le requérant s'était fait traiter immédiatement, il aurait peut-être été possible d'éviter l'intervention chirurgicale plus tard, mais en février 1964, quinze mois après, il était déjà trop tard pour faire autre chose que la triple arthrodèse. Le délai jusqu'au mois d'août 1965 n'a pas changé l'incapacité mais les souffrances dans l'intervalle auraient augmenté. Il soupçonne que la jointure de la cheville était aussi impliquée au début, sans que personne ne s'en soit aperçu, ce qui a eu pour effet d'aggraver l'incapacité et il suggère que peut-être une autre intervention chirurgicale consistant en une arthrodèse de la jointure de la cheville pourrait diminuer en quelque sorte l'incapacité.

La responsabilité de l'intimée dans cette cause, si elle est responsable, résulte de l'article 3(1)(*a*) de la *Loi sur la responsabilité de la Couronne,* 1-2 Elizabeth II, c. 30, qui se lit comme suit:

> 3. (1) La Couronne est responsable *in tort* des dommages dont elle serait responsable, si elle était un particulier en état de majorité et capacité
>
> *a*) à l'égard d'un acte préjudiciable commis par un préposé de la Couronne.

L'article 4(2) se lit comme suit:

> 4. (2) Il ne peut être ouvert de procédures contre la Couronne, en vertu de l'alinéa *a*) du paragraphe (1) de l'article 3, relativement à quelque acte ou omission d'un préposé de la Couronne, à moins que l'acte ou omission, indépendamment des dispositions de la présente loi, n'eût entraîné une cause d'action *in tort* contre le préposé en question ou son représentant personnel.

Il faut d'abord déterminer si le docteur Lefebvre était un «préposé de la Couronne» au sens de l'article 3(1)(*a*) quand il examina et traita le requérant au cours de ses devoirs comme surintendant médical du pénitencier, et si on en arrive à une conclusion affirmative, il sera alors nécessaire de déterminer si son acte ou omission eût entraîné une cause d'action *in tort* contre lui.

Le savant procureur de l'intimée cita plusieurs décisions de la province de Québec où un hôpital ou même une ville s'exonéra de responsabilité pour les actes des médecins ou même des garde-malades à son emploi, se basant sur le principe qu'ils agissaient comme professionnels et que l'hôpital ne pouvait exercer un contrôle sur leur conduite quand ils agissaient comme tels. (*Petit v. Hôpital Ste-Jeanne d'Arc*[1]; *Hôtel-Dieu St-Vallier v. Martel*[2]; *Cité de Verdun v. Thibault*[3]).

Il cita au même effet *Nadeau: Traité de droit civil du Québec*[4]:

> Le critère essentiel destiné à caractériser les rapports de commettant à préposé est le droit de donner des ordres et instructions au préposé sur la manière de remplir son travail. C'est un droit de surveillance et de direction qui s'étend jusque là et c'est, en même temps, le signe propre d'une personne qui en détient une autre sous son autorité.

Il faut cependant référer à ces précédents avec prudence parce que certaines de ces causes sont fondées sur une obligation contractuelle plutôt que délictuelle et aussi se réclament d'une jurisprudence anglaise qui elle-même a beaucoup changé depuis.

Quant à la jurisprudence anglaise, elle a beaucoup évolué depuis la cause de *Hillyer v. Governors of St. Bartholomew's Hospital*[5] au point que dans la cause de *Roe v. Min. of Health*[6] Denning L.J. déclara (traduction de M[e] Crépeau dans son livre de droit comparé, *La responsabilité civile du médecin et de l'établissement hospitalier*[7]):

> Je crois que les autorités hospitalières sont responsables des fautes commises par tous les membres de leur personnel, non seulement pour les fautes des infirmières et des médecins, mais également pour celles des anesthésistes et des chirurgiens Il importe peu

[1] (1940) 78 S C. 564.
[2] [1968] B R. 389.
[3] (1940) 68 B R. 1.
[4] Vol. 8, p. 353.
[5] [1909] 2 K B. (C.A.) 820
[6] [1954] 2 W L.R. (C A) 915 à la p. 923.
[7] éd 1956, pp. 150, 153.

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qu'ils soient engagés à titre permanent ou temporaire, à plein temps ou à temps partiel, qu'ils soient résidents ou consultants: l'hôpital répond d'eux tous. La seule exception concerne le cas des consultants ou anesthésistes choisis par le malade lui-même.

On peut résumer l'état actuel de la jurisprudence anglaise comme le fait Crépeau (*supra*) comme suit:

> A—Les autorités hospitalières sont responsables de toute négligence commise par les membres du «personnel permanent» en vertu du principe de la responsabilité du commettant.
>
> B—Les autorités hospitalières sont responsables des négligences commises, dans l'exécution des soins et traitements que l'établissement s'est engagé à donner au malade, par tout chirurgien, médecin, anesthésiste ou autre «officier médical» non choisi par le malade lui-même. Comme cette négligence constitue un manquement à l'obligation assumée à l'égard du malade, les autorités hospitalières engagent alors leur responsabilité personnelle. Il est cependant nécessaire de noter que, par une stricte application de la règle du précédent, seule la première proposition constitue le droit positif anglais actuel, parce qu'elle exprime l'opinion majoritaire de la Cour d'appel.

Crépeau critique fortement les causes de *Petit v. Hôpital Ste-Jeanne d'Arc* (*supra*) *et Cité de Verdun v. Thibault* (*supra*) qui s'inspiraient des principes du Common Law énoncés dans la cause de *Hillyer* qui eux-mêmes n'ont pas été suivis dans les causes plus récentes en Angleterre comme ci-haut indiqué. Il dit que dans ces causes on basait la responsabilité surtout sur l'existence présumée d'un contrat exprès ou tacite entre l'hôpital ou la ville et le malade. Dans la cause la plus récente de *Hôtel-Dieu St-Vallier v. Martel* (*supra*) le jugement était fondé encore une fois sur la question de contrat entre l'hôpital et le malade qui a souffert une incapacité par la négligence de l'anesthésiste. Le juge Taschereau, dissident, cite avec approbation les remarques du juge Casey dans *Beausoleil v. La Communauté des Sœurs de la Charité de la Providence*[8] où il dit:

> In this case the patient contracted with the hospital for all necessary services; of these one was the giving of the anaesthetic. On this premise and since for the purposes of this action I see no essential difference between the position of Dr. Forest and that of any other employee, the hospital must answer for his fault.

Il conclut:

> Rien ne démontre qu'un contrat médical soit intervenu entre le demandeur et l'anesthésiste...qui déclare s'être rendu à la salle d'opération le matin de l'intervention et sans même avoir communiqué, au préalable, avec le patient.

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[8] [1965] B.R. 37 à la p. 43.

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Si on se réfère à la jurisprudence de notre Cour suprême, nous trouvons la cause de *The Sisters of St. Joseph of the Diocese of London v. Fleming*[9], où le patient fut brûlé par l'application d'un traitement diathermique administré par une garde-malade avec expérience dans l'administration de tels traitements. L'hôpital fut déclaré responsable. Cette cause discute au long la cause de *Hillyer* déjà citée et conclut comme suit:

> There may be cases...where the particular work upon which a nurse may for the time being be engaged is of such a highly professional and skilful nature and calling for such special training and knowledge in the treatment of disease that other considerations would arise; but that is a totally different case from the one before us.

L'on ne peut par conséquent inférer de ce jugement que dans la présente cause la Couronne serait tenue responsable. Mais dans une cause plus récente, *Vancouver General Hospital v. Fraser*[10], l'hôpital fut tenu responsable dans un cas où un interne fit une erreur en examinant lui-même les radiographies et en décidant qu'il n'y avait pas de fracture du cou. Il laissa partir le patient de l'hôpital, et on dut le ramener le lendemain où il mourut quelques jours après. Il fut décidé dans cette cause que:

> The hospital undertook to treat the patient and was responsible for the negligence of its internes; and there was evidence on which the jury might properly find that the death of the patient resulted from his discharge from the hospital due to the interne's negligence either in not reading the X-ray films correctly or in not calling a radiologist

Le juge Locke, nonobstant sa dissidence sur la question que la mort résultait du mauvais diagnostic, déclare à la p. 64:

> ...The decision in *Hillyer v. Governors of St. Bartholomew's Hospital* (1909) 2 K.B. 820, does not, in my opinion, touch the present matter and the views expressed by Kennedy L.J. must be considered in the light of the comments made upon them in this Court by Davis J. in delivering the judgment of the majority in *Sisters of St. Joseph v. Fleming* (1936) S.C.R. 173, 190, and of Lord Greene M.R. in *Gold v. Essex County Council* (1942) 2 K.B. 293. Dr. Heffelfinger was an employee of the appellant and if there was negligence on his part in the present matter it was, in my opinion, in the course of his employment and if damage resulted the appellant is liable (*Cassidy v. Ministry of Health* (1951) 1 T.L.R. 539 at 548, Denning L.J.).

Dans une autre cause, *Cardin v. La Cité de Montréal et al*[11], où l'aiguille d'une seringue hypodermique se cassa dans

[9] [1938] R.C.S 173 à la p. 192. [10] [1952] 2 R.C.S. 36, 64
[11] [1961] R.C.S 655.

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le bras d'un enfant nerveux au cours d'une vaccination à une clinique opérée par la ville, lui causant une paralysie après trois interventions chirurgicales sans succès, la Cour trouva la ville responsable pour la négligence du médecin sans apparemment même discuter de la responsabilité de la ville pour le médecin à son emploi agissant dans ses fonctions professionnelles.

Dans la cause de *Grossman v. The King*[12], le juge Kerwin dit à la page 594:

> It must now be taken as settled by this Court in *Anthony v. The King* (1946) S C.R. 569 that the Crown's officer or servant must owe a duty to the third person the breach of which would make him liable to that third party before the Crown's responsibility could attach under this section; that is, the rule *respondeat superior* applies.

et, après, à la page 595, il dit:

> The true rule, however, is I think that which distinguishes those cases where an agent is not liable in tort to third persons who have suffered a loss because of the agent's failure to perform some duty which he owed to his principal alone from those cases where, in addition to a duty owing to the principal, the agent owed a duty to the third party.

A la page 603, le juge Taschereau, en référant à *The King v. Canada Steamship Lines Ltd.*[13] et à *The King v. Hochelaga Steamship Co.*[14], dit:

> What this Court held in these two cases clearly indicates that the employees of the Crown failed in their duty to third parties, that their negligence, although arising only out of an omission to act, entailed their personal liability and consequently the vicarious liability of the Crown. The Court was not merely confronted with cases of nonfeasance of acts which should have been done by the servant, as the result of a contract between the employer and the employee and which would not involve the personal liability of the latter to third persons, but with the failure to perform a duty owed to the victims (Halsbury, vol. 22, p. 255).

Dans la cause de *Gagné v. Sa Majesté la Reine*[15], le juge Noël distingua aussi entre le «non-feasance» et le «malfeasance».

Dans la présente cause il est évident que le requérant n'a pas choisi ni engagé le docteur Lefebvre. Ni n'a-t-il contracté avec le pénitencier comme un patient qui se présente à un hôpital de son choix pour se faire traiter. Évidemment

[12] [1952] 1 R.C S 571
[13] [1927] R.C S 68
[14] [1940] R C S 153.
[15] [1967] R C. de l'É. vol. 1, 263.

tous les prisonniers subissent un examen médical de routine à leur entrée au pénitencier, et durant leur incarcération s'ils se plaignent de quelque maladie, ils ont le droit de voir le médecin du pénitencier qui est engagé et payé par les autorités fédérales. Il me semble que la Couronne en fournissant ces soins prend la responsabilité des actes ou omissions actionnables de ses préposés, professionnels ou non, pourvu toujours que le préposé lui-même puisse être poursuivi *in tort* personnellement. En acceptant la responsabilité de fournir des soins médicaux au prisonnier, ce qui était évidemment nécessaire, la Couronne par l'entremise de son préposé, le docteur Lefebvre, et le docteur Lefebvre lui-même, assumèrent l'obligation envers un tiers, en ce cas le réclamant, de le traiter avec compétence et habileté.

Il me faut maintenant considérer si le docteur Lefebvre est responsable *in tort* envers le réclamant. Dans le «Common Law» on ne reconnaît pas de degrés de faute. On ne connaît pas la «faute lourde» du droit civil. S'il existe une faute certaine la responsabilité du médecin sera engagée sans considérer la gravité de la faute. (Crépeau, *op. cit.* p. 207). Le médecin en effet est tenu d'être diligent et prudent. Crépeau à la p. 212 suggère que le critère objectif doit être le suivant: «Qu'aurait fait à la place du défendeur et dans les mêmes circonstances 'externes', un autre praticien consciencieux et averti?»

Salmond[16] dit:

> ...For just as it is not sufficient that the defendant has acted in good faith to the best of his judgment and belief and has used as much care as he himself believed to be required of him in the circumstances by reason and justice, so, on the other hand, the law does not require the highest degree of care of which human nature is capable.

Le juge Létourneau, dans *Nelligan v. Clement*[17], en commentant l'opinion du juge Mignault dans la cause de *Dupont v. Martin*, 19 décembre 1922, dit que:

> ...l'erreur, la négligence et l'imprudence ne sont toutefois *faute* génératrice de responsabilité que s'il a été manqué aux règles de la profession ou de la science médicale, que si le médecin recherché a fait ou omis ce que n'eût pas fait ou omis un médecin...possédant une science normale parmi les membres de sa profession

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[16] *Salmond on the Law of Torts*, 1953, 11è éd. 493

[17] (1939) 67 B.R. 328 à la p. 332.

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Halsbury[18] dit:

> A person is not liable in negligence because some one else of greater skill and knowledge would have prescribed different treatment or operated in a different way. *R. v. Bateman*, (1925) 41 T.L.R. 557.

J'ai examiné avec soin la jurisprudence et les auteurs sur la question de faute médicale, mais plusieurs des causes ne nous aident pas parce que, quand on laisse un instrument ou une compresse, par exemple, dans un patient au cours d'une intervention chirurgicale, il est évident qu'on peut présumer quelque négligence et l'obligation s'impose au chirurgien de s'exculper. *Elder et autres v. King*[19]*; Nesbitt v. Holt*[20]*; G. v. C.*[21].

La règle de *res ipsa loquitur* s'applique dans la province de Québec (*Parent v. Lapointe*[22]). Le juge en chef Kerwin explique bien la portée de cette règle dans la cause de *Nesbitt v. Holt* précitée où il dit à la p. 146:

> *Res ipsa loquitur* is not a doctrine but "The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities"...It may apply in malpractice cases depending on the circumstances...

Mais dans la présente cause, il ne s'agit pas de l'application de cette règle, et je crois que le fardeau de la preuve doit reposer sur le requérant. La preuve ne fut pas très complète quant à la négligence du docteur Lefebvre. Le requérant ne fit aucune preuve que le docteur Lefebvre «a fait ou omis ce que n'eût pas fait ou omis un médecin possédant une science normale parmi les membres de la profession». D'autre part, le docteur Lefebvre n'essaya pas de s'exculper, sauf en disant que les radiographies ne montraient aucune fracture. Son témoignage n'indique pas s'il constata l'existence de l'arthrose ou non, et il n'expliqua pas sa recommandation quant au support plantaire.

Donc le requérant doit reposer sa cause quant à la négligence du docteur Lefebvre, premièrement sur le témoignage du Dr McIntyre, témoin expert de l'intimée, qui constata sans difficulté dans les radiographies l'existence de l'arthrose (tout en corroborant le docteur Lefebvre qu'elles ne montraient aucune fracture) et qui indiqua qu'un support plantaire ne pouvait corriger la situation, qui néces-

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18 2è éd., Vol. XXII, n° 601.

19 [1957] B.R. 87.

20 [1953] 1 R.C.S. 143.

21 [1960] B.R. 161.

22 [1952] 1 R.C.S. 376.

sitait une intervention chirurgicale, et que la condition ne pouvait que détériorer sans cette intervention; et deuxièmement, sur le fait que dès que le requérant fut examiné encore à l'institut Leclerc en mai 1965, et que d'autres radiographies furent prises, il fut référé à un orthopédiste sans délai. La preuve ne révèle pas si ces dernières radiographies firent apparaître l'arthrose plus clairement que celles prises à la demande du docteur Lefebvre, mais le Dr McIntyre n'éprouva pas de difficulté à le constater sur les premières radiographies que le docteur Lefebvre examina.

La présente cause ressemble à celle de *Vancouver General Hospital v. Fraser* (*supra*). Le jugement du juge Kerwin a trouvé que le docteur fut négligent en n'interprétant pas la radiographie correctement ou en n'appelant pas un radiologiste. La seule distinction qu'on peut faire est que dans cette cause il s'agissait de l'opinion d'un interne, tandis que dans la présente cause le docteur Lefebvre avait douze ans d'expérience en pratique générale. Dans la cause de *Wilson v. Swanson*[23], au cours d'une intervention chirurgicale, un chirurgien très compétent a fait un diagnostic de cancer de l'estomac après consultation avec un pathologiste et comme résultat il enleva plus des organes du patient qu'il n'aurait été nécessaire si on n'avait pas soupçonné la malignité. Plus tard, après d'autres examens, on détermina que la tumeur était bénigne. En exculpant le chirurgien, le jugement décida que le demandeur n'avait pas réussi à établir même une présomption *prima facie* de négligence.

Je crois que dans la présente cause il y a assez de preuve devant la Cour, même si ladite preuve ne fut pas faite par le requérant ou ses propres témoins, pour établir une cause *prima facie* de négligence contre le docteur Lefebvre.

Je trouve significatif que l'expert du requérant, le docteur Mackay, n'a pas même voulu regarder les radiographies en Cour parce qu'il ne se jugeait pas expert dans cette spécialité, mais le docteur Lefebvre, un praticien de médecine générale, n'a pas hésité à les examiner après les avoir fait prendre et à formuler son diagnostic là-dessus, sans juger à propos d'appeler un spécialiste pour en faire l'examen. Il est aussi significatif que les médecins à l'institut Leclerc

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23 [1956] R.C.S. 804.

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qui sont à l'emploi de la Couronne, comme le docteur Lefebvre, ont jugé nécessaire de référer le requérant à un orthopédiste, et il est donc difficile de voir pourquoi le docteur Lefebvre n'est pas arrivé à la même conclusion quinze mois avant, en février 1964. Il me semble que si le docteur Lefebvre ne constata pas l'existence d'arthrose en examinant les radiographies en février 1964, c'est parce qu'il n'avait pas assez d'expérience dans cette spécialité, et en ce cas il fut quelque peu imprudent en ne les montrant pas à un spécialiste en radiographies ou à un orthopédiste. Si, au contraire, il constata l'existence de l'arthrose, alors il fit montre de quelque imprudence en n'envoyant pas le requérant à un orthopédiste comme le médecin à l'institut Leclerc le fit quinze mois après. Son erreur de jugement n'est peut-être pas grave, mais je l'ai déjà dit, il n'est pas nécessaire que la faute lourde existe pour le trouver coupable de manque de prudence ou de diligence.

Quant aux dommages soufferts par le requérant à cause du délai à pratiquer l'intervention chirurgicale que sa condition nécessitait, ils sont minimes. Le docteur André Mackay, seul témoin médical du requérant, s'est contenté de relater l'incapacité dont le requérant souffre maintenant sans exprimer d'opinion sur la question de l'origine de cette incapacité ou si elle aurait été moindre si l'intervention chirurgicale avait été pratiquée plus tôt. Après son dernier examen, il dit que l'incapacité est de 9.15 p. 100 de façon générale et de 23 p. 100 pour l'occupation de sableur de planchers. Le docteur Shannon dans son rapport produit comme exhibit D-4 dit que l'incapacité permanente sera de 20 p. 100. Le docteur McIntyre en témoignant comme témoin de l'intimée était d'accord avec cette estimation. Mais il s'est exprimé bien clairement et nettement et sans contradiction par d'autre preuve médicale à l'effet que les maux de pied du requérant, l'arthrose, ont résulté du traumatisme souffert dans la chute qu'il fit du mur de la prison provinciale à Joliette le 5 décembre 1962, que dans le temps un traitement compétent aurait peut-être évité la chirurgie plus tard, mais qu'en octobre 1963, date de son entrée au pénitencier St-Vincent-de-Paul, il était déjà trop tard pour éviter une intervention chirurgicale éventuelle, que la triple arthrodèse qu'il fallait pratiquer a toujours eu pour résultat une incapacité d'au moins 12 p. 100, et dans le présent cas 20 p. 100, et que les résultats auraient été les mêmes même s'il y avait eu intervention chirurgicale en février 1964 au lieu de septembre 1965, sauf que dans l'intervalle il a souffert et ses souffrances ont augmenté. Sa réclamation se limite donc à la souffrance qu'il a endurée par suite du retard à l'opérer.

Le requérant lui-même expliqua qu'il n'avait pas cherché à se faire traiter après son évasion parce qu'il voulait rester caché. Cela peut expliquer pourquoi il ne s'est pas dans le temps fait traiter immédiatement après avoir reçu ses blessures, mais on ne peut certes blâmer la Couronne pour ce délai. Il a été repris en février 1963 et admet qu'à la prison provinciale de Bordeaux il fut radiographié et envoyé à l'hôpital St-Luc à Montréal où le 12 février 1963 on pratiqua une intervention chirurgicale sur son épaule. Apparemment ou il ne s'est pas plaint des douleurs au pied gauche durant cette période, ou s'il s'en est plaint on n'a rien fait pour le traiter, et ici encore on ne peut évidemment pas blâmer l'intimée pour le manque de traitement.

Il est donc apparent que l'incapacité dont il souffre maintenant, que j'établirais à 20 p. 100, résulte entièrement des blessures reçues lors de sa chute en décembre 1962 et du manque de traitement pendant l'année suivante, pour laquelle l'intimée ne peut pas être trouvée responsable, et nullement du retard à lui fournir l'intervention chirurgicale qui fut faite éventuellement. Il ne peut par conséquent rien être accordé au poste des dommages pour incapacité partielle permanente, pour laquelle il réclame $8,000, ni pour diminution de la jouissance de la vie, impossibilité de faire du sport, etc., pour lesquelles il réclame $4,000.

Il ne reste que sa réclamation de $3,000 pour douleurs, ennuis, inconvénients, pendant deux ans. Je ne suis pas convaincu que c'est à l'examen d'entrée en octobre 1963 que le docteur Lefebvre aurait dû déterminer l'existence de l'arthrose dégénérative de son pied. Le requérant dit qu'il s'est plaint de douleurs dans son pied dans le temps, mais le docteur Lefebvre nie ce témoignage en disant que ce n'est qu'en février 1964 qu'il a reçu la plainte et il a immédiatement fait prendre les radiographies. A tout événement, je ne trouve pas que le docteur Lefebvre est à blâmer pour ne pas avoir pris des radiographies en octobre 1963. Il le serait cependant à partir de février 1964 après qu'il eut l'occasion de voir les radiographies. Il ne peut s'agir par consé-

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quent d'une période de deux ans, mais seulement de dix-huit mois à partir de février 1964 jusqu'en août 1965, date de l'intervention chirurgicale. Il me faut ajouter que le requérant déclara à l'audition qu'il souffre encore après cette intervention—ses souffrances sont un peu différentes mais elles existent encore. D'après l'affidavit du Dr Mackay (exhibit P-1) il souffre d'une douleur au pied gauche au repos, et à la marche il y a une douleur qui irradie jusqu'à la fesse et à la colonne vertébrale. D'après le témoignage du docteur McIntyre dont il a été question plus haut, il aurait eu les mêmes résultats (et alors éprouvé les mêmes douleurs) même si l'intervention chirurgicale avait été pratiquée plus tôt.

Il ne s'agit pas donc d'établir la valeur de la totalité de ses douleurs entre février 1964 et août 1965, mais seulement la valeur de l'excédent de ses douleurs durant cette période en comparaison avec les douleurs dont il souffre maintenant.

Dans le document intitulé «Détermination du débat» (exhibit D-3) l'intimée a offert le montant de $500 pour ces douleurs sous réserve pour l'intimée d'en être trouvée responsable. Le procureur du requérant ayant refusé d'accepter ce montant, l'on ne peut dire qu'il y eut acceptation de la pollicitation et l'intimée n'est aucunement liée par cette offre. Comme il ne s'agit pas d'une période de deux ans mais de dix-huit mois, et que ce n'est que l'excédent des souffrances durant cette période dont il s'agit, souffrances qui auraient pu être un peu diminuées mais non entièrement supprimées, et étant donné les souffrances qui semblent exister encore, même après l'intervention chirurgicale, j'établirais les dommages sous ce chiffre à $300.

Jugement pour $300 et les frais.

OAKFIELD DEVELOPMENTS (Toronto) LIMITED .... APPELLANT;

Toronto 1968 Nov. 4-5

AND

Ottawa 1969 Mar. 13

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Associated companies—Control—Ontario Corporations Act, R.S.O. 1960, c. 71—Supplementary letters patent authorizing new shares—Ante-dating of supplementary letters patent—Whether allotment valid—Income Tax Act, s. 39.

Appellant and each of a number of other companies, all incorporated by letters patent under the laws of Ontario, had outstanding 5,000 common shares held by the same persons and would in consequence be associated companies under s. 39 of the *Income Tax Act* following an amendment in 1960. In order to avoid the tax consequences of that relationship by divesting the common shareholders of control, each of the companies on December 20, 1960, applied for supplementary letters patent authorizing *inter alia* the issue of 5,000 voting preference shares The supplementary letters patent (under the seal of the Provincial Secretary) although not issued until February 1961 were dated December 20, 1960. On December 21, 1960, each company's directors allotted 5,000 voting preference shares to two strangers.

Held, on appeal from an income tax assessment of appellant, inasmuch as the supplementary letters patent did not issue until February 1961 appellant had no unissued preference shares on December 21, 1960, and there could therefore be no valid contract on that date for the allotment of preference shares: hence the company remained under the control of the common shareholders. Neither the validity of the supplementary letters patent nor the status of the company was an issue in these proceedings and the respondent was thus not precluded from establishing that the supplementary letters patent bore a date antecedent to their actual issuance.

Pellatt's case (1876) L.R. 2 Ch. App. 527, applied. *Letain v. Conwest Exploration Co.* [1961] S.C.R. 98, discussed.

INCOME tax appeal.

Wolfe D. Goodman for appellant.

Douglas K. Laidlaw, Q.C. and *Colin L. Campbell* for respondent.

CATTANACH J.:—This is an appeal from the assessments to income tax dated September 15, 1965, for the 1963 taxation years ending March 31, 1963, and August 27, 1963,

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of Polestar Developments Limited, a predecessor corporation of Oakfield Developments (Toronto) Limited the appellant named in the style of cause herein.

The appellant is a private company created, pursuant to the laws of the Province of Ontario by letters patent of amalgamation dated October 8, 1964.

Polestar Developments Limited (hereinafter called "Polestar") was a private company incorporated pursuant to the laws of the Province of Ontario by letters patent dated March 22, 1960.

By letters patent of amalgamation dated August 27, 1963, Polestar amalgamated with Oakview Developments Limited to form Polestar Developments (1963) Limited.

By letters patent of amalgamation dated November 12. 1963, Polestar Developments (1963) Limited amalgamated with Dorset Land Developments Limited to form Polestar Developments (Ontario) Limited.

By letters patent of amalgamation dated October 8, 1964, Polestar Developments (Ontario) Limited amalgamated with eleven other private Ontario companies to form Oakfield Developments (Toronto) Limited, the appellant herein.

At all material times, Polestar was a member of a partnership carrying on business under the firm name and style of Overbrook Holdings which partnership was engaged in the business of land development.

The taxation year of Polestar ended March 31 in each and every year. As a result of the amalgamation of Polestar with Oakview Developments Limited to form Polestar Developments (1963) Limited the taxation year of Polestar commencing April 1, 1963, was ended on August 27, 1963.

The Minister, in assessing the appellant in respect of the tax payable by Polestar for its two fiscal periods ending March 31, 1963, and August 27, 1963, did so on the basis that Polestar was a company which was associated with each and all of forty-two other companies, the names of which were set out in paragraph 3 of the reply to the notice of appeal, and which are referred to as the Okun group, on October 8, 1964. By reason of the amalgamation, the forty-two companies were reduced to thirty-two in number.

During the whole of the taxation years of Polestar now under review there were 5,000 issued and outstanding common shares each carrying one vote per share held as follows:

1/3 by Ardwell Holdings Limited	1,667
1/3 by Bradford Investments Limited	1,666
1/9 by Doric Development Limited	556
1/9 by Loring Developments Limited	556
1/9 by Adair Developments Limited	555
Total	5,000

At the same time the shares in other companies in the Okun group were held in the same manner except that in some instances Loring Developments Limited and El Ciudad Limited were interchanged. These companies are referred to in paragraph 4(a) of the reply to the notice of appeal as the "inside group" who were, in fact, the same group namely, the estate of Benjamin S. Okun, Bernard M. Okun, Meyer Okun, Stanley Leibel, Sidney Freedman Family Trust, Morris Freedman and his wife Dorothy, Harry Freedman and his wife Lillian and Sidney Freedman.

If these were the only facts applicable there is no question, nor is there any dispute between the parties that the appellant would be associated with the Okun group of companies within the meaning of section 39(4) of the *Income Tax Act*[1].

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[1] Sec. 39(4) For the purpose of this section, one corporation is associated with another in a taxation year, if at any time in the year,

(*a*) one of the corporations controlled the other,

(*b*) both of the corporations were controlled by the same person or group of persons,

(*c*) each of the corporations was controlled by one person and the person who controlled one of the corporations was related to the person who controlled the other, and one of these persons owned directly or indirectly one or more shares of the capital stock of each of the corporations,

(*d*) one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations, or

(*e*) each of the corporations was controlled by a related group and each of the members of one of the related groups was related to all of the members of the other related group, and one of the members of one of the related groups owned directly or indirectly one or more shares of the capital stock of each of the corporations.

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However, in the budget speech of the Minister of Finance on March 31, 1960, he referred to his previous comment on the problem of associated companies. He said that it was becoming too easy to divide a corporation into a number of smaller components so that each may qualify for a low rate of tax on its first $25,000 of income earned. Accordingly it was proposed to introduce legislation applicable to the 1961 and subsequent taxation years for the purpose of providing that only one of a group of associated companies should receive the benefit of the lower rate of tax on the first $25,000 of taxable income. This was to be done by the then applicable rule for determining whether one corporation is associated with another, based on the ownership of a specified percentage of shares being replaced by a rule related to control of the corporations.

This proposed legislation was in fact enacted by chapter 43, Statutes of Canada, 1960, section 11(1) of which amended section 39(4) to read as it presently does.

This proposed legislation, the enactment of which appeared to be a certainty, was brought to the attention of Meyer Okun by his chartered accountant. There is no question that the impact of the proposed legislation on the Okun group of companies was discussed as well as the means to avoid its operation. Legal opinion was obtained by the chartered accountant as to the safety of a plan to do this which plan I expect was inspired by the chartered accountant who was seeking legal opinion in confirmation on behalf of his client or clients.

In any event all thirty-two companies, including Polestar, applied for and obtained from the Provincial Secretary for the Province of Ontario, supplementary letters patent in identical form to those obtained by Polestar which are dated December 20, 1960. In each case a number of voting preference shares equal to the number of authorized, issued and outstanding common shares then in existence in each of the companies was created by the supplementary letters patent. It was also provided that an application for the surrender of the charter would be based on the consent of the shareholders holding at least 50% of the shares carrying voting rights. This policy was obviously designed to permit of the winding up of the companies in the event of a deadlock between the common and preference shareholders.

In the case of each of the thirty-two companies the number of directors was increased from three to four. In each case one of the existing directors retired and steps were taken to elect two of the persons who became preference shareholders to the board of directors of each company.

All these corporate actions took place at meetings of the board of directors of each company held on December 21, 1960, the day after the date borne by all supplementary letters patent. The minutes of the meetings of each company are precisely similar in their terms. As intimated the meeting of the directors of each company were held on the same day beginning at 9:00 a.m. for the first company and those of the other companies at five minute intervals until 10:40 a.m. when the interval was twenty minutes followed by two thirty minute intervals, thus bringing the time to 12:30 p.m. The meetings resumed at 2:00 p.m. and continued at fifteen minute intervals until the final meeting at 3:00 p.m., although I noticed that on two occasions two companies held meetings simultaneously, one of those companies being Polestar.

It had been agreed by the common shareholders and the directors of each of the thirty-two companies that preference shares in each of the companies were to be created with voting rights equivalent to the number of votes exercisable by the common shareholders to avoid the undesirable consequences as the companies would otherwise be associated companies within the meaning of the *Income Tax Act*.

In almost every instance the persons acquiring preference shares received a personal guarantee from Meyer Okun saving the holder harmless from any loss by reason of the sale of the shares or on the winding up of the company to the full amount subscribed by them for the shares. In the case of Polestar, Meyer Okun also guaranteed the 10% cumulative dividend payable on the preference shares.

As a consequence of the foregoing circumstances the appellant alleges in paragraph 4 of its notice of appeal, that during the relevant taxation years 5,000 common shares carrying 5,000 votes were held as I have indicated above and at the same time Lionel H. Schipper held 4,999 preference shares and his wife, Carol, held one preference share mak-

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ing 5,000 votes, the equal to those vesting in the holders of the common shares. Mr. and Mrs. Schipper were strangers in the tax sense to the holders of the common shares.

On this basis the appellant alleges in paragraph 5 of its notice of appeal that at no time during the taxation years under review were the common shareholders of Polestar in control of Polestar because Lionel H. Schipper and Carol Schipper owned shares in Polestar representing the aggregate 50% of the outstanding votes eligible to be cast at any meeting of shareholders.

From this proposition it would follow that at no time during the pertinent taxation years was Polestar associated with any other corporation within the meaning of section 39(4)(*b*) which the appellant contends to be the case here.

This appeal, on the matter in issue between the parties which I have to decide, will fail or succeed upon the determination of the question, is the control of Polestar vested in the common shareholders? This appeal was argued upon the assumption that the group which held the common shares in Polestar was the group which controlled the other thirty-one companies. Whether or not Polestar is an "associated company" depends on the determination of the question as to control of it being vested in the common shareholders.

The word "controlled" as used in the above subsection has been held by the President of this Court in *Buckerfield's Limited, et al v. M.N.R.*[2] to mean the right of control that rests in the ownership of such a number of shares as carries with it the right to a majority of the votes, i.e. *de jure* control and not *de facto* control. This interpretation by the President was adopted with approval by the Supreme Court of Canada in *M.N.R. v. Dworkin Furs (Pembroke) Ltd., et al.*[3]

The Minister's contention is that control is vested in the common shareholders and counsel for the Minister's attack upon the argument on behalf of the appellant is two-fold:

(1) The inside group (as described above) have a right under a contract, in equity or otherwise with the holders of the preference shareholders of Polestar to control the voting rights of the preference shares and therefore by virtue of section 39(4a)(*c*) and

[2] [1965] 1 Ex. C.R. 299.
[3] [1966] Ex. C.R. 228; [1967] S.C.R. 223.

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section 139(5d)(*b*)[4] were deemed to have had the same position in relation to the control of Polestar as if they owned the preference shares.

(2) No preference shares were ever validly issued in Polestar and the purported allotment of those shares was invalid, void and of no force or effect in law in that at the date of the purported allotment, i.e. December 21, 1960, the supplementary letters patent to Polestar although dated December 20, 1960, had not been issued.

The facts upon which counsel bases his second contention are that the receipt of the application for supplementary letters patent on behalf of Polestar was acknowledged by the Deputy Provincial Secretary by letter dated December 29, 1960, in which it was intimated that the material was in order but that a clearance was being awaited from the Corporations Tax Branch of the Treasury Department with respect to the payment of all corporation tax. The acknowledging letter does not indicate the date upon which the application was received by the Department, but I assume it to have been December 20, 1960, because the receipt for the fee, which normally accompanies the application is dated December 20, 1960, and the supplementary letters patent when issued bore that date. By letter dated February 9, 1961, the Deputy Provincial Secretary advised the solicitor for the applicant, Polestar, that the necessary clearance had been received and that the supplementary letters patent had been given a tentative engrossing date of December 20, 1960, subject to further consideration by the Department before they would be issued. The tenor of the letter leads me to the conclusion that even as at February 9, 1961, a firm date had not been given for the supplementary letters patent. It was hedged with quali-

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[4] Sec. 39(4a) For the purpose of this section,

. . .

(*c*) subsection (5d) of section 139 is applicable *Mutatis mutandis,*
Sec. 139(5d) For the purpose of subsection (5a)

. . .

(*b*) a person who had a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, shares in a corporation, or to control the voting rights of shares in a corporation, shall, except where the contract provided that the right is not exercisable until the death of an individual designated therein, be deemed to have had the same position in relation to the control of the corporation as if he owned the shares; and

. .

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fications. However by letter dated February 15, 1961, the supplementary letters patent were transmitted to the solicitor for Polestar.

Meanwhile, on what I assume to have been a verbal assurance that the supplementary letters patent would issue under date of December 20, 1960, a meeting of the directors of Polestar was held at 10:30 a.m. on December 21, 1960, at which were present Stanley Leibel, Meyer H. Okun and Morris Freedman. The chairman announced that the supplementary letters patent varying the authorized capital had been received. He also announced that subscriptions for shares had been received from Lionel H. Schipper and Carol Schipper for 4,999 preference shares and 1 preference share respectively which upon motion made were allotted. Share certificates were directed to be prepared. The number of directors was then increased from three to four. Lionel H. Schipper and Carol Schipper were appointed directors and Morris Freedman resigned. The minutes state that Morris Freedman then retired from the meeting and that Lionel H. Schipper and Carol Schipper took their places at the meeting.

The minutes were signed by Stanley Leibel, Meyer Okun, Lionel H. Schipper and Carol Schipper and by Leibel and Okun as president and secretary respectively. The minutes were consented to by all shareholders who appended their signatures thereto.

As intimated before Lionel Schipper was a stranger in the tax sense to the common shareholders of Polestar although he had met Meyer Okun. He is a barrister and solicitor of some 10 years standing practising his profession in Toronto, Ontario. Meyer Okun had approached Mr. Schipper's father with the proposal that he should buy 5,000 preference shares of Polestar for $5,000 which would bear dividends at 10% and that he, Meyer Okun, would personally guarantee the payment of that dividend and save him harmless from any possible loss thereon.

Mr. Schipper, Sr., nominated his son to buy the shares on his behalf with funds he provided and engaged his son to take the steps to acquire the shares and safeguard his interests.

Accordingly by a document (Exhibit A2) dated December 19, 1960, addressed to Polestar, Lionel Schipper subscribed for 5,000 preference shares.

By letter also dated December 19, 1960, Meyer Okun wrote to Mr. Schipper referring to previous arrangements as discussed between them and enclosed two application forms for preference shares. Mr. Okun advised that the shares had been allotted, certificate No. 1 to Lionel H. Schipper for 4,999 preference shares and certificate No. 2 to Carol Schipper for 1 preference share. Mr. Okun's personal guarantee was also enclosed.

By letter dated December 22, 1960, Mr. Okun assured Mr. Schipper that his personal guarantee, in addition to indemnifying him from loss by reason of sale of the shares or winding up of Polestar, also included a personal guarantee of the payment of dividends. It was also agreed between them that Mr. Schipper should be guaranteed the repayment of $5,000 paid for the preference shares on thirty day's notice.

Mr. Schipper was fully cognizant of the purpose sought to be achieved by the issuance of the preference shares carrying voting rights precisely equivalent to the voting rights vested in the issued common shares. He knew that purpose to be that the companies would not be associated within the meaning of the *Income Tax Act*.

By letter dated December 22, 1960, Mr. Schipper acknowledged Mr. Okun's letter of December 19, 1960, and enclosed his subscription for 5,000 preference shares and his cheque for $5,000.

Thereafter the dividends on the preference shares were regularly paid by Polestar.

At no time did Mr. Schipper or his wife attend any directors' or shareholders' meetings of Polestar, nor did either of them at any time exercise the voting rights in the preference shares held by them. Minutes of directors' and shareholders' meetings were sent to them for their signature.

Mr. Schipper testified that he had no real interest in the management or the affairs of Polestar. His sole concern was in the receipt of dividends at 10% regularly and that in this respect he had placed his reliance on Mr. Okun's personal guarantee.

He did testify however that there was no discussion or arrangement between him and Meyer Okun or any other shareholder of Polestar that he would refrain from voting the preference shares held by him or that he would vote

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them as directed by the holders of the common shares. He testified that he was at liberty to attend corporate meetings either as director or shareholder and to vote his shares as he pleased, but he did not find it expedient to do so because his sole interest in receiving dividend payments was complied with. He added that no such arrangement was made with his wife by the common shareholders of Polestar. Mrs. Schipper was not called as a witness to testify that she was under no agreement to refrain from voting or to vote as directed by the common shareholders, nor was Mr. Schipper's father who was obviously the beneficial owner of the preference shares. Mr. Okun was not called to deny the existence of such an arrangement. If it should become incumbent upon me to do so I would be inclined to accept Mr. Schipper's testimony in this respect because he was the sole negotiator on his father's behalf and also on behalf of his wife.

In argument counsel for the Minister advanced five points which are set out as I understood them:

(1) The appellant has failed to demolish the assumption of the Minister outlined in paragraph 4(b) of his notice of reply to the effect that the holders of the common shares had a right under a contract, in equity or otherwise to control the voting rights vested in the preference shares in Polestar which voting rights represented 50% of the total voting rights and accordingly by virtue of section 39(4a)(*c*) and section 139(5d)(*b*) of the *Income Tax Act* the common shareholders are deemed to be in the same position with respect to the control of Polestar as if they owned the preference shares

(2) On the basis of the evidence adduced I should infer that such a right as outlined immediately above subsisted in the holders of the common shares.

(3) The proper inference to be drawn from all the circumstances was that the true relationship between Lionel Schipper and Polestar was that of creditor and debtor and that the true substance of the transaction between them was that Lionel Schipper simply loaned the money to Polestar.

(4) The preference shares were not validly allotted to Lionel and Carol Schipper at the meeting of the directors of December 21, 1960, and accordingly they never became preference shareholders.

(5) Polestar was not in possession of preference shares at December 21, 1960, the date of the meeting of the directors, because at that date the supplementary letters patent creating the preference shares had not been issued and accordingly no allotment ever took place.

There is no question whatsoever that the supplementary letters patent when issued bore date of December 20, 1960.

Neither is there any doubt that the supplementary letters patent were not signed, sealed and delivered until a date approximate to February 15, 1961.

In reply to the foregoing arguments advanced on behalf of the Minister, counsel for the appellant submitted that,

(1) the Minister had no status to attack the issue of the preference shares;

(2) in any event the Schippers were shareholders because they acted as shareholders and held themselves out as such;

(3) the issue of the preference shares was ratified by Polestar at its first annual meeting held on October 2, 1961, when the supplementary letters patent creating the preference shares had been delivered to Polestar and prior to the 1963 taxation years of the appellant, the minutes of that meeting containing a statement in general terms that all previous acts of the directors were ratified and approved; and

(4) the supplementary letters patent take effect from their date.

If, as argued by the Minister, the supplementary letters patent did not issue until well after the date thereof and if the date borne by the supplementary letters patent is not conclusive as against the Minister, it follows that, as at December 21, 1960, the date of the meeting of the directors at which preference shares were purportedly allotted to the Schippers, Polestar was not possessed of preference shares and any purported allotment of preference shares is void. If the original act was void no subsequent acts either by Polestar, or by the Schippers can rectify that invalidity. The authorized share capital of Polestar was fixed by its letters patent and consisted only of common shares. The only way that the authorized capital so set out in the original letters patent can be increased or varied is by supplementary letters patent (see section 33, *Ontario Corporations Act*).

The method by which an agreement to take shares is constituted is (1) by an application for shares to the company which may be verbal or in writing, (2) the allotment of the shares applied for and (3) notice to the applicant of the allotment. Allotment is a necessary element in the contract to take shares and is the formal act of appropriation of a certain number of unissued shares, pursuant to an application therefor, to the applicant (see Lord Cairns in *Pellatt's* case[5]). Therefore, if it is open to the Minister to prove that the actual issue of the supplementary letters patent was not

[5] (1876) L.R. 2 Ch. App. 527 at p. 535.

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December 20, 1960, the date they bore, but rather February 15, 1961 well subsequent to the date of the meeting of the directors on December 21, 1960, then the contract between the Schippers and Polestar to take preference shares failed because the subject matter did not exist.

As against this counsel for the appellant submitted that the supplementary letters patent take effect from their date and that a prerogative act under the great seal (of Ontario) cannot be contradicted.

By section 3 of the *Ontario Corporations Act* the Lieutenant Governor may in his discretion by letters patent issue a charter creating a corporation for any of the objects to which the authority of the Legislature extends and by section 5 the Provincial Secretary may in his discretion and under his seal of office exercise the rights conferred by the statute on the Lieutenant Governor but not those conferred upon the Lieutenant Governor-in-Council.

The effect of the foregoing sections seems to me to be that the Provincial Secretary is authorized to bring into being a company resembling one created by royal charter but subject to the restrictions which are imposed on its proceedings by the statute to which it owes its origin.

Lord Dunedin said in *Attorney-General v. De Keyser's Royal Hotel*[6]:

> . . . if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. . . .

Furthermore, the letters patent and the supplementary letters patent issued to Polestar were not issued under the great seal of Ontario but as provided in the statute by the Provincial Secretary under the seal of his office.

It seems to me, therefore, that the authority of the Provincial Secretary is limited by the restrictions imposed upon him by the Act and that the Crown has curtailed, to the extent of the restrictions so imposed, the royal prerogative delegated to the Lieutenant Governor and subdelegated to the Provincial Secretary.

Accordingly it follows that those cases upon which counsel for the appellant relied, which dealt with documents issued under the great seal, have no application to the circumstances of the present appeal.

[6] [1920] A.C. 508 at 526.

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The foregoing point does not appear to have been raised before the Supreme Court of Canada in *Letain v. Conwest Exploration Co.*[7].

In that case the respondent had entered into an option agreement with the defendant under which, if the defendant caused a company to be incorporated on or before October 1, 1958, certain mining claims owned by the respondent were to be transferred to the company so incorporated.

An application for letters patent was made to the Secretary of State before that date and the applicants were advised that letters patent would be prepared on the basis of their bearing date of September 25, 1958. A series of circumstances then occurred whereby certain changes in the corporate name were requested and withdrawn with the result that the letters patent were not signed, sealed, recorded and delivered until October 20, 1958, but when issued they bore the date of September 25, 1958, on the basis of the commitment previously given to the applicants therefor.

Action was brought and the basis of the action as developed in the pleadings was that the actual letters patent were signed, sealed and issued after October 1, 1958, the relevant date mentioned in the agreement between the parties to the litigation.

The matter was first heard by Collins J. before whom a point of law was raised, which was that under section 133 of the *Dominion Companies Act*, except in a proceeding for the purpose of rescinding or annulling the letters patent, the letters patent shall be conclusive proof of every matter and thing therein set forth which, of course, included the date of September 25, 1958.

The sections of the *Dominion Companies Act*[8] before the courts were section 11 and 133 reading as follows:

> 11. The company shall be deemed to be existing from the date of the letters patent.
>
> 133. Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof certified by the Registrar General of Canada, shall be conclusive proof of every matter and thing therein set forth.

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[7] [1961] S.C.R. 98.

[8] R.S.C. 1952, c. 53.

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Mr. Justice Collins, on the point of law raised before him, took the view that as the terms of the option agreement contemplated the incorporation on or before October 1, 1958, the question before him must be determined on the basis that at the time when the option was granted both parties should be taken to have been aware of the provisions of section 133 of the *Dominion Companies Act* and that section should be applied in determining the rights of the parties arising out of the option. He therefore granted an order dismissing the action.

The matter was then appealed to the Court of Appeal of British Columbia. Sheppard J. said that the substance of section 133 dealt primarily not with evidence but those rights which are to flow from the charter and which are sometimes called the status of the company. It was held that section 133 precluded the respondent in that action from controverting the date of incorporation appearing in the letters patent.

The matter was then appealed to the Supreme Court of Canada.

Kerwin C.J. (whose judgment was concurred in by Taschereau, Fauteux and Judson JJ.) after referring to sections 11, 132 and 133 of the *Dominion Companies Act* said at page 102: (*supra*)

> The above provisions when read together are concerned with the status and capacity of a company incorporated under the Act and while in response to a notice that a constitutional point might be involved the Attorney General of Canada and the Attorney-General of Quebec intervened and were represented by counsel, my conclusion is that we are not concerned with any question as to the right of Parliament to provide for what shall be evidence in a civil case in a provincial court Kutcho Creek Asbestos Company Limited is not a party to this action; it continues to exist and not one of its powers is affected. The rights of the appellant and respondent are to be determined by the meaning to be ascribed to clause 7 of the original agreement between them and the appellant is not precluded by the mere production of the letters patent from showing at the trial that Conwest did not exercise the option in accordance with its terms.

He therefore answered in the negative the point of law raised before Collins J. that the letters patent are conclusive proof of the fact that the company was incorporated on the date specified in the letters patent.

The judgment of Locke, Cartwright, Abbott, Martland and Ritchie JJ. was delivered by Ritchie J. who said at page 105: (*supra*)

> It is true that by conclusively fixing the status and powers of a Dominion company as being those set forth in the letters patent, except in a proceeding brought for the purpose of rescinding or annulling such letters patent, s. 133 may have an effect on the rules of evidence in provincial Courts in cases where the status of a Dominion company is in issue but this is not legislation "in relation to" civil rights, it is rather legislation having an incidental and consequential effect upon civil rights, and as such it is within the power and authority of the Parliament of Canada (see *Gold Seal Limited v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424 at 460. By its very nature, however, such effect is limited to matters which are incidental to the true character and subject-matter of the Dominion *Companies Act* and in a civil action in which the status and powers of a Dominion company are not involved it cannot be extended beyond the scope and purpose of that statute so as to preclude a party in a provincial Court from adducing evidence to establish that in fact the letters patent bear an earlier date than that upon which they were actually signed and sealed.
>
> Kutcho Creek Asbestos Company Limited is a company incorporated under the authority of the Dominion *Companies Act,* endowed with the characteristics enumerated in that statute and in its letters patent granted pursuant thereto, one of which is that its date of incorporation is to be conclusively taken for all purposes of its corporate dealings and activities as being the 25th of September, 1958. The date of incorporation is one of the badges of a company's status and identity, it is an integral part of its corporate personality which flows from its charter as do the other ingredients of its status, the determination of which is, as has been said, a matter within the exclusive jurisdiction of Parliament. With the greatest respect, however, it seems to me that it is not the status of Kutcho Creek Asbestos Company Limited but the actions of the respondent Conwest Exploration Company Limited which are at issue in this case, and I am unable to see how conclusive proof of the fact that the former company has acquired status with effect from September 25th for the purposes of the Dominion *Companies Act* can preclude the appellant from proving whether or not the latter company exercised its option on or before the 1st of October.
>
> The only method of creating a body corporate under Part I of the Dominion *Companies Act* is for the Secretary of State to grant a charter by letters patent under his seal of Office (see s. 5(1)). If the charter so granted bears a date earlier than that upon which the Seal was affixed, then, by virtue of s. 133, the company acquires status with effect from the earlier date. The question here, however, is not whether or not Kutcho Creek Asbestos Company Limited is to be conclusively taken as having the status of a company incorporated on the 25th of September, but rather whether or not the respondent caused it to be "incorporated on or before the 1st day of October, 1958" within the meaning of those words as they are used in para. 7 of the agreement pursuant to which this action is brought.

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I am of opinion that the fact that the letters patent of Kutcho Creek Asbestos Company Limited bear date the 25th of September and that company has status as from that date for the purposes of the Dominion *Companies Act* in no way precludes the appellant from adducing evidence to prove whether or not this option was exercised by the respondent in accordance with the terms of the contract now sued upon, and I would accordingly dispose of this appeal as proposed by the Chief Justice.

The *Ontario Corporations Act* contains section 11 which states that,

> A corporation shall be deemed to be in existence on and after the date of its letters patent.

Section 11 of the Ontario Act and section 11 of the Dominion Act are, in effect, identical in their terms.

However the Ontario Act does not contain a provision in any way comparable to section 133 of the *Dominion Companies Act* and accordingly, while the Ontario Act deals with the effective date of letters patent it does not deal with the effective date of supplementary letters patent.

Counsel for the appellant submitted that only the Attorney-General of Ontario can raise the issue of the validity of the issue of letters patent or supplementary letters patent. I agree with that proposition. The validity of the letters patent incorporating a company or supplementary letters patent issued to it cannot be collaterally attacked or questioned in an action brought by or against the company. The validity of letters patent or supplementary letters patent can only be brought into question in an action directly brought for that purpose by the Attorney-General.

But what does the Minister seek to do here? He puts in issue the validity of the contract of the allotment of preference shares between Polestar and the Schippers and says that there was no such contract at the time it was entered into, because as of that date, December 21, 1960, Polestar's capital stock did not include unissued preference shares. He says this because the supplementary letters patent creating such shares, although dated December 20, 1960, did not issue until February 1961. He says that he does not attack the validity of the issue of such supplementary letters patent, nor the status of Polestar but seeks to prove the actual date upon which the supplementary letters patent did issue. There is no provision in the *Ontario Corporations Act* which purports to give retroactive effect to supplementary letters patent. As I understand the decision in *Letain v. Conwest Exploration Ltd. (supra)* it is authority for the proposition that the date of letters patent or supplementary letters patent may be proven to be other than that specified thereon in a civil action in which the status of the company is not in issue. Here I do not think that the status of Polestar is in issue and accordingly the Minister is not precluded from establishing that in fact the supplementary letters patent bore a date antecedent to their actual issuance.

It, therefore, follows that no preference shares were validly issued by Polestar and that the common shareholders thereof were in control of that company.

In view of the conclusion I have reached it is not necessary for me to consider the other matters raised by counsel for the Minister.

Normally I would dismiss the appeal were it not for the Minister's prayer in paragraph 7(*a*)(i) and (ii) of his notice of reply,

> (*a*) that the appeal be allowed with costs and the assessments referred back to the Minister to
>
> (i) increase the profit of Polestar Developments Limited from Overbrook Holdings for the fiscal period ending the 31st of March, A D 1963, by $7,457 63, and decrease its profit from Overbrook Holdings for the fiscal period ending the 27th day of August, A D. 1963, by $10,145 06, and
>
> (ii) increase the profit of Polestar Developments Limited from Overbrook Holdings for the fiscal period ending the 24th of December, A D. 1963 by the said sum of $25,300 00, and decrease its profit from Overbrook Holdings for the fiscal period ending the 30th of April, A.D. 1963, by $25,300 00.

The appeal is therefore allowed with costs and the assessments are referred back to the Minister for reassessment in accordance with paragraph 7(a) of the Minister's notice of reply. In all other respects the assessments are confirmed.

Calgary 1969 Mar. 6-7

Ottawa April 1

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

WARDEAN DRILLING LIMITED ......RESPONDENT.

Income tax—Capital cost allowances—Contract to purchase equipment in 1963—Equipment not delivered until 1964—Test for determining year of acquisition—Income Tax Act. s. 20(5)(e)—"Acquired", meaning.

In December 1963 an oil drilling company made contracts in Alberta to purchase (1) a drilling rig and (2) a substructure for the rig. The rig, which was then in Texas and required substantial modifications, was by the terms of the contract to be paid for in 36 monthly instalments to be secured by a chattel mortgage, and title was to pass on shipment: it was shipped in February 1964. The substructure was not constructed nor delivered until 1964 In its accounts for 1963 respondent showed the rig and substructure as fixed assets and their prices as accounts payable.

Held (reversing the Tax Appeal Board), neither the rig nor the substructure was "acquired" in 1963 within the meaning of that word in s. 20(5)(*e*) of the *Income Tax Act,* and the purchaser was therefore not entitled to capital cost allowances therefor in 1963. The equipment was not "acquired" on the date of the contract to purchase, the test being when title passes or when the purchaser has all the incidents of title such as possession, use and risk though legal title may remain in the vendor as security. Here title to the rig did not pass until delivery (s. 20(1) of the Alberta *Sale of Goods Act,* R S A. 1955, c. 295); and title to the substructure did not pass until it was constructed (s. 21(1) Rule II of the Alberta statute *supra*).

INCOME tax appeal.

M. A. Mogan and *L. H. Pitfield* for appellant.

Marvin V. McDill for respondent.

CATTANACH J.:—In this appeal from a decision of the Tax Appeal Board dated February 22, 1966, whereby the respondent's appeal with respect to assessment for income tax for the respondent's 1963 taxation year was allowed and the assessment vacated, the sole issue is whether the respondent, in determining its taxable income for the 1963 taxation year, is entitled to deduct capital cost allowance on two items of equipment purchased by it being (1) one Ideco H-35 Drilling Rig (hereinafter referred to as the "rig") the purchase price of which was $94,847.40 and (2) one substructure for that rig (hereinafter referred to as the "substructure") the purchase price for which was $10,400.

The contention of the Minister is that the rig and substructure were not acquired by the respondent in its 1963 taxation year from which it follows that the respondent is not entitled to deduct capital cost thereon in determining its taxable income for that year.

On the other hand, while admitting that the rig and substructure were not paid for or delivered until the year 1964, the respondent contends that both such items were acquired during the 1963 taxation year because prior to the end of that year there was in existence a binding contract of sale and purchase enforceable by the vendor against the respondent and conversely and that, therefore, the respondent is entitled to capital cost allowance on these two items of equipment in its 1963 taxation year even though they were not delivered until 1964.

The respondent is a joint stock company incorporated under the laws of the Province of Alberta and is engaged in the business of drilling oil wells in western Canada. The respondent possessed four drilling rigs in working order and incidental equipment therefor but because of drilling contracts available to it the respondent had need of an additional rig to undertake further drilling contracts.

Accordingly at a meeting of the board of directors of the respondent held on November 1, 1963 it was decided to acquire a new rig. The pertinent portion of the minutes, introduced in evidence as Exhibit R-1 reads as follows:

> (*a*) That it was desirable that the Company should acquire a new rig to be designated as Rig No. 6. A list of all the equipment required was presented by the President. This list was thoroughly discussed and on motion duly made and seconded it was unanimously resolved that the Company request Mr. Lyle Hawkes of Ideco Limited present the Company a list of specifications and prices.
>
> (*b*) That Wardean Drilling Ltd. place an order with Ideco Limited to commence construction of Rig No. 6 immediately after specifications and prices should be agreed on.
>
> (*c*) That Mr. W. E. Caskey and Mr. Dean Caskey be empowered to commence purchasing of auxiliary equipment immediately in order to take advantage of good used equipment available at competitive prices.

As intimated in paragraph (c) of the above minutes the respondent also purchased two other items of auxiliary equipment in addition to the rig and substructure, one such

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item being a used pump and the other a diesel engine which was selected from a catalogue of the vendor. Both these items were in a deliverable state in 1963 but they were not delivered until 1964. With respect to these two particular items the Minister conceded that the capital cost allowance thereon was deductible in the respondent's 1963 taxation year but did not make a similar concession with respect to the rig and substructure. Therefore the only issue before me is whether the respondent is entitled to a capital cost allowance on the rig and substructure in its 1963 taxation year and I mention these two additional items of equipment because during the course of his argument counsel for the respondent suggested that there was no basic difference between the purchase of the used pump and diesel engine, on the one hand and the rig and substructure on the other. He, therefore submitted that in assessing the respondent as he did the Minister was blowing hot and cold. Counsel for the Minister pointed out that the only question before me is that respecting the rig and substructure, in which he is right, but he added that there was a distinction between the purchases of these respective items of equipment and that the Minister was in fact consistent in his assessment. I shall mention this matter later.

Pursuant to the authorization in the minutes of its board of directors dated November 1, 1963 the respondent entered into negotiations and discussions with the representative of Ideco Canada Limited (hereinafter referred to as "Ideco") in Edmonton, Alberta, for the purchase of a drilling rig. Ideco had a rig in stock at the plant of its parent company in Beaumont, Texas. As it stood it could be utilized as a service rig but not as a drilling rig to which latter use the respondent intended to put it. To do so the standard rig in stock with Ideco required extensive modification and additional equipment to render it serviceable as a drilling rig and to withstand the more rigorous climate of western Canada as well as to drill to the depths dictated by western Canadian terrain and formations. In short the respondent's specifications required the rig to be much heavier and stronger. For example the rear end of the standard rig as it stood was rated at 3800 pounds, whereas the respondent required a 5400 pound rear end. All material to meet the specifications for modification and additional equipment required by the respondent were on hand at the plant of Ideco's parent in Texas except spacer blocks for the installation of the heavier rear end. The delay encountered in obtaining this relatively minor but essential part resulted in a corresponding delay in adapting the standard service rig to a heavier drilling rig.

On December 2, 1963, the drilling superintendent of the respondent and the representative of Ideco flew to Texas to inspect the standard rig and to direct and agree upon the required changes. These matters were agreed upon at that time and delivery of the rig was to be taken by the respondent when the changes were made.

The purchase of the drilling rig was covered by a letter of agreement dated December 26, 1963 (introduced in evidence as Exhibit R-4) addressed to the respondent as purchaser from Ideco as vendor, the body of which reads as follows:

> To confirm your verbal order, we are enclosing the original and two copies of our Invoice No. 1-500-D covering the IDECO DIR-55 Drive-In Rambler Rig and components. Outlined below are the terms and conditions of sale as agreed
>
> 1. It is agreed that the total amount of this invoice excluding the sales tax will be financed over a three year period payable in thirty-six (36) equal monthly installments, plus seven percent (7%) interest on the declining balance. First payment due June 1, 1964, but interest to begin on date of shipment which is now scheduled for February 15, 1964.
> 2 We will accept your National T-20 Drawworks S/N *A 1542* in lieu of a down payment and will allow you $1,500 00 trade-in allowance as shown on our invoice. You are to give us possession of your T-20 Drawworks upon acceptance of this letter of agreement and the attached invoice.
> 3. The notes will be secured by a mortgage on the equipment covered by this sale
> 4 Wardean Drilling Company, Ltd. will maintain adequate insurance coverage of the equipment covered by any mortgage provided for herein at Wardean's expense against all risk of physical damage, including collapse and shall include a mortgage endorsement clause providing the coverage described in Exhibit A attached hereto and made a part of this letter agreement. A certificate of this insurance is to be furnished prior to delivery of the Ideco equipment.
> 5 All expense of loading, unloading, shipping, custom duties and taxes (sales, use, excise and other taxes) to be handled by and for the account of Wardean Drilling Company, Ltd.
>
> Ideco appreciates this opportunity to furnish your equipment needs. Please sign the original and one copy of this letter and return them to us promptly.

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In accordance with the request in the concluding paragraph the respondent endorsed its agreement thereto on December 31, 1963.

Accompanying that letter was an invoice dated December 26, 1963 referring to an order of December 2, 1963, for the drilling rig as modified in the amount of $94,847.40 U.S. currency being the basic price of the rig plus extras and additions which invoice was introduced in evidence as Exhibit R-5. On page five of this exhibit there is a note reading as follows:

> Title to pass and notes issued as of date shipment.

The drawworks referred to in paragraph numbered 2 in Exhibit R-5 above was delivered to Ideco well prior to December 31, 1963 for which a credit of $1500 was allowed to the respondent and treated by Ideco as a down payment on the purchase price of the rig.

On February 18, 1964 the drilling superintendent of the respondent went to Beaumont, Texas and there accepted delivery of the rig (see Exhibit A-1, being a warehouse delivery receipt) which he drove to Alberta, the rig being a self-propelled vehicle.

As indicated in paragraph numbered 1 in the letter of December 26, 1963 (Exhibit R-4) the purchase price was to be financed over a three year period payable in 36 equal monthly instalments to be secured by a chattel mortgage on the rig.

By a chattel mortgage dated February 19, 1964 (Exhibit R-8) the respondent assigned the drilling rig to Ideco by way of security for the payment of the purchase price thereof.

The substructure, to support the rig (being the other item of equipment with respect to which the Minister disallowed the respondent's claim for capital cost allowance in its 1963 taxation year) was ordered by the respondent's purchase order dated December 23, 1963 from Barber Machinery Ltd., 4608 McLeod Trail, Calgary, Alberta (Exhibit R-6) and described therein as "To fabricating substructure for Ideco H-35" at a contract price of $10,400 or less. The invoice of Barber Machinery Limited (Exhibit R-7) addressed to the respondent is dated December 31, 1963.

It is quite apparent to me from the evidence, nor do I think it was otherwise contended by the respondent, that the substructure and ramp were not in existence prior to December 31, 1963. They had to be constructed. The blueprint (Exhibit A-2) upon which the construction of the substructure would be based indicates that it was drawn and redrawn on January 3, 1964. It is admitted that the substructure was not delivered to the respondent nor paid for by the respondent until well into 1964.

The secretary and accountant of the respondent testified that in the double entry system of bookkeeping employed by her she recorded the rig and substructure (as well as the other items of equipment not here in issue) in the year 1963 as fixed assets with an off-setting entry in accounts payable to the amount of the respective purchase prices. With respect to this particular testimony I might mention here parenthetically that the authorities are clear that the bookkeeping entries of a taxpayer are not in themselves determinative of the true nature and substance of a transaction which give rise to such entries.

Section 11(1)(*a*) of the *Income Tax Act* (R.S.C. 1952, Chapter 148) provides as follows:

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year·
>
> (*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation; .

The deductions so allowed in respect of capital cost are set forth in Regulation 1100 of the *Income Tax Regulations* reading as follows:

> 1100 (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to
>
> (a) such amounts as he may claim in respect of property of each of the following classes in Schedule B not exceeding in respect of property
>
> (x) of class 10, 30%
>
> of the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class.

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Regulation 1100(a) as reproduced above is as was applicable in 1963 and 1964. The concluding paragraph as reproduced above was amended effective March 30, 1966 by adding a reference to section 1107 in the last clause.

It was accepted by the parties that the rig and substructure here in question fall within class 10 of Schedule B.

Property is defined in section 139(1)(*ag*) of the Act as meaning

> property of any kind whatsoever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind whatsoever, a share or a chose in action.

In section 20(5)(*e*) of the Act "undepreciated capital cost" is defined as follows:

> (5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,
>
> (*e*) "undepreciated capital cost" to a taxpayer of depreciable property of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time, minus ..

The decision in this appeal turns on the question as to when the rig and substructure were "acquired" by the respondent. The submission on behalf of the respondent was, as I understood it, that goods are acquired by a purchaser thereof when the vendor and the purchaser have entered into a binding and enforceable contract of sale and purchase. The test and concept of a contract was that adopted by the Tax Appeal Board in the decision now under appeal.

With all deference I cannot accede to that view.

In my opinion the proper test as to when property is acquired must relate to the title to the property in question or to the normal incidents of title, either actual or constructive, such as possession, use and risk.

On the facts in the present appeal there is no question whatsoever that the contracts for the purchase and sale of the rig and substructure were completed prior to December 31, 1963. Accordingly there is no question that as at the end of the respondent's 1963 taxation year it had rights under these contracts. Such rights are "property" within the meaning of section 139(1)(*ag*) of the *Income Tax Act* but Schedule B to the *Income Tax Regulations* does not include a class of property which is subject to capital cost allowance such as properties which are contractual rights under the contracts here in question. In order to fall within any of the specified classes in Schedule B there must be a right in the property itself rather than rights in a contract relating to the property which is the subject matter of the contract.

As I have indicated above, it is my opinion that a purchaser has acquired assets of a class in Schedule B when title has passed, assuming that the assets exist at that time, or when the purchaser has all the incidents of title, such as possession, use and risk, although legal title may remain in the vendor as security for the purchase price as is the commercial practice under conditional sales agreements. In my view the foregoing is the proper test to determine the acquisition of property described in Schedule B to the *Income Tax Regulations.*

This appeal was argued by both parties on the assumption that the contracts here in question are subject to the laws of the Province of Alberta. I think that assumption is correct. Both parties were resident in Alberta where the contracts were negotiated.

Section 20 and 21 of the *Alberta Sale Goods Act* (R.S.A. 1955 c. 285) outline the time of transfer of property in goods and rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Section 20 reads as follows:

> 20. (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

Section 21(1) reads as follows:

> 21. (1) Unless a different intention appears the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> Rule I Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed.
>
> Rule II. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice thereof. ..

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I have not reproduced the remaining rules in section 21 because only Rules I and II are material to the circumstances of the present appeal.

With respect to the rig it was the submission on behalf of the Minister that it was not in a deliverable state and accordingly the contract with respect to the rig would fall within Rule II above, whereas it was submitted on behalf of the respondent that Rule I was applicable to the contract.

Because of the view I take of the matter, it is not necessary for me to resolve this subsidiary controversy.

The contract was for a specific rig which, as it stood, was a service rig. To meet the needs of the respondent for its use as a drilling rig, the service rig had to undergo substantial modification and have additional equipment fixed thereto.

At the time the contract was entered into by the parties thereto the service rig was readily identifiable.

Property in the rig could have passed forthwith had the parties so intended. But the parties did not so intend. It was agreed, as evidenced by the note on page 5 of the invoice (Exhibit R-5) that "Title to pass and notes issued as of date shipment". Delivery or shipment was not until February 18, 1964 and accordingly property in the rig did not pass to the respondent until that date.

It is my opinion that neither Rule I nor Rule II set forth in section 21 of the *Sale of Goods Act* is applicable to the circumstances of this particular contract but rather that the intention of the parties as to when property in the rig was to pass is determined by the terms of the contract in accordance with section 20 of the *Sale of Goods Act*.

With respect to the substructure, the contract for the fabrication thereof was completed in the 1963 taxation year but the manufacture thereof did not begin until 1964. Accordingly the substructure falls within Rule II of section 21 of the *Sale of Goods Act* above and property therein could not pass to the buyer until well into 1964. In the contract for the sale and purchase of the substructure the parties did not exhibit a contrary intention.

With respect to the used pump and diesel engine for which the Minister allowed the capital cost allowance

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claimed by the respondent in its 1963 taxation year, the purchase of these two items of equipment fall precisely within Rule I above and accordingly the Minister acted properly and consistently in the allowing such claim and in disallowing the claim for the rig and substructure in the respondent's 1963 taxation year.

For the foregoing reasons it is my opinion that the Minister was right in disallowing the respondent's claim for capital cost allowance with respect to the rig and substructure in the respondent's 1963 taxation year.

It follows that the appeal is allowed and the assessment is referred back to the Minister for reassessment accordingly. The Minister is entitled to his costs to be taxed.

WESTERN ELECTRIC COMPANY INCORPORATED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Montreal 1969 Feb. 25-28 Mar. 3-4 — Apr. 11

Income tax—Withholding tax—Non-resident company supplying technological information to resident company—Whether "secret processes" or "other like property"—Whether trade secret—Income Tax Act s. 106(1)(a)—Can.-U.S. Tax Convention Protocol s. 6(a).

Technological information concerning a non-resident's products (*viz* drawings and specifications of materials, their assembly, etc.) supplied to a resident on a confidential basis are "secret processes" or "other like property" within the meaning of s. 6(*a*) of the Protocol to the Can.-U.S. Tax Convention and hence the non-resident's fees therefor (based largely on the selling price of the resident's products) are subject to withholding tax under s. 106(1)(*a*) of the *Income Tax Act* as being royalties for the use of property in Canada. A "secret process" referred to in s. 6(*a*) of the Protocol is synonymous with a trade secret The word "secret" has an affinity with the word "confidential".

English Electric Co. v. Musker (1964) 41 T.C. 556; *Mercer v. A.G. Ont.* (1881) 5 S.C.R. 538 referred to.

INCOME tax appeal.

H. Heward Stikeman, Q.C. and *Peter F. Cumyn* for appellant.

D. G. H. Bowman and *F. P. Dioguardi* for respondent.

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DUMOULIN J.:—At the start of this trial, a joint motion was made by the litigants that evidence adduced in the instant case should also apply to the two other appeals, namely numbers B-1870 for the 1964 taxation year and B-1871 for the 1965 taxation year. Moreover, this understanding is recorded in paragraph 2 of an agreed statement of facts filed as exhibit A-1 herein.

This "pattern" appeal is directed against respondent's notice of assessment, number 144557, dated April 15, 1966, claiming tax and interest of $332,544 and $46,853.51, respectively, as being due for the 1963 taxation year "in respect of certain payments paid or credited to it in the year by Northern Electric Company Limited under certain contracts between the appellant and Northern Electric Company Limited for the furnishing of technical information and assistance" (*cf.* notice of appeal, part A, paragraph 1).

The appellant, at all times material to this proceeding, was a New York (U.S.A.) corporation, incorporated under the laws of that State. It was not a resident in and had no permanent establishment in Canada (*vide* agreed statement of facts, paragraph 20).

Paragraph 3 of the notice of appeal states that:

3 During 1963, 1964 and 1965, five contracts were in force between the appellant and Northern (a Canadian corporation resident in Canada) respecting such technical information and assistance, the said contracts having come into effect on July 1st, 1959 (hereinafter called the "1959 Agreement"), August 1st, 1961 (hereinafter called the "1961 Agreement"), October 25th, 1962 (hereinafter called the "1962 Agreement"), July 1st, 1964 (hereinafter called the "first 1964 Agreement"), and August 1st, 1964 (hereinafter called the "second 1964 Agreement"). Payments under all of the said Agreements except the second 1964 Agreement are involved in the assessment herein appealed from.

A proper intelligence of the question at stake requires copious recitals from the statement of facts and the reply. Resuming the former, its paragraph 4, the leading and most comprehensive one, describes as hereunder the essential features of the business relationships between appellant and Northern Electric Company:

4. Under the 1959 Agreement, the appellant was to make available to Northern technical information relating to a selective list of products of the appellant which covered more than half the communication products manufactured by the appellant. The information furnished consisted of the manufacturing drawings and specifications of the materials and parts comprising such products, and manufacturing

drawings and specifications covering the assembly, wiring and acceptance test requirements of such products. The appellant supplied all of the new or changed information affecting these products resulting from its research and development. Also supplied were substantially all manuals, handbooks and associated drawings and specifications relating to quality control, distribution, installation and repair of these products Specifications covering products and material purchased by the appellant from others were also included. The 1959 Agreement replaced one which had become effective on July 1st, 1949 (hereinafter called "the 1949 Commercial Agreement"). The supply of technical information under the 1959 Agreement terminated on June 30th, 1964, but certain payments thereunder continue until June 30th, 1968. The first 1964 Agreement provides for the supply on a continuous basis of technical information relating to electronic switching systems No. 1 and No 101 and specified crossbar equipment. Provision is also made in the first 1964 Agreement for the possible supply of technical information on a "one-shot" basis with respect to other products as they may be specifically identified by Northern. By this term is meant the obligation to supply information only as it existed at the time Northern requested it without any continuing obligation to supply additional technical information thereafter. Although the number of products covered by the first 1964 Agreement is considerably less than under the 1959 Agreement, the electronic switching systems covered by the first 1964 Agreement represent some of the latest developments in the art of telephony and the actual technical information to be received by Northern under the first 1964 Agreement is quite extensive.

In 1962, appellant and Northern entered into an agreement covering testing facilities for carrier systems. This followed the 1961 Agreement concluded in order to provide Northern with technical information in respect to five specified products not covered by the 1959 contract.

We read at paragraph 7 of the notice of appeal, part A, that:

7. All of the aforementioned Agreements were entered into in the City of New York, in the State of New York, one of the United States of America. Payments for information received were also made in said City of New York The research and development work of the appellant was performed in the United States of America. The drawings and specifications involved were prepared in the United States of America and shipped by carrier to Northern in Canada. The appellant did not have in 1963, 1964 or 1965, and does not now have any office or place of business or permanent establishment in Canada.

The mode and proportional basis of, let us say, the pecuniary appreciation by Northern Electric for such immeasurably diversified and unceasing technical disclosures is thus described in paragraph 8 of Western Electric's appeal:

8 Northern's payments for technical information, as well as for certain specifications covering products and materials purchased by the appellant from others, were determined by applying various percentage fees, as specified in the Agreements, to the selling price of

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various products sold by Northern. In general, to the extent feasible, these percentage fees were based on the relationship of the appellant's research and development expenses to sales. Northern's payments for the manuals, handbooks and associated drawings and certain other specifications were on a semi-annual lump sum basis in the amounts specified in the Agreements In addition, Northern made further payments to the appellant to cover the appellant's costs of gathering and reproducing the information. Amounts received by the appellant from Northern under these Agreements were treated by the appellant as a reduction of its research and development expenses and accounted for by the appellant accordingly.

Patent rights, they add up in the thousands, appertaining to Western Electric, were, as indicated at paragraph 9 of the appeal:

. at all relevant times covered in a separate Agreement, and a 15% tax was withheld from any payments thereunder..

This paragraph next specifies that:

The information furnished under the 1959, 1961, 1962, first 1964 and second 1964 Agreements was not patentable The appellant protected itself by stipulating in the said Agreements that the information made available to Northern was to be non-transferable, and Northern is prohibited under the said Agreements from making any more copies of the information than are necessary for its own use

Appellant's conclusions are included in part B, paragraphs 2, 3 and 4 of its written procedures, and may be summed up concisely enough. It is claimed that any amounts received from Northern were not "included in any of the categories of payments set forth in the paragraphs of subsection (1) of section 106 of the Income Tax Act..." and in particular were not "rentals" or "royalties" as foreseen in section 6(*a*) of the Protocol to the U.S.-Canada Tax Convention; that technical information supplied to Northern "was not in itself property of any kind and... payments made by Northern for such information and assistance were not for the use of property in Canada"; "that the amounts paid or credited to (appellant) by Northern for 1963, 1964 and 1965 were 'industrial and commercial' profits, which in the absence of a permanent establishment of the appellant in Canada, cannot, by virtue of the said Canada-U.S. Tax Convention, be subjected to tax by Canada".

The respondent flatly denies paragraphs 3, 4, 5, 6, 7, 8 and 9 of the notice of appeal, admitting only the bare existence of the five contracts entered into by Western and

Northern. It then proceeds to set forth its interpretation of the controversy in paragraphs 11 and 12 of the reply to the notice of appeal; I quote:

> 11. The respondent says that the amount of $2,216,960 00 (for taxation year 1963, I presume) paid or credited by Northern, a resident of Canada to the appellant, a non-resident person, is subject to tax under section 106(1)(*d*) of the Income Tax Act because
>
> (*a*) it was paid or credited to the appellant as, on account of or in lieu of payment of, or in satisfaction of rent, royalty or a similar payment;
>
> (*b*) in any event, it was such a payment for the use in Canada of property or for property or other thing used or sold in Canada.
>
> 12. The respondent denies that the said amount was "industrial or commercial profits" within the meaning of the Canada-U S. Tax Convention.

Both parties rely on, substantially, the same statutory provisions, with, of course, divergent conclusions, namely, sections 3, 4, 106(1)(*d*), 123(10) of the Act; Articles I, II, and III of the U.S.-Canada Tax Convention signed March 4th, 1962, as amended, and section 6(*a*) of the Protocol to that Convention.

Before attempting to deal with the moot points at issue, a brief disclosure of "who's who" and a *dramatis personae* of the financial identities of the principal "actors" on the judicial stage may be of some interest, though it is already discernible, on the factual plane, that all technical information and assistance extended refer to the "art of telephony".

Paragraph 1 of the agreed statement of facts reminds us, *inter alia,* that "American" means the American Telephone and Telegraph Company. Then, at paragraph 22, we are informed that "at all times material to this proceeding the appellant has been a virtually wholly-owned subsidiary of American", and, in paragraph 23, that "in the years 1963 to 1965, Northern was a virtually wholly-owned subsidiary of Bell of Canada".

In the years 1963 to 1965, Western Electric held no shares in Bell of Canada and Northern Electric held no shares in Western or "American" (*cf.* para. 25).

Possibly, in an amplified application of the truism that there is more in two heads than in one, we are told by paragraph 30 of the agreed statement of facts that "in the

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years 1963 to 1965, the appellant employed 5,000 engineers". More important still to the matter at bar is the information conveyed by paragraph 35, hereunder:

> 35 In each of the years 1959 to 1965, the Appellant furnished copies of between 100,000 and 150,000 drawings and specifications to Northern pursuant to one or the other of the agreements mentioned in paragraphs 3 to 6 above.

This enormous mass of informative stationery was attended to "in the United States at Northern's expense and ... sent to Northern at destinations within Canada by first class mail". (*cf.* para. 37).

Lastly, to eliminate any lurking suspicion that appellant and Northern might not have dealt at arm's length, the former, on April 30, 1962, disposed of its 10% holdings of the latter's share acquired in 1959 (*vide:* para. 23).

This said, appellant, on page 11 of its written argument, concisely states the issues as follows:

> (a) Are the fees "rent, royalty or a similar payment" for the use in Canada of property within the meaning of Section 106(1)(*d*)?
>
> (*b*) Are the fees industrial and commercial profits within the meaning of Article II of the Convention and therefore exempt? (i e, are they other than royalties as described in Section 6(*a*) of the Protocol)

Previously, the appellant, in its written argument (page 8) had inferred that the technical information confided to Northern *"is composed of ideas. One can own the paper on which they are written, but not the ideas themselves. In particular, the information is not, nor is it like, secret processes and formulae, being neither process information nor secret* ... Furnishing technical information is part of appellant's overall business".

The italics are mine and emphasize that which might be qualified as both the intellectual and factual basis of appellant's plea. Time and time again, with the repetitiousness of a leitmotiv, it is contended that abstract knowledge or scientific lore, due to their intangibility, remain beyond the material scope of property.

Now, regarding the statutory and Canada-U.S. Convention texts, most of their relevant parts call for a textual quotation.

INCOME TAX ACT

106. (1) Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,

. . .

(*d*) rent, royalty or a similar payment, including, but not so as to restrict the generality of the foregoing, any such a payment

(i) for the use in Canada of property,

(ii) in respect of an invention used in Canada, or

(iii) for any property, trade name, design or other thing whatsoever used or sold in Canada

. . .

123. (10) The Minister may assess any person for any amount payable by that person under Part III, this section or section 129 and, upon his sending a notice of assessment to that person, Division F of Part I is applicable *mutatis mutandis*.

CANADA-U.S. TAX CONVENTION

Article I

An enterprise of one of the contracting States is not subject to taxation by the other contracting State in respect of its industrial and commercial profits except in respect of such profits allocable in accordance with the Articles of this Convention to its permanent establishment in the latter State.

Article II

For the purposes of this Convention, the term "industrial and commercial profits" shall not include income in the form of rentals and royalties, interest, dividends, management charges, or gains derived from the sale or exchange of capital assets.

. . .

Article III does not apply to the instant case, since it is admitted that Western Electric has no permanent establishment in Canada.

THE PROTOCOL

6 (*a*) The term "rental and royalties" referred to in Article II of this Convention shall include rentals or royalties arising from leasing real or immovable, or personal or movable property or from any interest in such property, including rentals or royalties for the use of, or for the privilege of using, patents, copy-rights, secret processes and formulae, goodwill, trade marks, trade brands, franchises and other like property;

Such are the statutory and international treaty provisions that govern the sought for solution. Next comes the technical information agreement of 1959 (a part of exhibit A-6, appendix C to the agreement as to documents), a fair sample of all other similar covenants between Western and Northern.

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Article I of this indenture is entitled "Technical Information to be Supplied" from July 1, 1959, to June 30, 1964. The opening section reads:

> Section 1. Western shall supply to Northern during the supply period of this agreement, to the extent and on the terms hereinafter set forth, technical information relating to those products listed in Appendix A, attached hereto and made a part hereof, entitled "Classified Merchandise List", as presently constituted or hereafter supplemented, manufactured by Western for sale or lease to the Bell Operating Companies. The technical information which Western shall supply hereunder to Northern shall consist of Western's manufacturing drawings and specifications of the materials and parts comprising such products, and manufacturing drawings and specifications covering the assembly, wiring and acceptance test requirements of such products, but said technical information shall not include any drawings or specifications with respect to machines, tools or processes involved in the manufacture, assembly, wiring, or testing of such products ..

Section 2 stipulates that:

> . . .
>
> (*c*) When Western is to supply technical information on a "continuing" basis, it shall supply not only technical information as it exists at the time of the request, but also additional technical information relating to the same products, including changes and new designs, and shall continue to do so for the duration of the supply period, subject to Section 4(*c*) of this Article I.

The obligation next assumed by Western foresees that:

> Section 3 To the extent of its right to do so Western shall supply to Northern on a continuing basis during the supply period of this agreement its technical information pertaining to all products in the product groups identified in Appendix B attached hereto and made a part hereof...

Two further undertakings of this 1959 agreement, sections 8 and 9(a) shed a fuller light on Western's obligations to its Canadian customer, Northern Electric; they are:

> Section 8. If at any time in the supply period of this agreement Northern shall request that Western supply technical information on a "one shot" basis pertaining to one or more codes of products included in Appendix A.. , Western shall, if it is in a position to do so, undertake to supply such information on reasonable terms to be negotiated and incorporated in an agreement substantially in the form illustrated by Appendix G attached hereto and made a part hereof.
>
> Section 9. (*a*) Although the technical information to be supplied hereunder, apart from the provisions of this Section 9, relates to products manufactured by Western for sale or lease to the Bell Operating Companies, Western shall supply during the supply period, subject to the terms, conditions and limitations of this agreement, Western's technical information of the same nature relating to products, listed in Appendix B at the time the information is available,

which Western may propose to manufacture or may be preparing to manufacture for sale or lease to Bell Operating Companies. Provisions corresponding to this Section 9 shall be included, if Northern so requests, in any agreement negotiated pursuant to Section 6(*b*) of this Article I.

. . .

Article III, under the caption of Fees, sets up a schedule of payments for the technical data and assistance provided; a reproduction of sections 2(a) and 6(a) complements a notion of the basis on which pecuniary remuneration should be computed (as previously expressed in paragraph 8 of the statement of facts):

> Section 2. (*a*) Northern shall pay fees to Western at the rates specified in Appendix B (.. or at the rates determined in accordance with Section 6(*a*) of Article I hereof) for the respective product groups, on each product subject to fee, as hereinafter defined, which is sold or *leased* (emphasis added) during the base period of this agreement, as also hereinafter defined, such rates to be applied to the net selling price of such product if sold for a separate consideration payable wholly in money and in all other cases to the fair market value thereof.
>
> Section 6 (*a*) In addition to the other payments provided for in this Article III, Northern shall pay Western 0 35% of the net selling price or fair market value, whichever may be applicable under paragraph (*b*) of this Section 6, of all products of the kinds listed in Appendix A,... The payments provided for in this Section 6 shall constitute compensation for the use of technical information, in connection with products for which payments are not otherwise provided.

For the needs of this case, a last but highly significant stipulation, formulated in Section 5 (a)(b)(c)(d) of Article IV (always Appendix C to agreement as to documents, exhibit A-6) will end the lengthy yet indispensable roster of citations. I had as well point out, without further ado, that we reach, here, the crux of the problem, the all important and warmly disputed question of whether or not the adjective "secret" in section 6(a) of the treaty protocol could have a meaning and intent coextensive with that of "confidential".

> Section 5. (*a*) Neither Northern nor its subsidiaries shall use the technical or other information supplied hereunder except as provided in this agreement.
>
> (*b*) Northern and its subsidiaries shall keep such technical or other information *confidential* (emphasis not in text).
>
> (*c*) Neither Northern nor its subsidiaries shall, without Western's express written permission, make or have made, or permit to be made, more copies of such technical or other information than are necessary for its or their use hereunder.

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(*d*) Neither Northern nor its subsidiaries shall make any procurement information contained in such technical or other information available to suppliers or prospective suppliers except on the agreement in writing (of which a copy will be furnished by Northern to Western, if requested) of such supplier or prospective supplier that it will keep such information *confidential* (italics added) and will not use it except for the purpose of supplying to Northern, or its subsidiaries, materials, parts or components described therein.

The appellant, as previously mentioned, among several lines of argument, stressed at great length the view that "since know-how is not property it cannot be sold, nor demised. Consequently, the courts have consistently characterized technical service agreements as contracts for the rendering of a service"; and reference is made to the British case of *English Electric Co. Ltd. v. Musker*[1], wherein Viscount Radcliffe wrote:

> There is no property right in "know-how" that can be transferred even in the limited sense that there is a legally protected property interest in a secret process.

I, at once, take due notice that should I sense something in the nature of a secret process, the decision above would have granted it legal protection as a common law right short of any other explicit guarantee.

Respondent, as it not unfrequently happens in jurisprudence, counters this opinion by another gleaned from the same affair of *Musker v. English Electric Co. Ltd.*[2], that of Lord Denning who said:

> Know-how is an intangible asset, just as intangible as good-will and just as worthy of recognition.

On pages 24 and 25 of his written submissions the Minister's learned counsel suggests that:

page 24: The technical information to the limited use of which the right is so granted is highly valuable proprietary information, acquired by Western at substantial cost, carefully guarded and developed with the advanced technological competence and substantial resources of A.T. & T., Western and Bell Laboratories. There is no realistic distinction between this information and any other secret process or trade secret that may be licensed on a similar basis.

page 25: Yet trade secrets and secret processes are no more than information of a secret nature as to the means of manufacture. It is submitted that the confidential information the right to the use of which was granted under the technical information agreements falls within precisely the same category and is therefore "like property".

---

[1] (1964) 41 T.C. 556 at p. 585 [2] 41 T.C. 556 at p. 582.

On page 3 of his brief, the appellant sets a premise, pervading throughout, and leading to the conclusion that Western rendered business services to Northern, for which it received monetary appreciation of no other class or kind than that of ordinary commercial profits, held tax free in Canada, for an American enterprise without a permanent establishment here.

This initial standpoint is that: "It cannot be said that the appellant furnishes to Northern such a comprehensive block of information that Northern, or for that matter, anyone else, needs only turn the information over to its employees in order to manufacture." And, from thence, an analytical review of the five agreements, especially that of 1959, would exclude from the technical assistance afforded all colour of "secrecy".

The oral evidence on that score is quite succinct. As explained by the assistant vice-president of corporate development at Northern, John Glover Todds: "The assistance derived from Western Electric's drawings and technical information, though not slavishly followed, are nevertheless essential... Information given us by Western, we consider as confidential but not as secret. In the engineering and technical departments (those of Northern) as of 1965, there would be about 1,500 scientists, all having access to the confidential information obtained from Western." Of itself, it seems only natural that highly technical communications should be handed over to highly trained scientists without any admissible suspicion that this might derogate from the confidential discretion attaching to them. Mr. Todds also testified that: "We can manufacture the product from product design information but with some further information as to processing".

An appraisal of the technical information's extensive scope was imparted to me by Mr. John T. Byrnes, Western's assistant manager of patent licensing, who specified that: "The information given in virtue of an agreement so to do is much more detailed than that accompanying a patent communicated to Northern."

An honourable mention is deserved by the distinguished counsel of both parties for their painstaking and exhaustive endeavours, for the far-reaching extent of their inquiries.

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For instance the exalted mantle of philosophy was had to clothe the notion of "property" in section 106(1)(*d*) of the Act.

Rightly or wrongly, I humbly suspect that the practical and often over-worked brains of our legal draftsmen never dreamt of tailoring a such-like vestment for a taxing provision; yet, should my surmise be erroneous, I crave indulgence. Still, this labour was not in vain; it achieved the meritorious if negative result of showing me what I could delete, at least so I think, from my perusal of the pertinent reasons of decision, the *rationes decidendi.*

Of these, the paramount one would be that dealing, as I must, with a measure of exception, expressly enacted by the contracting parties to limit the extent of their own national laws and to devise special rules governing special cases of mutual interest, I feel bound to adhere closely to the current and ordinary meaning of the treaty terms, even more so than to provisions of any other statute.

My guiding light should be, of necessity, the Convention covenant.

The undersigned feels fortified in this surmise by section 3 of the *Canada-United States of America Tax Convention Act, 1943* (S. of C. 1943-44, c. 21) which I cite:

> 3 In the event of any inconsistency between the provisions of this Act or of the said Convention and Protocol and the operation of any other law, the provisions of this Act and of the Convention and Protocol shall, to the extent of such inconsistency, prevail

A clear expression of intent that the treaty should exercise a sovereign sway over the subject-matter of its competence.

In this vein of thought, since the "confidential" nature of the continuous technical directions remains undisputed, the inquirer's task seems restricted to seek whether or not the afore-mentioned adjective might, under the known conditions and circumstances, bear a close enough analogy to the expression "secret processes" or at least offer sufficient grounds for being classified as "other like property", two of the taxing conditions in the Protocol's section 6(a).

To begin with, in this issue, figures have an undeniable eloquence. In slightly more than three and one-half years, from January 15, 1963, to August 31, 1965, Northern paid or credited to appellant a total amount of $5,823,307 pursuant to one or more of the five agreements. It stands to reason that no company would consider as costly an expenditure for trade informations devoid of a practically flawless degree of "exclusivity", assured by the professional "secrecy" of appellant's scientific researchers and the confidential conditions linked with their impartation to Western's selected clients. I am loath to think that "secret processes and formulae" as written in the Protocol are intended in a more restricted sense than that of a trade secret, the latter not improperly described as something strictly confidential. Neither do I assimilate a trade secret to an invention deserving of a patent. Furthermore, an intent to exclude from the exempting clause of the Convention's Article II "other like property", equivalent to "property like", akin to "secret processes or formulae", seems apparent in section 6(a) of the Protocol, even though I cannot detect any specialized meaning in the mention of "secret processes".

It may be repetitious but, I trust, not unavailing, to insist upon the likely assumption that it would be a textual error to sunder "secret processes" from interchangeability with its correlative counterpart "trade secret".

Should semantics be of some assistance, as well they might, a recourse to reputed dictionaries is permissible. *Webster's Third New International Dictionary* defines "trade secret" thus:

> A formula, pattern, process or device that is used in one's business and that gives an advantage over competitors who do not know it or use it.

A foremost French encyclopaedia, the *Dictionnaire encyclopédique Quillet, of recent publication* (1958) *v°* "secret", in the course of an exhaustive survey of the latter noun, applying it, generally, to scientific and artistic secrets, says:

> Dans les sciences, dans les arts, moyen, procédé connu d'une seule personne ou de peu de personnes.

Assuredly no reproach could attach to the lexicographer for not having at mind Western's legion of scientists who, nevertheless, are bound into a unique fasces by the ties of an all pervading professional secrecy towards their employer. Quillet, then, narrows down the word "secret" to one of its several adaptations "secret de fabrique", which is:

> Le fait pour un employé d'un établissement industriel de révéler les secrets de fabrication qui y sont appliqués, soit à un étranger, soit même à un Français, constitue un délit sévèrement réprimé par la loi pénale.

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No allusion is made to a patented secret, but obviously merely to trade secrets, "secret de fabrique". Regarding the legal classification of a trade secret, it was held in the American case of *Stalker v. United States*[4] that:

> It is established law that a trade secret constitutes property.

And again, as stated in U.S. Revenue Ruling 55-17:

> While manufacturing know-how is of a non-patentable nature it is something that its possessor can grant to another for a consideration. The right to use such know-how is not materially different from the right to use trade-marks, secret processes and formulae.

The affinity, if not synonymity, between "secret" and "confidential" stands out, amongst many others, in *Black's Law Dictionary*[5]*'s* definition of that adjective:

> Confidential: Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret.

Thus the adjective "secret" is resorted to twice to help qualify its related adjective "confidential".

This scrutiny of some known applications of key words in section 6(a) does not, I hope, derogate from the sagacious and oft-quoted directives laid down in *re Partington v. The Attorney-General*[6] wherein Lord Cairns wrote, *inter alia:*

> ...On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

There is, surely, a radical distinction to be drawn between searching after "an equitable construction" and inquiring into the current and ordinary applications of the "words of the statute".

On the penultimate page (27) of his argument, appellant's counsel raises as a final submission that:

> When considering the language of the Canadian Treaty and whether it could reasonably be extended to include payments for information concerning industrial, commercial or scientific experience or know-how, it should be noted that in three recent treaties which

[4] 209 Fed. Supp. 30.
[5] Fourth ed, 1951.
[6] (1869) L.R. 4 H.L., 100 at 122.

Canada has entered into, these words have been added to the definition of "royalties". The language is quite similar to the language used in some of the United States treaties to which we have referred earlier. The Canadian treaties are:

Canada—United Kingdom Convention,
Article XI subsection 5.
Canada—Japan Convention,
Article VIII subsection 2.
Canada—Trinidad & Tobago
Article X subsection 2.

Article 11(5) of the Canada-U.K. Convention, similar to the other two treaties, is drafted with the italicized addition in the undergoing style:

> The term "royalties" as used in this Article means any royalties, rentals or other amounts paid as consideration for the use of, or the right to use copyrights, patents, designs or models, plans, secret processes or formulae, trade-marks or other like property or rights, or for industrial, commercial or scientific equipment, *or for information concerning industrial, commercial or scientific experience* (emphasis in text of citation).

From this, the appellant concludes:

> It is difficult to appreciate how the Minister can be heard to argue that treaties which do not have the extended language should be given the same construction as those that do...

A fair suggestion, undeniably, but perhaps open to the retort that the minister's intention to tax scientific experience, extant throughout the preceding treaties, was even more explicitly asserted in the subsequent ones.

Be that as it may, I feel in substantial agreement with respondent's contention that:

> In the instant case, the appellant has granted to Northern a restricted right to use confidential, highly valuable technological information. That information is used by Northern in Canada in the manufacture of products sold by it and Northern pays Western a percentage of the sale price of the products sold in precisely the same way as it pays a royalty to Western under its patent licence agreement. To suggest that the payments made by Northern to Western as a percentage of the sale price of products manufactured with the use of the information, are in any intelligible sense different from royalties paid for the right to use a patent or a secret process (both of which are mentioned in section 6(*a*) of the Protocol) is to ignore commercial reality. It is submitted that in both cases what is paid is plainly a royalty. The confidential information supplied under the technical information agreements in the context of modern industry if not "secret processes" is of precisely the same nature: it is valuable, jealously guarded proprietary information... (*cf.* respondent's submissions, at pp. 32-33).

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The above lines had been prefaced by this cursive passage of Justice Henry's notes of judgment in *Mercer v. Attorney-General of Ontario*[7]:

> The term "royalties" is of every general import and very comprehensive.

For the reasons expounded, I reach the conclusion that this appeal must be dismissed. The appellant, consequently, is ordered to pay to the respondent the joint amounts of $332,544 and $46,853.51, a total sum of $379,397.51 with, in addition, all taxable costs.

Toronto 1969 Mar. 31, Apr. 1, 2, 3 — Ottawa Apr. 23

SARCO COMPANY, INC. ....APPELLANT;

AND

SARCO CANADA LIMITED ....RESPONDENT.

Patents—Compulsory licence—Appeal from Commissioner of Patents—"Abuse" of patent—Whether "satisfactory reason" for non-working patent—Issues defined by pleadings—Admissibility of evidence of subsequent facts—Whether establishment of "new trade or industry in Canada" prejudiced by refusal of licence—Patent Act, secs. 67(2)(a) and (d), 68(e), 70(1).

In May 1958 respondent was granted a Canadian patent for a trap for removing water etc from steam pressure systems. Appellant owned the U S patent for the invention. Because of appellant's persuasions and threats respondent decided not to manufacture traps in Canada but instead imported traps made by appellant in the United States. In late 1963 respondent at length began to manufacture traps in Canada and in that year made 1.4% of its traps here; 19.5% in 1964; 30% in 1965; 33% in 1966, 100% in 1967 and subsequently. Early in 1966 appellant began to make an improved trap in the U S. but because of respondent's Canadian patent could not make or sell such traps in Canada In September 1966 appellant applied to the Commissioner of Patents under secs. 67 and 68 of the *Patent Act* for a compulsory licence to use respondent's patented invention on the ground that it was not being worked on a commercial scale in Canada. The Commissioner denied the application, finding there had been no abuse of the patent within the application of s. 67(2)(*a*) but he did not deal specifically with appellant's contention of abuse under s. 67(2)(*d*). Appellant appealed to this court where, there being no transcript of the oral testimony heard by the Commissioner, the same witnesses gave evidence. The parties requested the court, if it found abuse of the patent, to exercise the Commissioner's powers under s 68 by granting or refusing a licence.

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[7] (1881) 5 S C R. 538.

Held, dismissing the appeal:—

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1 No "satisfactory reason" within the meaning of s. 68(2)(*a*) was shown for non-working of the invention for seven or eight years from the grant of the patent, and abuse of the patent under s (68)(2)(*a*) was therefore established Since however applicant was a party to the abuse the object of secs. 67 and 68 would be best attained by making no order for a licence, as s. 68(*e*) authorized

2 The evidence did not establish appellant's allegation that respondent had refused to grant appellant a licence on reasonable terms within the meaning of s 67(2)(*d*), but even if there had been such refusal appellant had not proved its allegation that the establishment of a new trade or industry in Canada was prejudiced thereby. The introduction of appellant's improved trap into Canada would be simply to enter an established trade, which was insufficient.

3. Having regard to the provisions of secs 70 to 72, which prescribe the procedure to be followed on applications to the Commissioner under secs 67 and 68 —

(*a*) an application under s 67(2)(*d*) founded on the refusal to grant a licence must fully set out the facts on which the applicant relies;

(*b*) evidence is receivable only for the purpose of proving or disproving questions of fact which remain unresolved on reading the application and counterstatement and an applicant cannot obtain relief in respect of facts not set out in his application but which may be established at the hearing before the Commissioner, including matters which have occurred since the application was filed.

4 While the questions which arise under s. 67 of abuse and of satisfactory reason for non-working a patent must be determined on the basis of the case put forward in the application, evidence of the situation at the time of the hearing may be relevant to those questions.

Brownie Wireless Co. (1929) 46 R P C. 457; *Loewe Radio Co.* (1929) 46 R P C 479; *Robin Electric Lamp Co* (1915) 32 R. P. C. 202; *James Lomax Cathro* (1933) 51 R.P C. 75, discussed.

APPEAL from Commissioner of Patents.

Donald F. Sim, Q.C. and *Roger T. Hughes* for appellant.

John W. Brown and *G. R. W. Gale* for respondent.

THURLOW J.:—This is an appeal under section 73 of the *Patent Act* from the refusal by the Commissioner of Patents to order the grant to the appellant under sections 67 and 68 of the Act of a licence to use the invention patented by Canadian patent number 557418.

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The statutory provisions under which the application was made provide as follows:[1]

67(1) The Attorney General of Canada or any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act.

(2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:

(*a*) if the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working, but if an application is presented to the Commissioner on this ground, and the Commissioner is of opinion that the time that has elapsed since the grant of the patent has by reason of the nature of the invention or for any other cause been insufficient to enable the invention to be worked within Canada on a commercial scale, the Commissioner may make an order adjourning the application for such period as will in his opinion be sufficient for that purpose;

. . .

(*d*) if, by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry of Canada or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted;

. . .

(3) It is declared with relation to every paragraph of subsection (2) that, for the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.

68. On being satisfied that a case of abuse of the exclusive rights under a patent has been established, the Commissioner may exercise any of the following powers as he may deem expedient in the circumstances;

(*a*) he may order the grant to the applicant of a licence on such terms as the Commissioner may think expedient, including a term precluding the licensee from importing into Canada any goods the importation of which, if made by persons other than the patentee or persons claiming under him would be an infringement of the patent, and in such case the

[1] The legislative history of these provisions in Canada is commented on by MacLean, P, in *Celotex Corporation et al v. Donnacona Paper Co.* [1939] Ex C.R. 128 at p. 129. The history of the corresponding provisions of the English Act, which was not the same as in Canada, is described by Luxmoore, J. in the *Brownie Wireless* case (1929) 46 R.P.C. 457 at p. 469.

> patentee and all licensees for the time being shall be deemed to have mutually covenanted against such importation; ...
>
> . . .
>
> (*e*) if the Commissioner is of opinion that the objects of this section and section 67 will be best attained by making no order under the above provisions of this section, he may make an order refusing the application and dispose of any question as to costs thereon as he thinks just.

In his decision the Commissioner found that in view of the conduct of the appellant and the efforts of the respondent no actual abuse of the monopoly rights had been proved and that the respondent had explained the delay but while he considered the case put forward under section 67(2)(*a*) he did not specifically deal with the case put forward by the appellant under section 67(2)(*d*). At the hearing of the appeal in this court the grounds of appeal relied on by the appellant were that the material before the court establishes abuses of the patent within the meaning of both of these provisions.

The material which the Commissioner had before him upon which to determine the matter consisted of the application and counterstatement and the affidavits accompanying them together with oral and documentary evidence presented by the parties at the hearing before him. No transcript or notes of the oral testimony were, however, included in the file forwarded to this court by the Commissioner. In the absence of such a transcript or notes the evidence of the same witnesses was heard on the appeal pursuant to leave granted by an order of this court made prior to the hearing. In the course of their testimony some additional exhibits were referred to and received but no additional witnesses were heard. In general, though possibly not in all details, the ground covered by the witnesses seems to have been much the same as that revealed by the findings of the Commissioner but while I do not regard the procedure adopted in this court as having been a complete trial *de novo* it appears to me to be necessary, in the circumstances, for the court to make its own findings of fact on the material before it rather than to examine the material merely to see if particular findings made by the Commissioner are sustainable.

The invention described in the patent specification relates to a disc type trap used to automatically remove water and insoluble gases from steam pressure systems. The trap is

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made of stainless steel and consists of three parts, a body, a disc and a cap. The body is a single steel block having an inlet opening leading horizontally from one side and then upwardly to an opening at the top. The top surface of the body is very finely machined both at the edge of the hole and at its outer edge. Between these finely machined surfaces is a circular depression from which an outlet hole leads to an outlet opening in the side of the body opposite that of the inlet opening. The disc is also a very finely machined piece of steel and rests, when the trap is in its closed position, on the finely machined surfaces of the top of the body, covering them and the tops of both the inlet and outlet holes. The cap fits over the disc and the top of the body but leaves the disc free to rise from the finely machined surfaces of the body to permit water and air to flow from the inlet opening to the circular depression and out the outlet opening. Water or air entering the trap under pressure of the system cause the disc to rise and the water and air are thus forced into the outlet orifice. When the water and gases have been eliminated and steam enters the trap forces generated by its heat and pressure between the cap and the disc and its velocity in passing to the outlet orifice cause the disc to become firmly seated again on the machined surface of the shoulders of the inlet orifice and to prevent the passage of steam from the system. The tops of the bodies and the discs are specially hardened to withstand damage from wear on the finely machined surfaces.

The patent was granted to the respondent on May 13, 1958, on an application which had been made by Ernest L. Midgette, the inventor, on October 6, 1954, and had been assigned by him to the appellant and by the appellant to the respondent on October 11, 1954. The appellant holds the United States patent for the invention and has manufactured traps known as TD-50's, which fall within it, since about 1956 in $\frac{3}{8}''$, $\frac{1}{2}''$, $\frac{3}{4}''$, 1″ and some larger sizes at its plant formerly at Bethlehem and later at Allentown in Pennsylvania.

Early in 1966 the appellant began manufacturing in the United States and distributing what it regards as an improved trap known as a TD-52. Instead of having a single hole (or several beside each other) leading from the circular depression to the outlet opening the TD-52 has three smaller holes spaced equidistantly from each other in the circular depression and these lead to the outlet opening by holes so sized and designed as to equalize the quantity of condensate carried by each of them. Such a trap is said to have the advantage of eliminating unevenness of wear on both the disc and the machined outer ring of the top of the body near the outlet hole and thus to achieve longer serviceability. Such a trap is also operable in systems wherein the back pressure in the outlet system reaches up to 85% of the inlet pressure whereas the TD-50 is operable only when the back pressure does not exceed 50% of the inlet pressure.

I should add at this point that at the hearing of the appeal the respondent took the position that back pressure was important only in closed outlet systems which are uncommon and that the advantages referred to were offset by the disadvantage arising from the smaller outlet holes being more likely to become blocked by rust or corroded metal or other foreign matter in the system. It also took the position that though the prices of TD-50 and TD-52's of the same size were about the same the TD-52 was in fact a more expensive trap since it took a larger size of TD-52 to discharge condensate to the capacity of a TD-50 and that the reason it could be used successfully in the same size in most TD-50 applications was that the capacity of the TD-50 that had been installed in such applications had been in excess of that required.

The appellant holds a United States patent for the improvement represented by the TD-52 and on April 30, 1967 (that is to say some three months after the decision appealed from) obtained the grant of a patent therefor in Canada. The patent for the improvement is known as the Cusi patent. The TD-52 trap is, however, within the respondent's patent and this prevents the appellant from making or selling such traps in Canada.

While the names of both the appellant and respondent include the word "Sarco", they are not associated or affiliated companies. The explanation for this and possibly for the Midgette patent rights in question in these proceedings being in different hands in Canada and the United States, lies in the fact that prior to 1948 both companies

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were controlled outright by Clement Wells who in or about 1948 caused the shares of the respondent to be transferred to trustees upon certain trusts for the benefit of his brother, Eric Wells, who was president of the Canadian company, and the wife of Eric Wells, for life and ultimately for the benefit of the employees of the Canadian company. Eric Wells died in the latter part of 1958 and Clement Wells died at some later date. He had in or about 1954 sold his interest in the appellant company to its employees. From 1962 to 1964, three-elevenths of the shares of the appellant were held by the respondent but since then there has been no proprietory relationship between them.

Both companies are and have been engaged in the manufacture and sale of a line of heating specialties including steam traps, pipe lines strainers, valves and pressure and temperature controls for heating and pressure systems and for some years after 1948, indeed throughout the remainder of the lifetime of Eric Wells, relations between them were very satisfactory apparently due in part to a sufficiently clear and respected understanding between them that the Canadian operations and market were the respondent's. Under this arrangement the respondent had free access to technical literature, engineering assistance and know-how provided by the appellant for any manufacturing activities it saw fit to undertake in the lines of products manufactured by the appellant and it also had in the appellant a source of supply for items and parts of such products which it was not engaged in manufacturing. Both companies marketed their goods under the trade mark "Sarco" which in Canada was registered as the appellant's mark. After the death of Eric Wells relations between the companies deteriorated and ultimately this and other litigation began, including an application by the respondent which resulted in expungement of the appellant's Canadian registration of the trade mark.

From the time when the TD-50 traps were first produced until late in 1963 the Canadian market for them was supplied entirely by traps manufactured by the appellant in the United States and imported into Canada by the respondent. In the years 1963, 1964, 1965 and 1966 some manufacture of the traps by or for the respondent took place in Canada but the proportion of Canadian made traps to the United States made traps supplied to the Canadian market was but 1.4%, 19.5%, 30% and 33% in these years respectively. Moreover throughout the period from the grant of the patent there never was any insurmountable technical or economic reason why the traps could not have been produced at a profit in Canada to the extent required to supply the Canadian market. It is therefore, in my view, clear that for the first seven to eight years of its existence the patent, being one for an invention capable of being worked in Canada, not only was not worked in Canada on a commercial scale within the meaning of the definition in section 2(*j*)[2] of the Act but as well that in the absence of a satisfactory reason for such nonworking, the onus of proving which rested on the respondent,[3] such failure to work the patent constituted abuse of the exclusive rights under the patent within the meaning of section 67(2)(*a*).

I turn therefore to the evidence offered as constituting a sufficient reason to excuse such nonworking.

In the latter part of 1957 and the early part of 1958, that is to say, prior to the grant of the patent, the respondent made inquiries of two machinery supply companies respecting suitable machinery and equipment for manufacturing the ½ inch size TD-50 trap at its plant at Claremont, Ontario and about a month after the grant of the patent it requested and later obtained from the appellant up to date drawings and information on the production of this trap. These were preliminary steps taken with a view to implementing the respondent's decision to commence manufacturing the ½ inch size of trap in Canada that size of trap being the one marketed in the greatest volume. No equipment had, however, been acquired and

[2] 2. In this Act, and in any rule, regulation or order made under it,

. . .

(*j*) "work on a commercial scale" means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent, in or by means of a definite and substantial establishment or organization and on a scale that is adequate and reasonable under the circumstances.

The extent of the duty of a patentee to work his patent is discussed by MacLean, P., in *Celotex Corporation et al v. Donnacona Paper Co.* [1939] Ex. C.R. 128 at p. 138 and by Luxmoore, J., under the corresponding definition in the English Act in the *McKechnie* case (1934) 51 R.P.C. 461 at p. 468.

[3] *Rodi & Wienenberger Aktiengesellschaft v. Metalliflex Ltd.* [*1966*] S.C.R. 593 per Hall, J. at p. 598.

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no manufacture of the traps had been commenced when shortly after the respondent's request for drawings and information a Mr. Simmonds, the president of the appellant company, came to Canada and persuaded the respondent not to undertake manufacture of the traps. It was said that Mr. Simmonds was upset by the prospect of the respondent undertaking to manufacture the traps, that he was of the opinion that the respondent was not capable of manufacturing them satisfactorily and that he pointed out that the appellant had invested an amount in the order of $500,000 for machines and equipment for the express purpose of producing the traps in the United States. No threat is alleged to have been made on this occasion but in the result the respondent agreed to purchase its requirements of the traps from the appellant though, it was said, only until the appellant's equipment was being operated at full capacity and the appellant was considering the purchase of additional equipment at which time the respondent would consider itself free to manufacture the traps in Canada. Thereafter the respondent continued to purchase from the appellant and to import from the United States its requirements of TD-50 traps but it continued to make preparations for the purpose of ultimately manufacturing them in Canada. In 1959 it instituted studies in induction heating for the hardening of the top of the trap body and in 1960 it purchased a machine which could be used for carrying out this operation as well as in the manufacture of some other products of the respondent's operations. In 1961 the respondent made inquiries respecting the economic feasibility of having discs for the traps made by a particular method but found it too expensive and did not pursue it. In 1962 the respondent acquired a grinding machine which could be used to finish the top surfaces of the bodies and discs of this kind of trap as well as parts of another type of trap which the respondent was producing.

In October 1962 a meeting of the directors of the respondent took place at which Mr. Simmonds was present. A number of subjects were under discussion and in the course of the meeting he was asked hypothetically what the reaction of the appellant would be to manufacture of TD-50 traps by the respondent. His reply was to the effect that if the respondent began manufacture of the traps in Canada the appellant would be in the Canadian market the next day. Whether his answer was that the appellant would begin selling in Canada traps made in the United States or would begin manufacturing them in Canada is not clear on the evidence but it is sufficiently clear that by way of reply he was reminded of the respondent's ownership of the patent and that the appellant had no right to enter the Canadian market. It is also clear both that the appellant was adamantly opposed to manufacture of the traps by the respondent and exercised its position and influence to prevent such manufacture so far as it could and that the respondent on its part was not prepared to consider giving the appellant permission to either sell or manufacture the traps in Canada.

As the respondent was dependent on the appellant as a source of supply for small parts for several of its important lines of production its directors concluded that it should not risk an open break with the appellant at that stage and thereupon decided to proceed clandestinely with its plans to start manufacture of the traps in Canada. In November 1962 it ordered a year's supply of name plates and arranged for the printing of instruction sheets to be enclosed with packages containing the traps. In the months that followed it also arranged for a supply of steel and placed orders for the manufacture by Canadian Acme Screw and Gear Ltd. of the three parts of the traps of the ½ inch size. Late in 1963 this resulted in the production of some 200 Canadian made traps representing some 1.4% of the respondent's requirements for the year. In the following year under similar manufacturing arrangements the proportion of Canadian made traps reached 19.5% of the respondent's requirements. At some point during 1965 and 1966 the respondent switched its orders for parts to another Canadian manufacturer, which entailed delays, and in those years the Canadian made traps rose to but 30% and 33% respectively of the respondent's requirements. In the latter part of 1967 as a result of an order placed some months earlier the respondent acquired a machine capable of producing 100% of its requirements and began manufacture of all parts of the traps at its own plant. Supplies of parts from its Canadian supplier had enabled it to reach 118% of its requirements for the first nine months of 1967 and

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there seems to be no question of its capacity to produce the whole of its requirements since then or of its intention to do so.

However, in May 1966 the appellant learned of the respondent's activities and in September of the same year launched its application to the Commissioner for a compulsory licence under the patent. To my mind the evidence of what transpired when the appellant found out that the respondent was manufacturing the traps makes clear (1) that the respondent in fact had been endeavouring to conceal the activity from the appellant, (2) that the appellant on its part would not tolerate manufacture of the traps in Canada by anyone but itself, if it could prevent it; (3) that it considered the manufacture of traps by the respondent to be in breach of an understanding between the two companies; and (4) that the appellant itself had no intention of manufacturing the traps in Canada so long as the understanding was honoured and it was able to keep the entire Canadian market supplied through the purchases and importation of traps from the United States made by the respondent.

The question to be determined on section 67(2)(*a*), as I see it, is whether the facts which I have related, and which, while stated in somewhat fuller detail, do not, I think, differ materially from those found by the Commissioner, afford a "satisfactory reason" for the non-working of the patent in Canada within the meaning of the statute. In the view I take of the proper interpretation of the statutory provisions this question is to be determined in its relationship to the facts set out in the application as constituting abuse. Thus, if an applicant alleges and establishes non-working of the patent on a commercial scale, for example, in the first five years of the patent's life what the patentee needs to establish is a satisfactory reason for non-working of the patent in that period. If the case put forward by the applicant is one of non-working or insufficient working up to the time of the application for compulsory licence it is that non-working or insufficient working for which a satisfactory reason is required. In either case evidence of the situation at the time of the hearing, if there is a hearing, may be relevant to the whole question whether the abuse as alleged has been made out since it may tend to confirm or refute the reasons offered for non-working or insufficient working in the period referred to in the application. The situation at the time of the hearing will also be relevant in connection with the exception provided for in section 67(2)(*a*) which, as I read it, is directed to the question whether for particular reasons non-working or insufficient working even up to the time of hearing should not be regarded as abuse, but to my mind these are the purposes in respect of which the situation at the time of the hearing is relevant in determining whether the alleged abuse has occurred.

That it is the abuse alleged in the petition, rather than the situation at the time of the hearing, which is the subject matter of the enquiry appears to me to follow from the wording of the statute. Section 67(1) provides that the Attorney General of Canada or any interested person may at any time after the expiration of three years ... apply to the Commissioner *alleging ... that there has been* an abuse ... and asking for relief ... It seems to me that this language contemplates that the case to be presented for an applicant is to be one in respect of an abuse that has already occurred. Indeed an applicant could scarcely be expected to plead and verify that an abuse was about to take place or that an existing abuse would continue until some indefinite future time when a hearing might take place. Subsection (2) then defines the situations in which a patent shall be deemed *to have been abused* but while the several defining paragraphs are expressed in the present tense there is nothing in them which appears to me to affect or vary the subject matter to be considered on a particular application as being that of whether the abuse alleged in the petition has occurred. Once a conclusion has been reached on whether or not the alleged abuse has occurred it may become necessary to consider which of the powers which section 68 of the statute authorizes the Commissioner to exercise should be exercised in the particular case and at that point again the situation at the time of the hearing may be relevant, particularly in considering whether the power under section 68(*e*) to make no order would in the circumstances be appropriate. That, however, is an entirely different question from that of whether or not an abuse has been established and both on

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the wording of the statute and in the nature of things it is a question which arises after a conclusion on the question of the establishment of the alleged abuse has been reached.

In the present case the substance of the allegation of abuse under section 67(2)(*a*) contained in the appellant's application and the affidavit accompanying it was that at the date of its presentation, that is to say in September 1966, the patent was not being worked on a commercial scale in Canada in that the TD-50 trap was not being manufactured by the respondent in adequate or reasonable quantities and that the TD-52 trap was not being manufactured at all. In my view this allegation is supported by the evidence and I find it to be established. It is also my opinion that the facts which I have outlined as having been put forward as a satisfactory reason for such non-working of the invention (in the circumstances described) are not capable of being regarded as a satisfactory reason for such non-working of the invention. As I see it, from the time of the grant of the patent to the time of the presentation of the petition, some eight years later, there had been no legal, technical or economic impediment to the working of the invention in Canada and the failure to manufacture on a commercial scale during this period had been the result of the respondent's decision or decisions to import rather than to manufacture.

The decision taken by the respondent in 1958 not to proceed with manufacture on a commercial scale but to import its requirements of the traps from the United States was, in my view, a clear decision to disregard the conditions on which the patent had been granted and the respondent's subsequent failure to work the invention on a commercial scale up to the time of the presentation of the application and even afterwards flowed from that decision and the respondent's conduct in implementing it. It may be that each step taken by the respondent in the meantime with a view to ultimately manufacturing the traps in Canada can be regarded as steps in the right direction but to my mind the fact that some eight years after the grant of the patent they had resulted in manufacture of but one third of the respondent's requirements characterizes them at best as much too ineffective and quite insufficient in the circumstances. Viewing the matter objectively, therefore, or from the point of view of the public, and with due respect for the view taken by the learned Commissioner, I do not find it possible to conclude on the evidence before me that there was not abuse of this patent under section 67(2)(*a*) as alleged in the application.

I turn now to the appellant's case founded on section 67(2)(*d*). This was based on five separate incidents to which reference will be made which were said to be refusals within the meaning of the paragraph and to amount to a consistent refusal by the respondent to consider licensing manufacture of the traps in Canada on any terms and at any stage both before and since the filing of the application for a compulsory licence. It was then submitted that the establishment of manufacture by the appellant in Canada of TD-52 traps would be a new trade which could not be carried on without a licence under the patent and that it was in the public interest that a licence should be granted to the appellant to manufacture products falling within the appellant's *Cusi* patent.

The only reference to section 67(2)(*d*) contained in the appellant's application is found in paragraph 3(*c*) which states that the nature of the abuse (which had been generally alleged in paragraph (1)) was as follows:

> . . .
>
> (*c*) contrary to section 67(2)(*d*) of the Patent Act, by reason of the refusal of the patentee to grant a licence upon reasonable terms, the establishment in Canada by the applicant of a new trade is prejudiced.

No facts were alleged indicating the refusal of a licence on reasonable terms in either the application itself or the affidavit which accompanied it. Nor was the "new trade" the prejudice to the establishment of which is the basis for relief under this provision further identified.

Section 70(1) of the Act provides that:

> 70(1) Every application presented to the Commissioner under section 67 or 68 shall set out fully the nature of the applicant's interest and the facts upon which the applicant bases his case and the relief which he seeks; the application shall be accompanied by statutory declarations verifying the applicant's interest and the facts set out in the application.

As sections 66 to 73 confer rights not known to the common law and at the same time prescribe a procedure for enforcing them I should have thought it was fatal to the appellant's application, so far as it was based on section 67(2)(*d*), that the facts on which it relied as constituting an abuse under that provision had not been fully set out in the application and that as an application for relief based on that paragraph it was entirely void.

Moreover, with respect, I disagree with the submission of counsel for the appellant that an applicant is not confined to the facts set out in his application but can rely upon and obtain relief in respect of any additional facts which may be established at the hearing before the Commissioner including matters which have occurred since the application was filed. In my view the hearing before the Commissioner is not a broad general enquiry into the history of the patent and all matters pertaining to it but is provided for the purpose of determining the issues which remain unresolved on reading the application and the counterstatement and the evidence which is receivable on such an inquiry is evidence that is relevant for the purpose of proving or disproving the disputed questions of fact. That this is the position seems to me to be apparent from sections 70 and 72 which prescribe the procedure to be followed.

Moreover, on an appeal to this court from the decision of the Commissioner, even in circumstances such as pertain in this case with respect to the record of the hearing before him, it is, I think, plain that an incident put forward as a refusal by the patentee to grant a licence which had neither been set out in the application nor established before the Commissioner cannot be relied on for the purpose of reversing his decision. It was for these reasons that I rejected a letter tendered by the appellant in rebuttal as evidence of the terms of a proposal made by the appellant in April 1964 to manufacture the patented traps in Canada which proposal the respondent declined. Evidence was, however, received with respect to the incidents dealt with before the Commissioner and I shall therefore consider them in turn as if they were properly before the court.

In discussing the requirements of the English provision corresponding to section 67(2)(*d*) Luxmoore J., said in the *Brownie Wireless Co.* case:[4]

> It is plain that in order to bring the case within that head the Applicant must establish three things. To take them in the order in which they are mentioned in head (*d*) the Applicant must prove:

[4] (1929) 46 R P C 457 at p 472.

(1) That the Patentee has refused to grant to the Applicant a Licence on reasonable terms: (2) The trade or industry either of the United Kingdom or the trade of any person or class of persons trading in the United Kingdom or the establishment of any new trade or industry in the United Kingdom is prejudiced by the refusal of the grant; and (3) That it is in the public interest that a licence should be granted.

The first thing to be noticed about the subclause is the generality of the phrases used in it. The grant of the licence which is refused must be a grant "on reasonable terms," an elastic phrase which can only be construed with certainty with reference to the actual facts of each particular case. No one can hope to lay down any exhaustive rules to enable the question whether the terms of a proposed licence are reasonable or not to be answered with certainty in every case. The answer to the question must in each case depend on a careful consideration of all the surrounding circumstances. The nature of the invention covered by the patent, the terms of the licences (if any) already granted, the expenditure and liabilities of the patentee in respect of the patent, the requirements of the purchasing public, and so on.

With respect to the necessity for the refusal relied on to have taken place before the application for a compulsory licence is made, the same judge said in the *Loewe Radio Co.* case[5]

It is necessary to consider the answer to that letter in reply to the one I have just summarised in which the *Loewe Company* said that it took the *Marconi Company's* letter as a refusal to grant a licence under the particular Patents, and that they would apply for a compulsory licence in consequence. For in the reply to that letter the *Marconi Company* expressed their regret that the *Loewe Company* had broken off negotiations without replying to the question as to the *German Company's* attitude to the pending infringement proceedings. I cannot help thinking that, if this question had been satisfactorily answered, there would have been no difficulty with regard to the query whether the licence should be limited to particular patents, or should comprise the whole group. Indeed I think this position emerged with some clarity during the course of the argument before me. In my opinion there was not in fact a definite refusal to grant a licence, and the time had not arrived for the *Loewe Company* to be in a position to apply for a compulsory licence on the ground that the licence offered was unreasonable, for its terms were never in fact discussed.

The finding is sufficient to dispose of this Appeal, because the jurisdiction to grant a compulsory licence cannot arise until there has been a refusal to grant a licence, and for this reason the appeal must be allowed....

The first of the incidents relied on in the present case as constituting a refusal to grant a licence on reasonable or any terms was that of the meeting already referred to of

[5] (1929) 46 R.P.C. 479 at p. 490.

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the directors of the respondent company when Mr. Simmonds, the president of the appellant company, was present in October 1962. Here the alleged refusal to grant a licence is said to be implicit in the fact that the respondent raised its patent rights in answer to Mr. Simmond's statement that the appellant would be in the Canadian market the next day if the respondent began to manufacture TD-50 traps in Canada. I do not doubt that the respondent was reluctant and even unwilling at that or any other stage to give serious consideration to any ordinary licensing of the appellant under the patent to manufacture TD-50 traps in Canada, both because the respondent considered the Canadian market as its own pursuant to the understanding by which the companies were guided and because the respondent feared the economic consequences of having the appellant as a competitor in the Canadian market. However, neither reluctance nor unwillingness by themselves amount to refusal and I do not discern in the evidence of this meeting anything that amounts to a refusal to license. There is no evidence that a licence was requested. It is not even clear that the appellant had any intention or desire to manufacture in Canada at that time and the threat to be in the Canadian market the next day is in my view more like a threat to begin importing into Canada than one to begin manufacture there. In these circumstances the raising by the respondent of its patent rights as an answer strikes me as no more than a reminder that the respondent would not tolerate infringement of its rights.

The next incident relied on was that of April 1964 to which reference has already been made. Not only was this incident neither described in the application nor developed in evidence before the Commissioner but neither the letter which was said to be an admission of it nor any other evidence of it was offered in the presentation of the appellant's case. It arose for the first time in the cross-examination of the respondent's witness on the credibility of his answer to a general question, also put on cross-examination, whether the appellant had ever suggested that it would come to Canada and manufacture TD-50 traps for the Canadian market. While this question and its answer were, as I see it, within the permissible limits of cross-examination on the issues before the court and the appellant was entitled to challenge the answer by calling the particular incident to the witness's attention I do not think it was open to the appellant to use the incident thus revealed as if it had been pleaded and raised before the Commissioner and introduced in the appellant's evidence in chief as a basis for the relief which it claims. Accordingly though it seems not unlikely that there may have been a refusal to grant a licence on the occasion in question I do not regard it as open to the appellant to rely on it.

I should add, however, that in the situation as I have described it any request by the appellant for a licence to manufacture in Canada made prior to the events of May 1966 and at a time when the appellant was profiting from supplying the respondent with traps from the United States and which on refusal was not followed promptly by an application for compulsory licence in my view scarcely warrants serious consideration as a refusal by which the establishment of a new trade was prejudiced, in a proceeding commenced more than two years later and only after the appellant's market in Canada for traps manufactured in the United States was endangered by the respondent's commencement of manufacture of them in Canada.

The third incident relied on as a refusal under section 67(2)(*d*) was a telephone conversation which took place in May 1966 between Mr. Hillmer then vice president of the appellant and a Mr. Powers then president of the respondent. The conversation occurred when Mr. Hillmer learned for the first time that the respondent, in breach of what he regarded as the arrangement between the two companies, had undertaken the manufacture of TD-50 traps. On securing Mr. Powers' reluctant admission that this was so Mr. Hillmer says (and this is not contradicted) that he told Mr. Powers the appellant was now going to manufacture these traps in Canada and that Mr. Powers thereupon said the respondent wouldn't permit it because it had the patent for the TD-50. In my view this conversation cannot be regarded as a request for a licence and I would not regard Mr. Powers' reply as anything more than a reminder that the respondent would not tolerate infringement of its patent rights.

The remaining two incidents relied on consist of (1) a letter written by the appellant's solicitor on April 19, 1967, that is to say some seven months after the commencement

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of the proceedings asking whether the respondent would be prepared to grant a licence and if so to make a proposal, and the respondent's failure to act upon it; and (2) the respondent's resistance of the proceedings.

In my view neither of these can serve as a basis for relief in this proceeding and though the respondent's failure to act on the letter indicates its unwillingness to treat on the subject to my mind the writing of the letter at that stage indicates as well the appellant's awareness that at that time it had no satisfactory case to present of a refusal that would serve the purpose of section 67(2)(*d*).

Nor do I think the total of these incidents establishes a refusal within the meaning of section 67(2)(*d*) on which the appellant can rely in this proceeding.

If, however, contrary to the views I have expressed, the conduct of the respondent can be regarded as a refusal to license on reasonable terms within the meaning of section 67(2)(*d*) the question arises whether it has been established that "the establishment in Canada by the (appellant) of a new trade or industry is prejudiced" thereby. In this connection it is to be observed that the appellant in its application limited the nature of the alleged abuse to be relied on to this particular one of the three subject matters contemplated by section 67(2)(*d*).

In the *Brownie Wireless* case[6] Luxmoore, J. in discussing the interpretation of the three expressions in the corresponding provision in the English Act said:

> The next important phrase is "the trade or industry of the United Kingdom." This is obviously a phrase capable of the most general interpretation. I think it should be construed in the manner indicated by Lord Warrington in the *Robin Electric Lamp Company Limited's* case in the passage to which I have already referred.
>
> The next phrase is "the trade of any person or class of persons trading in the United Kingdom." This is, in my judgment, not capable of so wide an interpretation as the preceding phrase, for while the word "trade" itself is of general import, the words that follow, "of any person or class of persons trading in the United Kingdom," especially when read with the phrase immediately following, must of necessity limit such generality to the existing trade of some person or class of persons. In view of the decision in the *Robin Electric Lamp Company's* case, and the fact that these words were inserted after (and I think because of) that decision, I am of opinion that the phrase "the trade of any person" must be construed as referring to the existing trade of the applicant.

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6 (1929) 46 R.P.C 457 at p. 473.

> The next phrase is "the establishment of any new trade or industry in the United Kingdom." This again is a phrase capable of the widest possible interpretation. In some senses it might well be said to be almost impossible to establish in the present day "a new trade or industry." Yet, on the other hand, it may well be that the working of a new invention may be of sufficient importance to constitute a new trade or industry, and this may also be so even though the new invention is itself dependent on the working of an existing invention. I only refer to this to show the general elasticity of the phrases used in the head under consideration. In the present case there is no suggestion of the desire of the *Brownie Company* to establish a new trade or industry. It has been admitted both before the Comptroller and in the argument before me that what the *Brownie Company* desire to do is to enter what is an existing trade or industry, namely, the trade or industry of manufacturing and selling broadcast loud speaker receiving sets. Again the phrase used in this connection is that the trade or industry "is prejudiced," an expression which must necessarily depend for its precise interpretation on the facts of the particular case under consideration Finally, it must be shown that "it is in the public interest that a licence should be granted." Here the phrase to be considered is "the public interest" Is this to be construed in its widest meaning, namely, the interest of the community including every class which goes to constitute that body, namely, the purchasing public, the traders and manufacturers, the patentee and his licensees, and inventors generally, or is it to be construed simply with regard to the purchasing public? In my view the former is the correct view.

Where, as in the present case, the allegation is that the establishment of a new trade or industry is prejudiced by the refusal to license the first question that arises is whether what the applicant proposes to do would in fact be a new trade. The proposed entry of the applicant into an established trade will not serve the requirement of the statute. The difference between these two concepts is illustrated by the opinions expressed in the *Loewe Radio*[7] case before Luxmoore J. and the earlier *Robin Electric Lamp Co.*[8] case before Warrington J. which, though decided on a different statutory provision, involved the same problem. In the *Loewe Radio* case the applicant proposed to manufacture radio sets having valves of a new type which fell within the respondent's patents. Luxmoore J. described the situation thus at page 486:

> It is claimed as the result of the experience of the *German Company* in Germany that the manufacture and sale of the *Loewe* multiple valve in Germany has opened an entirely new market and has brought loud speaker reception within the reach of a class of persons who were by reason of the prices charged for ordinary loud speaker receiving apparatus unable to purchase such apparatus. From this and the

[7] (1929) 47 R P C 479

[8] (1915) 32 R P C. 202.

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fact that there is admittedly at the present time in this country a large class of persons referred to as home constructors who manufacture and sell broadcast loud speaker reception sets without having obtained the necessary licences from the *Marconi Company,* it is argued that, if the *Loewe* multiple valves can be manufactured and sold in this country at a price even approximately approaching that obtained in Germany, a new and entirely unexploited market will be opened in this country which will bring loud speaker reception within the means of a class at present unable to participate in its enjoyment without in any substantial manner interfering with the existing market for the ordinary valve receiving apparatus.

At page 490 Luxmoore J. expresses his opinion thus:

I am satisfied that, having regard to the circumstances of this case, and especially the fact that the inventions covered by the *Loewe* Patents are of great importance, utility and novelty, it is obviously in the public interest that a licence to use the relevant *Marconi* Patents should be granted, because unless that is done, the *Loewe* inventions cannot be used. I am also satisfied for the same reasons that the establishment in this country of a factory for the manufacture and sale of the multiple valves covered by the *Loewe Company's* Patents will constitute the establishment of a new trade or industry in this country within the meaning of sub-section 2(*d*), Section 27 of the Consolidated Act. But while I agree with the finding of the Comptroller so far as this particular case is concerned, I feel bound to point out that in my opinion he has gone too far in stating as he does that "the working of any patent even for a minor improvement in an existing patent is *prima facie* the establishment of a new industry." In my opinion the whole question whether the working of a patent will constitute a new industry is a question of degree which can only be determined by a careful consideration of all the material facts of each particular case.

In the *Robin Electric*[9] case what the applicant proposed was to manufacture electric light bulbs fitted with a second filament that could be used when the first one failed thus prolonging the life of the bulb. Warrington J. said at page 216:

Moreover, in my opinion, the trade or industry to be considered is that of the making of tungsten filament electric lamps and the starting by the Petitioners of a trade in their particular lamps would not be the establishment of a new trade or industry. It would be nothing more than the entry of a fresh trader into an existing trade or industry. There is no ground for the suggestion that the trade or industry has been unfairly prejudiced by any act or omission of the Respondents.

Another illustration of the distinction is to be found in the *James Lomax Cathro*[10] case. The facts are described in the headnote as follows:

All the Patents related to screen-grid wireless valves, and the Applications were based upon the allegation that there was no manufacture

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[9] (1915) 32 R.P.C. 202.

[10] (1933) 51 R.P.C. 75.

under the Patents of valves of a particular type, namely, the American type, which alone are suitable for use and replacement in receiving sets of the American type which are in use to some extent in this country and to a considerable extent in certain of the Dominions. The Applicant showed that valves of this type were being imported into this country and that a large demand for them in certain of the Dominions was being met by importation from non-British sources. The Patentees had taken proceedings against importing infringers in this country and in one case had settled the action on substantial terms. Licences covering all the Patents had been granted for manufacture in this country and were unrestricted as to the type of valve to be manufactured, and under these licences there had been large manufactures of British-type valves under the first Patent and a smaller manufacture (which had ceased) of valves for export under the third Patent.

The Comptroller General in his decision said at page 84:

> ..."the establishment of any new trade or industry in the United Kingdom" has to be distinguished from the entry of a fresh trader into an existing trade or industry (see the *Brownie* case at page 473 and the *Robin Electric Lamp* case at page 216) and all the Applicant here proposes to do is, in my view, to enter, for the purpose of manufacturing American-type thermionic valves, the trade or industry of the making of thermionic valves or screen grid thermionic valves, just as in the *Robin Electric Lamp* case the Applicant in that case with his double-filament lamp was merely proposing to enter the trade of the making of tungsten filament electric lamps. In short, paragraph (d) does not appear to extend to the case of prejudice resulting merely to the establishment of a new business in an existing trade or industry.

In the present case the advantages attributed to the TD-52 traps, which the applicant wishes a licence to manufacture in Canada, over the TD-50 traps manufactured by the respondent lie in the evenness of wear on the disc and machined surfaces of the body and in the fact that the TD-52 will operate in situations where the back pressure is as much as 85% of the inlet pressure while the TD-50 will not operate satisfactorily where the back pressure is more than 50% of inlet pressure. In some closed systems this could make the difference of the TD-52 being operable in situations where the TD-50 would not operate satisfactorily. Such situations could, it was said, arise from such things as faulty design of the system, additional loading of the system after its installation, discharge of steam into the return system either from faulty steam traps in the system or inadvertently opened valves and encrustation or corrosion of piping in the return system.

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The evidence does not, however, establish that the situations in which TD-52 traps will operate satisfactorily but TD-50 traps will not, form any substantial portion of the Canadian market for steam traps. Indeed such evidence as there is on the point is to the effect that situations wherein the back pressure exceeds 50% are largely laboratory exercises and that there are on the market other types of steam traps which will operate where back pressure is 100% of inlet pressure.

In other situations the evidence is that the TD-52 trap (whether it is as advantageous as described by the appellant's witnesses or as disadvantageous as the respondent contends) will operate satisfactorily wherever a TD-50 trap, whether of the same or a smaller size, will operate. This, coupled with the evidence of the substantial extent to which TD-52 traps have been manufactured in the United States and European countries, in my view makes it clear that the TD-52, though possibly useful in some situations wherein a TD-50 would not serve satisfactorily, is, for practical purposes, a substitute for the TD-50 trap and that the commencement of manufacture of the TD-52 by the appellant in Canada would be simply the entry of a new trader into the existing trade or industry of steam traps (or even more narrowly of disc type steam traps) in Canada and not "the establishment of a new trade or industry in Canada" within the meaning of section 67(2)(*d*).

The appellant's case in respect of abuse within the meaning of section 67(2)(*d*) therefore fails.

There remains the question of what, if any, order should be made in view of the finding I have made that there was abuse of the patent within the meaning of section 67(2)(*a*). As the statute leaves this decision to the Commissioner I would have been inclined in a case such as this, where the view of the court on the question of abuse differs from that of the Commissioner and he has not had occasion to consider the subject of the appropriate disposition of the matter, to refer the matter back to him for that purpose. However, at the hearing of the appeal counsel for both parties asked that in the event abuse were found the court should exercise the authority and give the decision on whether a licence should be granted, referring it to the Commissioner to settle the terms of any licence that might be granted in the event that the parties could not reach agreement on them. Neither party, however, suggested as being appropriate any order other than to grant or to refuse a licence.

I have cited at the beginning of these reasons the relevant portions of section 68 by which the authority to award or deny relief is conferred. Under section 68(*e*) relief may be denied where the Commissioner is of the opinion that the objects of sections 67 and 68 will be best attained by making no order under paragraphs (*a*) to (*d*) which precede it. It appears to me that the objects of sections 67 and 68, as referred to in section 68(*e*), are to deter and to give a remedy for the several types of abuse of patent rights described in paragraphs (*a*) to (*f*) of section 67(2) by providing for the granting of compulsory non-exclusive or exclusive licences, for the restriction at the same time of rights to import the patented article otherwise exercisable by the patentee and, in appropriate cases, for revocation of the patent. As applied to a case of this kind, that is to say, a case of abuse of the kind described in section 67(2)(*a*) in failing to manufacture the patented article in Canada on a commercial scale, the object of these provisions is to bring about the manufacture of the patented article in Canada on a commercial scale without undue delay by ordering such licences with or without restrictions on importation by the licensee and patentee or by revoking the patent. This object can only be achieved by the procedure prescribed if, when a patentee is guilty of abusing his exclusive rights, persons interested in manufacturing the patented article in Canada make applications under section 67 and it also seems clear that such applications are not likely to be made unless in the ordinary case after applying and proving the abuse the applicant achieves a situation where he can manufacture the patented article either through his having been granted a licence or by revocation of the patent. Generally speaking, therefore, the object of the sections in a case of this kind will be frustrated if, after applying and establishing the abuse, applications under section 67 do not result in the applicant being put in a position to undertake such manufacture because the failure of an applicant to achieve such a result will discourage interested persons from making such applications. It seems to me to follow from this that the cases in which,

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after an abuse has been proved, it can properly be determined that the objects of sections 67 and 68 will be best attained by making no order, either for a licence or for revocation of the patent will necessarily be rare and unusual ones.

The present, however, is by no means a typical case. Here the applicant was a party to if indeed it was not the person primarily responsible for the abuse. This party both by persuasion and by threat and for its own purposes sought to avoid and succeeded in avoiding entirely for about five years and partially for another three years manufacture of the patented article by the patentee who early in the life of the patent had decided to manufacture in Canada and who never fully gave up its plans to do so. This applicant only applied for a licence when it found out that its efforts to prevent manufacture in Canada by the respondent had failed. If, in such a case, a licence is granted to the person who in its own interest has been attempting to prevent manufacture in Canada it seems to me that the result will be to lend encouragement to those who wish to serve the Canadian market for patented articles, but prefer to do so, so long as they can, with goods of foreign manufacture, to proceed as the appellant has done. The granting of relief in such a case would, as I see it, be a reward for promoting the abuse of a patent and would tend to encourage those who seek to avoid or prevent manufacture of patented articles in Canada.

On the whole, therefore, having regard to the responsibility of the appellant for the abuse complained of as well as to the conduct of the respondent in endeavouring to establish manufacture of the patented article in Canada and to the fact that the action taken by the respondent prior to the presentation of the application has in the meantime resulted in its achieving manufacture in commercial quantities in Canada I have come to the conclusion that in the present case the objects of sections 67 and 68 will be best attained by making no order for a licence and I shall therefore confirm the Commissioner's decision to dismiss the application.

The appeal will be dismissed with costs.

IN ADMIRALTY

Montreal 1969
Mar. 24
Ottawa Apr. 23

BETWEEN:

THE SHIP *MORMACSAGA* and her Owners .... DEFENDANTS (APPELLANTS);

AND

CRELINSTEN FRUIT COMPANY, *et al* .... PLAINTIFFS (RESPONDENTS).

Shipping—Deterioration of cargo—Ship entering strike-bound port—Shipowners' opinion that strike near end—Strike not near end—Whether shipowners negligent—Bills of lading subject to U.S. law.

The *Mormacsaga,* a U.S. line vessel, was at Buenos Aires on her regular route from Montevideo, Uruguay, to ports in Argentina, Brazil, the U.S.A. and to Montreal, when a seamen's strike began in the U.S A. which, it was known, would tie her up if she put in to a U.S. port. The *Mormacsaga* continued to take on cargo, including 700 tons of oranges at Santos, Brazil, for shipment under refrigeration to Montreal. Most of her cargo was destined for U.S. ports and the oranges (virtually the only perishable cargo) could not as stowed be unloaded without unloading other cargo (which it was estimated would cost $9,564). On her owners' instructions the *Mormacsaga* put in to Jacksonville, Florida, and her crew forthwith joined the strike, which continued for seven weeks with resulting deterioration of the oranges. The Montreal consignee of the oranges sued for damages ($53,150) alleging breach of contract by the shipowners in not diverting the ship to Montreal instead of going into Jacksonville. The owners' defence, which was based solely on the opinions of two of their senior officials, was that at the time the ship entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay.

The ship's bills of lading were expressly subject to U.S. law and the U.S. *Carriage of Goods by Sea Act (Cogsa)* which by s. 4(2)(*j*) relieves a carrier from loss arising from strikes. The bills of lading also contained a liberty clause giving the carrier power to divert the ship in a situation of risk to ship or cargo.

Expert evidence as to U.S. law established (1) that to make out a defence under s. 4(2)(*j*) of *Cogsa* a carrier must show that no negligence of his contributed to the loss, and (2) that the liberty clause in the bills of lading did not impose a duty on the carrier to divert the ship but merely to act reasonably.

Held, affirming Smith D.J.A.'s judgment for the plaintiffs, the shipowners had not established that their decision to enter Jacksonville instead of diverting the ship to Montreal was reasonable on the basis of the information available as to the possibility of the strike soon ending, and they had therefore not established that they were not negligent in ordering the ship into Jacksonville.

CORAM: Jackett P., Noël and Cattanach JJ.

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THE SHIP *Mormacsaga et al.* v. CRELINSTEN FRUIT CO. *et al.*

APPEAL by defendants from judgment of A. I. Smith, D.J.A., Quebec Admiralty District, awarding damages of $53,150.24 to plaintiffs.

Charles S. Alexander for defendants (appellants).

William Tetley, Q.C. and *Claude Armand Sheppard* for plaintiffs (respondents).

JACKETT P.:—This is an appeal from a judgment delivered on July 19, 1968, by Mr. Justice A. I. Smith, as District Judge for the Quebec Admiralty District, whereby he decided that the appellants were liable to pay to the respondents $53,150.24 together with interest and costs in respect of damages sustained by a shipment of oranges as a result of their being kept on the ship *Mormacsaga* for an excessive period by reason of the ship having been strikebound.

The appeal is an appeal against the decision that the appellants are liable for the damages in question. There is no appeal against the amount of the judgment.

In March 1962, the respondents, through their broker, William H. Kopke, Jr. of New York, contracted to purchase a quantity of Brazilian oranges from Citricula Brasileira Ltda. of Sao Paulo, Brazil, to be shipped from Santos, Brazil, by "Monthly Shipments starting about end May 1965" in "Refrigerated Stowage", which sale was made subject to the broker "arranging private steamer" and subject to "shippers approval of the date of the steamers and the days the steamer will remain in port loading". Mr. Kopke "developed the programme for the shipments" with the appellant, Moore-McCormack Lines, Inc. (hereinafter referred to as "Moore-McCormack"), and the shipper (i.e., the vendor of the oranges) signed a freight contract which obligated it to deliver and load the merchandise on the ships.

Moore-McCormack operated a liner service called the American Republic Service served by a number of United States vessels, the normal route of which was

Montevideo, Uruguay	Charleston, S.C.
Buenos Aires, Argentina	Norfolk, Virginia
Paranagua, Brazil	Baltimore, Md.
Santos, Brazil	Philadelphia, Pa.
Rio de Janeiro, Brazil	New York, N.Y.
Bahia, Brazil	Boston, Mass.
Jacksonville, Florida	Montreal, Canada

The *Mormacsaga* was one of the United States vessels used to service that route. Mr. Kopke was aware of this route.

Under the arrangement with Moore-McCormack, the first monthly shipment of the oranges purchased by the respondents was to be put on board the *Mormacsaga* in June 1965.

The *Mormacsaga* began the voyage in question at Montevideo on June 7, 1965. While it was at Buenos Aires, on June 15, 1965, a strike started in the United States involving unions representing a substantial portion of the crews and officers on United States ships. As a result of the strike being called, it was known to all concerned that, if the *Mormacsaga* put into an eastern United States port while the strike was in existence, it would be tied up by the strike until the end of the strike.

Notwithstanding the calling of the strike, the *Mormacsaga* continued to take on cargo at the various South American ports on its itinerary and to stow such cargo for delivery at the North American ports on its itinerary in the order in which they are set out above—all as had been arranged and planned before the strike was called.

In particular, when the ship was at Santos, the first monthly shipment of the oranges that had been sold to the respondents was delivered to the *Mormacsaga* on June 26, 1965, bills of lading were issued for it, and the oranges were stowed for delivery in Montreal in accordance with the stowage plans that had been made before the strike started on June 15, 1965. As so stowed, they could not be unloaded without first unloading some of the cargo consigned to United States ports.

When it had finished loading in South American ports, the *Mormacsaga* had on board cargo destined as follows:

for Jacksonville	880 T.
for Charleston	358 T.
for Norfolk	302 T.
for Baltimore	464 T.
for Philadelphia	447 T.
for New York	1,874 T.
for Boston	1,019 T.
for Montreal	1,274 T.
	6,618 T.

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Of the 1,274 T. destined for Montreal, oranges purchased by the respondents constituted 700 T. Those oranges occupied the whole of the vessel's refrigerated space except for two boxes of cheese. The remainder of the cargo could not be classified as perishable.

On June 29, 1965, the *Mormacsaga* left Rio de Janeiro for Jacksonville (there being, apparently, no reason for calling at Bahia on that trip) with an estimated time of arrival of July 10. Pursuant to orders from Moore-McCormack, the Master reduced his speed below the ship's normal speed with the result that she arrived at Jacksonville on July 13, 1965, where, the strike still being on, she tied up at a place where electricity was available for the refrigeration of the oranges, and the crew, including the Master, went on strike.

The *Mormacsaga* could have been diverted when she was off Jacksonville on July 12, 1965 (and presumably at any time after she left Rio de Janeiro) as she had sufficient bunkers and fresh water on board to have enabled her to sail directly to Montreal.

The strike finally ended on August 31, 1965. The *Mormacsaga* sailed from Jacksonville on September 3, 1965 and arrived at Montreal on September 22, 1965, at which time the oranges in question were delivered to the respondents.

While, otherwise, all steps were taken by the ship properly and carefully to keep and care for the oranges, by reason of the strike the oranges were on the ship over fifty days more than the time that they would ordinarily have been there. This extra delay in delivery resulted in the oranges deteriorating and being worth, when delivered, $53,150.24 less than they would have been worth if they had been delivered after a trip of normal duration.

This action was instituted by way of a writ issued out of the District Registry at Montreal. By the statement of claim, the respondents not only set up their *prima facie* claim under the bills of lading by alleging that the oranges had been received by the ship in good order and were delivered to the respondents in a deteriorated condition, but also allege, as follows:

> 5. THAT Defendants and other ocean carriers diverted other ships from East Coast American ports to avoid the strike but Defendants did not divert the *Mormacsaga*.

6. THAT at Toronto, Defendants' local agent admitted to William D. Branson that Defendants took a calculated risk in ordering the *Mormacsaga* into Jacksonville and did so for their own benefit because they hoped the strike would terminate soon.

7. THAT the proceeding of the *Mormacsaga* to Jacksonville, Florida, by Defendants was an intentional act, breaching and nullifying the contract and Defendants have no rights under the law, the contract or otherwise and Defendants are thus in the position, place and stead of insurers of the contract to carry.

* * *

20. THAT Defendants, prior to or upon the departure of the *S.S. Mormacsaga* from Santos, did not exercise due diligence to make said vessel in all respects seaworthy and fit to carry the said oranges and the ship was at the time of her departure and at various stages of the voyage unseaworthy and as a result Defendants are entitled to none of the rights or immunities of which they might otherwise benefit under the provisions of the law, the bill of lading or any contract.

The portion of the statement of defence which indicates the position taken by the appellants reads as follows:

22. THAT the voyage in question commenced in Montevideo, Uruguay, on or about June 7th, 1965;

23. THAT from Montevideo the *Mormacsaga* proceeded to her other scheduled ports of loading in the following order, namely, Buenos Aires in Argentina and Paranagua, Santos, Angras Dos Ries and Rio de Janeiro in Brazil, the whole as advertised and in accordance with the usual and customary route taken by the vessel;

24. THAT the vessel loaded general cargo in all the said ports for discharge at the following scheduled ports in the following order, namely, Jacksonville in Florida, Charleston in South Carolina, Norfolk in Virginia, Baltimore in Maryland, Philadelphia in Pennsylvania, New York in New York, Boston in Massachusetts (all on the East Coast of the United States of America) and Montreal, P.Q., Canada, the whole in accordance with the usual and customary route taken by the vessel;

25. THAT whilst the vessel was loading cargo in Buenos Aires, which she reached on or about June 12th, 1965, and left on or about June 19th, 1965, the strike referred to in Plaintiffs' Statement of Claim broke out at midnight on June 15th, 1965, affecting all the vessel's scheduled ports of call on the East Coast of the United States of America;

26. THAT at the time the said strike broke out Defendants had no way of knowing how long it might last;

27. THAT after the vessel had completed loading at Rio de Janeiro on or about June 29th, 1965, she departed for Jacksonville with a total general cargo of approximately 6,756 tons of which approximately 1,276 tons were destined for Montreal;

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28. THAT of the tonnage destined for Montreal approximately 700 tons consisted of the cases of oranges referred to in paragraph 1 of Plaintiffs' Statement of Claim and the remaining tonnage consisted of other general cargo;

29. THAT when the vessel sailed from Rio de Janeiro the cargo was stowed in such a manner that the cargo destined for Montreal (being the last scheduled port of discharge) could not have been discharged without first removing cargo destined for the intermediate ports on the East Coast of the United States of America;

30. THAT as the vessel approached Jacksonville the Defendants cabled her Master on at least two occasions instructing him to reduce speed;

31. THAT the last such cable was sent on July 9th, 1965, and read as follows:

"FURTHER REDUCE SPEED MAKE ARRIVAL JACKSONVILLE 0600 HOURS TUESDAY 13TH. ACKNOWLEDGE."

32. THAT Defendants instructed the Master to reduce speed in the hopes that the strike would be over by the time the vessel reached Jacksonville;

33. THAT after the vessel became strikebound in Jacksonville the Defendants had no way of knowing how long the strike might last;

34. THAT all twelve bills of lading produced together as Plaintiffs' Exhibit P-1 provide that the carrier shall be exempt from liability for loss or damage arising or resulting from strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

35. THAT even if the Defendants might have been justified in ordering the *Mormacsaga* to proceed directly to Montreal, by passing the scheduled intermediate ports of call on the East Coast of the United States of America, which is not admitted but on the contrary expressly denied, they were not bound to do so;

36. THAT in arriving at the decision not to divert the *Mormacsaga* the Defendants were bound to consider and did in fact consider the adventure as a whole and the interests of and their responsibilities to all shippers and/or consignees of the cargo on board as well as the interests of and their responsibilities to the shippers and/or consignees of the cargo here in question;

37. THAT at the time the vessel reached Jacksonville the strike had been in progress for almost one month;

38. THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay;

At the trial, it was common ground that the *Mormacsaga* never departed from its original schedule and had deliberately gone to Jacksonville nowithstanding that it was known that, when it did so, it would be tied up by the strike as long as the strike lasted.[1] It was also clear that the responsibility for no decision having been taken to avoid that situation arising was that of the senior officers of Moore-McCormack and was not a matter that had been left to the Master of the vessel. Evidence was given by the two senior officers concerned with reference to why no such decision was taken.

The first of the senior officers of Moore-McCormack who gave evidence was Harrison R. Glennon, Jr., whose title was Executive Vice-President, Operations. On direct examination, he testified that, at the time the strike began, they "felt" that they were making substantial progress in their negotiations and that the strike "would be of a very short duration". He said that negotiations were in progress on July 9, 10, 11 and 12 of 1965 and that, on July 12, they thought that "within a short period of time we would have a contract". At that time, in the back of their minds was the fact "that unless we could conclude a contract, because of the importance of our vessels, that the Federal Government would enter the picture and hopefully that ... they would force an early settlement". On July 12, in his opinion, "The prospects were reasonably good for an early settlement". In his view, "During strike negotiations it is just the feeling that you have, are you close to settlement or are you not?" On cross-examination, Mr. Glennon said that it was probably on his advice concerning the prospects of the strike that the company acted in going into Jacksonville. When referred to newspaper accounts of the strike negotiations being bogged down before the middle of July, he stuck to his statement that they were "at all times...hopeful of even that evening getting a settlement".

The second senior officer of Moore-McCormack to give evidence was Sebastien J. Mueller, Vice-President in charge of American Republic Line Service for that company. On

[1] I see no necessary inconsistency between evidence that the vessel was instructed to lay off the crew on account of the strike upon its arrival at Jacksonville and that the vessel proceeded to a berth where it could not unload and the contention that it was expected that the strike would end "without further undue delay". Clearly, when the vessel entered Jacksonville the strike was still on and she was going to be tied up by the strike. The crew would therefore go on strike and the vessel had to tie up where electricity was available for refrigeration. The appellants' position is that this was a situation which, they expected, would not last long.

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direct examination he said that, when the *Mormacsaga* left Rio de Janeiro, the officers of Moore-McCormack "thought that the settlement of the strike was imminent" and that they were receiving reports from their operations people—Mr. Glennon and those associated with him—who attended the "union meetings". He said that it was not logical for the *Mormacsaga* to have been ordered to proceed directly to Montreal by-passing the ports from Jacksonville to Boston because they thought that the end of the strike was imminent and that there would not be an undue delay and because the vessel was not stowed "that way". In addition, he said, "Had the strike been over and we had diverted the vessel we had to give consideration to other cargoes which were some 5500 tons for American ports as well". He also said that, at that time, there was no indication that they could be assured that the stevedores in Montreal would handle the discharge of American cargo "while we were on strike in the United States ports". On cross-examination Mr. Mueller, on being questioned about the way the oranges were stowed in relation to other cargo, said that, at the time the *Mormacsaga* loaded, "it was still our opinion that the strike would be of short duration", and that the strike "would be over" when the vessel arrived in a strike-bound port. He admitted that, if they had known, when they loaded the oranges on June 26, that the strike would not be over when they were due in Jacksonville, they would have stowed the oranges and other cargo so that the oranges could be unloaded first in Montreal as they did the two subsequent shipments on other vessels.

[Some of Mr. Mueller's evidence was relied on as tending to show that an agreement was made on behalf of the respondents that the strike need not be allowed to interfere with the normal trip of the *Mormacsaga.* I have not referred to such evidence, as in my view, no such agreement was established.]

Evidence was adduced by the respondent at the trial to show that the estimated extra cost of moving the cargo for United States ports in order to make the Montreal cargo "acceptable" would have been $9,564. I accept this evidence as establishing that the extra cost of unloading the oranges and other Montreal cargo before the United States cargo would have been approximately that amount.

Paragraph 16 of each of the bills of lading covering the shipment of oranges in question contains a clause reading: "This bill of lading shall be construed and the rights of the parties thereunder determined according to the law of the United States". Each bill of lading also contains a provision reading: "This bill of lading shall have effect subject to the provisions of the *Carriage of Goods by Sea Act* of the United States..." The latter Act, which has been put in evidence by the respondent, reads, in part, as follows:

CARRIER'S DUTY AND RIGHTS

RISKS—Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

DUE DILIGENCE TO MAKE SEAWORTHY BEFORE SAILING RESPONSIBILITIES AND LIABILITIES.—Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.

CARRIER'S DUTY TO CARGO

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * *

IMMUNITIES—EXCEPTIONS

Sec. 4(1)...

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

While the bill of lading expressly provides that the rights of the parties thereunder are to be determined according to the law of the United States, this is a type of situation where, I should have thought, the court is to assume that the foreign law is the same as Canadian law except to the extent that some party has pleaded and proved, by the evi-

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dence of experts, the state of the foreign law.[2] In this case, neither party has pleaded what it says the law of the United States is on any relevant aspect of the matter. The parties have, however, by mutual arrangement, each put before the court below the evidence of a qualified United States lawyer on certain aspects of the matter. Where there is no such evidence, the presumption, to which I have referred, in my view applies. Where there is such evidence, the court must find as a fact (the parties having, with the acquiescence of the court below, impliedly waived pleading the foreign law that they intended to prove) the state of the foreign law on the areas covered by such evidence.

Mr. J. H. Simonson, an attorney-at-law from New York, gave evidence on behalf of the respondents. He expressed the opinion that the effect of American law is "that a carrier cannot accept goods for a non-strikebound port and take those goods into a port that is known to be strikebound ... and hold them there and eventually make delivery resulting in loss to the owner of the goods bound for the non-strikebound port". He also pointed out an "important" difference between the United States *Carriage of Goods by Sea Act* (usually referred to as "Cogsa") and the Hague Rules as originally adopted, which consists of the fact that Cogsa does not make the carrier's duty to "cargo" as contained in section 3(2) subject to the "Immunities—Exceptions" contained in section 4 while the corresponding duties in the Hague Rules are expressed to be subject to the corresponding exceptions. (In support of his opinion that "carrier cannot go into a strikebound port with cargo for a non-strikebound port", Mr. Simonson referred to numerous authorities.) Mr. Simonson then quoted clause number 4 from the bills of lading in this case, which is usually referred to as the "Liberties Clause", and which reads in part as follows:

> 4. In any situation whether existing or anticipated before commencement of the voyage, which in the carrier's judgment may give rise to risk of damage, delay or disadvantage to the ship, her cargo or persons aboard, or make it imprudent to begin or continue the voyage or to enter or discharge at the port of discharge, or give rise

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[2] *Canadian Fire Ins. Co. v. Robinson,* (1901) 31 S.C.R. 488 at p. 493; *C.N. Steamships Co. v. Watson* [1939] S.C.R. 11 at p. 14; and *Transocean Machine Co. v. Oranje Line* [1958] Ex. C.R. 227 at p. 229. The rule does not apply, however, to special provisions of particular statutes altering the common law. See *Gray v. Kerslake,* [1958] S.C.R. 3 at p. 10.

to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge there, the carrier may discharge the goods into depot, lazaretto, craft, or other place; or may proceed or return, directly or indirectly, to such other port or place as the carrier may select and discharge the goods or any part thereof there; may retain the goods on board until the return trip or such time as the carrier thinks advisable; or may forward the goods by any means, but always at the risk and expense of the goods.

and expressed the opinion: "This says that the carrier can decline to export the goods. He has given himself full leeway in refusing to take it or discharge the goods if he has put them on board already, or discharge some other place, always for the purpose of avoiding delay and to damage the goods". (He also referred to authorities on this point.) In an apparent application of this principle to the facts of the present case, he said:

The contract of carriage is to carry safely to destination and to deliver the goods in the same apparent good order as when they were received by the ship. If the vessel cannot do this, it has breached the contract of carriage. Now, to stow cargo on a vessel which is going—a vessel which is going to a strikebound port, and particularly when this cargo is perishable, and is bound for a non-strikebound port, I believe in this case there is a violation under the contract of carriage.

He also expressed the opinion that section 3(1) of Cogsa is applicable in circumstances set out in a question put to him that reads as follows:

Mr. Simonson, in your opinion again in respect to a crew, an American crew, on an American flag ship bound for an American port which will be strikebound, and also the same crew is on a ship which has contracted to proceed to a port which will not be strikebound, do you consider that in the second contract that the crew is complete or the ship is seaworthy?

Finally, he expressed the opinion that the onus is on the carrier to show that the immediate cause of the damage is an "excepted cause" and referred to authorities to support that opinion.

Mr. Tallman Bissell, another attorney-at-law from New York, gave evidence on behalf of the appellants. He expressed the opinion that section 4(2)(*j*) of Cogsa, which relates to strikes, will give a carrier exemption from liability "provided that he can show that no negligence of his or on the sea... contributed to the loss". Referring to the Liberties Clause, he said, "... the ship must act reasonably under the circumstances. I don't believe there is a duty to divert, but merely a duty to act reasonably". Upon being

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referred to a passage in a judgment in one of the United States cases referred to by Mr. Simonson, reading as follows:

> If the vessel had proceeded to Los Angeles to wait out the strike, she would unquestionably become liable for damages to all other consignees of cargo for delays in delivery that could have been avoided.

he said, "I agree because in that case the judge had decided it was not unreasonable to divert the vessel."

The reasoning by which the learned trial judge came to the conclusion that the appellants were liable for the damage to the oranges is contained in the following portion of his reasons for judgment:

> The bills of lading provide that they will be subject to the provisions of the water carriage of goods act of the United States of America.
>
> Section 4(2)(*j*) of that statute provides that:
>
> "(2)(*j*) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general: Provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;"
>
> It is noteworthy that this section is identical with the corresponding section of the Canadian Water Carriage of Goods Act except that the last clause thereof is not included in the Canadian Act.
>
> Included also in the said bills of lading is the usual liberty clause and it appears to be common ground that the defendants would, in virtue of this clause, have been entitled to deviate to proceed direct to Montreal instead of entering the Port of Jacksonville.
>
> Expert evidence as to the Law of the United States was presented on behalf of both parties with jurisprudence in support thereof.
>
> The following is an excerpt from the testimony of Mr. Bissell, a New York Attorney, heard on behalf of the Defendants (at page 212) and referring to the exception relating to strikes:
>
> "Well, this exception is treated by the Courts as other similar exceptions in this section of the Act. That it will give the carrier, if he can bring himself within the exception, exemption from liability; provided he can show that no negligence or fault of his contributed to the loss."
>
> The witness referred particularly to the case of BUDHWAR vs. COLORADO FUEL, 1955 A.M.C. 2139.
>
> After considering the testimony of the experts and examining the cases cited the Court is of the opinion that the test of whether the entry of the Mormacsaga into the Port of Jacksonville on the 13th day of July amounted to failure on the part of the Defendants to carry out their contract and exercise due care to protect and safely carry the Plaintiff's shipment in accordance with its obligations under the contract of carriage is whether in so doing, rather than proceeding direct to Montreal, those in charge of the said vessel acted with proper regard for the rights of the consignees as well as with reasonable care for those rights.

Having regard to the fact that, to the knowledge of the Defendants and their representatives, a strike was in progress at Jacksonville and that when the Plaintiff's shipment was loaded at Santos and at all times thereafter, right up until the vessel entered the port at Jacksonville, the Defendants or their representatives knew or ought to have known that the strike was still in effect, did they not fail to act reasonably by entering the port of Jacksonville rather than deviating to and proceeding directly to Montreal, which they were entitled to do in virtue of the liberty clause above quoted.

As noted above, the Statement of Defence contains inter alia the following paragraph:

> "38. THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay."

This is an allegation which, if proven (and the burden of proof rested upon the Defendant) might have constituted a valid defense to the Plaintiff's action.

However in the opinion of the Court it was not established by the proof. The only evidence offered in support of the allegation that the Defendants had reason to believe that the strike would be over "without further undue delay" was the testimony of Mr. Glennon who stated that it was so expected. His testimony in this respect however was not corroborated or supported by any other evidence. Moreover from the newspaper clippings produced it would appear that there was no real basis for the expectation, or even the hope, that an early settlement of the strike would ensue.

In the Court's view the Defendants failed to establish that there was any real reason to expect an early end to the strike which at the time the vessel entered Jacksonville had been in progress for almost a month and as things turned out, persisted until August 31st, 1965.

In the circumstances the Court finds that the Defendants and their representatives, by entering Jacksonville rather than proceeding directly to Montreal failed to act with reasonable care and prudence and with proper regard to the preservation of the Plaintiff's shipment of oranges.

There is moreover no evidence that had the vessel continued on to Montreal, instead of entering Jacksonville, the Plaintiff's shipment would not have been saved undamaged nor is there proof to justify the conclusion that this could not have been done with due regard to the interests of the owners of other cargo.

In the circumstances the Court considers that the Plaintiff has established his right to recover the damages sustained by it as the consequence of the failure of the Defendant and its representatives to carry out their obligations under the said contract of carriage.

The appellants attacked this judgment on two principal grounds, *viz,*

(a) that the learned trial judge erred in his finding that Moore-McCormack "failed to establish that there was any real reason to expect an early end to the strike", and

(b) that Moore-McCormack should not be held liable unless the respondents can show that the decision not

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to divert was manifestly unreasonable bearing in mind that, as a carrier, Moore-McCormack had a responsibility to all shippers and consignees and had to consider the adventure as a whole and not just the respondents' interest.

While the respondents put forward submissions concerning various aspects of the matter, their formal position is that "the real issues in this case" are "whether the carrier or the ship acted reasonably in accepting the cargo, and particularly in sailing straight into a strikebound port".

It is common ground that the shipment of oranges in question was delivered to the carrier in good order and was delivered by the carrier to the consignee in a deteriorated condition. The respondents were therefore entitled to judgment for damages unless the appellants brought themselves within one of the exceptions in section 4 of Cogsa.

The only such exception upon which the appellants relied was section 4(2)(*j*) of the United States statute. The ambit of this exception was the subject of expert evidence led by both parties. The expert for the appellants expressed the opinion, in effect, that section 4(2)(*j*) will only provide a defence to a carrier in respect of a loss arising out of a strike "provided that he"—that is, the carrier—"can show that no negligence of his . . . contributed to the loss". The respondents' expert, as I understand his evidence, took an even narrower view as to the ambit of section 4(2)(*j*). I find *as a fact*, on this evidence, that, according to the United States law, a carrier does not establish a defence under section 4(2)(*j*) unless he, at least, shows that no negligence of his contributed to the loss[3] arising from the strike situation relied on to bring him within the exception.

[3] The witnesses do not make it clear by their testimony how they reached their conclusion. The result may have been reached by referring to a failure properly and carefully to "care for" the cargo as required by section 3(2) of Cogsa as "negligence" excluded from the ambit of the exception by the proviso to section 4(2)(*j*). (It is arguable that such reasoning would not be acceptable if the Canadian statute were applicable.) Alternatively, the reasoning may be quite simply that a carrier does not establish that damage was *caused* by a strike unless he excludes the possibility that it was *caused* by his wrongfully or improperly taking the ship into a strikebound port contrary to the primary obligation in the contract of carriage. Compare *Steinman & Co. v. Angier Line,* (1891) 1 Q.B. 619.

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The background against which it must be considered whether the appellants have discharged this onus of showing that the carrier's negligence has not contributed to the deterioration in the respondents' oranges caused by their being held in the strikebound port is that Moore-McCormack was operating a vessel that was held out to the public as being available to take goods from various specified ports in South America to various specified ports in the United States and to Montreal. When, therefore, by each contract of carriage evidenced by the bills of lading it issued for the various shipments it accepted in the South American ports, it undertook to deliver such goods to a specified port, that obligation must be considered in the light of the obligations similarly undertaken, in the ordinary course of its business, by all the other contracts of carriage so evidenced. In the ordinary course, therefore, the obligation to deliver the oranges in Montreal was subject to the carrier's responsibility to deliver first all the cargo consigned for United States ports. It follows that it was because it was following the normal and ordinary course of events that the vessel went to Jacksonville before it went to Montreal. Indeed, it would seem to be clear that a consignee in Jacksonville had an expectation that his cargo would be delivered on or about the time scheduled for the *Mormacsaga's* call at that port and would probably have had a legal recourse for any loss arising from an undue delay in delivery, if, for no justifiable reason, the ship had gone to Montreal before going to Jacksonville. Indeed, each of the other consignees of cargo destined for a United States port similarly had a business expectation, if not a legal right, to delivery in accordance with the established schedule, before the vessel went to Montreal.[4] Unless, therefore, the carrier had a right to change the normal route of the vessel by reason of the strike situation, there is no ground for suggesting that the carrier was negligent in allowing the vessel to go into the strikebound port.

It is, as I appreciate the situation, because the legitimate interests of the consignees of other cargo would have

[4] Compare *Leduc v Ward,* (1888) 20 Q.B.D. 475, at pp. 480 *et seq.; Margetson v. Glynn* [1892] 1 Q.B. 337; [1893] A.C. 351; *James Morrison & Co. v. Shaw, Savill and Albion Co.* [1916] 2 K.B. 783 at p. 792 *et seq.;* and *Frenkel v. MacAndrews and Co.* [1929] A.C 545.

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required that the vessel go to Jacksonville and the other United States ports before going to Montreal that both parties paid considerable attention to the so-called Liberties Clause to be found in all of Moore-McCormack's bills of lading. That clause reads, in part, as follows:

> 4. In any situation...which in the carrier's judgment may give rise to risk of damage, delay or disadvantage to the ship, her cargo or persons aboard...the carrier...may proceed...directly or indirectly, to such other port...as the carrier may select and discharge the goods...; may retain the goods on board until the return trip...or may forward the goods by any means, but always at the risk and expense of the goods.

The respondents' position is, in effect, as I understand it, that, once the strike situation arose, Moore-McCormack should have invoked the authority given to it by this clause in the bills of lading for goods consigned to United States ports so as to put it in a position, without being in breach of the contracts evidenced by those bills, to take the Montreal cargo to Montreal directly and so avoid having it tied up in a strikebound port.

With reference to the duty of the carrier to the consignee of the oranges destined for Montreal to exercise the Liberties Clause in the bills of lading for the remainder of the cargo so as to take the oranges directly to Montreal, I accept the evidence of Mr. Bissell that there was no "duty to divert" but only a "duty to act reasonably."

I have no doubt that the strike in question was a "situation" in relation to which Moore-McCormack would have been justified in considering exercising the power conferred on it by the Liberties Clause in the other bills of lading, and, indeed, as Mr. Bissell has indicated, it cast on the carrier a "duty to act reasonably", that is, as I understand it, to address itself to the question as to what special action, if any, was required by the strike situation having regard to the interests of all concerned in the adventure and to reach a reasonable decision as to whether, having due regard to the interests of all, the Liberties Clause should be invoked for the purpose of changing the order in which the ports on its schedule should be visited.

I find no support in the evidence as to the United States law for the contention by the appellants that the burden was on the consignee to show that the decision not to "divert" was manifestly unreasonable. As already indicated, I have accepted the evidence of the appellants' expert, Mr. Bissell, that it was for the carrier to show that his negligence had not contributed to the loss.

On the other hand, I am of the view that the carrier would have discharged the obligation on it (under United States law as I have found it to be on the evidence) to show that its "negligence" did not contribute to the loss, in circumstances such as exist here, if it had shown that, at the various points of time when the circumstances required it to consider the matter, it had addressed itself to the problem and did so in a reasonable manner. The question is whether it acted reasonably in the circumstances as a carrier faced with a special situation and owing a duty to all having an interest in the adventure, and not merely whether it acted reasonably having regard to the safekeeping of the oranges. Assuming it did so act reasonably, the Court should not substitute its judgment *ex post facto* for the decision made by the carrier in the somewhat critical situation facing it at that time.[5]

I do not find that the approach that I have expressed so laboriously differs in effect from that indicated in a much more concise manner by the learned trial judge. His reasoning, as I understand it, was as follows:

(a) he accepted Mr. Bissell's opinion that a carrier could not avail itself of section 4(2)(*j*) unless it showed that no negligence on its part contributed to the loss;

(b) he said, ". . . the test of whether the entry of the *Mormacsaga* into ... Jacksonville .. amounted to failure on the part of the Defendants to carry out their contract and exercise due care to protect and safely carry the Plaintiff's shipment in accordance with its obligations under the contract of carriage is whether in so doing, rather than proceeding direct to Montreal, those in charge of the said vessel acted with proper regard for the rights of the consignees as well as with reasonable care for those rights";

(c) having regard to all the circumstances, he re-stated the test as being, "did they not fail to act reasonably by

[5] Compare *Phelps, James & Co. v. Hill,* (1891) 1 Q.B. 605 at pp. 612-13.

entering . . . Jacksonville rather than deviating to . . . Montreal, which they were entitled to do in virtue of the liberty clause . . .;" and

(d) from this, he concluded that the allegation in the defence that, at the time that the vessel entered Jacksonville, there appeared to be a strong possibility that the strike might end without further delay might have constituted a defence if the defendant had proved it.[6]

While I am not satisfied that, in all circumstances of a strike situation, a mere forming of a general opinion that there is a strong possibility that the strike might not last long would be a sufficient discharge of the carrier's duty to consider exercising the Liberties Clause in the interest of cargo owners, I am satisfied that, if the appellant was not able to establish that there was a "strong possibility" of the strike ending without further delay at the time that the ship entered Jacksonville, the learned trial judge was right in holding that it had failed to establish the defence under section 4(2)(*j*) in the manner in which it had undertaken to establish it.

I might try to re-state my position on this crucial point in the appeal. Accepting, as I do, the position that United States law requires a carrier to act reasonably in deciding whether or not to invoke the Liberties Clause in some bills of lading to change a vessel's route, in my view, whenever a situation arises that would make it impossible, if the situation continues, for the vessel to operate normally in a port that it is scheduled to visit—whether it be a strike, a state of war, a revolution or any other abnormal state of affairs—the carrier must consider whether the probabilities of the situation call for any change in the plans that were made when such situation was normal; and it must do so as a reasonably knowledgeable, capable and responsible

[6] My own view is that it would have been more to the point if Moore-McCormack had established the allegation in paragraph 36 of the statement of defence "That in arriving at the decision not to divert the *Mormacsaga* the Defendants...did in fact consider the adventure as a whole and the interests of and their responsibilities to all shippers and/or consignees of the cargo on board as well as the interests of and their responsibilities to the shippers and/or consignees of the cargo in question". However, I do not find evidence establishing that such consideration was given at the relevant times. The learned trial judge does not consider the matter as though it had been submitted to him that this fact had been proved and the appellant does not attack the judgment because no finding of fact was made to that effect.

business man carrying on this type of business. Applying that to the situation facing Moore-McCormack just before it accepted the oranges on board at Santos, it might have considered refusing a shipment of perishable goods by reason of the uncertainties created by the strike. (I should say that I am not satisfied on the evidence that this would not have been a breach of the freight contract that had been entered into by the vendor of the oranges with the carrier.) If it had done so and the strike had been settled the day after the vessel left Santos, it might well have then seemed that, having regard to the probabilities of an imminent settlement, its decision had paid too little regard to the business interest of the respondent in having the oranges in Montreal at the scheduled time. Another possibility is that, when it did accept the oranges at Santos, it might have considered so stowing the rest of the goods in the vessel that, in the event that the strike turned out to be prolonged, the oranges could, without undue expense, be discharged at Montreal before the United States consignments were discharged. This would have made subsequent diversion a more acceptable decision. Similarly, when the vessel was leaving Rio de Janeiro, and again when it was off Jacksonville, I should have thought that the carrier should have examined the current situation by weighing the adverse effect on the owners of the oranges and other Montreal cargo of going to Jacksonville if the strike should then become protracted against the adverse effect on the consignees of United States cargoes (and the extra costs involved if the ship were diverted to Montreal) if the strike should then come to an end as soon as the vessel were committed to the divergent course.

Obviously, in deciding whether or not to make any change in the normal operation of the vessel in any such situation, the probable duration of the emergency situation would be a very important factor. If, for example, a handful of employees have called a one-day strike at a port that a vessel does not expect to reach for a month, it might well be an irresponsibly timid interference with normal commerce to depart from an announced schedule. If, on the other hand, a strike has been announced by both sides as one that is to be fought to the end, if both sides are apparently in shape for a protracted struggle, and if the government concerned has announced that the long run

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public interests require that the parties be allowed to fight it out, a carrier serving the public might be regarded as irresponsible if it does not take steps to enable it to protect the interests of consignees against the possibility that the strike will last a long time.

In this case, the carrier has, by its evidence, rested its case on a single proposition. It has justified not changing its plans in any way by reason of the strike on the ground that "there appeared to be a strong possibility that the strike might end without further undue delay". That has been put forward as a sufficient indication of a discharge of its duty to act reasonably. If it has failed to prove that contention, it has failed to discharge the onus of showing that its negligence did not contribute to the loss because the attempt to prove that allegation in its pleading is the only attempt that it made, by its evidence, to show that it was not at fault in not changing its schedule so as not to take the Montreal bound cargo, including the oranges, into a strikebound port.[7]

I have already reviewed the evidence of the two senior officers of the appellants that were involved in making the critical decision and, after giving it the most sympathetic consideration that I can, I have come to the same conclusion as the trial judge, namely, that the appellants have not established the correctness of the allegation in paragraph 38 of the statement of defence. Taken as pleaded, that paragraph is an assertion "THAT ... there appeared to be a strong possibility that the strike might end without further undue delay". That pleading, to me, is a pleading that such "strong possibility" appeared generally to those interested in the situation. The evidence really stops short of indicating anything except that it so "appeared" to Mr. Glennon who was able to point to no single factor that led him to that conclusion, and to his associates, who accepted his appraisal of the matter. To have any relevance for the purpose of discharging the onus of showing that their negligence did not contribute to the loss, it would have had to

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[7] Even if the appellants had proven that there was a strong possibility that the strike might end without further undue delay, I am not satisfied that that would have been sufficient to discharge the onus of showing that it had acted reasonably. In view of my conclusion that it did not establish that strong possibility, I am relieved from considering whether the onus did not go to showing that it had given, at the relevant times, a more precise consideration to the various factors involved.

be shown that there was some real basis in fact that led the appellants' officers to believe that the strike would probably end without undue delay. I adopt the finding of the learned trial judge that there was no "real reason" established by the appellants to expect an early end of the strike.

I find, therefore, that the appellants have failed to bring themselves within the "strike" exception contained in the United States *Carriage of Goods by Sea Act.*

In my view, therefore, the appeal should be dismissed with costs.

NOËL J.:—The learned trial judge found that the damage to the oranges had been caused by the defendants (the carrier and its owners) in that they failed "to carry out their contract and exercise due care to protect and safely carry the plaintiffs' shipment in accordance with its obligations under the contract of carriage" when on July 13, 1965, the vessel *Mormacsaga* entered the strike-bound port of Jacksonville in the U.S.A., where it remained stranded for 49 days before completing its scheduled trip and eventually reaching Montreal where plaintiffs' oranges were unloaded and found to be in a deteriorated condition.

He indeed held that the defendants failed "to act reasonably by entering the port of Jacksonville rather than deviating to and proceeding directly to Montreal, which they were entitled to do in virtue of the liberty clause contained in the bills of lading".

The learned trial judge in this connection referred to paragraph 38 of the statement of defence which reads as follows:

> (38) THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay.

and then stated:

> This is an allegation which, if proven (and the burden of proof rested upon the Defendant) might have constituted a valid defense to the Plaintiff's action.
>
> However in the opinion of the Court it was not established by the proof. The only evidence offered in support of the allegation that the Defendants had reason to believe that the strike would be over "without further undue delay" was the testimony of Mr Glennon who stated that it was so expected. His testimony in this respect however was not corroborated or supported by any other evidence. Moreover from the newspaper clippings produced it would appear that there was no real basis for the expectation, or even the hope, that an early settlement of the strike would ensue.

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In the Court's view the Defendants failed to establish that there was any real reason to expect an early end to the strike which at the time the vessel entered Jacksonville had been in progress for almost a month and as things turned out, persisted until August 31st, 1965

The learned trial judge then concluded as follows:

In the circumstances the Court finds that the Defendants and their representatives, by entering Jacksonville rather than proceeding directly to Montreal failed to act with reasonable care and prudence and with proper regard to the preservation of the Plaintiff's shipment of oranges.

He then finally added:

There is moreover no evidence that had the vessel continued on to Montreal, instead of entering Jacksonville, the Plaintiff's shipment would not have been saved undamaged nor is there proof to justify the conclusion that this could not have been done with due regard to the interests of the owners of other cargo.

Before dealing with a number of facts necessary in my view to properly understand the issues involved in this appeal, it is helpful, I believe, to point out three rather important facts admitted by the parties in that:

(1) "...the deterioration in the condition and state of the oranges, carried under twelve (12) bills of lading...was due solely to the extra passage of time during which the *Mormacsaga* (with the said oranges on board) lay strike-bound in Jacksonville from July 13th, 1965 to August 31st, 1965".

(i.e., a period of 49 days) and therefore the damage was caused only by the extended delay due to the laying up of the ship at Jacksonville because of the strike[8] which involved four United States unions, namely those of the masters, mates and pilots, the machine engineers, the radio operators and pursers.

(2) ...the contract of carriage is subject to the Carriage of Goods by Sea Act of the United States of America (known as "Cogsa").

Two American attorneys, Mr. James H. Simonson, on behalf of the respondents and Mr. Tellman Bissell, on behalf of the appellants, were heard as experts on United States law. Both of these gentlemen in their evidence referred to a number of American and Canadian decisions to establish the law applicable to the solution in this case, but were unable to refer to any case that was directly in point. They did, however, point out a number of differences

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[8] This is confirmed by the report of the surveyer from Hayes, Stuart & Co. Ltd, acting for the respondents (Exhibit P-3) which indicates that the oranges were properly cared for from the time they were loaded in Santos to the time they were discharged in Montreal.

between the Canadian law under the *Water Carriage of Goods Act* and the American legislation, and it may be of some interest to indicate them here.

Section 4(2)(*j*) of Cogsa (the U.S.A. statute) which creates an exemption in the case of (*inter alia*) strikes reads as follows:

> Section 4
>
> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
>
> j) strikes or lockouts or stoppage or restraint of labour from whatever cause whether partial or general: *provided that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts.*

The section in italics is not found in the Hague Rules or the Canadian *Water Carriage of Goods Act,* and section 3(2) of Cogsa which deals with the obligation of the carrier to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried" does not contain the opening words "Subject to the provisions of article 4" (which deals with a number of immunities of the carrier including strikes) which are found in the Hague Rules and in the Canadian *Water Carriage of Goods Act,* R.S.C. 1952, c. 291.

There is, as I see it, however, no difference between the Canadian law and the American law insofar at least as the immunity for strikes is concerned because the evidence of the expert witness was that the proviso in section 4(2)(*j*) would have no effect different than the corresponding section under the Canadian Act as it merely affirms the general principle that no man can take advantage of his own wrong[9]. With regard to the obligations and rights of the carrier, under the American Act, concerning the immunity given by strikes, I am content to accept as the law of the United States the expert evidence of T. Bissell for the defendants (p. 217 of the case) when, to the following question, he gave the following answer:

> Q And would you please tell the Court what in your opinion is the Law of the United States on the exception of strikes and in particular the proviso.
>
> A. Well, this exception is treated by the Courts as other similar exceptions in this Section of the Act that it will give the

[9] *Cf.* Ocean Bills of Lading, by Knauth, 1953 ed. at p. 223.

The maxim that "No man can take advantage of his own wrong" means that a man cannot enforce against another a right arising from his own breach of contract or breach of duty (Re *London Celluloid Co.* (1888) 39 Ch D. 190).

carrier, if he can bring himself within the exception, exemption from liability, provided he can show that no negligence of his or on the sea was perhaps no fault of his—contributed to the loss ...

3. Captain Dale E. Haakinson, the Master of the *Mormacsaga,* admitted that if the owners of the vessel had instructed him to come to Montreal directly instead of going to an American port, he could have done so as the vessel had enough water and fuel to do so.

The respondents submitted that the real issues in the appeal are:

(*a*) whether the carrier was negligent in accepting as it did, on June 24 to 27, 1965, the cargo of perishables (oranges) in Santos, when it knew that a strike had been declared on June 15, 1965, and was in progress on the east coast of the United States and that its ship would become strike-bound as soon as it reached Jacksonville, the first American port on its scheduled voyage northward, and

(*b*) whether the carrier was negligent thereafter in not diverting the ship from Jacksonville to a port which would not be strike-bound or to Montreal as it had a right to do under clause 4 of the bills of lading (Exhibit P-1) which reads as follows:

4. In any situation whether existing or anticipated before commencement of the voyage; which in the carrier's judgment may give rise to risk of damage, delay or disadvantage to the ship, her cargo or persons aboard, or make it imprudent to begin or continue the voyage or to enter or discharge at the port of discharge, or give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge there, the carrier may discharge the goods into depot, lazaretto, craft, or other place; or may proceed or return directly or indirectly, to such other port or place as the carrier may select and discharge the goods or any part thereof there; may retain the goods on board until the return trip or such time as the carrier thinks advisable; or may forward the goods by any means, but always at the risk and expense of the goods.

In order to properly understand the situation the owners of the vessel were faced with in deciding as they did to enter a strike-bound port, it is useful to go into some of the facts covering the voyage of the *Mormacsaga* prior to entering Jacksonville.

The north-bound voyage of the *Mormacsaga* started in Montevideo on June 7th, 1965, and then proceeded to her other scheduled ports of loading in the following order: Buenos Aires, Paranagua, Santos (where plaintiffs' oranges were loaded) Angras Dos Ries and Rio de Janeiro, where she loaded general cargo for discharge at the following ports in the following order: Jacksonville Florida, Charleston South Carolina, Norfolk Virginia, Baltimore Maryland, Philadelphia Pennsylvania, New York, Boston Massachusetts and, finally, Montreal, P.Q., in accordance with the usual and customary route taken by vessels in the owners of the *Mormacsaga's* American Republics Line Service.

The *Mormacsaga,* after completing loading at Rio de Janeiro on June 29th, 1965, sailed for Jacksonville, Florida, with a total general cargo of approximately 6,756 tons (although from the evidence of the captain at pp. 50-51, the total appears to be 6,618) of which 880 tons were to be discharged in Jacksonville, 358 tons at Charleston, 302 tons at Norfolk, 464 tons at Baltimore, 447 tons at Philadelphia, 1,874 tons at New York, 1,019 tons at Boston and, finally, 1,274 tons at Montreal of which 700 tons consisted of plaintiffs' oranges and the remaining tonnage consisted of other general cargo. The only perishables on board were plaintiffs' oranges and a small cargo of cheese.

The stowage plans, Exhibits P-14 and P-15, indicate how the cargo was stowed and the evidence of one Parfett, a witness produced by the plaintiffs, shows that the cargo for Montreal could not have been discharged without first removing some cargo destined for the other ports at a cost which was estimated at $9,564.

There is no question that the vessel could have been diverted to Montreal at some point after it left Rio de Janeiro or even later when it arrived close to Jacksonville. Had the vessel gone directly to Montreal from Rio de Janeiro, instead of proceeding to Jacksonville, as it did, it would have travelled only 637 miles further than Jacksonville since the distance to Jacksonville is 4,707 miles and to Montreal 5,354 miles. The time involved at the admitted optimum speed of 16½ knots would have been, according to C. Parfett (plaintiffs' witness) 11 days and 22 hours to Jacksonville and approximately 14 days to Montreal (*cf.* factum, p. 171, line 23). The extra time required would, therefore, have been a little more than three days.

I have gone into the facts covering the loading of the cargo, the manner in which the cargo was loaded and the possible routes the vessel could have taken to deliver plaintiffs' cargo in Montreal, because the decision to enter into a strike-bound port as defendants did, must be considered

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in the light of all the surrounding circumstances including the possibility or feasibility of diverting the cargo to Montreal, which enters into some of the considerations a carrier is faced with when a decision has to be taken as to what course its vessel should adopt having regard to the interest of all the cargo owners.

I do not consider that there is any substance in respondents' submission that the carrier was negligent in accepting the load of oranges in Santos when it knew that a strike was in progress on the east coast of the United States and that its ship would become strike-bound as soon as it reached Jacksonville, its first American port although I would have thought that some consideration would have been given at that time to loading the cargo so that the oranges could, if necessary, be unloaded first. A strike is something which may end at any time and the carrier was, in my view, entitled to continue to pick up cargo along its scheduled route in the hope and expectation that the strike would be over prior to or even when it reached the strike-bound port. I am not impressed either by S. J. Mueller's (Vice-President of the appellants) suggestion that William Kopke, the New York broker who arranged for the sale and purchase of the oranges, was aware of the possibility of the vessel becoming strike-bound but had agreed to load the cargo because of the possibility that the strike would probably be settled shortly.

Appellants' submission that Kopke, on behalf of the plaintiffs, had agreed to accept the risk of placing the cargo on board the vessel and to have the latter put into a strike-bound port, is not supported by the weight of the evidence. Mueller's evidence is at its highest a suggestion only and Kopke denies that he ever agreed to such a proposal. It also appears that this so-called agreement was not even alleged in the plea. At any rate, I cannot see how from such evidence, it can even be inferred that the plaintiffs had agreed that the carrier would safely transport and deliver its cargo only if the existing strike was settled, which is really what the respondents are saying and which is what it would have to mean to have any effect on the rights of the parties herein.

I am not particularly impressed either by the appellants' submission that they made two subsequent shipments for the respondents in July 1965 on the ships *Mormacmail* and *Mormacgulf* where an agreement to divert was stipulated and that no such agreement was made in the case of the *Mormacsaga*. It, in my view, merely shows that when Kopke, or the plaintiffs, realized that their cargo would be stranded in Jacksonville by the entry of the carrier into that port, steps were taken to make sure that no other cargo would be tied up in this manner.

The issue here, really comes down to whether the owners of the *Mormacsaga* should have diverted her around the United States ports and ordered her to proceed directly to Montreal or was justified in bringing her into Jacksonville, as they did, on the 13th of June 1965, where she remained tied up for 49 days.

Counsel for the appellants submitted that once a carrier establishes that damages have been caused by a strike, the claimant has the burden of establishing that the exception or immunity is inapplicable because the decision of the carrier to become strike-bound was unreasonable. The evidence admittedly established that the damage to the oranges had been caused by the long delay in Jacksonville and that this delay had been caused by the strike, but it also disclosed that the carrier had knowingly gone into a strike-bound port. I do not think that in such circumstances it can be said that a *prima facie* case of loss by strike has been made or that the carrier has brought itself within the exception or immunity as it must do. In order to do so, it must, in my view, clearly establish that the cause of the damage was not its negligence in entering into a strike-bound port. Where a carrier has the option of discharging its obligations to the consignees of cargo in different ways, the propriety of the decision to enter into a strike-bound port, as defendants did, where one of the consignees' goods were damaged, becomes a question of reasonableness which the carrier must establish by satisfactory evidence and by facts which are peculiarly within its knowledge. I should think that in such a situation a defendant must establish that upon all the circumstances shown in the particular case, the loss arose otherwise than by his negligence and the question to be determined then really becomes, of course, whether the loss was due to the strike or to the

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negligence of the carrier in entering a strike-bound port. In *Lloyd v. General Iron Screw Collier Co.*[10] Pollock, C.B. states at p. 291:

> It appears to me clear, upon the authorities, that Mr. Brett's proposition is correct, and that in cases of this kind, we must look, not at the causa proxima, but the causa causans, or real cause of the loss. Therefore, if the negligence of the master or mariners was the cause of the loss, the plaintiff is entitled to recover, notwithstanding the exceptions in the bill of lading.

There are, on the other hand, to my knowledge, no authorities to the effect that a ship with cargo cannot go into a strike-bound port. Under the *Carriage of Goods by Sea Act,* a strike does not indeed have to be unforeseeable or an absolute obstacle to the execution of an obligation as required to constitute "cas fortuit" or "force majeure" in order to free a carrier from liability. Once a carrier does go into a strike-bound port, however, it must be in a position to establish and must establish that the decision to go in was a reasonable one which in the discharge of its contract with the various owners of cargo carried on the vessel is consonant with the exercise of due diligence or due care, having regard to the fact that a line carrier must only discharge its obligations by ordinary means and does not necessarily have to incur exceptional expenses in order to insure the delivery in good condition of the goods of one particular cargo owner. A carrier, of course, must attempt to remedy the effects of a strike if it can do so by ordinary means as part of its obligation to take reasonable diligence or due care of the cargo it is carrying. There is, however, no obligation to take all means at any cost. It is sufficient, in discharging its obligations under its contract of carriage, that a carrier establish that in proceeding to a strike-bound port, it has proceeded *with due care* having regard, however, to the fact that the obligations it has assumed under a contract such as we have here are towards all the owners of the cargo on its vessel who (because of the nature of the cargo for instance) may be differently affected by whatever course of action is adopted by a carrier in placing itself in a situation covered by an immunity under the Act.

The carrier, in the present case, could have used under the "liberty clause" the ordinary and apparently not too expensive or inconvenient means and right it had of divert-

[10] (1864-65) 3 H&C 284.

ing its vessel and in my view, had an obligation to divert if, in the circumstances, that was the only reasonable thing to do in order to discharge with due care its obligations under the contract. A carrier may, indeed, in some cases be in a situation where it has good reason to believe that a strike will not be of long duration and that the entry of the vessel into a strike-bound port in accordance with its scheduled line service, would be in the best interest of the cargo in general. The carrier, in such a case, could not, in my view, be faulted if after a due and proper consideration of convincing reasons for thinking that the strike will soon come to an end, it reaches a business decision that the thing to do in the interest of the joint venture is to go into a strike-bound port even if it turned out later that its expectations did not materialize. A decision arrived at in such circumstances may be considered as reasonable and consonant with the exercise of due care even if it did not succeed and I would, in such a case, be reluctant to substitute a judge's business judgment to that of a businessman in the industry.

In the present instance, however, it does not appear to me that the carrier has established, by satisfactory and convincing evidence, that the decision taken on July 13, 1965, to enter the strike-bound port of Jacksonville was the exercise of sound business judgment.

I cannot, indeed, on the basis of the evidence adduced in this case, come to the conclusion that the carrier here by merely proceeding on its scheduled stops as it did has properly and carefully cared for the plaintiffs' perishable goods under the carriage contract or that it has successfully established that it is entitled to the immunity provided by section 4(2)(*j*) of Cogsa.

I say this because the evidence as to whether the problem of determining whether the ship should be diverted to Montreal or go into Jacksonville when the ship departed from Rio de Janeiro, and even some days later prior to taking a course towards Jacksonville, was considered by the carrier (as it should have been) is non-existent. The only indication in the evidence that the effect or consequences of entering into a strike-bound port seem to have been considered was when a couple of days before the ship reached Jacksonville, wires were forwarded to the captain requiring him to reduce the speed of his vessel.

The only evidence regarding the progress of the strike negotiations was given by Mr. Glennon, a vice-president of Moore-McCormack, the owners of the vessel, who was their representative at the negotiations with officials of the striking unions. He stated that the prospects for an early settlement of the strike were reasonably good on July 12th, 1965, the day prior to the entry of the vessel into Jacksonville. The strike had been in progress for approximately 30 days by then and Glennon said that this "is a little bit more than normal for strikes of this nature" although he admitted later that some previous strikes had lasted two to three months. He then added "during strike negotiations, it is just the feeling that you have, are you close to settlement or are you not. Is there any issue that remains open? If it cannot be resolved at all or are the issues so narrowed that within hours or days that you might iron them out and have a contract?"

He then later stated that he advised Mr. Moore, the president of his company, of the progress of the negotiations. "I advised him on that date that there was a possibility, or even a probability of an early solution of the contract negotiations."

I must say that it is quite impossible for me at least, to see how Mr. Glennon could, on July 12th, advise Mr. Moore that there was a probability of an early solution of the strike negotiations.

A strike, of course, may end at any time but upon a due consideration of all the facts prior to the decision to enter Jacksonville and even after, it appeared clearly on the 13th of July 1965, that no progress had been made in the negotiations which would even suggest to the most optimistic labour negotiator that a settlement was possible let alone probable.

As a matter of fact the evidence discloses that there was very little to go on to support Mr. Glennon's statement that the strike would probably be settled shortly.

The only conclusion I can reach is that the appellants have not established that the entering of their vessel into a strike-bound port was in the circumstances a reasonable decision to take and that they did not have in the diversion of their vessel to Montreal an ordinary and, under the circumstances, a not too expensive or inconvenient means of ensuring that respondents' perishable cargo would be properly cared for and delivered to destination in good condition. It then follows that by choosing as they did not to divert their vessel to Montreal, they acted wrongly without due care and in disregard to respondents' perishable cargo and thereby breached their obligations under their contract to carry and deliver respondents' cargo to destination. I should add that there is not even any cogent evidence that in proceeding as they did, the appellants were discharging their responsibilities to all shippers and consignees of cargo on the basis that they had to consider the adventure as a whole and not just the interest of plaintiffs. I can indeed find nothing in the evidence which would indicate that they were even motivated by such a consideration. In my opinion, the appeal should be dismissed with costs.

CATTANACH J.:—The issue in this appeal from the District Judge in Admiralty of the Quebec Admiralty District dated July 19, 1968, whereby the appellants were held liable for the damage sustained by the respondent with respect to its cargo of oranges carried by the appellants, the quantum of which is not in dispute, as I see it, resolves itself into the question of whether the appellants, in deciding to put into the strike-bound United States port of Jacksonville, acted as reasonable and prudent carriers.

The obligation of the appellants, at the critical time, which I conceive to be when the ship was off Jacksonville, was to consider whether to divert the vessel to the port of Montreal, the last port of call on its itinerary and to which the respondent's perishable cargo of oranges was destined, or not to so divert the vessel.

Because of the liberty clause in the bills of lading for the respondent and other cargo owners the option to so divert the vessel was open to its owners without being in breach of its contracts of carriage. The circumstances which prompted the decision of the ship's owners to order it to put in at Jacksonville which were relied upon by the respondent as justifying that decision at that time were (1) that the cargo was so stowed so that the ship was committed to its predetermined route and ports of call so as to discharge its cargo economically and (2) that it was expected that the strike would be of short duration.

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Like the learned district Judge, I do not think that there was convincing evidence, which it was the appellants' obligation to adduce, which would justify the conclusion that the strike would be of short duration.

There was no other evidence as to the circumstances which prompted the appellants' decision to act as they did. In the absence thereof I am forced to the conclusion that the carrier has failed to discharge the onus that it was not negligent in acting as it did.

I have had the opportunity of reading the judgment of the President in which he outlines, with detailed logic, the reasons for which he arrives at a conclusion identical to the conclusion which I have reached. I am in complete concurrence with his conclusion and his reasons therefor.

Accordingly I agree with the trial Judge's conclusion that the appellants are liable for the damage so incurred and I too would dismiss the appeal.

Toronto 1969 Apr. 10-11 — Ottawa Apr. 28

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION LIMITED .... APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Contract for construction of houses—Surety bond for payment of labour and material—Default by principal debtor—Crown not entitled to retain moneys appropriated to contract for excise tax owed by principal debtor—Rights of surety—Whether interest payable—Exchequer Court Act, secs. 47, 48—Excise Tax Act, R.S.C. 1952, c. 100, s. 50(8a).

In March 1965 the Crown entered into a contract with Dalite Corp. for the construction of 220 houses at a price of $594,459. As required by the contract Dalite Corp. furnished bonds (1) for the performance of the contract and (2) for payment of the labour and materials supplied. Suppliant was surety of both bonds. In June Dalite Corp., which had received $356,250 on the contract, became bankrupt and abandoned the contract. Suppliant, which as surety of the bond was then required by the Crown to complete the contract, paid $282,354 for labour and materials and the Crown paid to others a further $87,613 to complete construction of the houses. There remained $150,595 of the moneys appropriated for the contract. Of that sum the Crown retained $15,740 under s. 50(8*a*) of the *Excise Tax Act,* R.S.C. 1952, c. 100 for excise tax due by Dalite Corp. to the Crown in an unrelated matter and paid the balance of $134,855 to suppliant. Suppliant by this petition of right claimed payment of the $15,740 plus interest thereon at 5 per cent per annum.

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Held, suppliant was entitled to the $15,740 plus interest thereon from the commencement of the action.

1. The moneys appropriated for the Dalite contract stand on the same footing as securities in the hands of a creditor received from a principal debtor to which a surety is entitled in equity after making good a guarantee to such creditor. *In re Sherry* (1884) 25 Ch.D. 692 per Selborne, L.C. at p 702; *Halsbury* 3rd Ed. Vol. 18, p. 469, referred to.
2. Sections 47 and 48 of the *Exchequer Court Act* are not a bar to suppliant's demand for interest since its principal claim is based not on contract as contemplated by those sections but on equitable principles of the law of surety, creditor and principal debtor. *Dimensional Investments Ltd. v. The Queen* [1966] Ex. C R. 761; [1968] S C R. 93, distinguished.
3. Section 50(8*a*) of the *Excise Tax Act* is not applicable in the circumstances since at no time was any amount payable by the Crown to Dalite Corp.

PETITION of right.

C. A. Keith for suppliant.

George W. Ainslie, Q.C. and *R. W. Law* for respondent.

GIBSON J.:—By its petition of right the suppliant claims from the respondent the sum of $15,740.10 together with interest at 5 per cent per annum. The suppliant is the surety of two bonds supplied in respect to a contract between the respondent and a corporation by the name of Dalite Corporation (Canada) Limited.

The circumstances giving rise to this claim were as follows:

On March 23, 1965, the respondent Her Majesty acting by the Minister of Northern Affairs and National Resources and the said Dalite Corporation (Canada) Limited (hereinafter referred to as "Dalite") entered into a contract (hereinafter referred to as "the Dalite contract") under which Dalite undertook to construct and supply to the respondent:

(a) 30 Low Cost Houses—Angirraq Standard Plan Number 424—F.O.B. Hay River;

(b) 170 Low Cost Houses—Angirraq Standard Plan Number 424—F.O.B. Montreal;

(c) 20 Low Cost Houses—3 Bedroom Standard Plan Number 396—F.O.B. Montreal;

for a total contract price of $590,800 subsequently increased by authorized change orders to $594,459.

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In relation to the Dalite contract, Dalite furnished two bonds issued by the suppliant and numbered 221827 (a performance of contract bond) and 221828 (a labour and material bond) respectively.

By June 28, 1965, the respondent had paid to Dalite $356,250 for work done and material supplied, all according to the terms of the Dalite contract.

On June 28, 1965, a petition in bankruptcy was filed by or on behalf of Commodore Sales Acceptance Limited against Dalite, and the respondent, as entitled under the terms of the contract, took the Dalite contract out of the hands of Dalite. (Subsequently, the respondent in writing to the trustee in bankruptcy confirmed that it had already done so.)

By that time also, Dalite had abandoned this contract.

On July 6, 1965, by letter, the respondent called on the suppliant surety to perform the Dalite contract pursuant to the terms of the two bonds.

Subsequent thereto, certain persons who pursuant to contracts with Dalite had supplied labour or material for the work to be performed under the Dalite contract made claims for the payment of their unpaid accounts in respect thereof and pursuant to the said demand to perform on the bonds the suppliant paid accounts of labour and materialmen in the sum of $282,354.93. All of these accounts had been incurred prior to the bankruptcy of Dalite and were paid by the suppliant with the approval of the respondent who demanded and received sworn evidence of such payment. These accounts comprised all the accounts which the suppliant had obligated itself to pay under Bond 221828 (the labour and material bond).

As of August 31, 1965, the said 200 Angirraq houses had been fabricated except for minor deficiencies and were en route to their ultimate destinations. The respondent paid the sum of $1,940 to have the minor deficiencies rectified with the approval of the suppliant.

Then the suppliant negotiated with a corporation by the name of Welsh Lumber Co. Limited (hereinafter referred to as Welsh) for the completion of the work to be performed under the Dalite contract and consequent upon those negotiations on or about January 26, 1966, the respondent and Welsh entered into a contract under which Welsh undertook to construct 20 low cost houses being the work required to complete the Dalite contract for a total price of $85,673.45. The said low cost houses were constructed and delivered by Welsh to the respondent and the respondent paid the said amount of $85,673.45 to Welsh.

It so happened that Dalite was indebted to the respondent in the amount of $15,740.10 under the provisions of the *Excise Tax Act*. This indebtedness was wholly unrelated to the contracts which were the subject of the suppliant's bonds. On or about July 26, 1965, August 25, 1965, and January 6, 1966, the Minister of National Revenue by letter pursuant to section 50 (8*a*)[1] of the *Excise Tax Act* required the respondent to retain by way of deduction or set-off the amounts of $2,158.24, $15,000 and $15,740.10 respectively out of any amount that may be or become payable to Dalite.

The respondent paid to the suppliant the sum of $134,855.45 as partial reimbursement of the suppliant in respect of the payments made by the suppliant referred to above.

A summary of the monies appropriated to Dalite contract and disbursed or held by or on behalf of the respondent is as follows:

(a) to Dalite	$356,250.00
(b) to pay for minor deficiencies	1,940.00
(c) to Welsh	85,673.45
(d) held under section 50 (8*a*) of the *Excise Tax Act*	15,740.10
(e) to the suppliant	134,855.45
Contract price	$594,459.00

It is common ground between the parties pursuant to and by reason of the terms of the Dalite contract, that as of July 1965, when the Dalite contract was taken out of

[1] Where a person is indebted to Her Majesty under this Act the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to such person by Her Majesty.

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Dalite's hands that nothing was owing by the respondent to Dalite and that the respondent then had title to all the work, material, work in process of the Dalite contract.

It is also common ground between the parties that these two bonds were contracts of suretyship and not contracts of insurance. Surety bond number 221827 in the amount of $296,600 is a co-called performance bond. Surety bond number 221828 in the like sum of $296,600 is a so-called labour and material payment bond. The principal debtor in each of these bonds is the contractor Dalite Corporation (Canada) Limited. The suppliant is the surety and the obligee and creditor is the respondent (in right of Canada represented by the Minister of Northern Affairs and Natural Resources). In the second or labour and material payment bond, the surety is bound in the said sum to the respondent as obligee and creditor "for the use and benefit of claimants as hereinbelow defined". The definition of "claimant" referred to is:

> ...one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the contract, labour and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment (but excluding rental of equipment where the rent pursuant to an agreement is to be applied towards the purchase price thereof) directly applicable to the Contract;

These bonds were furnished by the surety and accepted by the respondent as obligee and creditor of the said Dalite contract pursuant to Article IV of the contract between the respondent and the principal debtor and contractor Dalite. The specific language employed was:

> The Contractor has furnished and Her Majesty accepts a Performance Bond, i.e.,
> Employees Liability Assurance Corp. Ltd.
> $296,600.00—April 15th 1965.
>
> (Insert details—name of Company, amount, date, etc.)
> and a Labour and Material Payment Bond, i.e.,
> Employees Liability Assurance Corp. Ltd.
> $296,600.00—April 15th 1965.
>
> (Insert details—name of Company, amount, date, etc.)
> With respect to the delivery of the materials and execution of the work by the Contractor, which bond or bonds shall operate according to their tenor. The Contractor shall post on the site of the work a notice that a Labour and Material Payment Bond is in force together with the name and address of the surety thereunder, definition of those persons protected hereunder and an outline of the procedure for submitting a claim thereunder.

The language employed by the respondent when formally by letter dated July 6, 1965, calling on and requiring the suppliant surety to complete the contract pursuant to its obligation under the bonds was:

> ...In view of the fact that the above contract is not yet completed, would you ensure that the necessary action is taken to provide for the delivery of the 220 prefabricated houses. The bulk of these houses have been delivered to Montreal. However, there are a number in the process of being prefabricated and a number that the materials have been ordered for but no actual construction has commenced on.
>
> We would appreciate being advised as to your plans for the performance of the balance of the work under the contract.

At that time out of the Dalite contract price of $594,459 appropriated, the respondent had not paid out $238,209.

The suppliant surety and the respondent in carrying out and completing this contract and fulfilling the terms of the bonds according to their tenor, (including the labour and material bond) expended $369,968.38. Of this amount, the respondent, as stated, expended $1,940 for minor deficiencies, $85,673.45 for the Welsh contract for a total of $86,613.45; and the surety paid $282,354.93 which as also stated, constituted payments to certain persons who, pursuant to contracts with Dalite and the respondent had supplied labour and material for the work to be performed under the Dalite contract. As a result, the overall deficiency in this Dalite contract was $131,759.38.

Subtracting the said sum of $86,613.45 from the balance of the moneys appropriated for the Dalite contract and then on hand when the Dalite contract was taken out of Dalite's hands namely, $238,209, leaves the sum of $150,595.55. Of this sum the respondent paid the surety only $134,855.45. The balance of $15,740.10 allegedly was held or was paid by the Department of Northern Affairs to the Department of National Revenue, both of the respondent, purportedly under the authority of section 50 (8*a*) (*supra*) of the *Excise Tax Act.*

Counsel for the suppliant submitted that (1) in all of the circumstances the provisions of said section 50 (8*a*) of the *Excise Tax Act* could not be applied in order to require any payment to the Department of National Revenue out of the funds appropriated for the Dalite contract and remaining for the completion of this contract, and that therefore, if there was a payment, it was an unauthorized

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and an unlawful one under the said statute; and alternatively, (2) it is a matter of general law relating to principal debtor, creditor and surety that when a surety is called upon to honour its obligation under a contract by a creditor, all funds appropriated to such contract must be held solely for the purpose of such contract and for the surety in priority to all other unrelated claims; and (3) that in all the circumstances, the surety is entitled to receive interest on the amount held illegally in this case, as a matter of general law and not as a right under any contract.

Counsel for the respondent submitted that (1) when the work was taken out of the hands of Dalite, the bonds became absolute and there became payable as liquidated damages the sums of $296,000 and $13,645.07 (sections 47 and 48[2] of the *Exchequer Court Act; Dimensional Investments Ltd. v. The Queen*[3]); (2) the contractual right between the suppliant and Dalite was that of guarantee and not of insurance (*vide: Trade Indemnity v. Worthington Harbour*[4]; *Whalen v. Union Indemnity*[5]); (3) the suppliant, upon paying the claimants, became entitled to (a) be subrogated to all the rights possessed by the claimants in respect of the debt default or miscarriage to which the guarantee exists; and (b) seek indemnification from Dalite, but is not entitled to be subrogated to any rights which the principal debtor had against the respondent, a third party (*vide: Halsbury's Laws of England*[6]; *Household Finance v. Foster*[7]; *Anson v. Anson*[8]; *In Re a*

[2] 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow

(*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, or

(*b*) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.

48. No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in the contract, shall be considered as comminatory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect.

[3] [1966] Ex. C.R. 761; aff'd [1968] S.C.R. 93.

[4] [1937] A.C. 1.

[5] (1931) 41 O.W.N. 208.

[6] 3rd Ed., Vol. 18 p. 468, para. 863 and vol. 14, p. 618, para. 1143.

[7] [1949] O.R. 123, 131.

[8] [1953] 1 W.L.R. 573, 576-79.

Debtor[9] *Brooks Wharf & Bull Wharf Ltd. v. Goodman Brothers*[10]; *Snell's Principles of Equity*[11]); (4) the claimants never had any claim against the respondent—There was no privity of contract, thus the suppliant who stands in the shoes of the claimants, can stand in no better position than the claimants and has no right to recover from the respondent (*vide: Hudson's Building Contracts*[12]; *The Millwall*[13]; *Pearson v. The King*[14]; *Hampton v. Glamorgan County Council*[15]; *Standing v. London Gas Co.*[16]); (5) the right of indemnification which the suppliant has against Dalite does not give it any rights under the contract between the respondent and Dalite. There is no privity of contract which would allow the suppliant to sue under the contract (*Tweddle v. Atkinson*[17]; *Dunlop Pneumatic Tyre Co. v. Selfridge*[18]; *Scruttons Ltd. v. Midland Silicones Ltd.*[19]; *Vandepitte v. Preferred Accident Insurance*[20]); (6) furthermore, on the work being taken out of the hands of Dalite, all its rights to claim any amounts from the respondent ceased. The contract was

> ...a contract to do the whole work stipulated for in consideration of a fixed sum, a portion of which under its terms was not to be paid until a period subsequent to not only the performance but to the acceptance of the work to be done under it. Manifestly performance is a condition precedent to the right of the plaintiff to enforce payment of the balance of the contract price (per Lester, J.A. in *Sherlock v. Powell*[21]);

see also: *Sumpter v. Hedges*[22]; *Munro v. Butt*[23]; *Elliott v. Hewitt*[24]; *Cheshire, Law of Contracts*[25]; *Burton v. Hookwith*[26]) and (7) it is well established that a defaulting contractor is not entitled to the benefit of the saving on his contract price where the works have been completed by others at a lower figure to the employer (*vide: Dussault v. The King*[27]).

In coming to a conclusion in this matter, it is not in dispute between counsel for the parties that, at any relevant

9 [1937] 1 All E.R. 1.
10 [1937] 1 K.B. 534.
11 25th Ed. pp. 452-54.
12 9th Ed. p. 579.
13 (1905) P. 155, 163.
14 (1916) 16 Ex. C.R. 225.
15 [1917] A.C. 13.
16 (1861) 21 U.C. Q.B. 209.
17 121 E.R. 762.
18 [1915] A.C. 847.
19 [1962] 1 All E.R. 1.
20 [1932] S.C.R. 22; aff'd. [1933] A.C. 70.
21 (1900) 26 O.A.R. 407.
22 [1898] 1 Q.B. 673
23 (1858) 8 E. & B. 738.
24 (1854) 11 U.C. Q.B. 292.
25 6th Ed. 458.
26 (1919) 45 O.L.R. 348.
27 (1917) 16 Ex. C.R. 228; aff'd. (1917) 58 S.C.R. 1.

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time, pursuant to section 50 (8*a*) of the *Excise Tax Act*, there was no "amount that may be or become payable to such person ("Dalite") by Her Majesty". As a result, the right of the respondent to deny payment to the suppliant of the said sum of $15,740.10 in issue in this action, cannot be founded on the respondent's pleading that "The Minister of National Revenue pursuant to section 50 (8*a*) of the *Excise Tax Act* required Her Majesty to retain by way of deduction or set-off the total amounts of $2,158.24, $15,000.00, and $15,740.10 respectively out of any amount that may be or become payable to Dalite".

Instead, the conclusion must be reached by determining what the suppliant surety undertook in this case, and what its rights are in the circumstances.

The two bonds which were required by the respondent of the contractor "Dalite" to be given and which were given, one for the performance of the contract and the other for the benefit of labour and materialmen, are two distinct and separate legal obligations; but neither bond changed the common law status of the respondent (creditor under the bonds) as it related to the contractor's (principal debtor under the bonds) employees or materialmen. The respondent had no duty to see that such labour and materialmen were paid.

The real purpose of the respondent in requiring the labour and material bond was the policy of the respondent in seeing fit to protect labour and materialmen engaged by the contractor "Dalite" in the performance of this public contract of the respondent for the doing of a public work. This policy as implemented by the requirement and delivery of this latter bond gave such labour and materialmen a guarantee for payment additional to that of the contractor "Dalite".

But neither bond was in fact necessary for the actual accomplishment of this particular undertaking; and as stated, the requirement of the second bond, or of splitting the guarantee into two bonds, and the giving of the latter bond was purely an act of the respondent as a protective measure for the betterment of that part of the public who were to supply the labour and material for this public contract so that the public generally would be assured that all elements contributory to the completion of this public contract were paid for and so that no complaint could be

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lodged against the respondent that the means had not been afforded to protect for payment the labour and material connected therewith.

Notwithstanding the fact that one bond is conditioned for the performance of the whole of the subject contract and the other is conditioned for the payment of labour and materialmen, both these bonds (executed and filed pursuant to the provisions of the subject contract, and in compliance therewith) and the subject Dalite contract must be construed together, in order to determine the extent of the liability of the suppliant surety under these bonds.

Putting it another way, the obligations of the bonds are to be read in the light of the subject Dalite contract that they were given to secure, and as a consequence, the extent of the undertaking entered into by the surety, is to be measured by the terms of the contractor's ("Dalite") (the principal debtor under the bonds) agreement with the respondent (the creditor under the bonds).

When the subject Dalite contract and these bonds are read together the intentions of both of the parties to the subject Dalite contract, as well as all the parties to the bond (i.e. principal debtor, creditor and surety) are clear. If the contractor failed to perform the subject contract, the surety was liable to perform it pursuant to one bond. Pursuant to the other bond, if the contractor failed to pay the labour and materialmen who supplied labour and material in the performance of this subject Dalite contract, then the surety was liable to the extent of this bond to pay such labour and materialmen.

But the surety engaged only to make good the deficiencies to the respective limits of these bonds. And when the surety was called upon to perform by the respondent (creditor under the bonds) and after it did perform under its guarantee, the surety was entitled to require the respondent (creditor) to hold and have used the balance of the moneys appropriated for this subject Dalite contract, namely, the sum of $150,595.55, solely for the purpose of this subject Dalite contract. Such moneys stand on the same footing as securities in the hands of a creditor received from a principal debtor to which a surety is entitled after making good or paying a guarantee to such creditor. (See *dicta* of Lord Selborne L.C. in *In re Sherry*[28]).

[28] (1884) 25 Ch. D. 692 at 702

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The right of the suppliant surety to have the balance due under the subject contract employed in the said manner, prevents the respondent (creditor) appropriating any part of such balance to the payment of any other debt or liability unrelated to the subject contract, as the respondent by its pleading stated it did. This right of the surety does not rest upon contract, but upon "general principles of equity similiar to those governing the marshalling of funds when one creditor of the same debtor may resort to either of two funds and another creditor to one only". (See *Halsbury's Laws of England*[29]).

On July 6, 1965, the respondent (by the said letter to the suppliant surety) elected to call on the suppliant surety to perform the subject Dalite contract pursuant to the guarantees in the bonds of surety and the suppliant surety did so perform. The respondent could have elected to treat the subject Dalite contract as at an end. If it had elected this latter course, of course, the surety would have been released. The respondent in this case has attempted to get the benefit of both such elections without some of the liabilities.

As to the claim for interest on $15,740, in my view, sections 47 and 48 of the *Exchequer Court Act* are no bar. The surety's claim against the respondent is not based upon contract which these sections contemplate, but on equitable principles of the law of surety, creditor and principal debtor.

In addition, section 48 refers to a contract "in which a drawback or penalty is stipulated for on account of non-performance of any condition . . .". Therefore, it must refer to a contract between the respondent and a third person. That was the situation in the *Dimensional Investments* (*supra*) case. That is not so here. But even if the suppliant was bringing an action based on this Dalite contract, then in any event the suppliant has not been in default and therefore section 48 does not apply to it.

The suppliant is entitled to judgment against the respondent for $15,740.10 with interest at 5 per cent from the commencement of this action.

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[29] 3rd Ed , Vol. 18, p. 469.

VERREAULT NAVIGATION INC. ....PLAINTIFF; | Quebec 1966 Nov. 17

AND

COOPÉRATIVE DE TRANSPORT MARITIME ET AÉRIEN ...... DEFENDANT. | Ottawa 1967 Mar. 3

Admiralty—Judgment for freight and demurrage—Right to interest before judgment—Jurisdiction to award—Exchequer Court Rule 172(6), Quebec Code of Civil Procedure, art 475.

In this court's reasons for judgment issued following trial of an action for freight and demurrage plaintiff was held entitled to recover a specified amount but through inadvertence the court omitted to deal with plaintiff's claim for interest from the date of its original demand for payment (which was made several years before the action was tried). Plaintiff moved to correct the reasons for judgment by awarding interest as claimed.

Held, as the minutes of the court's judgment had not yet been settled the court still had power, whether under Exchequer Court Rule 172(6) or the analagous procedure under Art. 475 of the Quebec Code of Civil Procedure, to deal with the claim for interest.

Paterson & Sons Ltd v. Canadian Vickers Ltd [1959] Ex. C.R. 289, distinguished.

Held also, the court's discretion to award interest prior to judgment is not confined to collision cases.

The Northumbria L.R. 3 A.& E. 6, referred to.

By an action commenced on February 10, 1961, the plaintiff claimed from defendant, the charterer of plaintiff's ship, the M/V *Keta:*—

(1) $11,300 in respect of the carriage of cargo on a voyage from Carleton, Quebec, to the Magdalen Islands, Quebec, Charlottetown, P.E.I., and Seven Islands, Quebec, in 1959;

(2) $1,200 for illegal detention of the ship for three days in the Magdalen Islands, plus $103.93 for unloading costs on Seven Islands; and

(3) interest on $5,974.10 from May 11, 1960.

The action was tried at Quebec in November 1966 before Noël J., who gave reasons for judgment dated February 3, 1967, wherein he held plaintiff entitled to judgment in the amount of $3,853.93 and costs but did not deal with the claim for interest. The plaintiff now moves to correct the reasons for judgment by awarding interest from May 11, 1960, that being the date on which the plaintiff demanded payment of the sums alleged to be due by defendant together with interest thereon from such date.

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Raynold Langlois for plaintiff.

Trevor H. Bishop for defendant.

NOËL J.:—On February 3, 1967, I issued reasons for judgment[1] in the instant case and made a fiat or pronouncement whereby I determined that "the plaintiff is entitled to judgment against the defendant in the amount of $3,853.93 and costs" without considering or dealing with the question of interest claimed in the action from May 11, 1960, the date of a letter sent by the plaintiff to defendant claiming payment of an amount of $5,974.10 with interest as of the above date and costs.

The matter for the payment of interest herein was inadvertently not considered nor dealt with by me in the above mentioned reasons for judgment nor in the pronouncement, and as the pronouncement or fiat of the present judgment has not yet been reflected in the minutes of judgment it is in my view still possible to remedy the situation and award interest in the event an award of interest should be made herein.

Upon discovering such an omission, I could have, of my own motion, delivered a supplementary pronouncement with or without a supplementary memorandum of reasons for judgment explaining what I was doing, or I could have, as I have done here, upon a motion produced by the plaintiff, awaited its presentation and following argument from counsel, determined if interest should be awarded and for what period of time prior to the date of judgment.

Counsel for the parties agree that the awarding of interest prior to the date of judgment is customary in admiralty cases and is within the discretion of the court, although counsel for the defendant maintains that it is customary only in claims resulting from collisions. Cf. *The Joannis Vatis* No 2[2]; *The Kong Magnus*[3].

There is considerable authority that the granting of interest prior to judgment is not, however, confined to collision cases but can be granted in all cases. In *The Northumbria*[4] Sir Robert Phillimore, at p. 10, expressed himself as follows:

> If it were necessary to examine this proposition, I should find it difficult to reconcile it with the recent case of *British Columbia Saw*

[1] Not reported.
[2] [1922] P. 213.
[3] [1891] P. 223; 7 Asp. M.C. 64.
[4] L.R. 3 A&E. 6.

> *Mill Company v. Nettleship.* But it appears to me quite a sufficient answer to these authorities to say, that the Admiralty, in the exercise of an equitable jurisdiction has proceeded upon another and a different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee where payment was not made, *ex mora* of the obligor; and that, whether the obligation arose *ex contractu or ex delicto.*

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In *Compania Naviera Limitada v. Attorney General for Palestine*[5], which dealt with a claim for compensation for loss of a ship, interest was awarded, at p. 316, from the date of the requisitioning of the ship by the defendant.

Counsel for the defendant took the position that plaintiff's motion to correct the reasons for judgment, dated February 3, 1967, was not the proper remedy and that if there was one it could only be done by way of appeal. He then referred to *Paterson & Sons Ltd v. Canadian Vickers Ltd*[6] where Smith D.J.A. refused to grant a motion moving for an order fixing the date from which interest was payable as the date or dates on which the various repair bills were paid. This case, however, is quite different from the instant one. In the *Paterson & Sons Ltd case* (*supra*), the learned judge had dealt with and therefore considered the matter of interest by condemning the defendant to pay the sum of $2,810.83 with interest and costs and furthermore the minutes of judgment had been settled.

In the instant case, the matter was not considered nor dealt with and the minutes of judgment have not yet been settled. It is therefore still possible for me, as I pointed out to counsel at the hearing of the plaintiff's motion, to deal with the matter prior to appeal, either under the Admiralty Rules and the Exchequer Court Rules or the rules set down in the Code of Civil Procedure of the Province of Quebec. It is indeed possible to do so under the Exchequer Court Rules, and particularly Rule 172 by virtue of Rule 215 of the Admiralty Rules which refers to the general practice of the Exchequer Court where there is a gap in the Admiralty Rules, and there is one here in that there is no provision in the Admiralty Rules for the reflection of fiats or pronouncements in minutes, although such minutes have always, as a matter of practice, been prepared and signed in admiralty cases in Quebec.

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5 (1948) 81 Ll. L.L.R. 314.

6 [1959] Ex. C.R. 289.

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Noël J.

Rule 172(6) provides a means for correcting omissions in judgments or orders by stating that:

> (6) Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court without an appeal.

The same result would also be reached if the Admiralty Rules contemplated the document prepared and delivered by the judge being the document representing the judgment of the court. On the above assumption, there would be no express provision in either the Admiralty Rules or the Exchequer Court Rules for dealing with an omission in a judgment and under Rule 2 of the Exchequer Court Rules read with Rule 215 of the Admiralty Rules, the Court could adopt, for the particular matter, a procedure by analogy to the practice and procedure in force in the appropriate provincial court, which here would be the practice in force in Quebec. By article 475 of the new Code of Civil Procedure of the Province of Quebec "a judgment which by obvious inadvertence... has omitted to adjudicate upon part of the demand may... be... corrected" and "such correction may be made on motion of one of the parties so long as the judgment has not been appealed; it may even be made of the judge's or prothonotary's own motion before the expiry of the delay for execution".

Having determined that I can deal with the matter of interest herein, the question is should I exercise the discretion I have of so awarding interest prior to the date of judgment in the circumstances of the present case.

Counsel for the plaintiff requests that interest be awarded from May 11, 1960, date of the letter forwarded to defendant by plaintiff claiming payment of an amount of $5,974.10, which letter, however, was not proven nor produced at the trial. The action herein was taken and served on the defendant on February 10, 1961, and any interest awarded herein cannot go beyond such date. The present action was heard in November 1966, i.e., seven years after the event which gave rise to the action and more than four years after the date upon which action was taken. It appears that a good part of the delay was caused by the difficulty of locating, for purposes of discovery, Captain Stanley Wilson, a key witness herein and the former captain of the plaintiff's ship.

In view of this and the fact that the plaintiff herein was content to charter his ship without insisting upon the drawing up of a written agreement or even a written confirmation of such agreement which, in my view, has had some effect on the contestation herein, as well as on the length of time it took to bring it to trial, an award of interest of five percent for half of the period from February 10, 1961, to February 3, 1967, and interest at the same rate from February 3, 1967 to the satisfaction of this judgment should be adequate in the circumstances of the present case to which the defendant (in addition to the amount of $3,853.93 and costs to which he is already condemned) should and is hereby condemned. In view of the fact that the matter of interest was not raised in argument at the trial, there will be no costs awarded on plaintiff's motion for correction.

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QUEBEC ADMIRALTY DISTRICT

Montreal 1969 — Jan. 13-18, 30 — Ottawa — May 16

FALCONBRIDGE NICKEL MINES LIMITED, JANIN CONSTRUCTION LIMITED and HEWITT EQUIPMENT LIMITED .... PLAINTIFFS;

AND

CHIMO SHIPPING LIMITED, CLARKE STEAMSHIP COMPANY LIMITED and MUNRO JORGENSSON SHIPPING LTD. DEFENDANTS.

Shipping—Lightering cargo in ship's lighter—Loss of cargo—Negligence of ship's master—Hague Rules—Whether applicable to lightering—Carrier's responsibility for discharging cargo—Immunities—Limitation of liability—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Sch., Art. I(d), III, Rs 1, 2—Art. IV, Rs. 1, 2—Canada Shipping Act, R.S.C. 1952, c. 29, secs. 657 and 663.

In September 1966 a valuable tractor and generator carried by the ship *Crosbie* from Montreal to Deception Bay Quebec were, in accordance with the practice at that port and the understanding of the shipper and shipowner, off-loaded onto a lighter belonging to and carried aboard the *Crosbie*. The weather was very unsettled at the time (1100 hours) but the *Crosbie's* master wished to have the equipment ready to be put ashore at high tide which was at 1337 hours. During the crew's meal hour from 1200 to 1300 hours the lighter was left unattended moored to the ship and was striking against the ship's

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side in rough seas and rising winds when one of its mooring lines was observed to be loose. Before this could be remedied the lighter tilted and the tractor and generator slid off. The bill of lading, which was expressed to be subject to the Rules of the *Water Carriage of Goods Act,* permitted lightering of the cargo but also provided that the ship's liability for cargo ended with delivery of the cargo from the ship's gear at the point of discharge.

Held, the carrier was liable for the loss of the tractor and generator, but its liability was limited to $500 for each.

1. In putting the expensive equipment on the lighter in the prevailing weather and leaving it unattended without ensuring that it was adequately secured to the lighter and that the lighter was adequately moored to the ship the master and officers of the *Crosbie* were negligent.

2. The clause in the bill of lading that the ship's liability for cargo ended with its discharge from the ship's gear was subject to the understanding that the cargo be lightered ashore by the ship's lighter, which was thus a term of the contract binding on the carrier.

3. The Rules in the Schedule to the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, applied to the lightering, i e. to the tractor and generator after they were off-loaded from the ship to the lighter, which was a ship within the definition of Art. I(*d*) of the Rules.

4. The obligation of the carrier under Art. III, R 2 to properly care for and discharge the equipment was not excluded by Art. IV, R 1 because although the lighter had been rendered unseaworthy by inadequate securing of the equipment this was because of want of due diligence by the *Crosbie's* officers, and thus of their employer the carrier, to make the lighter seaworthy, as required by Art. III, R 1. Neither was the carrier's liability excluded by Art. IV, R.2, the loss not having been caused by (para *a*) an act, neglect or default in navigation or management of the ship; (para *c*) perils of the sea; (para *d*) act of God; or (para *q*) any other cause.

   Goodwin, Ferreira & Co. et al v. Lamport & Holt, Ltd (1929) 34 Ll.L.Rep. 192; *Lindsay Blee Depots Ltd v. Motor Union Ins. Co.* (1930) 37 Ll L Rep. 220; *The Hoegh Lines v. Green Truck Sales, Inc.* 1962 A.M C. 431; *Pyrene Co. v. Scindia Steam Navigation Co.* [1954] 2 All E.R. 158; *G. H. Renton & Co. v. Palmyra Trading Corp. of Panama* [1957] A.C. 149; *Reed v. Page* [1927] 1 K.B. 743; *Maxine Footwear Co. v. Can. Gov't Merchant Marine Ltd* [1959] A C. 589; *Leval & Co. Inc. v. Colonial Steamships Ltd* [1961] S C.R. 221; *Gosse Millerd Ltd v. Can. Gov't Merchant Marine* [1929] A.C. 223; *Nugent v. Smith* (1875-6) C.P.D. 423; *Keystone Transports Ltd v. Dominion Steel & Coal Corp.* [1942] S.C.R. 495, referred to.

5. Since the value of the tractor and generator were not declared by the shipper before shipment nor inserted in the bill of lading the carrier's liability for the loss was limited to $500 for each under Art. IV, R.5. Each was a "unit" within the meaning of Art. IV, R.5.

   Studebaker Distributors Ltd v. Charlton Steam Shipping Co. [1938] 1 K B. 459; *Anticosti Shipping Co. v. Viateur St-Amand* [1959] S.C.R. 372; *Sept Iles Express Inc. v. Clement Tremblay* [1964] Ex. C.R. 213, referred to.

6. As the equipment was lost without the actual fault or privity of the shipowner, the shipowner's liability was also limited by secs. 657 to 663 of the *Canada Shipping Act*. The amount of the limitation was determined by the tonnage of the *Crosbie,* not that of the lighter, and in any case would exceed $1,000. The lighter was a "ship" within the meaning of s. 2(98).

City of Fort William v. McNamara Construction Co. (1957) 10 D.L.R. (2d) 625, distinguished.

ACTION for damages for loss of cargo.

David L. D. Beard for plaintiffs.

Trevor H. Bishop for defendants.

KERR J.:—This action arose out of the loss of a tractor and a generating set which went overboard from a barge (scow C-242-A)[1] while it was moored to the ship *P. M. Crosbie,* hereinafter referred to as "the *Crosbie*" or "the ship", at Deception Bay, Hudson Strait, Province of Quebec. The tractor and generating set had been loaded, along with other general cargo, on board the *Crosbie* at the port of Montreal for transport to Deception Bay. The *Crosbie* arrived at Deception Bay on September 18, 1966, and during the morning of September 20 her crew discharged the tractor and generating set onto the deck of one of three barges carried on the ship for the purpose of taking cargo to shore, and soon afterwards both pieces of equipment went overboard from the barge and sank. Efforts to find them were unsuccessful.

First, a word to indicate the parties and their respective interests in the action.

At the time of the loss of the tractor and generating set the plaintiff Falconbridge owned the generating set and had an interest in the tractor, as lessee, under a rental agreement with the plaintiff Janin, which in turn had rented the tractor from its owner, the plaintiff Hewitt. Falconbridge was also the shipper and consignee named in the bill of lading which was issued.

The defendant Chimo owned and operated the *Crosbie.* Chimo and the defendant Clarke Steamship had a mutual arrangement in respect of the carriage of cargo by ships

[1] In the pleadings and evidence this scow is sometimes referred to as a barge or lighter, and the several terms are interchangeable. It has no motive power, masts, sails, rudder or lights. It has a square stem and stern and a flush built steel deck.

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of either company to northern waters, in which they used the designation "Chimo Clarke Northern Services". The defendant Munro Jorgensson was ship's agent for Chimo.

An outline of the pleadings may be useful here.

In their statement of claim the plaintiffs allege that the defendant Clarke Steamship was at all material times a part owner of the *Crosbie* or managed the ship or was the ship's agent or charterer of the ship. All of this is denied by the defendants. The plaintiffs make similar allegations in respect of the defendant Munro Jorgensson, which are denied by the defendants, except that they say that Munro Jorgensson was an agent with respect to the issuing of the bill of lading under which the shipment was carried and with respect to the booking of the shipment.

The plaintiffs also allege that the defendants contracted with the plaintiffs to transport the equipment concerned on board the *Crosbie* from the Port of Montreal to Deception Bay, where it was to be off-loaded from the ship by the defendants, in lighters to be provided by Falconbridge, and the lighters were then to be taken by the defendants to a point off shore where the equipment would be received by Falconbridge and taken to shore by Falconbridge.

The plaintiffs further allege that the equipment was received by the defendants and taken on the *Crosbie* to Deception Bay, where it was off-loaded from the ship on September 20, 1966, onto a barge belonging to the ship, and that a short time later while the barge was alongside the ship, but unattended, the barge tilted and caused the equipment to fall overboard and be lost.

The plaintiffs proceed to allege that the loss of the equipment was caused by the negligence of the defendants, the ship *Crosbie,* her master and crew and the servants, agents and employees of the defendants for whose negligence all of the defendants are responsible. Particulars of their negligence are set forth in paragraph 10 of the Statement of Claim.

The plaintiffs then allege that by reason of the said negligent acts the defendants mismanaged the cargo concerned, and that they failed to carry out their contract to safely deliver the tractor and generating set.

The plaintiffs claimed damages in the amount of $165,096.03.

The defendants Chimo and Clarke Shipping filed a joint statement of defence and the defendant Munro Jorgensson filed a separate but similar defence. *Inter alia,* they deny the allegations of fault and negligence and breach of contract, but admit that the tractor and generating set were carried by the *Crosbie* and were off-loaded from the ship onto a barge belonging to the ship and that a short time later, while the barge was alongside the ship, the barge tilted and the equipment went overboard and was lost. They pray acte of the admission in the statement of claim that there was a contract between the plaintiffs and Chimo Clarke Northern Services.

The defendants also allege that in a letter to Falconbridge, dated February 24, 1966 (Exhibit D-1), Munro Jorgensson, as agent for Chimo Clarke Northern Services, outlined an agreement whereby Chimo Clarke Northern Services agreed to carry for plaintiffs a cargo from Montreal to Deception Bay, to be discharged by the crew of the *Crosbie* onto barges and taken by them ashore, where it was to be discharged from the barges by Falconbridge; that pursuant to that agreement a regular non-valued Chimo Clarke Northern Services bill of lading (Exhibit D-2), was issued covering the cargo, which included the tractor and generating set; that the cargo was governed by all the terms and conditions of the bill of lading, which terms and conditions are binding on all the plaintiffs, and are invoked by the defendants.

They further allege that Chimo was the sole owner of the *Crosbie* and used due diligence to make her and her related equipment seaworthy, and that her related equipment included the barge or scow, C-242-A, also solely owned by Chimo.

The defendants further allege that the crew of the *Crosbie* proceeded to discharge her cargo onto the scow C-242-A and onto two barges provided by Falconbridge, all in accordance with the terms and conditions of the agreement (Exhibit D-1) and the bill of lading (Exhibit D-2); that at about 1200 hours on September 20, 1966, the crew carefully and properly stowed the tractor and generating set onto scow C-242-A, and, as agents or representatives of Falconbridge were unable to discharge the equipment from the scow immediately, it remained safely tied alongside the *Crosbie;* but between 1200-1300 hours the winds suddenly and unexpectedly increased to Force 13 and caused a very rough sea near the ship which caused the scow to hit heavily against the ship, loosened its mooring lines, and caused it to list heavily, thus allowing the tractor and generating set to slide off into 15-20 fathoms of water; and although all reasonable efforts were made to locate and salvage the equipment, it was not found.

The defendants plead that the loss of the equipment was caused by an act of God or peril of the sea. They also invoke all the terms and conditions of the bill of lading and Rules in the schedule to the Canadian *Water Carriage of Goods Act*. They allege that the terms and conditions of the bill of lading governed the carriage of the shipment until it was delivered at the shore.

Each of the defendants Clarke Steamship and Munro Jorgensson alleges that it was not the owner, charterer, demise charterer or manager of the *Crosbie*, her crew or scow C-242-A and at no time material to this action did it have any control over the ship or her crew, and it invokes clause 15 of the bill of lading, set forth later herein.

Chimo further alleges that the loss of the equipment was not due to its fault or privity, and it invokes the limitation of liability in sections 657-662 of the *Canada Shipping Act* with respect to the scow C-242-A and/or the *Crosbie*.

In their reply the plaintiffs join issue with the defendants on their defence and deny that the defendants can limit their liability pursuant to the *Canada Shipping Act* with respect to the scow C-242-A or at all. They also deny the application of the *Water Carriage of Goods Act* to limit the liability of the defendants, and say that, the goods having been discharged from the *Crosbie*, the statute does not have application. They deny that the loss was caused by an error in navigation or in the management of the ship. They allege that it was caused by an error in the management of the cargo. They further deny that the loss resulted from an act of God or a peril of the sea, and that the weather was of the severity indicated by the defendants, but if such weather did occur, it was forecasted and was normally to be expected at the place and time of the loss. They also deny the validity of clauses 7 and 10 of the bill of lading to limit the liability of the defendants relating to the loss of the equipment after discharge from the *Crosbie*. They further plead that at the time of the loss the equipment was stored on the deck of the scow. Also that at all material times the scow was in an unseaworthy condition to the knowledge of the defendants; that the defendants were all privy to the negligent acts of their servants, the master of the ship, etc., in authorizing the use of the scow for the carriage of the equipment; that the defendants failed to advise any of the plaintiffs that a ship's barge would be used to discharge the equipment or that both the tractor and the generating set would be placed on the barge at the same time; and that such use of the barge was not contemplated by the plaintiffs or the parties at the time of the making of the contract and it was a breach of the contract.

Now, as to the contract of carriage.

It was common ground at the trial that there is no wharf or pier at Deception Bay, and that ships anchor in deep water at the inner end of the Bay, and cargo is off-loaded from them to barges, which are taken to a landing beach at or near high tide, and there the cargo is off-loaded from the barges to the shore; and when conditions are not suitable for beaching, the barges can be tied to mooring buoys near the beach and taken in to the beach later for off-loading.

It was also common ground at the trial that there is a practice at Deception Bay whereby shore barges, *i.e.*, barges owned by companies which have land operations there, are permitted to be used, when available, by the cargo ships to get cargo from ship to shore.

[His Lordship here reviewed the evidence and then proceeded]:

The bill of lading contains the following provision:

> . . . If the ship is not owned or chartered by demise to the Company or Line by which this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract with the Owner or Demise Charterer, as the case may be, as principal made through the agency of the said Company or Line which acts as Agents only, and shall be under no personal liability whatsoever in respect thereof.

In my opinion, while there were mutual arrangements between Chimo and Clarke, respecting which only some general evidence was given, the evidence does not show a contractual relationship between Clarke and Falconbridge in respect of the voyage and cargo concerned, nor anything

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from which liability on the part of Clarke, either in tort or contract, to any of the plaintiffs can be found.

The evidence of Capt. Jorgensson[2] and Mr. Munro[3] establishes, in my opinion, that Munro Jorgensson was acting only as an agent for Chimo, seeking customers and acting as a go-between between them and Chimo, and preparing proposals for acceptance or rejection by them, but without any authority to make a contract for any of them. It had no ownership in the *Crosbie,* no control over the ship or its crew. In my opinion, the evidence does not show a contractual relationship between Munro Jorgensson and Falconbridge in respect of this voyage or cargo and there is no liability in tort or contract on the part of Munro Jorgensson.

In essence, in my opinion, the contract was between Chimo and Falconbridge. What carriage, then, was Chimo under an obligation to perform?

The bill of lading is dated at Montreal September 10, 1966, and shows, *inter alia,* Falconbridge as shipper and consignee, *P. M. Crosbie* as the ship, Montreal as the port of loading and Deception Bay as the destination. It acknowledges receipt of the cargo to be conveyed and delivered to the consignee at Deception Bay. It contains the following printed clauses in particular relation to the methods of conveyance and delivery:

> 6. (e) The Carrier shall be at liberty as often and from whatever cause and at whatever place it may deem expedient to lighter or otherwise carry the goods to and from the ship and/or to tranship into any other steamer, hulk or craft and thence to reship by lighter or otherwise into the same or any other steamer or vessel whatsoever;
>
> 7 (a) Delivery of the goods shall be taken by the consignees from the ship's tackle, package by package, immediately the ship is ready to discharge, when all responsibility of the Carrier shall cease, or, at the option of the Carrier, the goods may be discharged and stored afloat or ashore at the sole expense and risk of the consignee, but always subject to the Carrier's lien;
>
> . . .
>
> (d) The Carrier shall be at liberty to discharge day and night, holidays included, as fast as ship can deliver, regardless of weather conditions and the Carrier shall be under no liability to notify the consignee of the arrival of the goods, any custom of the port to the contrary notwithstanding;

[2] Marine Superintendent for defendant Chimo Shipping Limited.
[3] President of defendant Munro Jorgensson Shipping Ltd.

It also contains the following clause:

> 1. Notwithstanding anything herein contained to the contrary this Bill of Lading if,
>
> . . .
>
> (b) issued in Canada shall have effect subject to the provisions of the Rules as applied by "The Water Carriage of Goods Act" 1936 (Canada);

and it also contains the following clauses, *inter alia*, imprinted on the face of the bill of lading by means of a stamp:

> Ship's liability for cargo carried under this bill of lading is coextensive with the contract of carriage and begins and ends with the receipt of cargo in the ship's gear for loading, and the delivery of cargo from the ship's gear at the point of discharge.
>
> No liability in respect to damage of goods and/or cargo after discharge from vessel unless reported to carrier and/or his agent at time of such discharge.

Capt. Jorgensson testified that he had discussed with Herrol, of Falconbridge, that another ship, the *Woldingham Hill*, was expected to be at Deception Bay at the same time as the *Crosbie*, and consequently he told this to the captain of the *Crosbie* and told him also that there were shore barges there and for him to use whatever barges he could find available to him. The practice in previous years was the same, *i.e.*, that the ship's barges would be put off the ship and when loaded with cargo from the ship they would be taken to the shore by the ship's motor boat.

Although the stamped liability clauses which I have set forth are susceptible of an interpretation that the contract of carriage ended with the discharge of cargo from the *Crosbie's* gear, they are essentially liability clauses and such an interpretation would not make good sense in the circumstances of this case, for the bill of lading gives the carrier liberty to lighter the cargo and it was certainly the understanding of those persons from Chimo and Falconbridge who were making the arrangements for the due performance of the contract that the crew of the *Crosbie* would use the ship's barges, which were carried for the purpose, and other available barges, to take the cargo to shore. That is what was done on previous occasions under similar bills of lading. It was what was in fact done on this occasion. In my opinion, the contract must be held to have put an obligation on Chimo, as carrier, to off-load

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the cargo onto barges and to take the barges to shore, either to the beach or to the mooring buoy near the beach, at which point delivery to Falconbridge would be made. As to what barges were to be used, I am satisfied that the ship's barges were to be used and that the ship's crew would, in addition, have liberty to use shore barges if and as they would be available; but that there was no requirement that a shore barge would be used for the tractor or the generating set. Details of this nature were left to the judgment and discretion of the *Crosbie's* master, who would be in a position to make an appreciation of the situation and to make on-the-spot decisions.

I move on now to outline the circumstances in which the tractor and generating set were lost.

The *Crosbie* arrived at Deception Bay on September 18, 1966, and anchored about one-half a mile off Bombardier Beach. On September 19 the wind increased and a second anchor was put out, but the ship dragged her anchors slightly because of the wind. Her crew commenced to discharge cargo onto the ship's barges on September 18 and continued to do so on September 19. They used three barges belonging to the ship and also obtained and used Falconbridge barges. The barges were towed one at a time, by the ship's crew, using the ship's motor boat, to the beach and the cargo was taken off the barges there by the consignees or by persons on their behalf, not by the ship's crew.

[The learned Judge then reviewed the testimony of the witnesses concerning the events of September 20. This indicated that the weather at Deception Bay was unpredictable; that at 1000 hours on September 20 the *Crosbie's* master was warned by a man who came out in a boat not to bring barges in to the beach until further advised; that on the orders of the master, who wished to off-load the barge at the beach at high tide, which was at 1337 hours, the generator and tractor were loaded on the barge C-242-A. Loading, the master testified, was completed at 1145 hours, and the barge was left unattended alongside the *Crosbie* during the crew's meal hour from 1200 to 1300 hours. He testified that while having his lunch in the saloon he observed a sudden increase in the wind. Various estimates were given of the wind's force by different witnesses from as high as force 13 (83-92 m.p.h.) by the master to much lower figures by others. The high seas, it was testified, caused the barge to strike the ship's side, and around 1300 hours a mooring line on the barge was seen to be loose, causing a corner of the barge to strike heavily against the ship, but before this could be remedied the tractor and generator slid off the barge into deep water, and could not be recovered.]

It is understandable that when lightering of cargo from ship to shore is limited largely to periods of high tide the master of the ship will want to off-load the cargo into barges in advance of high tide and to proceed expeditiously to do so, unless it seems to him unsafe. However, in off-loading the heavy tractor and generating set onto one barge on the morning of September 20 the master of the *Crosbie* was running dangerously close to the margin of safety, for the weather was unsettled and worsening, the winds were shifting and increasing, and there had been waterspouts on the Bay; the experienced local man who was in charge of the beach, White, thought that the conditions and prospects were such that at or soon after 1000 hours he went to the *Woldingham Hill* and instructed the master of that ship to stop unloading, and also went to the *Crosbie* and told the master not to take cargo to shore, or words to that effect; Lewis, whose job was to observe and record the weather, said that at about 1000 hours a swell developed on account of the wind and tide, and at 1100 hours the winds were 35 m.p.h., and gusting to 50, and the Bay was "in a fit" all morning. Any barges at the *Crosbie* would have to lie alongside the ship until high tide, which would not be until 1337 hours, and during that period they would be subject to the vicissitudes of wind, waves and tide.

The evidence of Captain Bugden that the wind increased from about a fresh breeze to 70 m.p.h. during a period of only 15 minutes before the loss, is mere conjecture on his part, for he and everyone else on board the ship were below deck and none of them was aware of what was taking place elsewhere or in a good position to know what conditions on the Bay were after they went below deck.

The responsible officers of the *Crosbie* compounded the danger by leaving no one on deck to watch the weather. It was not sufficient that there were port holes in the men's mess-room or in the captain's cabin. I am satisfied that no one was really watchful of the weather or the tractor and generating set. I must assume that those responsible were not vigilant.

In my opinion, the responsible officers of the *Crosbie* did not exercise the care that reasonably prudent and experienced ship's officers would ordinarily exercise to ensure the safety of the two expensive pieces of equipment. They did

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not exercise the care which was reasonably and practically possible and which they were bound to take in a situation that had elements of danger which they were aware of or should have been aware of. The least that could have been expected of them, if they were willing to risk the tractor and generating set on the barge in uncertain and worsening weather, was to ensure that the equipment was sufficiently secured to prevent it from sliding off the flush deck of the barge.

When Captain Bugden first saw the barge bumping against the ship and the tractor moving towards the side of the barge, he sought to get some one to secure the barge; but it was then too late to control events and prevent the equipment from going off the barge. However, that was a situation which the responsible officers should not have allowed to come into being. In my opinion there was, to use the words of Duff C.J. in *Canadian National Steamships v. Bayliss*[4]:

> . . . inattention to precautions which would, it is not unreasonable to consider, have, probably, had the effect of preventing the loss.

Consequently, I find that the loss of the tractor and generating set resulted from a chain (or a "network", to use an expression of Lord Shaw in another case) of causes which had its commencement by the master and officers of the *Crosbie* putting the tractor and generating set on the barge in the prevailing weather and leaving them unwatched without ensuring that they were adequately secured to keep them from sliding and without ensuring that the barge was adequately moored to the *Crosbie,* and which had its culmination soon afterwards in the tractor sliding on the flat steel deck of the barge and making it so unstable as to cause the equipment to slide overboard. The acts and omissions of the master and responsible officers amounted to negligence, in my opinion.

Having made the said findings I move now to consideration of the Rules in the Schedule to the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, including the question whether they applied to the lost equipment at the time it was lost, the equipment having by then been off-loaded from the *Crosbie* to the barge.

[4] [1937] S.C.R. 261 at 264.

The following comment is found in *Scrutton on Charterparties*, 17th ed., published in 1964, at p. 409:

> It has not yet been decided whether the use of the word "ship" has the effect of excluding from the "carriage of goods by sea" to which the Rules relate the lightering of goods out to a ship at the port of loading or their removal to shore by lighter at the port of discharge. If the carrier undertakes to perform these operations it seems possible that they might be considered as part of loading and discharging respectively. If he does not, it seems probable that the Rules would have no application to these operations; the terms of Article I(d) lend some support to this view.

This comment was made in view of the reasoning of Devlin J. in *Pyrene Co. v. Scindia Navigation Co.*[5], which I shall refer to later herein.

There is no doubt that the bill of lading in this case is subject to the Rules in the Schedule to the Act. Sections 2 and 4 of the Act are as follows:

> 2 Subject to the provisions of this Act, the Rules relating to bills of lading as contained in the Schedule (hereinafter referred to as "the Rules") have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.
>
> 4. Every bill of lading, or similar document of title issued in Canada that contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

I have indicated that the bill of lading contains a paramount clause that it shall have effect subject to those Rules.

Article I of the Rules contains certain definitions. It reads [in part] as follows:

> In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,
>
> (d) "ship" means any vessel used for the carriage of goods by water;

The barge C-242-A is a vessel used for the carriage of goods by water. It is used for that purpose in navigation to and from ocean-going ships in at least some waters in which such ships move. In my opinion it is a ship, within the meaning of that word in Article I of the Rules[6].

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[5] [1954] 2 Q B. 402 at pp. 417-18, adopted by the House of Lords in *Renton v. Palmyra* [1957] A C. 149 at pp. 170, 173, 174.

[6] See the cases on the meaning of "ship" and "vessel" cited later herein in connection with the *Canada Shipping Act*.

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The following Rules in Articles II, III and IV may be considered next:

Article II.

Risks.

Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Article III.

Responsibilities and Liabilities.

1. The Carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried

Article IV.

Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

There can be no question, I think, that Article III, Rule 2, applied to the discharge of the cargo from the *Crosbie* to the barge. Subject to the provisions of Article IV, the carrier was under an obligation to "properly and carefully" care for and discharge the goods carried on the *Crosbie*.

The discharge provisions of the Rules were considered by Mr. Justice Roche in *Goodwin, Ferreira & Co. et al v. Lamport & Holt, Ltd*[7], where the facts were that cotton yarn was discharged from a ship into a lighter and then a piece of machinery was discharged and made a hole in the

[7] (1929) 34 Ll. L. Rep. 192.

lighter, through which sea water entered and damaged the yarn. On the question whether discharge of the yarn from the ship had been completed, Roche J. said, at p. 194:

> . . . The contention of the defendants with regard to the lighterage is this, that lighterage was not merely permissible and proper but that when the goods in question (the yarn) were put into the lighter the sea transit was over and the whole transit was over which was made the subject of the Carriage of Goods by Sea Act, 1924, and that therefore the defendants were not bound at that stage by the provisions of that Act, and that with regard to the risks of perils of the sea, even if there was negligence of their servants, those were all provided for at that stage and in respect of that stage by the provisions of the bill of lading itself, unaffected by and not rendered more onerous by the provisions of the Carriage of Goods by Sea Act, 1924. I think it would follow, if the contention were well founded, that the Act did not apply; that the exceptions of the bill of lading itself would be sufficient to protect the defendants upon any view of the facts of this case.
>
> But in my judgment the contention itself is erroneous. The discharge of these goods was part of the operation which are covered and affected by the Carriage of Goods by Sea Act, 1924. In my judgment the discharge of these goods was not finished when they were put into a lighter when other goods were being discharged into the same lighter to make up the lighter load which was to start for the shore. When it is contemplated that the goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of the Act of Parliament is, in my judgment, going on so long as other goods are being raised into the lighter and stowed into the lighter alongside or on top of them.

The judgment in the *Goodwin, Ferreira v. Lamport & Holt* case (*supra*) was considered by Mr. Justice Talbot in *Lindsay Blee Depots, Ltd v. Motor Union Ins. Co.*[8] There a barge was loaded with 1000 tons of coal from a ship, and other coal from the ship was still to be loaded into it the next morning. The action was on a policy of insurance. Talbot J. distinguished the facts of the cases and said, at p. 224:

> It is obvious that the facts are not quite the same. There in the case of Goodwin, Ferreira & Co., Ltd, and Others v. Lamport & Holt, Ltd, discharge appears to have proceeded continuously. There had been no substantial interruption between the discharging of the yarn and of the machinery. In this present case discharge had been discontinued several hours. The question there arose more important in a wholly different kind of action and on the construction of a statutory enactment which has no application in the present case.

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[8] (1930) 37 Ll L.Rep. 220.

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But, on the whole, though I appreciate the argument based on what is said to be the logical application of that decision, I do not think I should be justified in taking it as governing the interpretation of the word "discharged" in a policy.

In my judgment, the 1000 tons of coal had been discharged at 7 p.m. on Aug. 11, 1924, and the risk undertaken by this policy was therefore at an end.

That judgment was also considered by the United States Court of Appeals, Ninth Circuit, in *The Hoegh Lines v. Green Truck Sales, Inc.*[9], in which, during the unloading of cargo from a ship onto a lighter, some cases of parts were damaged when dropped on the lighter, and other cases, already unloaded, were damaged thereby. The District Court had held that the *Carriage of Goods by Sea Act* (COGSA) did not apply because the parts had been discharged before they were damaged, and that the ship's liability was not limited to $500 per package or customary shipping unit under the Rules. The Court of Appeals rejected this view of the District Court, and said at p. 434:

> We believe that cargo is not discharged within the meaning of COGSA when it is still in the process of being unloaded from a vessel onto a lighter. We reject the view of the trial court that each case of spare parts was discharged when it was first lifted from the hold of the vessel by the tackle of the floating derrick *Colossus.* In *Remington Rand vs. American Export Lines* (S D.N.Y., 1955), 1955 A.M.C. 1789, 132F. Supp. 129, the court held that COGSA's exemption of a carrier from liability for fire did not apply to cargo which had been fully loaded onto a lighter for 24 hours. The court stated that discharge onto a lighter is complete "when the loading has been completed or while no other cargo is being loaded into the same lighter".

The Rules relating to discharge were examined again in 1954 by Devlin J., in *Pyrene Co. v. Scindia Steam Navigation Co.*[10], in particular relation to a situation in which a piece of machinery, a fire tender, was being lifted from a barge to the ship concerned, by the ship's tackle, and before it was across the ship's rail it was dropped and damaged, and he dealt with the application of the Rules in respect of loading onto the ship and discharge from the ship. The following are excerpts from his judgment, which, although somewhat extensive, may be usefully quoted for the purposes of this case:

> The fire tender was not the only piece of machinery supplied by the plaintiffs for shipment on board this ship, though it was the only

[9] 1962 A.M.C. 431.

[10] [1954] 2 All E.R 158.

piece that was damaged before shipment. A bill of lading had been prepared to cover the whole shipment, and it was issued to I.S.D. in due course but with the fire tender deleted from it. The bill of lading incorporated the Hague Rules and was subject to their provisions, as by the Carriage of Goods by Sea Act, 1924, s. 3, it was bound to be. It is not disputed that, in this case, as in the vast majority of cases, the contract of carriage was actually created before the issue of the bill of lading which evidences its terms.

I think it is convenient to begin by considering the effect of the rules For counsel for the plaintiffs contends that, even if a bill of lading covering the fire tender had been issued incorporating the rules, the holder of the bill would not be subject to immunity in respect of an accident occurring at this stage of the loading If this is so, it disposes of the defendants' plea. If it is not so, I shall have to consider whether the rules affect the contract of affreightment when no bill of lading is issued, and whether the plaintiffs were a party to that or any similar contract. The argument of counsel for the plaintiffs turns on the meaning to be given to art. I(e) which defines "carriage of goods" as covering

> "the period from the time when the goods are loaded on to the time when they are discharged from the ship".

Counsel says these goods never were loaded *on* to the ship. In a literal sense obviously they were not. But counsel does not rely on the literal sense; there are rules which could hardly be made intelligible if they began to operate only after the goods had been landed on deck. He treats the word "on" as having the same meaning as in "free on board"; goods are loaded on the ship as soon as they are put across the ship's rail, which the tender never was He submits that the rule (which, of course, has effect in English law only by virtue of its place in the schedule to the Carriage of Goods by Sea Act, 1924) must be construed in accordance with English principles. He relies on *Harris v. Best, Ryley & Co.*, and *Argonaut Navigation Co., Ltd. v Ministry of Food, S S Argobec* ([1949] 1 All E.R. 160), which lay down the rule that loading is a joint operation, the shipper's duty being to lift the cargo to the rail of the ship (I shall refer to that as the first stage of the loading) and the shipowner's to take it on board and stow it (I shall refer to that as the second stage).

Counsel contends, therefore, that the accident occurred outside the period specified in art. I(e). So, he says, art. IV (5) (which limits liability), and, indeed, all the other rules which regulate the rights and responsibilities of the shipowner, do not apply. They are made applicable by art. II which provides that:

> ". . . under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth".

"Contract of carriage" is defined in art. I(b); the term

> "applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea . . ."

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Then it is para. (e) of art I that contains the definition of "carriage of goods" on which counsel relies. It is in this way he argues that, if the casualty does not fall within the period covered by this last definition, the rules do not apply to it.

In my judgment, this argument is fallacious, the cause of the fallacy, perhaps, lying in the supposition inherent in it that the rights and liabilities under the rules attach to a period of time. I think they attach to a contract or part of a contract. I say "part of a contract" because a single contract may cover both inland and sea transport; and, in that case, the only part of it that falls within the rules is that which, to use the words in the definition of "contract of carriage" in art. I(*b*), "relates to the carriage of goods by sea". Even if "carriage of goods by sea" were given by definition the most restricted meaning possible—for example, the period of the voyage—the loading of the goods (by which I mean the whole operation of loading in both its stages and whichever side of the ship's rail) would still *relate* to the carriage on the voyage and so be within the "contract of carriage".

Article II is the crucial article which, for this purpose, has to be construed. It is this article that gives the carrier all his rights and immunities, including the right to limit his liability. He is entitled to do that "in relation to the loading" and "under every contract of carriage". Now, I shall have to consider later the meaning of "loading" in art. II and whether it is such as to exclude what I have called the first stage, i e., the operations on the shore side of the ship's rail. For the moment, I am concerned only to see whether its meaning is cut down by the definition in art. I(e) on which counsel for the plaintiffs relies. The only phrase in art. II that can cut it down is the one I have quoted: "under every contract of carriage": it is only in so far as art. I(e) operates through the definition of "contract of carriage" that it can have any effect on art. II. I have already sought to demonstrate that, however limited the period in art. I(e) may be, the loading in both its stages must still *relate* to it, and so be within the definition of contract of carriage. A precise construction of art. I(e), while not irrelevant, is in no way conclusive of the point I have to decide, which turns, I think, on the meaning of "loading" in art. II.

But before I try to elucidate that, let me state my view of art. I(e). For, as I have said, though not dominant, it is not irrelevant; in construing "loading" in art. II you must have regard to similar expressions throughout the rules, art. I(e) included. In my judgment, no special significance need be given to the phrase "loaded *on*". It is not intended to specify a precise moment of time. Of course, if the operation of the rules began and ended with a period of time a precise specification would be necessary. But they do not. It is legitimate in England to look at s. 1 of the Act, which applies the rules, not to a period of time, but "in relation to and in connection with the carriage of goods by sea". The rules themselves show the same thing. The obligations in art. III(1), for example, to use due diligence to make the ship seaworthy and man and equip her properly are independent of time. The operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of art. I(e) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed, perhaps, by a period of sea transport and then again by a period of inland transport. Discharging from rail at the port of loading may fall into the first period; loading on to the ship into the second. The reference to "when the goods are loaded on" in art. I(e) is not, I think, intended to do more than identify the first operation in the series which constitute the carriage of goods by sea, as "when they are discharged" denotes the last. The use of the rather loose word "cover", I think, supports this view.

There is another reason for thinking that it would be wrong to stress the phrase "loaded on" in art. I(e). It is, no doubt, necessary for an English court to apply the rules as part of English law, but that is a different thing from assuming them to be drafted in the light of English law. If one is inquiring whether "loaded *on*" in art. I(e) has a different meaning from "loaded" or "loading" in other parts of the rules, it would be mistaken to look for the significant distinction in the light of a conception which may be peculiar to English law. The idea of the operation being divided at the ship's rail is certainly not a universal one. It does not, for example, apply in Scotland: *Glengarnock Iron & Steel Co., Ltd. v. Cooper & Co.* (22 R. (Ct. of Sess.) 676, per Lord Trayner). It is more reasonable to read the rules as contemplating loading and discharging as single operations. It is, no doubt, possible to read art. I(e) literally as defining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why exclude loading from the period and include discharging? How give effect to the frequent references to loading in other rules? How reconcile it with art. VII which allows freedom of contract

> "prior to the loading on and subsequent to the discharge from . . ."?

Manifestly both operations must be included. That brings me back to the view that art. I(e) is naming the first and last of a series of operations which include, in between loading and discharging, "handling, stowage, carriage, custody and care". This is, in fact, the list of operations to which art. II is, by its own terms, applied. In short, nothing is to be gained by looking to the terms of art. I(e) for an interpretation of art. II.

I think, therefore, that art. I(e), which was the spearhead of argument of counsel for the plaintiffs, turns out to be an ineffective weapon. But that still leaves it necessary to consider the meaning of "loading" in art. II. Just how far does the operation of loading, to which art. II grants immunity, extend? Now I have already given reasons against presuming that the framers of the rules thought in terms of a divided operation, and in the absence of such a presumption the natural meaning of "loading" covers the whole operation. How far can that be pressed? Article III(2), for example, provides: "the carrier shall properly and carefully load", etc. If "load" includes both stages, does that oblige the shipowner, whether he wants to or not, to undertake the whole of the loading? If so, it is a new idea to

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English lawyers, though, perhaps, more revolutionary in theory than in practice. But, if not, and "load" includes only the second stage, then should it not be given a similar meaning in art. II with the result that immunity extends only to the second stage? There is, however, a third interpretation to art. III(2). The phrase "shall properly and carefully load" may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in Carver's Carriage of Goods by Sea, 9th ed., p. 186, is to define, not the scope of the contract service, but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only on different systems of law but on the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view, the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.

I reject the interpretation of loading in art. II as covering only the second stage of the operation. Such authority as there is is against it. If loading under the rules does not begin before the ship's rail, by parity of reasoning discharging should end at the ship's rail; but so to hold would be contrary to the decision of Roche J., in *Goodwin, Ferreira & Co, Ltd. v. Lamport & Holt, Ltd.*

Since the shipowner in this case in fact undertook the whole operation of loading it is unnecessary to decide which of the other two interpretations is correct. I prefer the more elastic one, that which I have called the third. There appears to be no binding authority on the point. I have noted the view expressed in Carver; on the other hand, Temperley's Carriage of Goods by Sea Act, 1924, 4th ed., p. 26, and Scrutton on Charterparties, 15th ed, p. 160, consider that the carrier is responsible for the whole of the loading. However, it is sufficient for me to say that, on the facts of this case, the rights and immunities under the rules extend to the whole of the loading carried out by the defendants and, therefore, counsel for the plaintiffs' first point fails. I think, if I may so put it, that it is a good thing that it should fail. There must be many cases of carriage to which the rules apply where the ship undertakes the whole of the loading and discharging; and it would be unsatisfactory if the rules governed all but the extremities of the contract. It so happens that, in this case (rather unusually), the exemption of the extremities would benefit the shipper. For the form of bill of lading which would have applied is made subject to the rules simpliciter and does not set out the traditional mass of clauses which the rules have rendered generally ineffective. If they were there the shippers would probably

> fare worse under them than under the rules. It would certainly be a triumph for the innate conservatism of those who have not scrapped their small print if, though only on the outer fringes, it was to come into its own But the division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail

This dictum of Devlin J. was applied by the House of Lords in *G. H. Renton & Co. v. Palmyra Trading Corp. of Panama*[11]. Lord Morton of Henryton said, at p. 169, in approving the interpretation given to Article III, Rule 2, by Devlin J.:

> . . . I construe the words "shall properly and carefully carry and discharge the goods carried" as meaning that the carrier must perform the duties of carriage and discharge imposed upon him by the contract in a proper and careful manner.

Lord Somervell of Harrow said, at p. 174:

> The general ambit of the Hague Rules is to be found in article III, rule 2, which has already been cited. It is, in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care. This question was considered by Devlin J. in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* in relation to the words "shall properly and carefully load". I agree with his statement, which has already been cited.

In the present case the carrier carried barges on the *Crosbie* for use in lightering cargo from that ship to shore, and it used the barges for that purpose. It was bound to lighter the goods by its contract of carriage. In that situation, it is my view that the Rules applied to the lightering. The lightering should be considered as a part of the discharging operation, but even if the discharging of the goods concerned from the *Crosbie* was completed when they were put on the barge, the barge was a ship used by the carrier in performing its obligation to carry the goods by water under the contract of carriage covered by the bill of lading and consequently, in my view, the Rules applied to that portion of the carriage.

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[11] [1957] A.C. 149.

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The first consideration under Article IV is whether the loss resulted from unseaworthiness of the ship. There is no question that the *Crosbie* was seaworthy. Any question of unseaworthiness relates to the barge.

The plaintiffs allege that the barge was unseaworthy to receive the equipment, or, in the alternative, that it was made unseaworthy by overloading.

The barge was relatively new, undamaged and in good condition to receive cargo when loading commenced on September 20. Was it then seaworthy, *i.e.*, fit to receive the contemplated cargo as a carrying receptacle and fit to encounter the ordinary perils that were likely to be encountered in the several stages of loading, lying alongside the ship, moving from the ship to the shore, and lying moored near the shore? See, in this respect, *Kopitoff v. Wilson*[12]; *Steel v. State Line Steamship Co.*[13]; *Reed & Co. v. Page, Son and East*[14]; *McFadden v. Blue Star Line*[15]; *Elder Dempster & Co. v. Paterson, Zochonis & Co.*[16].

There is no doubt in my mind that the barge was seaworthy when the ship's crew commenced to load it.

Was it made unseaworthy by the tractor and generating set? There is ample authority for the proposition that a vessel may be made unseaworthy by wrong loading and excessive loading. See, for instance, *Reed v. Page* (*supra*) at p. 749:

> . . . I think, inasmuch as wrong loading, excessive loading, can amount to unseaworthiness, and constitute unseaworthiness, if the vessel is at the end of the loading stage so overloaded as to be a danger to herself and her cargo, that then there is a breach of the warranty which I find exists, that she shall be fit to complete or enter upon and carry out the next stage of the contract.

I am satisfied that the evidence establishes that the master and the officers of the *Crosbie* were qualified for their positions and duties on the *Crosbie* and its voyage and were competent therefor, even if negligent at Deception Bay, and that Chimo did not fail to give the master proper

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[12] (1876) 1 Q.B.D. 377 at p. 380. [13] (1877) 3 App. Cas. 72 at p. 86
[14] [1927] 1 K.B. 743 (C.A.) at p. 754
[15] [1905] 1 K.B. 697 at p. 704. [16] [1924] A.C. 522 at p. 539.

instructions and necessary information as to the availability of shore barges, and otherwise. There was no want of due diligence on the part of the carrier to secure that the *Crosbie* was properly manned, equipped and supplied. But I think that the barge was rendered unseaworthy by the inadequately secured tractor and generating set. When the tractor slid towards the edge of the deck it thereby made the barge unstable. Its instability in the circumstances amounted to unseaworthiness. The loss of the tractor and generating set resulted immediately from that unseaworthiness.

The fault in that respect was that of the captain and responsible officers of the *Crosbie*. There was a want on their part of due diligence to make the barge seaworthy. They were employees of the carrier, and the carrier is responsible in law for their failure to exercise the due diligence required by Article III, Rule 1.

Cartwright J., as he then was, said in his dissenting reasons in *Maxine Footwear Co. v. Canadian Government Merchant Marine Ltd*[17], at p. 808:

> The carrier is responsible in law for the failure of his employees to exercise the due diligence required by art. III, rule 1.

On appeal[18], the Judicial Committee agreed with that statement of the law. They said, at p. 602:

> Cartwright J., dissenting, agreed with the finding that the appellants' goods were not stowed until the commencement of the fire. He held that an owner only escapes liability for damage caused by unseaworthiness if due diligence has been exercised not only by himself but by his experts, servants or agents. He further held that this failure to exercise due diligence caused the fire which amounted to unseaworthiness and caused the loss. He would have entered judgment for the appellants.
>
> The question as to the scope of due diligence was dealt with by this Board in *Paterson Steamships Ltd. v. Robin Hood Mills Ltd:* "The condition"—that is, of the exercise of due diligence to make a vessel seaworthy—"is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose—see *Dobell & Co. v. Steamship Rossmore Co.*"
>
> The failure to exercise due diligence by the fourth officer was therefore, if the matter becomes relevant, a failure to exercise due

[17] [1957] S.C.R. 801

[18] [1959] A.C. 589.

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diligence by the carrier within article III, rule 1. On this point their Lordships agree with Cartwright J.

In that same case the Judicial Committee held that Article III, Rule 1, is an overriding obligation. They said, at pp. 602-04:

> . . . Article III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.
>
> The further submissions by the respondents were based, as they had to be, on the construction of article III, rule 1. It was submitted that under that article the obligation is only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage.
>
> It is difficult to believe that this construction of the word "before" could have been argued but for the fact that this doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law.
>
> It is worth, therefore, bearing in mind words used by Lord Macmillan with reference to the English Carriage of Goods by Sea Act, 1924, which embodied the Hague Rules, as does the present Act. "It is important to remember that the Act of 1924 was the outcome of an International Conference, and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation." (*Stag Line Ltd. v. Foscolo, Mango & Co.*)
>
> In their Lordships' opinion "before and at the beginning of the voyage" means the period from at least the beginning of the loading until the vessel starts on her voyage. The word "before" cannot in their opinion be read as meaning "at the commencement of the loading." If this had been intended it would have been said. The question when precisely the period begins does not arise in this case, hence the insertion above of the words "at least."
>
> On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this unseaworthiness caused the damage to and loss of the appellants' goods. . . .

The situation, then, if the Rules applied to the tractor and generating set until they were lost, appears to me to be this: If the loss resulted from unseaworthiness of the barge caused by want of due diligence on the part of the carrier to make the barge seaworthy, the exceptions from immunity in Article IV, Rule 2, are of no avail to the carrier, but the limitation of liability in Rule 5, where the words "in any event" are used, applies; if the loss did not result from unseaworthiness of the barge, or if it resulted from unseaworthiness which was not caused by the want of such due diligence, the carrier may have recourse to the immunities in Rule 2.

The pertinent paragraphs of Rule 2 in this case are the following:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
>
> (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
>
> (c) perils, danger, and accidents of the sea or other navigable waters;
>
> (d) act of God;
>
> (q) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The Supreme Court of Canada considered paragraph (a) in *Leval & Co. Inc. v. Colonial Steamships Ltd.*[19], and referred to a number of earlier decisions and the principle laid down in *The Glenochil*[20], at p. 226 as follows:

> In *Gosse Millerd Limited v. Canadian Government Merchant Marine*, it was held by the House of Lords that negligence in the management of the hatches was not negligence in the management of a ship, but they referred to a number of earlier decisions and approved the principle laid down by a Divisional Court in *The Glenochil.* That principle was accepted by the Supreme Court of the United States in cases arising under the American *Harter Act* and was affirmed and applied by the Court of Appeal in *Hourani v. Harrison.*
>
> Their Lordships pointed out in the *Gosse Millerd* appeal that there might be cases on the border line "but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion".

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[19] [1961] S.C.R. 221. [20] (1896) P. 10

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The principle laid down in *The Glenochil* (*supra*) was considered and approved by the House of Lords in the *Gosse Millerd* case. See footnote hereto[21].

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[21] [1929] A.C. 223, at pp 230-33, as follows:

From the statement of the facts as found by the learned judge it could not be disputed that the respondents had failed properly and carefully to carry, keep and care for the goods carried. But the respondents pointed out that the obligation imposed upon them was expressly made subject to the provisions of Art. IV., and they claimed that the loss or damage complained of resulted from the act, neglect or default of their servants in the management of the ship. The argument at the bar turned mainly upon the meaning to be placed upon the expression "management of the ship" in that rule. The words in question first appear in an English statute in the Act now being considered; but nevertheless they have a long judicial history in this country. The same words are to be found in the well known Harter Act of the United States, and as a consequence they have often been incorporated in bills of lading which have been the subject of judicial consideration in the Courts in this country. I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

In the year 1893, in the case of *The Ferro*, certain oranges had been damaged by the negligent stowage of the stevedore. It was held by the Divisional Court that the negligent stowage of the cargo was not neglect or default in the management of the ship. Gorell Barnes J. says: "I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship.' I am not satisfied that they go much, if at all, beyond the word 'navigation.'" Sir Francis Jeune says: "It would be an improper use of language to include all stowage in such a term" (i e., "mismanagement of the ship"). "It is not difficult to understand why the word 'management' was introduced, because, inasmuch as navigation is defined as something affecting the safe sailing of the ship . . . it is easy to see that there might be things which it would be impossible to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation."

In the case of *The Glenochil* the same two learned judges, sitting as a Divisional Court, held that the words did protect the shipowner for damage done by pumping water into the ballast tank in order to stiffen the ship without ascertaining that a pipe had become broken, and thereby let the water into the cargo. Gorell Barnes J. says: "There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper

I have already stated my view of the cause of the loss of the tractor and generating set. In my opinion, the loss did not result from any act, neglect or fault in the navigation or management of the ship within the meaning of the paragraph here under consideration.

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handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Sir Francis Jeune says: "It seems to me clear that the word 'management' goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself." And referring to his own judgment in *The Ferro,* he says: "It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo."

The principles enunciated in this case have repeatedly been cited since with approval in this country and in America. The same two learned judges applied them in the case of *The Rodney,* and they were accepted by the Court of Appeal in the case of *Rowson v. Atlantic Transport Co.* In that case the Court of Appeal held that carelessness in handling the refrigerating apparatus of the vessel, resulting in damage to the cargo, must be regarded as falling within the expression, on the ground that the refrigerating apparatus was used for the ship's provisions as well as for the cargo, and therefore that negligence in managing it was negligence in management of the ship.

My Lords, I do not think it necessary or desirable to discuss whether the Court of Appeal was right in their application of the principle in that particular case for reasons which will appear later; I refer to the judgment only because it accepted as the basis of the decision the construction which had been placed upon the words in the case of *The Glenochil.* In the case of *Hourani v. Harrison* the Court of Appeal had to consider the meaning to be attached to the words of Art. IV., r. 2, in a case in which loss was caused by the pilfering of the stevedore's men whilst the ship was being discharged. The Court held that this did not fall within the expression "management of the ship"; but both Bankes L.J. and Atkin L.J. (as he then was) discussed the meaning to be placed on the expression. Bankes L.J. reviews the authorities both in this country and in the United States; he points out that the principle laid down in *The Glenochil* has been accepted in the Supreme Court of the United States as being correct, and he adopts and applies that principle to the case which he is then considering. The learned judge expresses the distinction as being between "damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself." Atkin L.J. says: "that there is a clear distinction drawn between goods and ship; and

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Further considerations under Rule 2 of Article IV are whether the loss arose or resulted from the causes set forth in paras. (c) perils of the sea; (d) act of God; or (q) any other cause.

The defendants plead that the loss of the equipment was caused by an act of God or a peril of the sea.

The meaning of "act of God" has often been expounded. See, for example, *Scrutton on Charterparties*, 17th ed., at p. 219, *Carver on Carriage by Sea*, 11th ed., at p. 10. It will be sufficient for this case to cite what was said by James L.J. in *Nugent v. Smith*[22], as follows, at p. 444:

> . . . The "act of God" is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him. . . .

and what was said in the same case by Cockburn, C.J. as follows at pp. 437-38:

> . . . In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such vis major as the act of God.

I have already found that the loss of the tractor and generating set could have been guarded against by the

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when they talk of the word 'ship' they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea."

My Lords, in my judgment, the principle laid down in *The Glenochil* and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in the *Hourani* case under the present English statute, is the correct one to apply. Necessarily, there may be cases on the border-line, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion.

22 (1875-6) C.P.D. 423.

Crosbie's crew by the exercise of reasonable care and precautions. The defence of "act of God" therefore fails.

The exception "peril of the sea" was dealt with at some length and previous decisions and statements of principles were reviewed by the Supreme Court of Canada in *Keystone Transports Ltd. v. Dominion Steel & Coal Corp.*[23]. The court said, at p. 505:

> From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence.

In the present case the wind and waves played a part in making the barge bump against the *Crosbie,* with resulting sliding of the tractor, but that could have been guarded against by the ship's crew by the exercise of reasonable care and precautions. The loss is attributable to negligence. The defence of "peril of the sea" fails.

By reason of such negligence, also, paragraph (q) of Article IV, Rule 2, does not provide immunity to Chimo.

If there was a failure to properly and carefully discharge the tractor and generating set from the *Crosbie,* or if the use of the ship's barge to take the goods to the shore is considered as part of discharging to which the Rules relate, as was said in *Scrutton on Charterparties* to be possible, the limitation in Article IV, Rule 5, as follows, will apply:

> 5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

No value was declared or inserted in the bill of lading.

The interpretation to be given to the words "per package or unit" is controversial.

A footnote on p. 427 of *Scrutton on Charterparties* states that "unit" probably means the unit of enumeration or measurement shown in the bill of lading as provided by Article III, Rule 3(b).

[23] [1942] S.C.R. 495.

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In the United States' *Carriage of Goods by Sea Act*, Cogsa, the corresponding words are:

> $500 per package . . . or, in case of goods not shipped in packages, per customary freight unit.

The expression "package or unit" was referred to in *Studebaker Distributors, Ltd. v. Charlton Steam Shipping Co.*[24] in connection with an insurance policy which provided a limitation on "packages", in that case unboxed automobiles. Goddard J. said in part as follows at pp. 466-67:

> . . . Apart, however, from the Harter Act, the plaintiffs say, firstly, that there is a short answer to this clause—namely, that it applies only to a package, and here there was no package. The goods are expressly stated to be unboxed, and the case was argued before me by both parties, who doubtless want a decision on what are known to be the actual facts, on the footing that the cars were put on board without any covering, or, to state it in another way, just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer. "Package" must indicate something packed. It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk. If the shipowners desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, "package or unit," to use the language of The Hague Rules. The only case that I have been able to find that assists, though perhaps not much, is *Whaite v. Lancashire & Yorkshire Ry. Co.* There the plaintiff put pictures into a wagon with sides but no top, and loaded it on a railway truck, and the Court held that the wagon was a parcel or package within the Carriers' Act, as the goods were packed in the wagon. It seems to me that the primary object of this clause is to protect a shipowner against receiving an article of considerable value so covered as to prevent him from seeing what it is, this being at least one of the objects of the Carriers' Act, and in *Whaite's* case Bramwell B. stressed that though the railway company could see that there were pictures in the wagon, they could not see their exact character, as this was concealed by the plaintiff's mode of packing. While I hope I am not giving an unduly narrow construction to the clause, I do not feel that I can hold that a motor-car put on a ship without a box, crate or any form of covering is a package, without doing violence to the English language.

The Supreme Court of Canada had the question in *Anticosti Shipping Co. v. Viateur St-Amand*[25], in connection with a motor truck. In giving the judgment of the court, Rand J., as he then was, said in part as follows, at pp. 376-77:

> Here no value of the truck was declared or inserted in the bill; it is not suggested that the rule does not distribute all liability for

[24] [1938] 1 K.B. 459.

[25] [1959] S.C.R. 372.

damages, and the limit of $500 "per package or unit" must then be applied. The word "package" is clearly not appropriate to describe a truck in the condition of that here and may be disregarded; and this leaves our enquiry to the term "unit".

The limitation is clearly for the benefit of carriers by water, dictated by considerations of important policy. I see no ground for implying any duty on the part of the carrier to bring the fact of limitation to the notice of a shipper or in any other respect to concern himself with the requirement which the statute makes equally apparent to both parties. By s. 2 of the statute

> ...The Rules relating to bills of lading as contained in the Schedule...have effect in relation to and connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

and that imperative is likewise binding on both of them.

The word "unit" would, I think, normally apply only to a shipping unit, that is, a unit of goods; the word "package" and the context generally seem so to limit it. But there has been suggested and in some cases the rule specifies the unit of the charge for freight. Neither the bill of lading nor the evidence here throws any light on the freight rate unit. There seems to have been only a flat charge of $48 plus $3 wharfage fee; there is no indication, for example, of a rate based on tonnage or any other weight quantity. The weight of the truck is shown, but to assume that the charge is calculated on a rate for 100 pounds would bring a fractional figure which is most unlikely to represent the actual basis. The sum of $500 would scarcely be taken as a fair limitation of the value of the average 100 pounds weight of freight; in this case the amount would be the product of 102.16 units at $500 each or $51,000 which seems disproportionate to any policy estimate to be attributed to the rule. And the absence itself of any reasonable ground for extending the word to that type of measure, with the other considerations, excludes its application here.

We are left, then, to take the unit as being that of the article. That this may produce anomalies is indisputable, but the rule does not seem to permit qualification. The responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement.

An analogous case came before the United States Court of Appeal, Second Circuit, in *Isbrandtsen Company, Inc. v. United States of America*. There the provision of the rule was,

> In case of any loss or damage to or in connection with goods, exceeding in actual value $500 lawful money of the United States, per package or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, . . .

The shipping unit was a locomotive and tender which was likewise the unit for the freight charge in the flat sum of $10,000. There were

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10 in all of these units. Augustus Hand, Ct. J., at p. 92 uses this language:

> This interpretation may lead to a strange result, for freight on small locomotives under twenty-five tons is computed per ton and consequently would involve a larger liability than is imposed for the more expensive locomotives involved here. But the language of the limitation is controlling and applies to the locomotives and tenders here by its express terms. Our conclusion accordingly is that Isbrandtsen's liability is limited to $500 per unit of locomotive and tender, or $5,000 in all.

The application there was much more serious than that here and I see no warrant for any other conclusion than that the damage in this case must be limited to the same sum of $500.

There is an interesting discussion as to the meaning of "package" in the United States' *Carriage of Goods by Sea Act* (Cogsa) in *Mitsubishi International Corp. v. Steamship Palmetto State and States Marine Corp. of Delaware*[26].

In *Sept Iles Express Inc. v. Clement Tremblay*[27], Kearney J., of this court, had the problem in connection with a motor truck. The respondent argued that "unit" means the article shipped. The appellant argued that it means a unit of weight, or customary freight unit. In giving effect to the limitation of $500, Kearney J. said at pp. 216-18:

> I think the definition given by the respondent to the word "unit" is more in keeping with its natural and usual meaning than the one advocated by the appellant, especially since the word forms part of the phrase "package" or "unit". Although it is etymologically possible to give a different generic meaning to the two words, I think there is insufficient law or fact in the circumstances to warrant doing so.
>
> It cannot be disputed that s. 5 of Art. IV was designed for the protection of carriers, and, if the appellant's interpretation of "unit" were accepted, it would, in my opinion, for reasons hereinafter mentioned, serve to defeat the purpose of the legislation and render the immunity or limitation meaningless.
>
> Furthermore, to allow the appellant's omission to make a declaration of value to prevail would not be unlike allowing the shipper to invoke his own omission to penalize the carrier by substituting $70,000 instead of $500 as the latter's limit of liability. Perhaps this word "omission" is not the appropriate term because there is no evidence that the failure of the shipper or its agent to cause a valuation to be inserted in the bill of lading was due to inadvertency. Indeed, if the appellant anticipated that the meaning it now seeks to attribute to the word "unit" would prevail, doubtless it would have been careful to refrain from making any declaration of value.

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[26] 1963 A.M C. 958.

[27] [1964] Ex. C.R. 213.

It is well recognized that in fixing freight rates, whether on land or sea, there are more than a dozen factors which are taken into consideration: see Freight Traffic Red Book, 1955, published in the United States In my opinion, the most important of these are the value, bulk, weight and risk of handling the article I place value first since it is an ever-present factor which accounts for the rate differential applicable to the carriage of two articles of the same size and weight but where the value of one greatly exceeds the value of the other. But this is not the only reason why great importance is attached by the carrier to the shipper's valuation of the object to be shipped. True, such declared valuation, insofar as the carrier is concerned, is only *prima facie* evidence of the actual value of the article shipped, and is not binding on him, but as I read the Act it is not open to the shipper to claim any damages in excess of the amount of his declared valuation.

Counsel for the shipper pointed out that acceptance of the definition given by the respondent leads to an anomaly in as much as it permits a carrier who, as in the present case, has been found negligent for failure to properly stow a new motor vehicle, which could be readily seen to be worth far more than $500 and for which, as subsequent evidence shows, the shipper had paid approximately $20,000, to argue that his liability be restricted to $500.

In the *Anticosti* case, in the court of first instance the learned trial judge relied on such an anomaly, particularly since the truck in question was not boxed and the carrier could easily see that its value far exceeded $500, and condemned the defendant to pay $4,222. On appeal that reasoning in the Court of Queen's Bench was not accepted by Owen J, but he affirmed the said judgment on other grounds, namely, that no bill of lading (or similar document) existed and that in consequence Art. IV(5) was inapplicable.

It is interesting to note that Owen J, who delivered the said judgment, observed that, in his opinion, the reasons given by the trial judge were untenable. Rand J in rendering the judgment of the Supreme Court agreed with Owen J. in this latter respect, but found, contrary to the judgment of the Court of Appeal, that a bill of lading had been filled out but mislaid, that Art. IV(5) was applicable and that the amount of damages must be limited to $500, and he maintained accordingly the appeal.

It is important to note that the so-called anomaly referred to by counsel for the appellant could have been eliminated and would never have arisen if the shipper had inserted the valuation which he attached to the motor vehicle in question; and if he had inserted its valuation at approximately $20,000, which is a large sum, this would have permitted the carrier to charge more freight or take special precautions in protecting the unit from loss or damage.

Counsel for the shipper pointed out that in the United States the word "unit", as contained in our Act and the corresponding British Act, was replaced with the phrase "customary freight unit". (See Carver—Carriage of Goods by Sea, 9th ed., at pp. 1102 and 1108). Although it is said that this alteration "would appear to have been made to clarify the meaning of unit rather than change it", I am not satisfied that such is the case.

Mr. Justice Goddard, in the case of *Studebaker Distributors Ltd. v. Charlton Steam Shipping Co. Ltd.* wherein a bill of lading contained a clause by which it was agreed that the value of each "package"

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did not exceed $250, expressed the opinion that both the terms "package" or "unit", as found in The Hague Rules, referred to an individual piece of cargo, as appears from the following extract found at page 467 of his judgment. (Note: The extract is quoted *supra* at p. 62 hereof.)

In the present case, the freight rate was as stated in the letter from Munro Jorgensson to Falconbridge, Exhibit D-1, as follows:

> $34 00 per ton of 2,000 pounds or 40 cubic feet, whichever is the greater. Freight considered prepaid. National Harbours Board Wharfage at Montreal for account of shipper at current rate which is presently 60¢ per cargo ton.

and in the column in the Bill of lading headed "No. of Packages and Contents", there appears "2 Cat. Diesel Electric Sets crated and mounted on steel bases"; and "1 Caterpillar D8 Tractor...". The weights are shown in pounds; measurements are in feet and inches. Numerous other items of cargo are shown, including boxes, cartons, barrels and bags.

It seems to me that it would be incongruous to treat the generating set as a package, because it was crated, and apply to it a limitation of $500, and at the same time apply to the tractor a limitation based on a unit of ton or cubic foot measurement, which would result in a limitation, not of $500, but of an amount reached by multiplying the number of such units in the tractor by $500.

In the absence of binding authority to the contrary, I am disposed to do as Mr. Justice Kearney did in the case he decided and hold that each of the pieces of equipment, the generating set and the tractor, is a unit to which the limitation of $500 in Article IV, Rule 5, applies. And I so hold.

In their arguments at the hearing, counsel referred to certain clauses in the bill of lading, in addition to the Rules, relating to the carrier's liberties and liability.

Carver in *Carriage by Sea* says, at p. 139, that in shipping cases a shipowner may contract out of all liability, including liability for negligence, only if he uses exceptionally comprehensive general words, and, at p. 140, that it is now settled that the words "at shipper's risk" do not exempt the shipowner from liability for negligence, and the onus of disproving negligence is on him, although they do not prevent him from relying on a specific exception in the contract which does relieve him from such liability. Of course, Article IV, Rule 8, makes certain clauses of this kind null and void in bills of lading that have effect subject to the provisions of the Rules as applied by the *Water Carriage of Goods Act*.

The principles to be applied to clauses which purport to exempt one party to a contract from liability were set forth by the Judicial Committee in *Canada Steamship Lines Ltd. v. The King*[28], as follows, at pp. 207-08:

> In considering this question of construction their Lordships have had in mind articles 1013 to 1021 of the Civil Code of Lower Canada and also the special principles which are applicable to clauses which purport to exempt one party to a contract from liability. These principles were stated by Lord Greene M.R. in *Alderslade v. Hendon Laundry Ld.* as follows: "Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."
>
> It appears to their Lordships that none of the judges of the Supreme Court regarded this passage as being in any way in conflict with the law of Lower Canada, and Kellock J. observed: "It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case."
>
> Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:—
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec was removed by the decision of the Supreme Court of Canada in *The Glengoil Steamship Company v. Pilkington*.
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation."

[28] [1952] A.C. 192.

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(3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence," to quote again Lord Greene in the *Alderslade* case. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

I have considered the additional clauses and will include them as an appendix. But, on my appreciation of the contract of carriage, which was to take the cargo from Montreal to the beach at Deception Bay, using the *Crosbie* and its barge facilities, and on my finding that the Rules apply thereto, these clauses are not, in my view, effective to relieve Chimo from the consequences of its negligence or to limit its liability respecting the loss of the tractor and generating set, whatever effect they might have in other respects.

If the Act and Clause 1(b) of the bill of lading do not apply the Rules to the lightering of the cargo from the *Crosbie* to the shore or to the tractor and generating set after they were off-loaded onto the barge, it may be, nevertheless, that the Rules so apply by reason of the contract of carriage, for Clause 1(b) of the bill of lading states that it shall have effect subject to the provisions of the Rules, and Clause 10 provides that all the terms and provisions of and all the exemptions from liability expressed and incorporated in the bill of lading shall extend and apply to loss of goods in the custody of the carrier subsequent to their discharge from the ship as fully as if they were set forth seriatim in that paragraph.

While a fine distinction may be drawn between the words "subject to" in Clause 1(b) and "expressed and incorporated" in Clause 10, I am disposed to find, and I do find, that the effect of these clauses is to incorporate the provisions of the Rules into the lighterage portion of the contract. It seems unlikely that the parties to this single contract of carriage intended that one set of laws and rules, *viz*, the *Water Carriage of Goods Act* and its Rules, would apply to the voyage from Montreal to Deception Bay, but that, as soon as cargo was placed on a barge of the ship to be taken to shore, that Act and its Rules would cease to apply thereto, and a new set of laws, including the provisions of the Civil Code of the Province of Quebec, would come into operation and apply to such cargo and the rights and obligations of the parties in respect of it.

The defendants also invoked the limitation of liability in sections 657 to 662 of the *Canada Shipping Act,* with respect to the *Crosbie* and/or the barge C-242-A.

The portion of section 657 which is pertinent herein is as follows, as amended by S. of C., 1961, c. 32, s. 32:

> 657. (1) For the purpose of sections 657 to 663
>
> (*a*) "ship" includes any structure launched and intended for use in navigation as a ship or as a part of a ship; and
>
> . . .
>
> (2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely:
>
> . . .
>
> (*b*) where any damage or loss is caused to any goods, merchandise or other things whatsoever on board that ship;
>
> . . .
>
> (*d*) where any loss or damage is caused to any property, other than property described in paragraph (*b*), or any rights are infringed through
>
> (i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or
>
> (ii) any other act or omission of any person on board that ship;
>
> liable for damages beyond the following amounts, namely:
>
> . . .
>
> (*f*) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (*d*), an aggregate amount equivalent to 1,000 gold francs for each ton of that ship's tonnage.

Section 661 is as follows:

> 661. For the purposes of section 657 and 660, the tonnage of any ship that is less than three hundred tons shall be deemed to be three hundred tons.

Section 2(98) is as follows:

> 2. In this Act,
>
> (98) "ship" includes every description of vessel used in navigation not propelled by oars; for the purpose of Part I (Recording, Registering and Licensing) and sections 657 to 662 inclusive (Limitation of Liability) it includes every description of lighter, barge or like vessel used in navigation in Canada however propelled;

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Insofar as the barge C-242-A is concerned, I think that there is ample authority for me to find that it is a "ship" within the meaning of section 2(98) of the *Canada Shipping Act.* See, among other cases, the following which were cited by counsel in argument: *Gapp v. Bond*[29]; *The Lighter No. 3*[30]; *The Gas Float Whitton No. 2*[31]; *Polpen Shipping Co. v. Commercial Union Assuce. Co.*[32]; *The Mudlark*[33]; *Weeks v. Ross*[34]; *The Harlow*[35]; *Marine Craft Constructors, Ltd. v. Erland Blomqvist (Engineers), Ltd.*[36]; *Mary McLeod v. The Ontario-Minnesota Pulp and Paper Co. et al*[37]; and *City of Fort William v. McNamara Construction Co.*[38].

Having regard to my findings, I think that Chimo is entitled to limit its liability pursuant to sections 657 to 663 of the *Canada Shipping Act.*

A question whether such limitation should be based upon the tonnage of the *Crosbie* only, or the barge only, or the combined tonnage of both, was raised at the hearing. Certain tug and tow cases were cited in this respect. See *City of Fort William v. McNamara Construction Co.* (*supra*) and *Monarch Towing & Trading Co. v. B.C. Cement Co.*[39], in which the tug and its tow were held to be one ship for purposes of limitation of liability under the *Canada Shipping Act.* However, I do not think that the circumstances in those cases and in this case are analogous. The barge was carried on the *Crosbie* for use in discharging the *Crosbie's* cargo, and the *Crosbie's* crew used the barge in the discharging operation. The carrying capacity upon which the profit of the contract depended was in the *Crosbie.* In the circumstances, it is my opinion that the limitation of liability should be based upon the tonnage of the *Crosbie* only.

It was agreed by the parties, at the argument, that if the amount of the limitation of liability under the *Canada Shipping Act* becomes material, there should be a reference to ascertain the tonnage in question. Such a reference

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29 (1887) 19 Q B D 200
30 (1902) 18 T L R. 322
31 [1896] P. 42
32 74 Ll. L. Rep. 157.
33 [1911] P 116
34 [1913] 2 K.B 229.
35 [1922] P. 175
36 [1953] 1 Ll L. Rep. 514.
37 [1955] Ex. C R. 344
38 (1957) 10 D L R. (2d) 625.
39 [1957] S C R. 816

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would not serve a useful purpose if my conclusions are correct, for the limitation of $500 per package or unit under the *Water Carriage of Goods Act*, a total of $1000 for the tractor and generating set, is much less than the amount of any limitation under the *Canada Shipping Act* based upon the tonnage of the *Crosbie*. However, if a reference should become necessary, the matter may be spoken to.

In *Club Coffee Co. v. Moore-McCormack Lines, Inc. et al*[40], a case involving a failure to deliver a portion of a ship's cargo, Thurlow J., of this court, said at pp. 369-70:

> In most cases of this kind the measure of the damages recoverable for failure to deliver goods is the value of the goods at their destination at the time they should have been delivered pursuant to the contract of carriage and it is, I think, for this reason that in many expressions of judicial opinion the measure of such damages has been referred to as being the value of the goods. The true measure of such damages, however, was, I think, somewhat more accurately expressed by Lord Esher, M R. in *Rodocanachi v. Milburn* ((1886) 18 Q.B.D. 67), when he said, at page 76:
>
> > I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost.
>
> So expressed the measure of damages appears to me to coincide with the principle of *restitutio in integrum* and to be broad enough to include the whole of the owner's loss . . .

I have found that Chimo is entitled to limit its liability and I am satisfied that the amount of its liability as so limited will be substantially less than the damages which would otherwise be recoverable by the plaintiffs against Chimo in this action, in contract or in tort. However, I shall determine such damages for the purposes of the action.

In a letter to Falconbridge, dated May 9, 1966, Exhibit P-22, the plaintiff Hewitt quoted $186,000 for 3 generating sets. Falconbridge bought 2 of the sets for $124,000, Exhibit P-6. Both sets were identical and each included a control panel. It was one of these sets that was lost, but its control panel was shipped separately and was not lost. Sales officers of Hewitt put the price of the panel, if sold separately, at $5,000. Hewitt sold a similar set, without a panel, to Falconbridge in June 1967, for $57,000.

The lost tractor was rented by Hewitt to the plaintiff Janin under an agreement dated August 26, 1966, Exhibit

[40] [1968] 2 Ex. C R. 365.

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P-11, at a monthly rental of $4,000 for each working month and $450 for each winter month. In the agreement the value of the tractor was stated to be $77,888, inclusive of 6% provincial sales tax. Janin was responsible to pay the price of the tractor in event of its loss. Concurrently, Hewitt gave Janin an option to purchase the tractor for $73,480, exclusive of the provincial sales tax, Exhibit P-12. The price included a blade and a "C" frame, which were not lost. Moreault, Manager Sales Administration of Hewitt, divided the total price of $77,888 as follows: tractor only $64,180; blade and "C" frame $9,300; provincial sales tax $4,408. In turn Janin rented the tractor to Falconbridge by an agreement dated September 12, 1966, Exhibit P-18, on the same rental terms, and in the agreement the replacement value of the tractor, complete, was stated to be $78,000. After the loss of this tractor Hewitt rented a replacement tractor, only slightly different, to Janin on the same terms, Exhibit P-16, and then Janin rented it to Falconbridge on identical terms, Exhibit P-23. Falconbridge later purchased this tractor by paying $76,000 in rental payments, and a balance of $2,000, plus $4,211.67 interest, Exhibit P-30. By agreement between Falconbridge and Janin, Falconbridge paid Hewitt $77,888 in reimbursement for the lost tractor and the blade and "C" frame, which were not lost. The Engine Sales Manager of Hewitt testified that the price Hewitt puts in its leasing agreements is the current market price at Montreal at the date of the leasing.

The dimensions and weights of the lost machines were not established in evidence with exactness and I think that on the evidence I cannot do better than to use the computation of freight, heavy lift and wharfage charges which were prepared by Captain Jorgensen and received as Exhibit D-22, as follows: Generating set – freight $775.20; heavy lift – $62.22; wharfage – $4.14; Total – $841.56: Tractor – freight $1,472.20; heavy lift – $487.80; wharfage – $10.84; Total – $1,970.84.

On the basis of the foregoing I find that the market value of the generating set and tractor at the time and place of their loss was their said sales price plus freight, heavy lift and wharfage charges, respectively, which in the case of the generating set was $57,000 plus $841.56 for a total of $57,841.56, and in the case of the tractor was $64,180 plus

6% provincial sales tax plus $1,970.84 for a total of $70,001.64. Accordingly, I find Falconbridge's damages to be $57,841.56 and the plaintiffs' damages in respect of the tractor to be $70,001.64.

In argument, counsel for the plaintiffs asked that one month's rental of the tractor be also allowed as damages. It appears to me that any rental that was paid was credited on the replacement tractor which Falconbridge purchased. He also asked that the damages include an amount of $938.76 for insurance premiums paid by Falconbridge and for interest at 5% on the amount of damages from the date of the loss to date of judgment. I am not satisfied that these amounts should be allowed as damages.

In the result:

(1) the action against the defendants Clarke Steamship Company Limited and Munro Jorgensson Shipping Ltd. will be dismissed;

(2) the plaintiff Falconbridge Nickel Mines Limited will have judgment against the defendant Chimo Shipping Limited in respect of the lost generating set for $500, and the plaintiffs will have judgment against the said defendant in respect of the lost tractor for $500;

(3) I will hear the parties with regard to the matter of costs upon a motion for judgment.

APPENDIX to Reasons for Judgment of Kerr J. in Falconbridge Nickel Mines Limited, Janin Construction Limited and Hewitt Equipment Limited, Plaintiffs, and Chimo Shipping Limited, Clarke Steamship Company Limited and Munro Jorgensson Shipping Ltd., Defendants, Court No. 1368.

Clauses in the Bill of Lading

Ship's liability for cargo carried under this bill of lading is coextensive with the contract of carriage and begins and ends with the receipt of cargo in the ship's gear for loading, and the delivery of cargo from the ship's gear at the point of discharge.

. . .

No liability in respect to damage to goods and/or cargo after discharge from vessel unless reported to carrier and/or his agent at time of such discharge.

. . .

All deck cargo carried at owner's risk.

2. Some other exceptions:—The Carrier shall not be liable for:—

. . .

(e) more than the invoice or declared value of the goods, whichever shall be least;

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6. The Carrier shall have the following liberties, any warranty or rule of law notwithstanding:—

. . .

(b) To carry goods of all kinds, dangerous or otherwise, and to carry livestock and/or goods of any description on deck but when so carried the same shall be entirely at owner's risk;

7. Methods of Delivery:

(a) Delivery of the goods shall be taken by the consignees from the ship's tackle, package by package, immediately the ship is ready to discharge, when all responsibility of the Carrier shall cease, or, at the option of the Carrier, the goods may be discharged and stored afloat or ashore at the sole expense and risk of the consignee, but always subject to the Carrier's lien;

. . .

(d) The Carrier shall be at liberty to discharge day and night, holidays included, as fast as ship can deliver, regardless of weather conditions and the Carrier shall be under no liability to notify the consignee of the arrival of the goods, any custom of the port to the contrary notwithstanding;

10. Before Loading and after Discharge:

The terms and provisions of and all the exemptions from liability expressed and incorporated in this Bill of Lading shall extend and apply to loss or detention of or damage to goods in the custody of the Carrier, or his servants, prior to loading on and subsequent to the discharge from the ship on which the goods are carried by sea as fully as if the same were set forth seriatim in this paragraph, provided always that neither the Carrier nor the ship shall under any circumstances be liable for loss or detention of or damage to goods arising from any cause whatsoever when the goods are not in the custody of the Carrier or his servants.

The language in the proviso in Clause 10 "under any circumstances" and "from any cause whatsoever" (when the goods are not in the custody of the carrier or his servants) is much stronger than the words used in the other clauses. There would have been no difficulty in inserting in the clauses an express reference to negligence or other equally clear words embracing negligence, if the clauses had been intended to protect against the consequences of negligence. The clauses do not clearly relieve from such consequences. The risks and liabilities to which the clauses relate may also include loss or damage due to causes other than negligence of the carrier or its servants.

J. D. STIRLING LTD ....APPELLANT;

AND

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

Ottawa 1969

May 22

June 4

Income tax—Business income, computation of—Forgiveness of trade debt—Whether taxable.

Appellant company carried on a contracting business in relationship with the *M* company, which supplied materials and sometimes acted as subcontractor or joint contractor on various jobs. The *M* company held 224 of the 400 shares of appellant, the remainder being held by *S*. In 1961, following acquisition of the *M* company by a foreign company *S* purchased the *M* company's 224 shares in appellant. Under the purchase contract appellant was forgiven its indebtedness to the *M* company of $250,789, the net balance of the contra accounts of the two companies for the three preceding years.

Held, appellant was not taxable in 1961 on the $250,789 so forgiven by the *M* company in that year.

British Mexican Petroleum Co. v. Jackson 16 T.C. 570; *Oxford Motors Ltd v. M N.R.* [1959] S.C.R. 548, referred to.

Semble: If a man carrying on a business asserts claims in a particular year for goods sold or services rendered in a previous year over and above anything that he may have charged for those goods or services in the year in which they were delivered or sold, and manages to collect such additional amounts even though he has no legal right to do so, the amounts so collected are revenues of his business for the year in which they are realized even though the profits of his business are otherwise computed on a so-called accrual basis.

INCOME tax appeal.

R. deW. MacKay, Q.C. and *Brian Crane* for appellant.

A. Garon, Q.C. and *G. J. Rip* for respondent.

JACKETT, P.—This is an appeal from a re-assessment of the appellant under Part I of the *Income Tax Act* for the 1961 taxation year. The sole question in issue is whether the respondent was wrong in including in the appellant's income for the year an amount of $250,789.43, which is described in the Statement of Adjustments to Declared Income attached to the re-assessment as "Capital gain denied".

For some years prior to the taxation year, the appellant was a corporation whose shares were held as follows:

Miron et Frères Ltée	224
J. D. Stirling	176

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At that time, the company carried on a contracting business under the immediate management of Mr. Stirling and, in the course of that business, had continuing business relations with Miron et Frères Ltée who was a supplier of material to the appellant and acted as subcontractor to the appellant in connection with some jobs and carried on other jobs with the appellant under joint venture arrangements. At that time, the shares in Miron et Frères Ltée belonged to a number of brothers whose surname was Miron, and those gentlemen and Mr. Stirling carried on matters between the two companies in an informal way.

As a result of the business relations between the appellant and Miron et Frères Ltée during the 1959, 1960 and 1961 taxation years of the appellant (which ended on June 30 of each year), there were debts or obligations owing by the appellant to Miron et Frères Ltée and debts and obligations owing by Miron et Frères Ltée to the appellant[1] still outstanding on November 30, 1960, as follows:

Appellant owed Miron et Frères Ltée	$532,711 06
Miron et Frères Ltée owed appellant	281,921.63
Net balance owed by appellant to Miron et Frères Ltée	250,789.43

In May 1960 the Miron brothers sold their shares in Miron et Frères Ltée to a company owned and controlled by La Société Générale de Belgique.

On January 30, 1961, Mr. Stirling bought from Miron et Frères Ltée its 224 shares in the appellant company. The agreement to buy such shares was contained in a letter written to, and accepted by, Miron et Frères Ltée, which letter contained a number of special terms including the following:

> (6) I, and Stirling Ltd, and St. Clair hereby grant to you and your parent, associated and/or subsidiary companies and Miron Cement Inc., and members of the Miron family, and Cimenteries et Briqueteries Réunis, a full final and complete release and discharge of and from all obligations and indebtedness existing at November 30th, 1960, and from any and all actions, claims and demands existing at that date (including without limiting the generality of the foregoing any claims that I, Stirling Ltd., or St. Clair may have for consulting, design, engineering or other services in connection with the cement plant,

[1]Some of these were originally owing to or owing by a wholly-owned subsidiary of the appellant called St. Clair Products & Equipment Ltd.

> excepting those expenses already invoiced and paid), except the rights and obligations under existing joint venture agreements.
>
> Reciprocally you and your parent, associated and/or subsidiary companies hereby grant to me and Stirling Ltd., and St. Clair a full final and complete release and discharge of and from all obligations and indebtedness existing at November 30th, 1960, and from any and all actions, claims and demands existing at that date, except for the rights and obligations under existing joint ventures, and except the obligations of me and Stirling Ltd., and St. Clair under Clause 3 hereof.

At the end of the letter agreement appear the words, "We confirm the foregoing insofar as we are respectively concerned", followed by what purport to be signatures on behalf of the appellant and of its subsidiary company.[2]

On September 29, 1961, the appellant's income tax return for the 1961 taxation year was filed and the statement of earned surplus that forms part of the financial statements attached thereto contains an item reading:

> Earned Surplus arising from Forgiveness of Debt with Creditors $250,789 43

The auditor's letter to the appellant's shareholders, which also forms part of such financial statement, contains, *inter alia*, a paragraph reading as follows:

> We have accepted a legal opinion from company council (*sic*) wherein it has been indicated to us that the $250,789 43 gain arising from a forgiveness of debt with creditors represents non-taxable revenue.

The reference in the Statement of Adjustments to Declared Income to "Capital gain denied" (referred to in the opening paragraph of these reasons) is presumably a reference to these two portions of the financial statement attached to the appellant's Income Tax Return for the taxation year.

By its notice of appeal, after referring to the other facts outlined above, the appellant refers to the agreement of November 30, 1960, as follows:

> 12. On or about November 30, 1960, it was decided between Appellant and Miron et Frères Ltée, that settlement should be made of the contra accounts above referred[3] to and, accordingly, by written agreement dated January 30, 1961, a copy of which will be produced at the Hearing hereof, Appellant and Miron et Frères Ltée entered into an agreement whereby each gave to the other a complete release and discharge of and from all obligations and indebtedness existing at November 30, 1960, with the consequence that the said net balance

[2] No doubt has been raised as to the validity of this agreement or as to its being binding on the appellant.

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of indebtedness of $250,789.43 (the capital gain denied by the assessment in respect of the 1961 taxation year of Appellant) was in effect forgiven by Miron et Frères Ltée to Appellant.

The appellant's notice of appeal states its reason why the appeal should be allowed as follows:

13 Appellant alleges that the said capital gain denied in respect of its taxation year 1961 in the amount of $250,789 43 constitutes a forgiveness of debt by Miron et Frères Ltée as a result of an offer of settlement at the time of their ceasing to carry on joint ventures, which cessation arose from the change of ownership of Miron et Frères Ltée and properly constitutes a "windfall" or capital gain.

The respondent's reply contains the following allegation of fact:

4. In making the assessment for the 1961 taxation year, the Respondent assumed that:

(*a*) the sum of $250,789.43 which the Appellant claims was the net balance of accounts payable by Appellant to Miron et Frères Ltée, actually represented overcharges in ordinary contracts in the carrying on of its business by its majority shareholder, Miron et Frères Ltée, in various joint and other projects during the Appellant's taxation years ending June 30, 1959, June 30, 1960, and June 30, 1961, and which overcharges were intimately related to the Appellant's earnings in the said years, and which reduced the Appellant's income for these years, and that the reconciliation of the said sum constitutes income to the Appellant for 1961 within the meaning of sections 3 and 4 of the Income Tax Act.

and sets out the respondent's reasons as follows:

6 The Respondent states that the $250,789 43 from which the Appellant was released by Miron et Frères Ltée, constituted income to the Appellant for 1961 within the meaning of sections 3 and 4 of the Income Tax Act

7. The respondent states that the $250,789 43 constituted overcharges by Miron et Frères Ltée, to the Appellant in the ordinary course of operations of their joint and other projects while carrying on business during the Appellant's 1959, 1960 and 1961 taxation years, and was a reduction in the course of its operations of the excessive costs to the Appellant to a fair and equitable sum which overcharges were intimately related to the Appellant's earnings in the said years, and which reimbursement of the overcharges represented income to the Appellant in the year 1961 within the meaning of sections 3 and 4 of the Income Tax Act.

[3] The "contra accounts above referred to" are, apparently, the amounts on the books on November 30, 1960, according to which the appellant had accounts payable to Miron et Frères Ltée in the aggregate amount of $532,711.06, and Miron et Frères Ltée had accounts payable to the appellant aggregating $281,921 63. See paragraph 8 of the notice of appeal.

At the hearing of the appeal evidence was adduced from which it appeared that, following the change in control of Miron et Frères Ltée from the Miron brothers to the Belgium company, it became clear to both Mr. Stirling and the new management of Miron et Frères Ltée that the old method of carrying on business in a close and informal relationship had to come to an end and that some change in the ownership of the appellant's shares would be expedient. Mr. Stirling thereupon instructed an officer of the appellant to prepare, as a "ploy" to be used in the inevitable negotiations between him and Miron et Frères Ltée, such "claims" by the appellant against Miron et Frères Ltée as could be built up from the situations that had arisen out of the imprecise business relations that had existed between the appellant and Miron et Frères Ltée.

Claims were prepared accordingly, totalling $410,679.89. A large proportion of these "claims" were claims, to be put forward by Mr. Stirling on behalf of the appellant, that settlements previously made between the two companies involved allowances by the appellant to Miron et Frères Ltée of amounts on current account that were larger than they should have been from the point of view of what was fair and just, or claims that Miron et Frères Ltée should pay to the appellant amounts for services rendered by the appellant to Miron et Frères Ltée in respect of which no claim for payment had previously been made. Included in the claims, however, were, in addition, other amounts such as amounts which, if they had been collected, would have been received on capital account (*i.e.*, payments for office furnishings).

These claims, according to the evidence, while they were regarded by the officer who prepared them for the appellant as having "no foundation in fact", were taken seriously by officers of Miron et Frères Ltée other than the Miron brothers (who would have been best qualified to appraise them but were no longer available to do so); and such officers concluded that, while some of such claims were without any foundation, there was a substantial amount of merit in others. In addition, there were other possibilities,[4]

[4] Reference was made to a possibility that the appellant might claim to be entitled to a percentage of the cost of a cement plant built by Miron et Frères Ltée for engineering services provided by the appellant for which no charge had been made.

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according to an officer of the Miron company, of claims by the appellant for payments for services not included in the prepared "claims" which, while of little merit, involved such large amounts that they could not be overlooked in considering any settlement of claims between the two companies.

During the course of negotiations toward the agreement under which Mr. Stirling became the owner of all the shares in the appellant, the management of Miron et Frères Ltée reached the conclusion that these claims put forward on behalf of the appellant as a bargaining "ploy", taken with the other potential claims to which I have referred, should be regarded as roughly equivalent to the balance of accounts payable according to the books by the appellant to Miron et Frères Ltée, in the sum of $250,789.43, and the result was that the agreement for mutual releases quoted above was included in the ultimate agreement.

Clearly, the release of a debt (such as the sum of $250,789.43 that was the balance of accounts as between the two companies in this case as it appeared from their respective books) does not of itself give rise to revenue from the debtor's business even though the amount released is a debt that has been taken into account as an expense of that business. See *British Mexican Petroleum Co. v. Jackson.*[5] A release of a trade debt may, however, be a means of effecting a payment that is part of the current revenues of a business. Compare *Oxford Motors Ltd. v. M.N.R.*[6]

The respondent does not however, by its reply, contend that there is any such basis for treating the sum of $250,789.43 as revenue of the appellant's business. What he says, in effect, as I understand the meaning of the reply according to the submission of counsel for the respondent during argument, is that Miron et Frères Ltée had, during the three specified years, charged the appellant certain amounts in excess of the contract prices (overcharges), that these overcharges, which had become reflected in the books of both companies, were subsequently discovered by the appellant who had persuaded Miron et Frères Ltée to agree that they were overcharges and that such "reconciliation" of that amount was income of the appellant in the year in which it was accomplished.

[5] 16 T.C. 570.

[6] [1959] S.C.R. 548.

I do not find that this view of the facts is supported by the evidence. In so far as the claims asserted by way of "ploy" are in respect of alleged "overpayments" by the appellant to Miron et Frères Ltée, all the evidence is that the amounts originally agreed on and taken into the books were in accordance with "contract", and the "validity" of the claim, if any, was based only on a sense of what was fair as between persons who had been operating in a close and informal relation and not on an understanding of the contractual relations between the parties. Other claims were claims asserted for services rendered, which claims do not appear to have been asserted previously. These claims could in no sense be regarded as claims for adjustment of an "overcharge". I have heard no evidence that suggests to me that anything in the whole list of claims prepared as a "ploy" could be regarded as a claim to redress an overcharge in the sense of a payment or allowance of an amount in excess of what was payable in accordance with contract.[7]

The difficult question on the facts in this case, although I am doubtful that it arises on the pleadings, is whether the appellant derived income in the year in question by the assertion of, and collection of, claims on revenue account. I have no doubt that, if a man carrying on a business asserts claims in a particular year for goods sold or services rendered in a previous year over and above anything that he may have charged for those goods or services in the year in which they were delivered or sold, and manages to collect such additional amounts even though he has no legal right to do so, the amounts so collected are revenues of his business for the year in which they are realized even though the profits of his business are otherwise computed on a so-called accrual basis. If I had come to the conclusion that that is what had happened in this case, I would be inclined to give the parties an opportunity, if they so desired, to amend their pleadings on appropriate terms.

[7] If there had been on the facts any such "reconciliation" of overcharges in previous years, it would have been a question whether it could be taken into income for the taxation year of the reconciliation or whether it would have had to be taken back to the various years of overcharge. On the view I take of the facts, however, that question does not arise in this case.

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In this case, however, there was no payment as such of the claims asserted by the appellant in 1960-1961 against Miron et Frères Ltée and the difficult question as to whether the giving of a release by Miron et Frères Ltée of its claim against the appellant was a means adopted of making such a payment was not raised by the pleadings, and neither any part of the evidence nor any part of the cross-examination was directed to such question. In the circumstances, it would, in my view, be unjust to make a finding that there was any such payment.

Furthermore, any possibility that I might have concluded that this is a case where there should, at this stage, be an opportunity to apply for an amendment to pleadings with a possibility of a new trial is obviated in my mind by the fact that the respondent had ample opportunity on discovery, by questions obviously arising from the issues that were pleaded, to ascertain the facts that had not previously appeared on the record and could, then, if he had chosen to do so, have taken steps to amend the pleadings before trial.[8]

The appeal will be allowed and the assessment will be referred back to the respondent for reassessment on the basis that the amount of $250,789.43 which was added to the "Declared Income" should not have been so added. (There may be consequential adjustments but that direction will be sufficient.) As the appeal is successful, the appellant will be allowed its costs of the appeal.

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[8] I have in mind that, as far as appears from the record, the appellant did not reveal the existence of its claims against Miron et Frères Ltée in the sum of $410,679 89 prior to discovery. They should, however, have come to light on examination for discovery if it followed the obvious course.

LA MAUR, INC. .... APPLICANT; Toronto 1969 Apr. 22-23

AND

PRODON INDUSTRIES LTD and RAYETTE-FABERGE OF CANADA LTD .... RESPONDENTS. Ottawa June 17

*Trade Marks—Expungement application—Sale of hair fixatives—Whether designs dominated by words "HY*STYLE" and "STYLE" confusing—Trade Marks Act, 1952-53, c 49, secs. 6(1), (2), (5)(a), (c) and (e), 16(3)(a), 18(1)*

On December 17th 1963 a trade mark consisting of a design dominated by the word "HY*STYLE" was applied for and registered by one of the respondents for proposed use in the sale of hair fixatives which respondents thereafter sold mainly to retail outlets in Canada (their sales for the three years following registration being almost $1,000,000) Expungement of the trade mark was sought by the applicant under s. 56(1) of the *Trade Marks Act* on the ground that since 1951 the applicant had been using an unregistered trade mark consisting of a design dominated by the word "STYLE" in the sale of hair fixatives mainly to wholesale distributors in Canada, and that the respondents' trade mark was on the date of its registration confusing with applicant's mark and therefore non-registrable (secs. 16(3)(*a*) and 18(1)). No evidence of actual confusion was adduced.

Held (applying the tests set out in secs. 5(*a*), (*c*) and (*e*) for determining whether confusion existed between the two trade marks), applicant had failed to prove that there was likelihood of confusion within the meaning of s. 6(1) and (2) between the two trade marks on the date respondents' mark was registered.

EXPUNGEMENT application.

George H. Riches, Q.C. for applicant.

Donald F. Sim, Q.C. and *Roger T. Hughes* for respondents.

GIBSON J.:—La Maur, Inc., seeks an expungement (section 56(1)[1] of the *Trade Marks Act*) of the registration of the respondents' trade mark (HY*STYLE and Design, entry numbered 136,898 in the Trade Mark Register) beneficially owned by the respondent Rayette-Faberge of Canada Ltd., and registered in the name of the respondent

[1] 56. (1) The Exchequer Court of Canada has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

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Prodon Industries Ltd., alleging that the registration is invalid (section 18(1)(*a*)[2] of the Act) because such trade mark was not registrable "at the date of registration" (December 17, 1963), in that "at the date of filing of the application, it was confusing with" the applicant's unregistered trade mark STYLE "that had been previously used in Canada" by the applicant (section 16(3)(*a*)[3] of the Act).

The applicant does not rely on "made known".

The respondents question the applicant's prior use in Canada; and also say that their trade mark was not confusing with the applicant's trade mark within the meaning of section 16(3)(*a*) of the Act.

On the critical date, namely, December 17, 1963, the application by the respondents for the registration of the said trade mark HY*STYLE and Design was predicated on proposed use.

The unregistered trade mark that the applicant alleges had been previously used in Canada by it is the word "STYLE"; and that such use was in association with hair fixatives. Such alleged use the applicant says was continuous from 1954 through the date of the application for registration of the respondents' trade mark, through the date of publication of the respondents' mark and down to the commencement of these proceedings.

The said trade mark of the respondents consists of a design or get-up in the centre of which as a predominant feature are the words "HY*STYLE".

The evidence of the applicant is that in the main it sold its product using its unregistered trade mark STYLE, to beauty salons in Canada, who in turn sold certain of such

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[2] 18. (1) The registration of a trade mark is invalid if

(*a*) the trade mark was not registrable at the date of registration;

[3] 16 ...

(3) Any applicant who has filed an application in accordance with section 29 for registration of a proposed trade mark that is registrable is entitled, subject to sections 37 and 39, to secure its registration in respect of the wares or services specified in the application, unless at the date of filing of the application it was confusing with

(*a*) a trade mark that had been previously used in Canada or made known in Canada by any other person;

product to customers of beauty salons; and that the product of the respondents using its said registered trade mark, in the main, was sold to retail outlets.

The sole issue in these proceedings is whether the respondent has the right to have the registration of its trade mark remain on the register and the resolution of this issue is dependent on whether in the circumstances of the proof in this case there was use in Canada by the applicant prior to December 17, 1963, and if so was there or was there not as of December 17, 1963, confusion or a likelihood of confusion in the minds of the users between the products of the applicant sold to such users and the products of the respondents sold, each employing respectively its unregistered and registered trade marks.

On the evidence, I find the great majority of the sales of the applicant's wares employing its unregistered trade mark in Canada, from 1954, were made to wholesale distributors in Canada but some were made by the applicant directly to retail outlets.

As a consequence, I am of the view that the applicant has proved that it used its trade mark in association with its hair fixative wares in Canada since 1954 continuously to the date of these proceedings.

The more difficult problem is whether such use of the applicant's unregistered trade mark in association with such wares was likely to cause confusion as of December 17, 1963, with the proposed trade mark of the respondents, then proposed to be used in association with its wares, also hair fixatives, within the meaning of section 6(1) and (2)[4] of the Act.

There is no evidence of actual confusion.

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[4] 6. (1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.

(2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

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The unregistered trade mark that the applicant used in association with its wares from 1954 was not just the word "STYLE". Instead, it was a whole design consisting, among other things, of an oval in the centre of which was written the word "STYLE" in special script and against a particular background. Exhibit 24-1 of the affidavit of Mr. Walter C. Smith sworn on March 17, 1967, is representative of the manner in which such unregistered trade mark was used by the applicant.

The registered trade mark of the respondents consists also of a whole design, but undoubtedly the predominant feature of it are the words "HY*STYLE". The other *indicia* in their trade mark in relation to the *indicia* in the get-up of the unregistered trade mark of the applicant other than the word "STYLE" in it, are not things which are or were likely to cause confusion in the minds of the public.

Employing, in relation to the evidence, the relevant catalogue of factors in order to assess and determine the issue of confusing in this case, namely, all the surrounding circumstances including the matters referred to in section 6(5)(*a*), (*c*) and (*e*)[5] *serriatum,* I am of the view:

The applicant's unregistered trade mark has little inherent distinctiveness being a weak mark employing a word in ordinary and common usage.

When this is coupled with the evidence as to "the extent to which they have become known" (section 6(5)(*a*) of the Act), nothing substantial has been done to strengthen this trade mark. As to this, Exhibit B of the affidavit of Mr. Milton L. LaBrosse submitted by the applicant shows that in the ten relevant years the total sales to his company in Saskatchewan (which is the sales to the wholesale dis-

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[5] 6. ...

(5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

(*a*) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;

...

(*c*) the nature of the wares, services or business;

...

(*e*) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

tributors upon which the applicant relies) consisted of only $25,594.13 worth of such wares. In addition, though, the applicant also filed an affidavit of Mr. Walter C. Smith of Minneapolis, Minnesota, an officer of the applicant, in which he swore that the retail value of sales of applicant's product employing its unregistered trade mark in Canada during that period amounted to about $175,000; and that also during that period the applicant had advertised its wares in association with its unregistered trade mark extensively in many well known United States magazines which had a wide circulation in Canada. Much of this evidence is based on hearsay; but based on such of it as is admissible, it is difficult to measure the impact of it and so I do not consider it of much weight.

As to the "nature of the wares", both of the applicant and the respondents are the same.

As to "the degree of resemblance between the trade marks" as has been stated the whole of the design or get-up must be looked at. But the dominant feature in both are respectively the words "STYLE" and "HY*STYLE".

One general matter should be mentioned, *viz.*, from the respondents' evidence, that in three years since 1963 in Canada the respondent sold almost a million dollars worth of its wares employing its said registered trade mark. (And despite this no evidence of actual confusion was adduced).

Speaking generally as to quality and weight of evidence, it should also be mentioned that there was an absence of evidence from any witness other than witnesses who were officers or employees of the applicant and other than Mr. Milton LaBrosse, who is the wholesale distributor in Saskatchewan, and this is of particular significance in this case. In addition, the applicant relies on sales by LaBrosse's Company to beauty parlor operators, but there was no evidence from any beauty parlor operator. There was also no evidence of the manner in which the applicant's products were sold to the ultimate users by such beauty parlor operators. There was some evidence of sales to such retail stores as Woodward's in Western Canada, but no evidence as to how the users purchased the applicant's products sold in association with their trade mark in Canada.

In all of the circumstances, this case falls to be decided on the matter of onus of proof.

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I am not satisfied that the applicant has proven the likelihood of confusion at the relevant time within the meaning of section 6(1) and (2) of the Act, and therefore, has not proven that as of December 17, 1963 the respondents' then proposed trade mark was confusing with its unregistered trade mark.

As a consequence, the application is dismissed with costs, which are hereby fixed at $1,000.

Winnipeg 1969

Apr. 28-30, May 7-9

Ottawa June 17

OLD DUTCH FOODS LTD. ....PLAINTIFF;

AND

W. H. MALKIN LTD, SHOP-EASY STORES LIMITED AND WESTERN POTATO PRODUCTS LTD } DEFENDANTS.

Trade Marks—Statutory passing-off action—Trade Marks Act, 1952-53, c. 49, s. 7(b)—Plaintiff's chips sold in get-up under name "Old Dutch" —Competitor using name "Dutch Maid" and different get-ups—Whether goodwill acquired for plaintiff's get-up—Whether public likely to be confused.

For several years prior to September 16th 1964 plaintiff made substantial sales of potato chips in western Canada under the trade mark "Old Dutch", using various packaging get-ups which were advertised extensively in certain western cities. Commencing on September 16th 1964 one of the defendants, and later a second defendant, commenced selling potato chips in the same area under the trade mark "Dutch Maid" using a variety of packages which were of the same colours as plaintiff's but of different design.

Held, (dismissing a claim under s. 7(b) of the *Trade Marks Act*), while the evidence established that plaintiff had built up goodwill for its potato chips under the name "Old Dutch" it was not established (1) that plaintiff had built up goodwill for any precise get-up, or (2) that the get-up used by either defendant commencing on September 16th 1964, and thereafter, caused or was likely to cause public confusion as between plaintiff's and defendants' potato chips.

Wilkinson Sword (Canada) Ltd v. Juda [1968] 2 Ex. C.R. 137; *Clairol International Corp. et al v. Thomas Supply & Equipment Co. et al* [1968] 2 Ex. C.R. 552, referred to.

ACTION.

James D. Kokonis and *Robert H. Barrigar* for plaintiff.

Gordon F. Henderson, Q.C. and *Kent H. E. Plumley* for defendants.

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GIBSON J.:—This is primarily a statutory tort action under section 7(b)[1] and section 52[2] of the *Trade Marks Act*.

Added and joined in these proceedings are three other actions and one action by way of counterclaim, but from the proof and argument, it is clear that all of them are of relative minor importance.

These three other actions are: an action for passing-off at common law, a statutory action under section 7(*e*)[3] of the Act, and a claim for an order expunging from the register the trade mark of the defendant Western Potato Products Ltd., DUTCH MAID AND DESIGN; and the action by way of counterclaim is for a declaration that the plaintiff's trade mark OLD DUTCH is invalid and for an order expunging it from the register.

The subject wares in these proceedings are potato chips.

The plaintiff at all material times sold its potato chips using the trade mark OLD DUTCH, but in its primary action does not rely on this trade mark but instead, predicated on what it had done in relation to its wares, potato chips, relies on the protection afforded by section 7 (*b*) of the *Trade Marks Act* and submits in evidence and argument that what the defendants did in September 1964, was done in such a way as to cause or be likely to cause confusion in the subject market place between the defendants' potato chips and the plaintiff's potato chips.

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[1] 7. No person shall

. . .

(*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

[2] 52. Where it is made to appear to a court of competent jurisdiction that any act has been done contrary to the provisions of this Act, the court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits, and may give directions with respect to the disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

[3] 7. No person shall

. . .

(*e*) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

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The plaintiff alleges its market at all relevant times for its potato chips was Western Canada which in certain evidence was described as the area from the Lakehead in the Province of Ontario to Vancouver and Victoria, British Columbia.

What the defendants or some or one of them commenced to do in September, 1964, was to market potato chips, in part at least, in the said market area, using the trade mark DUTCH MAID and a certain get-up of packaging for them.

The dates of the action and counterclaim and certain of the dates relating to the ownership and registration of the plaintiff's trade mark OLD DUTCH and the trade mark DUTCH MAID are of significance.

The dates of the action and of the counterclaim are as follows:

December 11, 1964	Statement of claim against W. H. Malkin Ltd and Shop-Easy Stores Limited.
June 17, 1966	Statement of defence by defendants W. H. Malkin Ltd and Shop-Easy Stores Limited.
August 17, 1967	Western Potato Products Ltd added as party defendant.
January 8, 1968	Amended statement of claim.
May 14, 1968	Western Potato Products Ltd filed statement of defence and counterclaim.
December 24, 1968	Amended statement of defence, W. H. Malkin Ltd and Shop-Easy Stores Limited plus counterclaim.
COUNTERCLAIM	
May 14, 1968	Western Potato Products Ltd.
December 24, 1968	W. H. Malkin Ltd and Shop-Easy Stores Limited.

The plaintiff's dates are as follows:

October 19, 1956	Old Dutch Registered No. 104,697 Old Dutch Foods (U.S.) based on use August 30, 1954 (Exhibit 30)

December 16, 1964	Assignment to plaintiff, Old Dutch Foods Ltd Winnipeg, Manitoba (Exhibit 30)

The defendants' dates are as follows:

February 4, 1931	Dutch Maid trade mark and Design Registration No. 238/51464 to Earl M. Eba (Exhibit 31A)
March 16, 1931	Assignment Earl M. Eba to Dutch Maid Products Limited (Exhibit 31A)
February 4, 1956	Trade mark renewed (Exhibit 31A)
April 23, 1956	New owners—The W. H. Malkin Co. Ltd. (Exhibit 31A)
October 21, 1957	Owners new address—3377 Grandview Highway, P.O. Box 4500, Vancouver 1, B.C. (Exhibit 31A)
September 1, 1964	Owners new name—W. H. Malkin Ltd. (Exhibit 31A)
June 29, 1966	Assignment to Western Potato Products Ltd. (Exhibit 31A)

The plaintiff, using the trade mark OLD DUTCH from 1955 until December 16, 1964, marketed its potato chips in boxes it called "Twin Pac" and "Triple Pack" and in smaller packages using the colours red, white, green and yellow. During all this time, the registered owner of the trade mark OLD DUTCH was Old Dutch Foods (a partnership) of Minneapolis, Minnesota. Then on December 16, 1964, the OLD DUTCH trade mark was assigned by the latter to the plaintiff (see Exhibit 30).

From 1955 to 1959, the plaintiff imported its potato chips from Old Dutch Foods, Minneapolis, Minnesota and sold them to a distributor in Winnipeg, Manitoba by the name of M. & L. Distributors Limited, who in turn sold them to the public.

In 1959 and through the date of the commencement of this action, *viz.* December 11, 1964, and to date, the plaintiff manufactured its potato chips in Canada and sold and distributed them itself.

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Old Dutch Foods, Minneapolis, Minnesota, in 1956, in order to secure the registration of the trade mark OLD DUTCH, in a written submission to the Registrar of Trade Marks dated April 27, 1956, admitted that there could be no confusion in Canada between the mark OLD DUTCH and the trade mark DUTCH MAID. (The trade mark DUTCH MAID AND DESIGN has been on the Register since 1931). Part of this submission reads as follows:

> The two remaining citations involving the words DUTCH MAID can hardly be confused with OLD DUTCH. There is a substantial difference between MAID and OLD, apart from the fact that the word MAID is used in the sense of a suffix as compared with the use of OLD in the sense of a prefix, and one could not exclusively appropriate the word DUTCH. Accordingly, it would appear reasonably clear that there could not be confusion between the registrations for DUTCH MAID and OLD DUTCH.

In evidence and in argument the plaintiff placed great emphasis on the use of the word "DUTCH" in association with potato chips as of September 16, 1964. Among other things, the plaintiff alleges, and there is no evidence to the contrary, that as of that date no other potato chips employing the word "DUTCH" were sold in the alleged subject market; and the plaintiff also alleges but there is little evidence to support the same, that the word "DUTCH" in association with potato chips as of that date meant the plaintiff's OLD DUTCH potato chips.

As to the defendants, from 1931 to September 16, 1964, the trade mark DUTCH MAID AND DESIGN, according to the evidence, in association with potato chips was never used. The paper title to it only was kept on the Register.

On September 16, 1964, the defendant, W.H. Malkin Ltd, assigned this trade mark to the defendant Western Potato Products Ltd (see Exhibit 31A). But this assignment was never registered on the Register until June 29, 1966.

Prior to that, in July, 1964, a company by the name of Westfair Foods Limited, not a defendant in these proceedings, caused a deal to be made between the defendant W.H. Malkin Ltd, and the defendant Western Potato Products Ltd, whereby the trade mark DUTCH MAID AND DESIGN would be assigned to the latter for $10,000 (see Exhibits 65 and 66). At the same time some agreement to manufacture potato chips to be marketed using the trade mark DUTCH MAID was made between Western Potato Products Ltd, and W.H. Malkin Ltd, and Irish Potato Chips Ltd, Winnipeg. (Subsequently, the latter's name was changed to Federated Fine Foods Ltd.) This agreement was verbal.

Then on April 7, 1965, a formal agreement was entered into between Western Potato Products Ltd, and Irish Potato Chips Ltd (See Exhibit 116).

In July 1964 also, when the above arrangements were made, Irish Potato Chips Ltd, ordered from a supplier by the name of Belkin Paper Box Ltd., Vancouver, B.C., approximately 8,000 boxes in which to put DUTCH MAID potato chips on which the name of W.H. Malkin Ltd appeared, as the person of origin of these potato chips. (See Exhibit 39). It also ordered approximately 24,000 boxes with the name of Western Potato Products Ltd, on them.

Between September 16 and November 16, 1964, DUTCH MAID potato chips bearing the Malkin name were sold on the market, notwithstanding the assignment from Malkin to Western dated September 16, 1964, of the trade mark DUTCH MAID AND DESIGN.

The plaintiff alleges this was done so that there would be a defence to a claim for abandonment.

Subsequent to November 16, 1964, DUTCH MAID potato chips were sold under the name of Western Potato Products Ltd. For a period after that date the name of Federated Fine Foods Ltd also appeared on the boxes containing such potato chips.

From this brief outline of some of the facts in this case, it perhaps should be noted that none of the parties have handled their respective trade marks with very much care and understanding of their value as a business asset. And in respect to any goodwill attached to the plaintiff's trade name OLD DUTCH, it also was not handled with much care and understanding.

As a result, the legal issues applicable to the facts of this case are relatively narrow.

As to the primary action in these proceedings, (and these remarks are confined to it) namely the statutory tort action under sections 7(*b*) and 52 of the *Trade Marks Act,* as I understand it, the correct course in interpreting these provisions (and the other provisions) of the *Trade Marks Act,*

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1952-53 (Can.) c. 49 per Martland J. in *S. & S. Industries Inc. v. Rowell*[4] is that stated by Lord Herschell in *Bank of England v. Vagliano Bros.*[5] wherein "discussing the approach taken by the Court of Appeal in construing a provision of the *Bills of Exchange Act*, in relation to the state of the law before the Act was passed" Lord Herschell said:

> My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

Lord Herschell then went on to say, as Jackett P. points out in the *Wilkinson Sword* case, *supra*, that resort:

> . . . may of course be had to the previous state of the law for the purpose of aiding in the construction of the code where there is some reason for it, for example,
>
> (*a*) where a provision is "of doubtful import", and
>
> (*b*) where, in the code, words are found that had previously acquired a technical meaning, or had been used in a sense other than their ordinary sense (in which event the same interpretation might well be put upon them in the code).
>
> Lord Herschell emphasized that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

In interpreting section 7(*b*) of the *Trade Marks Act* in accordance with these principles, all the words in this subsection except the words "likely to" (cause confusion) and "confusion", should be interpreted in their natural meaning uninfluenced by any consideration derived from previous decisions under former statutes or under the common law.

As to the words "likely to" (cause confusion) when employed in this type of context in a code such as this, they have acquired a technical meaning and the same interpretation given in earlier decisions should be put on them.

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[4] [1966] S.C.R. 419 at 425; followed by Jackett P. in *Wilkinson Sword (Canada) Ltd v. Juda* [1968] 2 Ex. C.R. 137 at p. 161.

[5] [1891] A.C. 107 at pp. 144-45.

As to the noun "confusion", it has not acquired a technical meaning, but some assistance in interpreting its meaning may be obtained from section 6(5)[6] of the Act.

The technical acquired meaning when so employed of the words "likely to" (cause confusion) is not "intended to" (cause confusion). Such technical meaning is the same as "calculated to" (cause confusion) or "reasonably likely to" (cause confusion). (See *Eno v. Dunn*[7]; *In re McDowell's Application*;[8] *Kerly on Trade Marks*[9]). It, therefore, makes no difference whether the employment of any method of directing public attention is fraudulent, or merely mistaken or accidental.[10] But as a practical matter of proof, it will be easier for a plaintiff to succeed if a defendant has acted fraudulently or in a manner approaching dishonesty.

Not only is there no technical acquired meaning of the noun "confusion" as used in section 7(*b*) of the *Trade Marks Act,* but also the Act does not define it or precisely direct how it should be interpreted. And none of the catalogue of factors prescribed in section 6(5) of the *Trade Marks Act* which are employed to assess and determine the issue of "confusing" in cases where that adjective is relevant, are precisely in point. (See Cameron J. in *Building Products Ltd. v. BP Canada Ltd.*[11]) But such catalogue of factors may be used as guidelines in interpreting the

[6] 6. . . .

(5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

(*a*) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;

(*b*) the length of time the trade marks or trade names have been in use;

(*c*) the nature of the wares, services or business;

(*d*) the nature of the trade; and

(*e*) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

[7] (1890) 15 App. Cas. 252; (1890) 7 R.P.C. 311.

[8] (1927) 44 R.P.C. 335 at 341.

[9] 8th Ed. p. 400 et foll.

[10] cf Thurlow J. in *Clairol International Corp. et al v. Thomas Supply & Equipment Co. et al* [1968] 2 Ex. C.R. 552 at pp. 561 and 562, where he says that paragraphs (*b*), (*c*) and (*d*) of section 7 of the *Trade Marks Act* "each by its terms is limited to conduct which is deceptive or likely to result in deception and is in that sense dishonest".

[11] (1961) 36 C.P.R. 121 at 132, 134 and 139.

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noun "confusion" in section 7(*b*). (See *Canadian Converters' Co. v. Eastport Trading Co.*[12] and *Carling Breweries (B.C.) Ltd. v. Tartan Brewing Ltd.*[13])

So, therefore, in interpreting the meaning of the whole of section 7(*b*), (interpreting the other words in their natural meaning) it seems clear that by this statutory tort action prescribed in section 7(*b*) of the *Trade Marks Act,* protection is afforded against the employment of any method of directing public attention so as "to cause or be likely to cause confusion in Canada" by which one person's "wares, services or business" are made to appear as if they originated from another, whether or not a trade mark is involved. The relevant time to consider in determining whether or not this statutory tort has been committed is the time of the commencement of the employment of any such method of directing public attention to them or it.

Two common methods of breaching this subsection may be by the use of misleading get-up and by unfair salesmanship, and both are relevant in this case. It is not unusual for these two to go together. Sometimes misleading get-up is sufficient to justify an action against a third party for enabling others to breach this subsection. In such a case, sometimes though, the manufacturer may not be sued, but his customers may be, if they in fact make unfair use of the misleading get-up.

The proof in an action such as this is always difficult to obtain.

To succeed, a plaintiff must prove, firstly, that what he has done in relation to his "wares, services or business" (the get-up) has caused a certain part of the public or the public as a whole, if such is the case (that is, the plaintiff's "market") to associate such with his "wares, services or business"; in other words, a plaintiff must prove that what a defendant has done has resulted in confusion to the public in the plaintiff's market, as to the origin or source of the "wares, services or business"; and that as a result in the subject market, such get-up has acquired a secondary meaning or significance, thereby establishing a right in such a plaintiff. This right has been described in some of the cases as a proprietary right. (As a practical matter in this regard,

[12] [1969] 1 Ex. C.R. 493; (1968) 70 D.L.R. (2d) 149.

[13] [1969] 1 Ex. C.R. 500; (1969) 2 D.L.R. (3d) 398.

the plaintiff must prove that he has extensive enough goodwill for his "wares, services or business" for them or it to be recognized by members of the public in the plaintiff's market; otherwise, it would not be possible for such members of the public to be deceived or confused when they come across similar "wares, services or business" put out or carried on by another. Putting it another way, section 7 (*b*) of the Act protects established lines of "wares, services or business" of established businesses from illegal imitation, but does not provide a shield behind which a new goodwill can be built up). (In this respect, in contrast, registration of a trade mark by reason of section 19[14] of the *Trade Marks Act* which gives "to the owner the exclusive right to the use throughout Canada of such trade mark in respect of . . . (his) wares or services", gives to such owner an absolute right to stop others from using that trade mark, and as a consequence, goodwill can be built up behind the protection given by section 19 of the Act).

Secondly, such a plaintiff must prove what sometimes has been described as an invasion of such a right. Such invasion or breach of such a right in the manner contemplated by section 7(*b*) must be in such a way as to "cause or be likely to cause confusion in Canada". (Whether or not, in any given case, the employment of any method of directing public attention caused or was likely to cause confusion in Canada within the prohibition contemplated by section 7 (*b*), is a question of fact, and proof must be such as to convince a Court that more probable than not confusion has been caused or there is reasonable apprehension of the likelihood of confusion being caused.)

Thirdly, such a plaintiff must prove that such breach of section 7(*b*) of the *Trade Marks Act* caused or was likely to cause him damage.

In this primary action, as stated, the plaintiff does not rely on the trade mark OLD DUTCH in its action under section 7(*b*) of the Act. It relies solely on its get-up which employed the words of the trade mark OLD DUTCH in association with its potato chips.

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[14] Subject to sections 21, 31 and 65, the registration of a trade mark in respect of any wares or services, unless shown to be invalid, gives to the owner the exclusive right to the use throughout Canada of such trade mark in respect of such wares or services.

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It proved that it had made very substantial sales for some years prior to September 16, 1964, of potato chips in boxes which it called "Twin Pak" and "Triple Pack" and also in a variety of smaller packages. It proved that it advertised extensively its "Twin Pak" and "Triple Pack" box designs employing the mark OLD DUTCH. It did not prove precisely that such use and advertising was well known by the public in the whole of its alleged market area. But it did prove that such use and advertising, at least extended to the Winnipeg area and to some very much lesser extent, Fort William, Port Arthur, Regina, Calgary, Vancouver and certain other smaller cities. But the get-up it employed during the period 1955 to September 16, 1964, varied and was not consistent. The only consistent thing was the employment of the mark OLD DUTCH in its marketing of its potato chips.

The plaintiff also proved that the defendant W.H. Malkin Ltd, from September 16, 1964, to November 16, 1964, in association with the words DUTCH MAID and in boxes bearing the words DUTCH MAID did sell potato chips in boxes containing double packs and triple packs of potato chips and that thereafter the defendant Western Potato Products Ltd, sold potato chips in a similar fashion.

The get-up of the boxes and packages containing these latter potato chips bore the same colours as the boxes and packages of the plaintiff, namely, red, white, green and yellow, but the design was different.

The evidence is that from September 16, 1964, to 1968 the sales of the plaintiff of potato chips increased progressively substantially and unabated. In the year 1968 such sales totalled $7,197,723 (see Exhibits 130-131).

The plaintiff also adduced evidence through several witnesses that each had confused an OLD DUTCH product with a DUTCH MAID product on a single isolated occasion. The plaintiff also adduced evidence through one retailer in Winnipeg who said that sometimes the customers ordered OLD DUTCH potato chips by merely referring to them as DUTCH potato chips.

The defendant adduced evidence through witnesses, mainly retailers, who said they sold both OLD DUTCH and DUTCH MAID potato chips from September 16, 1964, and never knew of any customer being confused as to which brand of potato chips he or she was purchasing.

In the result, from the whole of the evidence, I am of opinion that although the plaintiff sold large quantities of potato chips in association with the words OLD DUTCH, that the get-up of its boxes and packages was not consistent throughout the period that there were no other potato chips being sold in this market area employing the word "DUTCH" or any other word in combination with the word "DUTCH" as of September 16, 1964; and that the public in such market area were reasonably familiar with the words OLD DUTCH in association with potato chips.

As a consequence, I am of opinion that the plaintiff had built up a certain amount of goodwill in connection with the sale of its potato chips employing the words OLD DUTCH but not in respect to any precise get-up used by it.

I am of the view also that the defendants in using the words of the trade mark DUTCH MAID and certain parts of the design in association with the sales of their potato chips commencing September 16, 1964, were not unmindful of the commercial success of the plaintiff in selling its potato chips using the words OLD DUTCH. But I am not convinced that the get-up of the packages used or caused to be used by the defendants (or some or one of them) commencing September 16, 1964, and thereafter, was such that the same did in fact cause in any material way the public to be confused or was such that it was likely to cause confusion between their potato chips and the plaintiff's potato chips, in the subject market within the prohibition contemplated by section 7(*b*) of the Act.

The plaintiff's application to amend its pleadings in respect to the defendant Western Potato Products Ltd, is granted in the terms requested. The case that was attempted to be made against Western was an action for enabling the defendants W.H. Malkin Ltd, and Shop-Easy Stores Limited to breach section 7(*b*) of the Act.

As to the other claims in the primary action and as to the other three actions and counterclaim, I am of opinion there was insufficient evidence adduced for any of them to succeed.

In the result therefore, the actions are dismissed with costs and the counterclaim without costs.

1969 Ottawa May 20-23, 26-28 July 23

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

DONALD H. F. BLACK ....RESPONDENT.

Estate tax—Residuary bequest to widow for life—Gift over to descendants —Whether widow has general power to dispose of residue inter vivos— Estate Tax Act, secs. 3(1)(a) and (2), 58(1)(i)—Quebec Civil Code, art 962.

B, who died in 1957 domiciled in Quebec, by his will gave legacies to his children and the residue to his wife "for her use and enjoyment, comfort and general welfare during the remainder of her lifetime", with a direction to his executors to divide the remaining capital amongst his descendants on her death The widow, who was named executrix, renounced that office immediately on her husband's death and under the will the children thereupon became executors with seisin of the whole property and the usual extended powers of sale etc. The testator's widow died in 1965 domiciled in Quebec. Her estate was assessed to estate tax of $26,430 on the footing that under her husband's will she had a general power within the meaning of s 58(1)(*i*) of the *Estate Tax Act* to dispose *inter vivos* of the property of his estate and that her estate was therefore subject to estate tax on that property under s 3(1)(*a*) and (2) of the *Estate Tax Act.*

Held, the assessment could not stand.

(1) Under the husband's will the portion of his estate not required by his widow "for her use and enjoyment etc" did not become part of her estate His will created not a usufruct but a substitution *de residuo* of that property, which thus passed directly from him to his children on his widow's death. *Quebec Civil Code, art. 962.*

M N R v Smith [1960] S.C R. 478 referred to.

(2) Under the husband's will the widow's right to use the capital of his estate was for a limited purpose only, *viz* for "her use and enjoyment, comfort and general welfare" and was therefore not a general power of disposition within the definition of s 58(1)(*i*) of the *Estate Tax Act* so as to be assessable to estate tax.

Montreal Trust Co v. M N R. (Bathgate Estate) [1956] S.C R. 702; *Montreal Trust Co (Hickson and Yuile) v. M.N.R.* [1964] S C R. 647; *Campion v. Carlin and Cholette* 62 Que. S.C. 43; *Montreal Trust Co. (Scott Estate) v. M N.R.* 60 DTC 1183; *Bowie Estate v. M N.R.* 64 DTC 297; *Rowland Estate v. M.N.R.* 67 DTC 676, referred to.

(3) Moreover, even if the widow had a general power under the will to dispose of the husband's property she could not exercise it following her renunciation as executrix without the intervention of the executors who as ultimate beneficiaries would be presumed to permit disposition of the capital only for her use and enjoyment, comfort and general welfare. The widow therefore was not competent to dispose of the

capital of the estate in the hands of the testator's executors immediately prior to his death, as required by s. 3(1)(*a*).

Com'r of Estate and Succession Duties (Barbados) v. Bowring [1962] A.C. 171; *M.N.R. v. Canada Trust Co. (Maine Estate)* 63 DTC, 791 referred to.

INCOME tax appeal.

Alban Garon, Q.C. and *P. H. Guilbault* for appellant.

Paul Dioguardi and *Pierre Dufour* for respondent.

WALSH J.:—This is an appeal by the Minister from a judgment of the Tax Appeal Board dated August 29, 1968, allowing respondent's appeal from an estate tax re-assessment dated January 26, 1967, levying a tax in the amount of $26,430.41 in respect of the estate of Elizabeth Catharine (Fraser) Black. The parties are in agreement as to the facts of the case which involves the interpretation of the will of the late Harvey H. Black, husband of the late Elizabeth Catharine (Fraser) Black, and an agreed statement of facts was filed in the record. The said Harvey H. Black died domiciled in the Province of Quebec on March 13, 1957, having made a last will and testament in notarial form dated December 6, 1945, leaving as beneficiaries his said widow and three children. His said widow Elizabeth Catharine (Fraser) Black died on August 15, 1965, domiciled in the Province of Quebec, and it is the contention of the appellant that at the time of her death she had a general power within the meaning of Section 58(1)(*i*) of the *Estate Tax Act* to dispose by instrument *inter vivos* of the property inherited from her late husband within the meaning of sections 3(1)(*a*) and 3(2)(*a*) of the *Estate Tax Act*. The relevant sections of the Act read as follows:

3 (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

(*a*) all property of which the deceased was, immediately prior to his death, competent to dispose;

3. (2) For the purpose of this section,

(*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein or such general power as would, if he were *sui juris*, have enabled him to dispose of that property;

58. (1)(*i*) In this Act,

"general power" includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of

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property as he sees fit, whether exercisable by instrument *inter vivos* or by will, or both, but does not include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee;

The will directs testator's executors to pay his debts, funeral and testamentary expenses and discharge all particular legacies as soon after his death as convenient. Particular legacies are left to each of his children of the first degree in the amount of $2,000. His wife, the said Elizabeth Catharine Fraser, is named as executrix and given seisin and possession of all testator's property with her powers and seisin extended beyond the year and day limited by law and provision is made that in the event of the death, resignation, refusal or incapacity to act of the said wife she shall be succeeded as executrix by his two sons and daughter or the survivor of them. It is also provided that it shall not be necessary to appoint a curator to any substitution "which may be created by this my will". The executors are given the usual extended powers, including the right to sell or otherwise dispose of the property of the succession and to determine all questions and matters of doubt which may arise in the course of their administration. The important clauses of the will for the purposes of this case read as follows:

> ARTICLE IV. And all the rest residue and remainder of the property real and personal moveable and immoveable of every sort nature and description of which I may die possessed or in which I may have any interest or over which I may have the power of appointment or disposal including all Policies of Life Insurance and the proceeds thereof whether payable to my wife or to my estate, I give, devise and bequeath to my wife for her use and enjoyment, comfort and general welfare during the remainder of her lifetime.
>
> ARTICLE V. Upon the death of my wife or upon my death if she predecease me, I direct my Executors to divide so much of the capital of my Estate as may then remain (or the whole thereof if my said wife shall have died before me) equally among my children in the first degree with representation in favour of their issue and with accretion in favour of the survivors or survivor of them.
>
> ARTICLE VI. The property hereby given is so given upon the express condition that it shall so long as it may be in the hands of my Executors be exempt from seizure or attachment for the debts of any beneficiary and no beneficiary shall have the right to assign his or her share without the written consent of the Executors. . . .

The first question to be decided is whether the will created a usufruct or a substitution. If it was a usufruct as respondent's counsel contends then the widow Elizabeth Catharnie Black had no rights as owner of the property in question at any time and clearly it could not be taxable as part of her estate. The Quebec Civil Code defines usufruct as follows:

> 443. Usufruct is the right of enjoying things of which another has the ownership, as the proprietor himself, but subject to the obligation of preserving the substance thereof.

The term substitution is not specifically defined but Article 925 in describing the two kinds of substitution reads in part:

> Fiduciary substitution is that in which the person receiving the thing is charged to deliver it over to another either at his death or at some other time.
>
> Substitution takes its effect by operation of law at the time fixed upon, without the necessity of any delivery or other act on the part of the person charged to deliver over.

Article 928 reads:

> A substitution may exist although the term usufruct be used to express the right of the institute. In general the whole tenor of the Act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptation of particular words, in order to determine whether there is substitution or not.

Article 929 reads in part:

> The disposition which creates the substitution may be conditional like any other gift or legacy.

Article 944 reads:

> The institute holds the property as proprietor, subject to the obligation of delivering over, and without prejudice to the rights of the substitute.

Article 952 reads:

> The grantor may indefinitely allow the alienation of the property of the substitution which takes place in such case only when the alienation is not made.

Article 962 reads in part:

> The substitute takes the property directly from the grantor and not from the institute.

It is necessary to read all the clauses of the will as a whole in order to interpret the testator's true intentions. The disposing clause in Article IV gives the entire residue

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of deceased's estate "to my wife for her use and enjoyment, comfort and general welfare during the remainder of her lifetime". The next clause Article V states that upon the death of his wife his executors are to divide "so much of the capital of my estate as may then remain, equally among my children in the first degree". It appears clear that the testator foresaw the possibility that some of the capital of his estate might be required for the "use and enjoyment, comfort and general welfare" of his wife during her lifetime and that he does not merely confine her interest in the estate to the income as would be the case if a usufruct had been created. It appears equally clear however that she was not given the ownership of the property to use as she deemed fit without restriction. In my view the term "use and enjoyment comfort and general welfare" indicates merely that he wanted her to be able to be maintained in comfort for the remainder of her life according to the standard of living to which they were accustomed, even if this involved some use of the capital of the estate, but that he certainly did not intend her to give away the capital of the estate or any portion thereof during her lifetime, and he clearly sets out in Article V what is to be done with the remainder of the capital, on her death.

Respondent's counsel points out that there are three essential elements in a substitution,

(a) two donations of the same thing, first to the institute and then to the substitute,

(b) in fiduciary substitutions, a successive order,

(c) a time factor for the handing over by the institute to the substitute either expressly or tacitly stipulated.

There would have been no problem here if the testator had simply given the enjoyment and usufruct of his estate to his wife with the ownership to his children, as in this case there would not have been a substitution because there would not have been two successive donations of the ownership. I believe, however, that the wording of the present will creates a substitution *de residuo* of the property not required for the "use and enjoyment comfort and general welfare" of the widow during her lifetime. This portion of testator's estate never passed in ownership to his widow, but went directly to the children at a period of time determined by the date of the death of his widow. (Article 962 *Quebec Civil Code*). The benefit she received was the income from his entire estate during her lifetime (as if she had been given a usufruct) and a right to such portion of the capital as required for "her use and enjoyment, comfort and general welfare". The ownership of his entire estate did not therefore pass to his children at his death, and there was a lapse of time before the ownership of the unused portion passed to them on the death of his widow, but when it did so pass it passed to them directly from his estate and not from her estate. The will therefore created a substitution *de residuo* and not a usufruct. The fact that there was a clause stating "it will not be necessary to appoint a curator to any substitution which may be created by this will" does not affect this, as this is a standard clause put in many wills to avoid the rather cumbersome procedure set out in the *Civil Code* relating to curators to substitutions which a testator often wishes to avoid, even though he has in fact created a substitution in his will.

The question is definitively dealt with in the Supreme Court judgment in the case of the *Minister of National Revenue v. Smith et al.*[1] where the majority judgment by Chief Justice Kerwin and Justices Abbott and Taschereau held "A fiduciary substitution having been created by the testator's will, the named legatees received the property directly from the testator pursuant to Art. 962 C.C. and consequently that property was excluded from the wife's estate. The three elements necessary to create a substitution were present in the testator's will: two successive benefits were conferred, one to the institute and the other to the substitutes, and there was to be a period between the enjoyment of the institute and the opening of the substitution. The fact that the institute could dispose of the property was no obstacle, as Art 952 provides for a substitution *de residuo*."

An article by Notary Antonin Lefebvre in *La Revue du Notariat*[2] cited by appellant, is to the contrary, indicating that an essential element of a substitution is to conserve the property and to deliver it, and accordingly if the widow can sell or hypothecate the property, then there is no sub-

[1] [1960] S.C.R. 477.

[2] Vol. 47 at page 520.

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stitution but simply a legacy "*de residuo*" and at her death the residue of the property inherited from the husband enters into her succession and not that of her husband, and the children receive the residue not from their father, as they would have if there had been a substitution, but rather from the succession of their mother. This article was however written in 1945, some time before the Smith judgment, and in any event could not be cited as good authority in the light of the judgment in that case. Moreover it dealt with a hypothetical clause giving her the absolute right to dispose of the property, which is not the present case.

The fact that I have concluded, however, that the will created a substitution *de residuo* and not a usufruct, does not by any means mean that the property is taxable under the provisions of section 3(1)(*a*) of the *Estate Tax Act*. It is here that the exact wording of the rights given to the wife under the will becomes of paramount importance and the applicability of the jurisprudence cited by both parties must be carefully examined in the light of the words used in the various wills under review.

In the case of *Montreal Trust Co. v. M.N.R. (Bathgate estate)*[3] the testator left the residue of his estate to his trustees to pay the net income to his wife during her lifetime and "to pay to my wife the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". On her death the residuary estate was to be divided equally between his chlidren. It was held that the wife was competent to dispose of the residue of her husband's estate as she had a general power enabling her to appoint or dispose of it and that "when a donee can require the whole of the residue to be paid to him and thereupon dispose of it as he sees fit he has power or authority to dispose of the property as he sees fit within the meaning of section 4(1) of the Act,"[4] (compare sections 3(2)(*a*) and 58(1)(*i*) of *Estate Tax Act*). In that case however it must be noted that the trustees had to pay her whatever she requested or desired, there apparently being no discretion in them to refuse such a request.

[3] [1956] S.C.R. 702.

[4] Headnote of judgment of Justice Rand.

This case can be compared with that of *Montreal Trust Co., Hickson and Yuile v. M.N.R.*[5] where the mother of the deceased left a share of the residue of her estate in trust for his children, with the provision that if he should die childless this share was to be paid to his testamentary or legal heirs. He died childless and by his will appointed his widow as his universal legatee. It was held that when the substitution opened the deceased's widow, as substitute, took the fund directly from the mother of the deceased and not from the institute, her husband, and also that the argument that the deceased had such a general power to dispose of the fund as to bring the property within section 3 of the Act could not be upheld. Since the deceased could not dispose of the property to anyone but his testamentary heirs, he did not have the power to dispose of it "as he saw fit" within the meaning of section 58(1)(*i*).

The Superior Court case of *Campion v. Carlin & Cholette*[6] did not deal with estates tax but rather with the title to an immoveable sold by the wife. The purchaser himself refused to carry through the transaction, attempting to avoid his obligation by alleging that the plaintiff did not have the right to sell the property under the provisions of the will, as it was subject to a substitution. The will read: "I give, devise and bequeath to my wife..., during her life with power to use such portion thereof for her maintenance and comfort as she may deem advisable" and a further clause provided that "should there remain at the time of her decease any part or portion of the estate hereinabove bequeathed to her" etc. It was held that the substitution created by the will was a substitution *de residuo* but in view of Article 952 permitting the grantor to allow the alienation of the property of the substitution the wife could alienate the property during her lifetime and give good title thereto. In our present case, however, there is considerable doubt as to whether the wife could alienate any of the property of the succession herself and give title thereto, which question I will deal with later.

In the case of *Montreal Trust Co. (Scott Estate) v. M.N.R.*[7] the will provided that the residue of the estate was left to the testator's wife who was to have the right to

[5] [1964] S.C.R. 647.
[6] 62 Que. S.C. 43.
[7] 60 DTC 1183.

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"freely use and dispose of the revenue and capital as long as she lives". On her death whatever had not been disposed of was to pass to testator's daughter. The entire capital of the estate remained in the hands of the executor in the wife's lifetime and none of the capital was touched. It was held however that the property was dutiable as during her lifetime she had the capacity to alienate the property in question even though she could not do so by will. The provisions of the will showed the intention to give the wife unrestricted power to alienate the whole of the capital, and this constituted a general power notwithstanding restrictions as to disposition by will. It is to be noted that the wording of the said will does not restrict her use and disposal of the property in any way, and is clearly distinguishable from the present case.

The case of *Bowie Estate v. M.N.R.*[8], a judgment of the Tax Appeal Board dealt with a situation where the residue of an estate was left to the executors and trustees on certain trusts by one of which they were instructed to pay the income therefrom to deceased's sister for the term of her natural life with a proviso that the sister "is to have the right to encroach upon the principal of the fund hereby set aside should she so desire for any purpose or purposes whatsoever". When she died in assessing her estate the assets standing to the credit of the trust created for her benefit by her brother were included. The appeal against this decision was allowed since, although under the terms of the trust she was to have the right to encroach upon the principal of the fund, that provision did not give her the right to revoke or cancel the trust or demand that the entire assets of the trust created by her brother should be turned over to her, so that she could personally dispose of the trust assets as part of her personal estate. The judgment stated, "From the language used the most that could be inferred was that the testator would be satisfied to have his trustees make encroachments for any purpose or purposes whatsoever which were for the benefit of his sister."

The case *Rowland Estate v. M.N.R.*[9], another judgment of the Tax Appeal Board, dealt with the situation where a trust was created to pay the wife during her lifetime the

[8] 64 DTC 297.

[9] 67 DTC 676.

net income from the estate and "such part or parts of the capital as she in her sole discretion may require from time to time". Upon her death the remaining capital was to go to her son. The appeal from the assessment including the assets of her husband's estate in her estate when she died was allowed and it was held that it appeared that the testator intended that his wife's requirements or needs should be met by payments out of the capital at regular intervals if need should arise. Such needs had not arisen and although she was bequeathed the right to decide the amount of her needs and to receive such amounts from the capital of her husband's estate from time to time during her lifetime if the income of the estate was insufficient, she did not have a general power which would enable her to dispose of all the capital of her husband's estate, and the property should therefore not be included in the taxable value of her estate. This judgment cites with approval the Ontario case of *Agnew v. Canada Permanent Trust Co.*[10] where the will read: "I hereby empower my said wife to draw from the corpus of my estate whatever sums of money she may desire for her own use". Chief Justice Rose held that her executors must account to the beneficiary of the husband's estate, as while she could draw money to spend it for her own use she could not do so for reinvesting in her own name.

Dymond's Death Duties, Volume 1 states at page 96 that "in cases where a life tenant is empowered to appropriate for his own personal maintenance such part of the capital of the settled fund as he may need, he is not regarded as competent to dispose of the part which he does not require. (*Re Pedrotti's Will* (1859), 27 Beav. 583). On the other hand where a life tenant has the power to deal with such part of the capital as he thinks fit, with the remainder over on his death, he is competent to dispose of the whole".

Loffmark on Estate Taxes at page 169 states: "It has been held in England that if a person merely has power during his lifetime to apply for his own use such part of the funds as he may need he is not competent to dispose of that part which he does not need and which thus remains intact at his death. (*Re Richards* [1902] 1 Ch. 76)."

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[10] [1933] O.W.N. 80.

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It is clear in our case that if the widow could use capital at all it was only for "her use and enjoyment, comfort and general welfare" and for this limited purpose only and she therefore had no right of disposal. I reject appellant's argument that "enjoyment" might include the right to make donations to third parties of the property, as inconsistent with the context and obvious intention of the clause. The definition of general power in section 58(1)(*i*) quoted above refers to the right to "appoint, appropriate or dispose of property *as he sees fit*" and it is clear that the present will does not give this unlimited right to the widow. She was therefore not competent to dispose of the property within the meaning of sections 3(1)(*a*) and 3(2)(*a*) of the Act.

Even if her use of capital was not restricted by the wording of the will, however, it would have been restricted in practice by the facts in this case. Had Mrs. Black remained as executrix she could have retained seisin of the property in that capacity, and by virtue of the extended powers given to the executor under the will have sold same giving valid title, or alternatively she could have turned over the property to herself as institute under the substitution and then have sold such portion of same as she deemed necessary for "her use and enjoyment, comfort and general welfare". She would be wearing two hats, as executrix under the will and institute under the substitution, and from the practical point of view there would therefore have been no control over her use of this discretion. There has been somewhat conflicting jurisprudence on the subject of the validity of such alienations. The case of *Campion v. Carlin & Cholette* (*supra*) held that she could sell and give valid title basing the finding on Article 952 C.C. Here the disposing clause contained the words "as she may deem advisable" and there was no indication that this right was subject to the control of any executor or trustee. The case of *Ricard v. St. Jean*[11] also permitted the sale of an immoveable by the widow during her lifetime. The holding, however, decided that she was neither a usufructuary nor an institute under a substitution and was therefore under

[11] (1959) 77 Que. S.C. 302.

no obligation to conserve and hand over the property, the will having created a *fideicommis de residuo* without a substitution. A similar finding was made in the case of *Brais v. Fortier et al*[12] but it should be noted that the wife was given the right not only of administration of the property of the succession, but even the disposal of same. The author Antonin Lefebvre in *La Revue du Notariat* (*supra*) would also permit the alienation of the property, but on the basis that there is no substitution if there is no obligation to conserve, but merely a legacy *de residuo*. He is, however, dealing with a hypothetical clause reading as follows:

> Je donne et lègue à mon épouse, tous mes biens, meubles et immeubles, que je délaisserai le jour de mon décès et qui composeront ma succession, pour par elle en jouir et disposer en pleine et absolue propriété à compter de mon décès et comme de chose lui appartenant, cependant je veux et entends que ce qui restera de mes biens lors du décès de madite épouse retourne à mes enfants, et, il en sera de même si ma légataire universelle convole.

which is clearly much wider than the clause in the present will, as it gives the wife the right to enjoy and dispose of the assets in full and absolute ownership as if they belong to her.

On the other hand, the majority judgment in the Supreme Court in the case of *Smith and Montreal Trust Co. v. M.N.R.* (*supra*) held that a fiduciary substitution was created. "The fact that the institute could dispose of the property was no obstacle as Article 952 provides for a substitution *de residuo*". This case was not dealing with the validity of title which the institute could convey by disposing of part of the property during her lifetime, and the actual question of whether she was competent to dispose of the property immediately prior to her death was settled by the fact that she had some 13 years after her husband's death signed a notarial document repudiating any right given her in the will to dispose of the property comprising the rest of the estate and had delivered over to the substitutes under the substitution in anticipation of the term appointed for the opening thereof, the naked ownership of the property in the residue of the estate, but this does not

12 (1955) Que. S.C. 222.

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diminish the authority of the finding quoted. It is not necessary for the decision of the present case to reach a conclusion as to whether alienations by Mrs. Black would have given valid title to the property if they had not been for her "use and enjoyment, comfort and general welfare", however.

The fact is that in the present case Mrs. Black was at no time in a position to appoint, appropriate or dispose of the property as she saw fit, and certainly she was not so immediately prior to her death. The record discloses that Harvey Black died on March 13, 1957, and that five days later, on March 18, 1957, his widow formally renounced the office of executrix, which she was permitted to do under the terms of the will, and the execution of the will thereupon devolved upon her two sons and daughter or the survivor of them according to the provisions of clause VII of the will. Though she did not formally renounce to the substitution nor hand over the assets thereof to the institute, as in the *Smith* case, it is clear that the seisin of the property of the estate remained vested in the executors. As a matter of interest it might be noted, though I do not believe this affects the decision of the issue, that she had previously named one of her sons, Donald Harvey Fraser Black, as her legal attorney by notarial deed dated February 27, 1957, and it appears that her mental condition was deteriorating to a point where she could no longer manage her own affairs. It can also be noted that none of the capital was in fact ever disposed of for "her use and enjoyment, comfort and general welfare". The judgment of the Tax Appeal Board points out that before dealing in any way with the assets of the estate the executors had to comply with section 46(1) of the *Estate Tax Act* requiring them before transferring, delivering or paying over any property to any successor to pay the amount payable pursuant to or by virtue of the Act as tax or to furnish security for the payment of this. It is clear that during the five-day interval between the death of the testator and her resignation as executrix Mrs. Black could not have legally disposed of any part of the corpus of the estate in any manner whatsoever. Certainly she could not do so immediately prior to her death within the meaning of section 3(1)(*a*) of the *Estate Tax Act*.

A number of cases have dealt with the situation where seemingly wide powers of disposal (in many cases far less restricted than the powers in the present will) have nevertheless been held to be restricted by the necessity of intervention of executors or trustees so that it has been decided that the beneficiary of the powers was not competent to dispose within the meaning of the Act.

The Privy Council case of *Commissioner of Estate and Succession Duties (Barbados) and Trevor Bowring*[13], dealt with a trust set up in Massachusetts by the donor to pay her the income from it during her lifetime and following her death to her son. There was a clause providing that during her lifetime she should have the right to amend or revoke the trust in whole or in part by an instrument in writing, provided however that this was consented to in writing by the trustees. Under Massachusetts law, where the trust was created, the trustees had the right to consent or refuse to consent to such an amendment. At the date of her death in Barbados, estate duty was claimed on the trust property under provisions in their statutes practically identical to the relevant sections of our *Estate Tax Act*. It was held that the donor, was not, at the date of her death, possessed of a general power making her competent to dispose of the trust property since any amendment or revocation of the trust deed was subject to the consent of the trustees and as a consequence estate duty was not payable.

In the case of *M.N.R. v. Canada Trust Co. (Maine Estate)*[14], the deceased had, under the will of her husband, the income for life on the capital of his estate and the trustees were authorized to make such additional payments out of the capital as from time to time the widow "in her absolute discretion" might deem essential to maintain her as she was accustomed. These were certainly wider powers than given in the present will and the Minister contended that the widow could have, the day after her husband's death, demanded the whole of the trust property. It was held by Jackett P. that, from the context of the whole will, the authority given the trustees to make payments out of the capital of the estate was not overridden by the discretionary

13 [1962] A.C. 171.
14 [1964] Ex. C.R. 949; 63 DTC 791.

powers given to the widow to request such payments. The final decision as to whether such payments would be made was reserved in favour of the trustees and the Minister's appeal was therefore dismissed.

In the Tax Appeal Board case of *Bowie Estate v. M.N.R.* (*supra*), where the trust in favour of deceased's sister permitted encroachment on the capital "should she so desire for any purpose or purposes whatsoever" the finding was nevertheless to the effect that this provision did not give her the right to revoke or cancel the trust or demand that the entire assets of the trust created should be turned over to her so that she could personally dispose of the assets as part of her personal estate. "Neither was it possible to visualize at the time that the trustees would accede to her wholesale demand when the whole tenor of the will was diametrically opposed to revocability or cancellation of the trust. From the language used the most that could be inferred was that the testator would be satisfied to have his trustees make encroachments for any purpose or purposes whatsoever which were for the benefit of his sister but it was evident that the right to encroach should not be regarded as coming within the definition of general power".

A similar finding was made in another Tax Appeal Board case of *Rowland v. M.N.R.* (*supra*). Here the trust was to pay the wife during her lifetime the net income from the estate and "such part or parts of the capital that she in her sole discretion might require from time to time". Here again the powers were clearly wider than those in the present will. The finding was that the testator intended that the wife's requirements or needs should be met by payment out of the capital at regular intervals if need should arise. She was given the right to decide the amount of her needs and to receive such amounts from the capital of her husband's estate from time to time during her lifetime if the income of the estate was insufficient but this did not give her a general power which would have enabled her to dispose of the capital of her husband's estate and that it should therefore not have been included in the aggregate taxable value of her estate. This judgment quoted favourably the *Maine* case previously cited.

Both the *Bathgate* and *Scott cases* (*supra*) can readily be distinguished in that the will in the former case used, as I have previously indicated, the words "and to pay to my wife the whole or such portion of the capital thereof which she may from time to time and at any time during her life request or desire" so she could require the trustees to pay the whole or any portion of it to her at any time and they would have no discretion to refuse, while in the latter case the beneficiary was given the right "to freely use and dispose of the revenue and capital as long as she lives". Although the capital remained in the hands of the executors without having been touched at the time of her death they could not have refused to turn it over to her on her request as the will also contained a clause stating that this right was "subject always to the seisin, rights and powers hereby conferred upon my executors in respect to such of the property from time to time not used or disposed of by my wife", which makes it clear that the executors only retained seisin of the balance.

To conclude therefore it is abundantly clear in the present case that Mrs. Black did not have a general power within the definition of section 58(1)(i) of the Act to dispose of the property "as she saw fit", and even if she had such power under the will, it could not have been exercised by her without the intervention of the executors following her renunciation as executrix, and the executors, being the same persons who would eventually inherit upon the opening of the substitution, would be presumed to permit disposal of the capital only for "her use and enjoyment, comfort and general welfare" and not for any other purpose. She therefore was not competent to dispose of the capital of the estate which was in the hands of testator's executors at a date "immediately prior to her death" and such property was not taxable as part of her succession. The appeal is therefore dismissed with costs.

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Ottawa
June 24-25

July 31

SMITH KLINE & FRENCH INTER-AMERICAN CORPORATION ...... PLAINTIFF;

AND

MICRO CHEMICALS LTD, PAUL MANEY LABORATORIES CANADA LTD and GRYPHON LABORATORIES LTD .... DEFENDANTS.

Patents—Compulsory licence of process for making medicine—Use of invention in research pending licence—Whether infringement—Determination of royalty postponed at patentee's instigation—Whether damages affected under the Patent Act, s. 41(3).

In the course of research *M* made a small quantity of a medicinal compound by plaintiff's patented process and later applied under s. 41(3) of the *Patent Act* for a compulsory licence of the invention. Pending a decision thereon *M* made additional batches of the compound by plaintiff's process during further research designed to put *M* in a position to use the licence as soon as it was granted; and substantial quantities of the compound manufactured by *M* and put in tablet form by *G* were delivered by *P* free of charge to two hospitals in Manitoba for medical evaluation. On June 21, 1966, the Commissioner of Patents granted a licence effective that date, but at plaintiff's request postponed proceedings for determination of the royalty, which on February 3, 1967, he fixed at 15% of sale price on sales from June 21, 1966. On September 20, 1967, it was however held by this court ([1968] 1 Ex. C.R. 326) that the licence dated only from February 3, 1967. Between June 21, 1966, and February 3, 1967, *M* sold *G* a large quantity of the compound. Plaintiff sued *M, G* and *P* for infringement of its patent.

Held: (1) In using plaintiff's patented process both before and after the application for a licence, not for the purpose of improving on the invention but to satisfy itself that it could produce the product commercially by that process as soon as a licence was granted *M* infringed the patent. Nothing in s. 41(3) of the *Patent Act* warranted such use of the invention. The damages, if any, suffered by plaintiff from such infringement were, however nominal.

Frearson v. Loe (1878) 9 Ch.D. 48; *Hoffmann-La Roche v. Delmar Chemicals Ltd* [1965] 1 Ex. C.R. 611; *Hoffmann-La Roche Ltd v. Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd* [1965] 2 Ex. C.R. 266; *Gibney v. Ford Motor Co. of Canada* [1967] 2 Ex. C.R. 279; *United Telephone Co. v. Sharples* (1885) 2 R.P C. 28; *Proctor v. Bayley and Son* (1889) 6 R.P.C. 106 at 109, referred to.

(2) In supplying the compound free of charge to hospitals with a view to expediting commercial sales of the compound at the earliest possible moment after a licence was granted defendants infringed the patent; but plaintiff's damages were nominal.

Dunlop Pneumatic Tyre Co. v. British and Colonial Motor Car Co. (1901) 18 R.P.C. 313 at 315; *British Motor Synd. v. Taylor & Son* [1901] 1 Ch.D. 122 at 133, referred to.

(3) Defendants' use of the invention between June 21, 1966, and February 3, 1967, was an infringement of the patent, and although the Commissioner's postponement of his decision on royalty was instigated by the plaintiff it did not necessarily follow that the damages should be based on the amount of royalty fixed on February 3, 1967.

Meters Ltd v. Metropolitan Gas Meters Ltd (1911) 28 R.P.C. 157 at 164-65; *F. Hoffman-La Roche & Co. A.G. and J.R. Geigy S.A.'s* patent referred to.

In accordance with an agreement of the parties the plaintiff's damages should be the subject of a reference.

ACTION for infringement of patent.

R. Graham McClenahan and *David E. Clarke* for plaintiff.

Hon. J. T. Thorson, Q.C. for defendants.

WALSH J.:—This is an action by plaintiff against defendants for infringement of its Canadian letters patent No. 612204 granted for a period of 17 years from January 10, 1961, for a process for the manufacture of trifluoperazine (and salts thereof) which is the generic name for a useful medicinal compound. On or about March 25, 1965, (the agreement as to facts refers to the date as March 30, 1965) the defendant Micro Chemicals Ltd applied to the Commissioner of Patents under section 41(3) of the *Patent Act* for a compulsory licence authorizing it to make and sell trifluoperazine dihydrochloride, hereinafter referred to simply as trifluoperazine, and after considerable correspondence and extensive submissions by both parties he issued a decision on the application on June 21, 1966, granting a non-exclusive licence "effective as of this day". On the question of royalty and other terms of the licence he ordered the patentee to file its submission with a copy to the applicant within 30 days and the applicant would then have another 30 days to file its own submission and comments and upon consideration of the submissions the Commissioner indicated he would then finalize the licence with effect as "of the date of this decision" (Exhibit 12).

The licence was finalized on February 3, 1967, when the Commissioner settled the terms of the licence, fixing the royalty at 15% of the applicant's net selling price to others

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of the product prepared or produced pursuant to the licence and sold by it, with the said term "net selling price" being defined in the said licence (Exhibit 16).

The statement of claim alleges that before the effective date of the said licence on February 3, 1967, and without the licence, permission, or assent of plaintiff and subsequent to the 10th day of January, 1961, defendant Micro Chemicals Ltd commenced to carry out the said invention in Canada and with the other two defendants commenced to use and sell the resulting trifluoperazine in Canada, in infringement of the plaintiff's exclusive right, privilege and liberty by virtue of its Canadian letters patent, and asks for a declaration that, as between the parties for the purposes of this action Canadian letters patent 612204 is valid, that it has been infringed by the defendants, and for damages or an accounting of the profits as it may elect, for a direction that all necessary accounts may be taken and inquiries made for the purpose of ascertaining the damages or profits to which plaintiff is entitled, and for costs of the action and such further and other relief as may seem just.

By judgment of President Jackett dated September 20, 1967, in proceedings between the plaintiff *Smith Kline & French Inter-American Corp.* and defendant *Micro Chemicals Ltd*[1] it was decided that a decision under section 41(3) cannot be made retroactive and hence a term of the licence of February 3, 1967, that royalty should be paid on sales subsequent to June 21, 1966, must be struck out. This judgment followed his earlier decision in the case of *Hoffmann-La Roche v. Delmar Chemicals Ltd*[2], in holding that under section 41(3) of the *Patent Act* the decision of the Commissioner can either refuse the application or grant a licence containing appropriate terms and providing for royalty or other consideration, and it is only one of these decisions that is subject to an appeal to the court. The Commissioner's decision of June 21, 1966, and the purported grant of the licence on that day was not a completed act as the terms of the licence and royalty had not yet been settled.

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[1] [1968] 1 Ex. C.R. 326.

[2] [1966] Ex. C.R. 713.

Plaintiff filed as Exhibit 1 at the hearing an agreement as to facts to which solicitors for both parties had agreed, to which was annexed photostats of all the exhibits referred to therein. Plaintiff also read into the record certain portions of the evidence given at the examination for discovery of John Cook as an officer of defendant Paul Maney Laboratories Ltd during the course of which it was agreed by counsel for defendants that this should also be regarded as being an examination of Mr. Cook as an officer of defendant Gryphon Laboratories Ltd and of defendant Micro Chemicals Ltd with the same questions, answers and objections applying in the case of all three defendants. Most of the material read into the record in connection with this examination is already covered in the agreement as to the facts.

The only witness called at the hearing was Paul Landt Diosady called as a witness by defendants. He has been a professional engineer for 30 years with a chemical engineering degree and has been a consultant for defendant Micro Chemicals Ltd since 1958 when that company was incorporated. He testified that some time prior to the application of defendant Micro Chemicals Ltd on March 25, 1965, for a licence, they had been carrying out research for the production of small quantities of similar substances. In 1958 they had explored the possibilities of promazine, one of the phenothiazine products. They next experimented with chloropromazine and obtained a licence for the production of this. They then experimented with the production of promethazine and finally tried to produce trifluoperazine, the drug we are now dealing with. As a preliminary to this they researched the literature and tried to make it and in March 1963 made 10 grams during the course of research. Between March 25, 1965, and prior to January 1966 research and preparation for operation of the licence the company had applied for continued. They wanted to determine how to get the best yield out of the process. The various batches made would be kept by them for reference. The statement in paragraph 9 of the licence application (Exhibit 2) indicating that the applicant had already produced trifluoperazine according to the specifications of the pat-

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ent and by the process described, on a trial or pilot scale and that it can do so with equivalent safety and quality equal to the product produced by the patentee and on a sufficiently large commercial scale and at a substantially lower price than that charged for stelazine (the name used for plaintiff's product) was based on the experiments made prior to the application. Exhibit 20 which he referred to is a schedule of the various small batches which they experimented with between November 1, 1965, and January 22, 1966, showing the size of the batches and the results attained. No attempts were made to develop a different process but the experiments were with a view to successfully duplicating the process set out in the patent. He explained that, even following the patent, it was often difficult to reach satisfactory results and they wished to be in a position to use the licence as soon as same was granted. Even now stability studies are continuing to check on storage, effects of various conditions on the product and similar information which is important in connection with the marketing. After succeeding in producing 10 grams in March 1963 no more of the product was manufactured until the experiments recommenced in November 1965. Experiments were carried on with intermediary materials in the interval. It was not until January 4, 1966, that larger scale experiments were attempted using 675 grams but the first results had to be discarded. On January 25, 1966, 3.2 kilograms were made however. Some of the earlier small batches were retained for analytical tests to prove the quality to the Food and Drug Directorate, which approval had already been obtained however, in 1963.

Defendants in their statement of defence declare that defendant Micro Chemicals Ltd had the right to produce the product on a trial or pilot scale according to the specifications of the patent and by the process described prior to its licence application on March 25, 1965, in furtherance of its said application in order to prove to the Commissioner of Patents that it could produce the substance safely and with a quality equal to the plaintiff's product and on a sufficiently large commercial scale as alleged in its licence application. Subsequent to March 25, 1965, and prior to

January 22, 1966, continued research and preparation was for purposes of eventual operation under the licence which it reasonably expected would be granted and the manufacture was still in small quantities consisting of approximately 30 batches of about 20 grams each. Between January 1966 and prior to June 21, 1966, it manufactured, as it had the right to, three batches, one of three kilograms on January 25, 1966, one of 10 kilograms on March 16, 1966, and one of 26.5 kilograms on May 26, 1966. (These figures were later corrected in the agreed statement of facts to 3.2 kilograms, 9.8 kilograms and 26.5 kilograms respectively.) The defence further alleges that prior to 1966 defendant Micro Chemicals Ltd had reason to expect the licence would soon be granted but the long illness of the Commissioner of Patents resulted in a deferment until June 21, 1966. On March 2, 1966, the Province of Manitoba invited the defendant Paul Maney Laboratories Ltd. to submit a quotation for a six months' supply of trifluoperazine tablets for use in its hospitals for mental diseases at Brandon and Selkirk. Defendant submitted its quotation. Subsequently and before any acceptance of it by the Province of Manitoba the medical superintendent of the hospital for mental diseases at Brandon on March 28, 1966, requested defendant Paul Maney Laboratories Ltd to supply a quantity of trifluoperazine tablets on a no charge basis for chemical evaluation and a similar request had previously been received from the office of the medical superintendent of the hospital for mental diseases at Selkirk. As a result of these requests, 10,000 5 milligram tablets were sent to the Selkirk hospital on March 14, 10,000 10 milligram tablets on March 18, and a further 10,000 10 milligram tablets and 5,000 5 milligram tablets on June 3, 1966. (The defence refers to 20,000 10 milligram tablets on June 3 but this is not borne out by Exhibit 28). Also, 5,000 5 milligram tablets and 20,000 10 milligram tablets were sent to the hospital at Brandon on March 30, 1966 (Exhibit 25). All of these tablets were provided free of charge for experimental purposes, the trifluoperazine having been delivered by defendant Micro Chemicals Ltd to defendant Gryphon Laboratories Ltd which put the contents into tablet form and supplied the tablets so

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formed to the defendant Paul Maney Laboratories Ltd who made the actual shipments. Defendant Micro Chemicals Ltd did not sell any of the product to defendant Gryphon Laboratories Ltd., nor did Gryphon Laboratories Ltd. sell it to Paul Maney Laboratories Ltd, all being supplied on a no charge basis prior to June 21, 1966. Defendants further plead that subsequent to June 21, 1966, after the Commissioner of Patents "had granted to the defendant Micro Chemical Laboratories Ltd the licence for which it had applied" and prior to February 3, 1967, "the date on which the Commissioner of Patents settled the terms of the said licence and fixed the amount of the royalty payable by the said defendant" defendant sold a total of 70 kilograms of trifluoperazine which was manufactured to the defendant Gryphon Laboratories Ltd for the sum of $16,800 and that pursuant to paragraph 13 of the terms of the licence defendant Micro Chemicals Ltd paid the sum of $2,520 into the Exchequer Court in payment of the royalty payable by it on the said sales. On January 3, 1968 the defendant Micro Chemicals Ltd consented to the payment out of court to the plaintiff of the said sum of $2,520 and interest thereon and also the sum of $1,008 paid into court on July 7, 1967, in payment of the royalties payable in respect of sales made by defendant Micro Chemicals Ltd during the period from February 4, 1967, to June 30, 1967, with interest thereon. Defendants further plead that during the period subsequent to June 21, 1966, and prior to February 3, 1967, each of them acted in the *bona fide* belief that the Commissioner of Patents had on June 21, 1966, granted to defendant Micro Chemicals Ltd a valid licence and that each of them might lawfully act as they respectively did and that plaintiff is estopped by its conduct from denying that the licence granted by the Commissioner of Patents "on June 21, 1966", was a valid licence. They further plead that the plaintiff is not entitled to claim a greater amount than the amount of royalty that the Commissioner of Patents would have been likely to fix in the ordinary course when he granted the defendant Micro Chemicals Ltd the licence for which it had applied, if he had not been requested by the plaintiff to postpone the fixing of the royalty until after he had decided to grant the licence. They further plead that recently plaintiff has fixed the amount of compensation to which it is entitled in respect of sales of trifluoperazine tablets to hospitals by a voluntary arrangement which was made with Mowatt and Moore Ltd., granting that corporation a licence under Canadian letters patent No. 612,204 pursuant to which the royalty paid by it to the plaintiff on its sales of trifluoperazine products to hospitals should be at the same rate as that payable by the defendant Micro Chemicals Ltd to the plaintiff as fixed by the Commissioner of Patents on February 3, 1967. In conclusion they deny that plaintiff has suffered any loss or that defendants or any of them have made any profit from the alleged wrongful acts, or at all. They admit that Canadian letters patent No. 612,204 is valid as between the parties hereto and for the purposes of this action.

It should be reiterated here that the decision of President Jackett (*supra*) which was not appealed from definitively settles the question that the licence dates from February 3, 1967, and not June 21, 1966, but maintains the Commissioner's decision granting the licence and fixing the royalty at 15% of the net selling price as defined therein. Although two of the defendants, Paul Maney Laboratories (Canada) Ltd and Gryphon Laboratories Ltd, were not parties to that action and defendants had at first contended that the decision was therefore not *res judicata* as against them, I reject this argument. The judgment fixed the date of the licence as February 3, 1967, and that is no longer subject to dispute.

The alleged infringements break down into four periods which should be considered separately as follows:

1. Actions of Micro Chemicals Ltd prior to March 25, 1965, the date of application for the licence.

2. Actions of Micro Chemicals Ltd between November 1, 1965 and January 22, 1966, when experimental batches were prepared.

3. Actions of all three defendants between January 25, 1966, and June 21, 1966, consisting of the transfers of the material from Micro Chemicals Ltd to

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Gryphon Laboratories Ltd, the manufacture of tablets by Gryphon Laboratories Ltd, and the activities of Paul Maney Laboratories (Canada) Ltd.

4. Actions of the defendants between June 21, 1966, and February 3, 1967.

Before dealing with the four different time periods during which alleged infringements took place, defendants' counsel in argument dealt with the background of the licence application explaining the delays in granting same, and what the court had found to be a legal error on the part of the Commissioner in granting a licence on June 21, 1966, subject to the later fixing of the royalty and subsequently when same was fixed on February 3, 1967 making it applicable retroactively to the June 21, 1966 date. He referred to a letter written by counsel for plaintiff on May 3, 1965, to the Commissioner of Patents (Exhibit 3) in reference to defendants' application for a compulsory licence which quoted from the judgment of Mr. Justice Rand in the case of *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd*[3] stating as follows:

> . . . once the commissioner decides the case to be one for licence, it lies with the patentee, by whatever means are open to him, to present substantial support for the royalty which he claims; in the absence of that he will be in a weak position to complain of any holding by the commissioner.

The letter therefore suggests that the patentee should not present its position as to royalty until a decision has been made on the merits of the application. A copy of this letter was sent to defendants' counsel. (It should be noted that the judgment referred to merely decided that insufficient evidence had been made before the Commissioner to enable him to form a valid finding as to the amount of royalty and referred the matter back to him, but is not authority for a proposition which has since been rejected, that the Commissioner can proceed in two stages, first granting the licence, and then settling the royalty and terms subsequently.) In reply to this letter the Commissioner wrote on May 5, 1965, (Exhibit 4) suggesting,

[3] [1959] S.C.R. 219 at 223.

somewhat tentatively, that in order to shorten the time required to arrive at a decision concerning the order for the granting of the licence or refusal, he might agree to obtain submissions on the royalty subsequently, and that therefore he was not insisting that this question be dealt with in the patentee's counter-statement provided it would file same within one month from service of the statement rather than 60 days. Plaintiff's counsel replied saying that this would not be possible and that they would require a 60-day period, reiterating their request that the royalty submission be withheld pending the decision on the merits of the licence to avoid prematurely revealing confidential financial information which, if the application were refused, there would have been no need to have revealed. The Commissioner agreed to this. Lengthy counter-statements, replies and correspondence followed until November 3 and finally, on November 8, counsel for defendants wrote the Commissioner of Patents suggesting that it would now be appropriate to deal with the question of royalty and requesting a hearing on November 29. Counsel for plaintiff in answer to this wrote the Commissioner of Patents suggesting that the hearing of the issue be deferred until the government received a report from the Hilliard Committee, and objecting to a royalty hearing until a decision had been reached as to the granting of the licence (Exhibit 9). Defendants' counsel answered this, and two letters of the Commissioner of Patents dated November 17, 1965, (Exhibits 11 and 11A) indicated that he had decided that a hearing on the question of royalty would not be in order prior to his decision on the merits of the application, and that he felt no oral hearing was necessary on the application. He indicated that he hoped to reach a decision at an early date. On January 31, 1966, counsel for defendants wrote him again, asking when a decision could be made and the reply indicated that the Commissioner had been ill for some time which had delayed the decision. Defendants' counsel made further submissions in a letter of March 7, 1966, and this was answered by plaintiff's counsel on March 30, 1966. On May 19, 1966, defendants' counsel sent the Commissioner of Patents a copy of a letter dated

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April 5, 1966, from the Food and Drug Directorate indicating that there was no objection to Paul Maney Laboratories (Canada) Ltd marketing triflurin (trifluoperazine) tablets in Canada and approving the drafts of the proposed physicians' index card and physicians' brochure. The letter asks for the source of the trifluoperazine hydrochloride used as raw material and information that the dosage forms meets B.P. standards together with the method of assay. In a subsequent letter defendants' counsel explained to the Commissioner that the source of the trifluoperazine referred to was Micro Chemicals Ltd., the applicant for the licence, and a further letter from the Food and Drug Directorate dated June 6, 1966, to the Commissioner of Patents indicates that Micro Chemicals Ltd manufacture the chemical and supply it to Gryphon Laboratories Ltd who turn the chemical into the finished dosage drug referred to as triflurin tablets which is marketed by Paul Maney Laboratories Ltd, all three companies having a common ownership, and that they have adequate manufacturing facilities and controls and comply with the Food and Drug Regulations (Exhibit 11P). It was following this that the Commissioner issued his decision of June 21, 1966.

In addition defendants' counsel pointed out that in the submission of March 30, 1966, made by plaintiff to the Commissioner of Patents, reference was made to a voluntary licence which it had concluded with Mowatt and Moore Ltd for the manufacture and sale of products containing trifluoperazine and in plaintiff's subsequent submission respecting royalty reference was again made to this with an indication that the said Mowatt and Moore Ltd would sell a volume equivalent to 10% of that of plaintiff. This was supported by an affidavit from the President of Mowatt and Moore Ltd (Exhibit 14C1).

While plaintiff undoubtedly had the legal right to grant this voluntary licence during the pendency of defendant Micro Chemicals Ltd's application for a compulsory licence, its motivation in doing so and then attempting to use this as a further argument against the granting of the compulsory licence Micro Chemicals had applied for long previously, is, to say the least, open to suspicion, and the Commissioner very properly did not allow this to affect his eventual granting of a compulsory licence to defendant Micro Chemicals Ltd.

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Dealing now with the first alleged infringement by defendant Micro Chemicals Ltd, resulting from the experimental manufacture of 10 grams, using plaintiff's process prior to March 25, 1965, the date of application for the licence, the facts concerning this were dealt with in the evidence of the witness Diosady, already referred to, the manufacture having taken place in March 1963 when the said defendant was experimenting with this and other similar products. Defendants' counsel cited the old English case of *Frearson v. Loe*[4] to the effect that "When articles which are the subject of a patent are made without a licence from the patentee simply for the purpose of *bona fide* experiments those who so make them are not necessarily liable to an action, but when they are made and used for profit, or with the object of obtaining profit even to a limited extent, such making and using constitute an infringement of the patentee's rights..." He further submitted that defendant Micro Chemicals Ltd had the right before applying for the licence to establish that it could satisfactorily manufacture the product so the Commissioner would not be in a position to refuse the granting of the licence for this reason. He admitted that there is no onus on the applicant to show that he is entitled to the licence but that under section 41 (3) of the Act the Commissioner is required to grant it unless he sees good reason to the contrary. He contended that nevertheless an applicant would be imprudent if he was not prepared at the time of the hearing on the application to show that he was in a position to produce the product. He pointed out that paragraph 9 of defendant Micro Chemicals Ltd's application for licence pointed out that it had already produced trifluoperazine according to the specifications of the patent and by the process described on a trial or pilot scale and that it could produce it with a quality equal to that of the

[4] (1878) 9 Ch. D. 48.

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product produced by the patentee on a sufficiently large commercial scale and at a substantially lower price than that charged by the patentee for stelazine, the trade name of its product, and that this application is supported by the affidavit of the general manager of the company who could not make this statement unless the product had already been produced on a trial scale as had been done. Moreover, even if there was an infringement resulting from such production no harm was done to the plaintiff as the quantity produced did not enter into commerce.

Against these arguments plaintiff's counsel cited section 46 of the *Patent Act* which grants the patentee and his legal representatives "the exclusive right, privilege and liberty of making, constructing, using and vending to others to be used the said invention". He cited the case of *Hoffmann-La Roche Ltd v. Delmar Chemicals Ltd*[5] quoting from the judgment of Thurlow J. at page 615 to the effect that:

> . . . there is no statutory requirement that an applicant prove anything to entitle him *prima facie* to the licence for which he applies In particular there is no statutory requirement that he prove that he is competent to produce the food or medicine or that he is possessed of the equipment, know-how and resources to do so, though the Commissioner may consider it of some importance, depending on the facts of the case, to be informed of the applicant's qualifications and if he thinks necessary to inquire into them.

A similar holding was made in the case of *Hoffmann-La Roche Ltd v. Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd*[6]. He stated that there is no Canadian case on the use of a patented process for purposes of experimentation by parties other than the inventor but cited the case of *Gibney v. Ford Motor Co. of Canada*[7] which deals with the use of an invention by way of experiment and in order to bring it to perfection, which does not apply in the present case, as the process for producing the product had already been perfected and the product was on the market. The British case of *United Telephone Co. v. Sharples*[8], in which a teacher bought from abroad telephones for his

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5 [1965] 1 Ex. C.R. 611.

6 [1965] 2 Ex. C.R. 266.

7 [1967] 2 Ex. C.R. 279

8 (1885) 2 R.P.C. 28

pupils to take apart and experiment with, claiming he could not afford the royalty-paid instruments, held that this was a "user for advantage". He argued that this is similar to the present case where the experimentation both during the first and second periods enabled defendants to prepare for eventual manufacture and sale of the product when the licence was obtained and hence was a "user for advantage" by defendant Micro Chemicals Ltd. The case of *Proctor v. Bayley and Son*[9], refers to the case of *Frearson v. Loe (supra)*, as follows:

> .. The authority of *Frearson v. Loe* was referred to—a case reported in 9, Chancery Division—to justify the assertion that that which is really an experimental user is not an infringement of the patent, nor within the mischief contemplated by the Statute of Monopolies, because if a person takes a patented article for the purpose of seeing whether he can improve upon that patented article, not practically using the patented article, but testing and trying from that patented article whether he can invent a better thing for the public, he cannot tell that, without having the thing before him which he can take to pieces and have before him for the purpose It would be a very unwise thing to say that such a user as that would be within the meaning of the patent law, or entitle the patentee to an injunction.

He argued that while section 34 of the *Patent Act* contemplates improvement, it does not contemplate the right to make, use, or sell "the original invention and that the onus would be on the defence to establish that its use was purely experimental with a view to making improvements".

In the light of this jurisprudence and on the evidence before me I cannot conclude that defendants' experimental use of the process during the period prior to its application for a licence on March 25, 1965, was experimental in the sense of being for the purpose of attempting to improve on the invention, but find that it was rather for the purpose of satisfying itself that it could satisfactorily produce the product on a commercial basis by use of the patented process. As the witness Diosady explained, even when following the process set out in the patent, a number of experiments were required in order to get it to work satisfactorily. The experiments made were primarily for the purpose of making trifluoperazine by the patented process.

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9 (1889) 6 R P C 106 at 109

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The arguments and jurisprudence cited in connection with the first period apply with even greater force to the second period in question from November 1, 1965, to January 22, 1966. During this period defendant Micro Chemicals Ltd recommenced its experiments in the manufacture of trifluoperazine making in all some 26 batches (Exhibit 20) many of which yielded no results or were discarded. Others were unsatisfactory with respect to the quantity of the finished product obtained from a given quantity of starting material. Most of these batches were made using quantities of 25 or 27 grams of the starting material but on January 4, 1966, two batches of 675 grams each were attempted but the resulting product was discarded in both cases. By January 22 the chemists were satisfied with the tests, when they obtained 19.1 grams and 20 grams respectively of the finished product from two 27-gram batches. It was admitted that the purpose of these experiments was to explore the procedure and conditions of manufacture in order to get increased yield and to establish that Micro Chemicals Ltd could produce the product economically. Defendants' counsel argued that such experiments were clearly within the intention of section 41(3) of the Act which states that "In settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention". The trifluoperazine produced by these experiments was put in bottles and kept for the defendant Micro Chemicals Ltd, and never entered into commerce so that no damage was suffered by plaintiff and no profits made by the said defendant as a result of these experiments. As already indicated in dealing with the first period, these experiments, though undoubtedly expedient from the point of view of defendant, constituted a technical infringement of the patent as they were not carried out for the purpose of improving the process, but to enable the defendant Micro Chemicals Ltd to produce it commercially as soon as the licence it had applied for could be obtained. The fact that such experiments were necessary and useful to defendant Micro Chemicals Ltd is evident from the fact that when Mowatt and Moore Ltd was given a voluntary licence by plaintiff on February 23, 1966, to manufacture and sell pharmaceutical compounds containing the active ingredient trifluoperazine manufactured pursuant to plaintiff's patent, it incurred expenses in excess of $12,000 to prove the biological equivalency of its product to that of the patentee, and in the preparation of medical information, materials and the education of its representatives in informing physicians regarding the use of trifluoperazine (Exhibit 14C1), and, moreover, plaintiff's counsel in a letter to the Commissioner of Patents on May 6, 1966 (Exhibit 11L), referring to his client's submission of March 30, 1966, in which it had been stated that the said licencee, Mowatt and Moore Ltd, was ready and anxious to commence selling immediately after its licencing agreement had been signed (several weeks previously), now stated he has learned from the licencee that quality controls which the agreement forces on it necessitate additional clinical testing now in progress and the use by doctors of the licencee's brand of trifluoperazine in the place and stead of that of the patentee and that it will be another month before the sale of the licenced trifluoperazine can be commenced.

It is therefore clearly advantageous to a would-be licencee to place itself in a position where it can immediately commence commercial sales of the product as soon as the licence is obtained without incurring a delay of several months thereafter while tests and experiments are conducted, but this expediency does not, in my view, justify the manufacture, even on an experimental basis, of a patented product for which a licence has not yet been obtained, nor can this intent be read into the wording of section 41(3) of the Act.

The third period of alleged infringement dates from January 25, 1966, when a batch of 3.2 kilograms was manufactured by defendant, Micro Chemicals Ltd, this being the first manufacture in commercial quantity, to June 21, 1966, when the Commissioner indicated that he was granting the

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licence. During this period for the first time the other two defendants, Gryphon Laboratories Ltd and Paul Maney Laboratories (Canada) Ltd, entered into the picture. Defendant Micro Chemicals Ltd admits that it transferred trifluoperazine to defendant Gryphon Laboratories Ltd during this period and that ownership passed at the time of the transfer though it was only invoiced to that company on June 30, 1966, and July 15, 1966. The total quantities involved amounted to 39.5 kilograms (Paragraphs 61, 62 and 63, Statement of Facts, and Exhibits 21 and 22). Gryphon on its part during this period made tablets from the bulk material. Meanwhile defendant Paul Maney Laboratories (Canada) Ltd had a sales representative in the Province of Manitoba who called on officials of the hospitals for mental diseases at Brandon and at Selkirk to solicit orders for the product. On March 2, 1966, the Province of Manitoba purchasing bureau requested it to submit a quotation for a six-months' supply of trifluoperazine tablets for use in the said hospitals and the said defendant in due course submitted the said quotation which was delivered at Winnipeg on March 9, 1966. This quotation is on a standard form of the purchasing bureau for the Province of Manitoba and the said defendant offered to make delivery on April 1, with the balance on request in connection with some of the items quoted, and in other cases uses the term "deliver on request after April 1" (Paragraphs 65, 66 and 67, Agreement as to Facts, and Exhibit 23). Subsequently between March 14 and June 3, 1966, various sample lots of 5 milligram and 10 milligram tablets were sent to the Selkirk and Brandon hospitals for experimental purposes, free of charge, on request of the Medical Superintendents of those hospitals (Paragraphs 68, 69 and 70, Agreement as to Facts, Exhibits 25, 26, 27 and 28). These tablets had been transferred to defendant Paul Maney Laboratories (Canada) Ltd by defendant Gryphon Laboratories Ltd. The total amount so furnished was less than three-quarters of a kilogram and no actual order was received for the purchase of any of the tablets until June 30. Defendants' counsel quoted T. A. Blanco White *Patents for Inventions*, 3rd Ed. at p.

82, to the effect that "Mere possession, transport or storage is not 'use' for this purpose . . .". The same statement continues however on page 83 to the effect that "Possession for the purpose of use in a business, however, will create a presumption of use (or at least of a threat to use) . . ." and cites among others the case of *British United Shoe Machinery Co. v. Simon Collier Ltd*[10]. The author further states on page 83: "The expression 'vend' includes not only sale, but commercial dealing generally. For instance, although mere purchase and possession is not infringement, acquisition and possession of infringing articles 'with the intention of using them in trade' is 'vending' (and consequently infringement) . . .". Again "Exposure for sale is infringement and so is attempted sale of articles manufactured for the purpose (*British Motor Synd. v. Taylor,* at 17 R.P.C. 729,731 (C.A.)), but a mere offer for sale, unaccompanied by possession, amounts, it would seem, to a mere threat to infringe." Plaintiff's counsel cited the case of *Dunlop Pneumatic Tyre Co. v. British and Colonial Motor Car Co.*[11] where cars were innocently shown at an automobile show having upon them imported tires which infringed the patent. It was not disputed that the motor cars were exposed for sale and would normally be sold with tires, but it was conceded that if a sale was made the tires would have been changed before actual delivery and the tires which the vendors were entitled to use would have been installed. It was only while the machines were on display therefore and presented to the possible customer or spectator that there was any infringement. The court nevertheless held that: ". . . if a person uses an invention to present his goods for sale, and intending the thing exhibited to represent what he is going to sell, and if part of that thing is an article which is an infringement and is serving a useful purpose during that time by being exhibited as part of the machine, I think it is a user of the invention." The case of *British Motor Synd. v. Taylor & Son*[12] held "Whether pos-

[10] (1910) 27 R P C. 567 at 572
[11] (1901) 18 R P C. 313 at 315.
[12] [1901] 1 Ch. D 122 at 133.

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session constitutes a user must depend upon the nature of the article: it may amount to a user, and it may not: here it is said that it did not amount to a user. But there was acquisition and possession of these articles for trade purposes with the intention of using them in trade; and in my judgment such an acquisition and such possession of an article, whatever its nature may be, is a user." Defendants' counsel argued that cases such as these are not applicable to licences under section 41(3) of our *Patent Act* though they might, but for this section which creates a special case, constitute an infringement under section 46 of the Act. I find no jurisprudence to support this contention and I do not believe that the intention of section 41(3) of the Act with respect to the desirability of making the medicine available to the public at the lowest possible price is sufficient to justify what would otherwise be an infringement of the patent made with the view of expediting commercial sale of the medicine by the licencee at the earliest possible moment after the licence is granted. I find therefore that there was an infringement by all three defendants during this period.

Finally we come to the fourth period following June 21, 1966, when the Commissioner purported to grant a licence to defendant Micro Chemicals Ltd to manufacture and sell the product subject to the later fixing of the terms of the licence and of the royalty, which decision by the Commissioner was subsequently found by the court not to constitute the granting of a licence as of that date. While defendant had not formally objected to this procedure when it was suggested to the Commissioner by solicitors for plaintiff in their letter of May 3, 1965 (Exhibit 3), it is clear that it was on the instigation of the plaintiff's counsel that the Commissioner adopted this procedure. Moreover, before the Commissioner reached his decision on the granting of the licence, defendants' counsel wrote him on November 8, 1965, suggesting that it would now be appropriate to deal with the question of royalty (Exhibit 8) and this was objected to by plaintiff's counsel in a letter to the Commissioner dated November 12, 1965 (Exhibit 9).

Defendants' counsel claimed that his clients acted in good faith in the belief that the licence was effective as of

June 21, 1966, and that therefore plaintiff is entitled only to fair and reasonable compensation. He cited the case of *English and American Machinery Co. v. Union Boot and Shoe Machine Co.*[13] to the effect that the amount of damages is to be ascertained by inquiring what amount of profits from licences plaintiffs have been deprived of by the action of the defendant. In that case plaintiffs had granted a number of voluntary licences which could serve as a basis for calculating the royalty they would have received had the infringing use been licensed. He also referred to the case of *Meters Ltd v. Metropolitan Gas Meters*[14], in which Lord Justice Moulton stated:

> There is one case in which I think the manner of assessing damages in the case of sales of infringing articles has almost become a rule of law, and that is where the patentee grants permission to make the infringing article at a fixed price—in other words, where he grants licences at a certain figure. Every one of the infringing articles might then have been rendered a non-infringing article by applying for and getting that permission. The Court then takes the number of infringing articles, and multiplies that by the sum that would have had to be paid in order to make the manufacture of that article lawful, and that is the measure of the damage that has been done by the infringement. The existence of such a rule shows that the Courts consider that every single one of the infringements was a wrong, and that it is fair—where the facts of the case allow the Court to get at the damages in that way—to allow pecuniary damages in respect of every one of them. I am inclined to think that the Court might in some cases, where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. It is the duty of the defendant to respect the monopoly rights of the plaintiff. The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission. I am inclined to think that it would be right for the Court to consider what would have been the price which —although no price was actually quoted—could have reasonably been charged for that permission, and estimate the damage in that way. Indeed, I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure. But I am not going to say a word which will tie down future judges and prevent them from exercising their judgment, as best they can in all the circumstances of the case, so as to arrive at that which the plaintiff has lost by reason of the defendant doing certain acts wrongfully instead of either abstaining from doing them, or getting permission to do them rightfully.

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13 (1896) 13 R P C. 64 at 67

14 (1911) 28 R.P.C. 157 at 164-65.

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The case of *Watson, Laidlaw & Co. v. Pott, Cassels, and Williamson*[15] approved the judgment of Lord Moulton in the aforementioned *Meters Ltd.* (*supra*) case.

The Canadian case of *Dominion Manufacturers Ltd. v. Electrolier Mfg. Co.*[16] also approved the finding in the *Meters Ltd.* (*supra*) case, and followed it.

Defendants' counsel contended that but for the postponed fixing of the royalty at the request of plaintiff's counsel, the whole matter would have been settled by June 21, 1966, and on the basis of the eventual royalty set by the Commissioner, and that therefore this is the sum which defendant Micro Chemicals Ltd should pay on its sales of the product following June 21, 1966. He said further that plaintiff's estimate that Mowatt and Moore Ltd would sell 10% as much as it did under the voluntary licence issued to Mowatt and Moore Ltd and that the royalties plaintiff would receive on such sales would be based on this estimated volume (since the royalty payable in this voluntary licence fluctuated with the volume and the product mix (Exhibit 14A-1, Addendum 1)) is misleading in that the plaintiff was always subject to a compulsory licence under section 41(3), any number of which could be ordered and this was not subject to its control.

Plaintiff's counsel also cited a number of cases on this point. In the English case of *F. Hoffmann-La Roche & A. G. and J. R. Geigy S.A. v. Inter-Continental Pharmaceutical Ltd.*[17], which dealt with a somewhat similar section respecting compulsory licences in the English Act, defendants applied for a compulsory licence and without awaiting the result made an offer for sale and issued a catalogue of the goods including the drug in question. Plaintiffs then sought an injunction. In the meantime the Comptroller wrote a letter saying that *prima facie* the defendants would be entitled in due course to a compulsory licence. At page 233 Harman L.J. states:

> ... In my view, on the true construction of the Act, the licence must be valid from the day when it is granted, and not before It would

[15] (1914) 31 R.P C 104 at 120 [16] [1939] Ex C R 204

[17] [1965] R P C 226.

> need very strong words, in my judgment, to allow the Comptroller to pour a pot of whitewash over the applicant who has been infringing, say, for two years, and to tell the injured party that nothing can be done over that period, and that subject to payment of a royalty, no remedy is open to him.

At pages 234-35, Diplock L.J. states:

> In considering whether an interlocutory injunction should be granted, a point which, in my view, we have to decide (or at any rate to make up our minds upon) is whether or not as contended for by the defendants here, the Comptroller has any power or jurisdiction under section 41 to grant a licence with retrospective effect from a date prior to the date of the grant If, upon the true construction of the section, he had such power, so that the effect of a licence when granted by him could be to change the legal character of what had been an infringement at the time it was done so that it was no longer an infringement, but a lawful act, then I think that the court would be bound to hesitate a long time before granting an interlocutory injunction to restrain something which was a breach of the law at the time that it took place, but ceased retrospectively to have been a breach of the law at some later date.
>
> I am, however, quite satisfied that there is no such power on the part of the Comptroller to grant a licence of that kind

The case of *Geigy S.A.'s Patent*[18] held that if the Comptroller by his decision settled all the terms of the licence, merely leaving the parties to put into exact words what had already been decided, the date of the decision would be the date of the licence, but conversely if he sent the parties away to agree to terms no licence would be granted on such terms as he thought fit until he had seen those terms and approved them. Lord Parker L.C.J., in rendering judgment, stated at page 265:

> I would only add that in my judgment, my understanding of the law as it seems to me accords with common-sense, that there can be no licence or indeed contract until the terms have been agreed.

In the light of these decisions and of the Canadian decision in *Hoffmann-La Roche v. Delmar Chemicals Ltd* (*supra*), plaintiff's counsel argued that defendants could not have believed in good faith on June 21, 1966, that the Commissioner's decision granting a licence without fixing the terms thereof or the amount of the royalty was proper, and in any event the notice of application to the Commissioner of Patents to delete all reference to the granting of a licence

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[18] [1966] R.P.C. 250.

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from his order of June 21, 1966, and to direct defendants to make no distribution of the drug until such time as the licence with all the terms thereof had been granted, which notice was dated July 4, 1966 (Exhibit 13) was sufficient warning to defendants to destroy their argument that they continued to deal in the product in good faith and in the *bona fide* belief that they could act on the licence. He further cited the case of *Young and Neilson v. Rosenthal & Co.*[19]:

> . . . Intention is not a part of infringement.

In the case of *British Motors Synd. v. Taylor* (*supra*), where the defendants were innocent in the sense that they were ignorant of plaintiff's patent rights when they purchased the infringing articles, it was held nevertheless that their ignorance was no defence. See also the case of *Unwin & Heath*[20], where it is stated:

> ...There may be an indirect infringement, as well as a direct one, though the intention of the party be perfectly innocent, and even though he may not know of the existence of the patent itself.

He argued further that to whitewash the defendant would encourage drug manufacturers to experiment in the manufacture of various patent drugs in order to decide which would be most profitable before even applying for a licence, and that in the present case defendants deliberately disregarded the patentee's rights, weighing the consequences against the profits as a business risk. He pointed out that defendants were already using the trade name triflurin tablets for their trifluoperazine product as of March 31, 1966, as appears from the letter of the Food and Drug Directorate dated April 5, 1966 (Exhibit 11M).

At the opening of the hearing it was agreed between the parties that the question of damages would be settled by a reference after trial and that the court would order accordingly in accordance with the provisions of Rule 154A(2). Rule 154A(1)(c) refers to such a reference under Rule 177 "if it then appears that such issue requires to be de-

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[19] (1884) 1 R.P.C. 29 at 39.

[20] (1854-5) 5 H. of L. 505 at 537.

cided". In argument at the conclusion of the trial defendants' learned counsel claimed that no reference was necessary and that the court if it found that an infringement existed, particularly with respect to the fourth period in question, could itself fix the damages by basing them on the amount of the royalty eventually fixed on February 3, 1967, and which would undoubtedly have been fixed in the same amount at June 21, 1966, had the Commissioner established the royalty in his decision of that date. Plaintiff's counsel contended however that it was his clear understanding that there would definitely be a reference with respect to the damages after the trial in the event that plaintiff succeeded in establishing the existence of the alleged infringements, and that for this reason he had produced no evidence whatsoever as to the amount of damages which plaintiff would claim. He pointed out that his client has the option of claiming an accounting for profits and that in order to determine whether it wished to exercise this option it would be necessary for it to examine officers of the defendant corporations further. He pointed out that damages might be assessed against Paul Maney Laboratories (Canada) Ltd, on the basis of its sales price rather than against defendant Micro Chemicals Ltd, there having been infringements by the three defendant corporations at three different levels and that his client is not required to accept minimal damages.

Without going into the question of the amount of damages here I believe that a reference should be made as agreed. It is clear that the damages suffered in the first two periods in question, if any, were merely nominal though plaintiff's rights as patentee are entitled to full protection, and as previously stated, I find that they were infringed during both of these periods. With respect to the third period when all three defendant corporations were active in preparing for the eventual sale of the product as soon as it was licensed, there was also infringement of patentee's rights but again no sales to third parties or profits by defendants on which any calculation of damages could be based, so again the damages would be merely nominal dur-

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ing this period. With respect to the fourth period following June 21, 1966, however, and before the final licence on February 3, 1967, established the royalty payable subsequent to that date, substantial sales were made by defendants and I cannot accept the contention of defendants' counsel that the only amount which could be claimed as damages resulting from these sales was the same royalty which was eventually fixed on February 3, 1967. To do so would be equivalent to saying that although it has been settled that the Commissioner was wrong in making the royalty take effect retroactively to June 21, 1966, the court must nevertheless award damages in exactly the same amount as if this decision of the Commissioner had been correct. I do not so find and I believe therefore that the question of damages during this period remains open, and while one of the options would be to allow damages in the same amount as if the royalty had taken effect June 21, 1966, this need not necessarily be the basis for the damages to be allowed.

I direct that the matter of establishing the amount of the damages resulting from the infringements of plaintiff's patent No. 612204 by defendants be referred to the Registrar for inquiry and to report; the whole with costs against defendants to be taxed.

GOLDEN HORSESHOE TURKEY FARMS LIMITED .... APPELLANT;

Toronto 1968 May 8

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Forgiveness of loan by trade supplier—Not income.

Appellant, which was in the turkey farming business in Ontario, became insolvent in 1964 because of a loss of turkeys from disease. Appellant's supplier of feed, by way of accommodation, paid appellant's debt of $24,222 to a creditor for turkeys purchased in 1964, and then forgave appellant the amount so paid.

Held, the $24,222 forgiven was a profit arising to appellant in 1964 in dealings between lender and borrower, and was therefore not income and hence not taxable.

APPEAL from income tax assessment for 1964.

Wolfe D. Goodman and *Arnold L. Cader* for appellant.

D. G. H. Bowman for respondent.

GIBSON J.:—The question for decision in this appeal from an assessment for income tax for the taxation year 1964 is whether or not the forgiveness of $24,222.11 by Maple Leaf Mills Limited to the appellant in the course of the latter's 1964 taxation year should be regarded as a receipt from its trade or business during that year.

Maple Leaf Mills Limited in 1964 forgave a debt owing to it by the appellant of $206,700.59. All of this debt, except the said $24,222.11, was incurred by the purchases of feed from it by the appellant. The $24,222.11 debt was incurred by way of financial accommodation provided by Maple Leaf Mills Limited to the appellant when Maple Leaf Mills Limited paid that sum to a company known as Cuddy Turkey Farms Limited, a creditor of the appellant, in respect of four invoices in 1964 representing purchase of turkey poults.

The appellant, in the taxation year 1964 and prior thereto, was in the turkey farming business at Mount Hope, Ontario. It bought its turkey poults in the main from Cuddy Turkey Farms Limited and its feed to raise them

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from Maple Leaf Mills Limited. It then raised the turkeys to maturity and sold them on the market.

In 1964 the appellant was insolvent, which condition came about mainly because of a catastrophic fatal loss of turkeys from disease. In a settlement Maple Leaf Mills Limited forgave, as stated, the total indebtedness of the appellant to it in 1964.

In filing its income tax for the taxation year 1964, the appellant treated the whole of this gain as capital and added it to its surplus account. The respondent, in assessing the appellant for its 1964 taxation year, took the position that this total sum represented a forgiveness of a debt on revenue account and accordingly included it in computing for taxation purposes the appellant's income for 1964.

This appeal however, as stated, is restricted to the treatment for income tax purposes of the foregiveness of the said debt of $24,222.11 incurred in the manner before mentioned.

In my view, this case falls to be decided on the law applicable to abatements. The question is whether this was an abatement of a capital liability or an abatement received in the course of the appellant's normal trading operations. If it was the latter then this sum is "income" within the meaning of that term in the *Income Tax Act,* namely a profit from the appellant's business in the taxation year 1964.

To determine the substance of this transaction of abatement for income tax purposes it is necessary to categorize and find the relationships of the parties to it.

From the evidence it is beyond doubt that there are two distinct relationships in law to be considered in this matter: firstly, there is the relationship between the appellant and Cuddy Turkey Farms Limited which was that of debtor and creditor in respect of turkey inventory of the appellant in the sum of $24,222.11; and secondly, there is the relationship between the appellant and Maple Leaf Mills Limited which was that of lender and borrower in respect of a similar sum of $24,222.11. It is also beyond doubt that it is the latter relationship and the sum involved in it that is germane to the adjudication of this appeal.

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In my view, the sum received by way of an abatement of this debt was a profit to the appellant arising out of its dealings with Maple Leaf Mills Limited, and this abatement arose in dealings when the relationship between the appellant and Maple Leaf Mills Limited was that of lender and borrower. This profit arising out of such relationship therefore, was not income within the meaning of that term in the *Income Tax Act* and is not taxable.

The appeal is allowed with costs and the matter is referred back for re-assessment not inconsistent with these Reasons.

ISADORE WEINSTEIN ....APPELLANT;

Toronto 1968

June 11-12

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Income tax—Receivables—Reserves—Sale of land—Profit portion of price payable in future—Minister's right to set up reserve for profit—Income Tax Act, s. 85B(1)(b), (d) and (e).

In June 1959 *W* purchased an interest in a parcel of land in Ontario for $23,750 and sold it in October 1959 for $53,750, of which $23,750 was paid forthwith. The balance was to be paid in 25 months and was in fact paid $15,000 in 1961 and $15,000 in 1962. In his income tax return for 1959 *W* (who had taxable income from other sources) did not report his profit from the above transaction in the mistaken belief that it was a capital gain but the Minister in assessing *W* for 1959 added to his reported income the $30,000 profit from the land sale (as being a business profit) and deducted the same amount as a reserve under s. 85B of the *Income Tax Act*. For 1960 *W* was assessed to tax on his income as reported, but for 1961 and 1962 the Minister in each year reduced the $30,000 reserve allowed in 1959 by $15,000, thereby increasing *W's* income for tax purposes by the equivalent amount.

Held (affirming the Tax Appeal Board), notwithstanding that *W* had in no way indicated that he had adopted any method for computing his income, the Minister was entitled to assess him as he had done for 1961 and 1962.

APPEAL from decision of Tax Appeal Board[1] dismissing appellant's appeal from 1961 and 1962 income tax assessments.

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[1] 41 T.A B C. 253.

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Hubert J. Stitt and *Schuyler M. Sigel* for appellant.

M. A. Mogan and *M. J. Bonner* for respondent.

GIBSON J. (*orally*):—For the purpose of deciding the issue in this appeal the parties agree that a $30,000 profit made by the appellant in a real estate transaction is income and not a capital gain.

The transaction took place in the taxation year 1959. In June of that year the appellant paid the sum of $23,750 as part of the purchase price of an interest in a parcel of land referred to in these proceedings as the McCord property[2]. On October 6, 1959 the appellant sold all his interest in the said parcel of land for a total consideration of $53,750. The sale price of $53,750 was payable and was in fact paid as follows, namely: (i) $23,750 payable and paid in October, 1959; (ii) $30,000 payable 25 months after October, 1959, and the appellant received $15,000 in 1961 and received the remaining $15,000 in 1962.

The appellant originally took the position that this $30,000 profit was a capital gain. The respondent by re-assessment dated March 30, 1962, categorized this profit as income and purported to assess the profit from this "business" (see section 139(1)(*e*) of the *Income Tax Act*) on an accrual basis under section 85B(1)(*b*) of the Act and pursuant to section 85B(1)(*d*)[3] of the Act set up a reserve for the full amount of it. No appeal was taken from this re-assessment[4].

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[2] The land was situate in Forest Hill Village, Ontario.

[3] Section 85B(1) of the *Income Tax Act* is as follows:

. . .

(*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year;

. . .

(*d*) where an amount has been concluded in computing the taxpayer's income from the business for the year or for a previous year in respect of property sold in the course of the business and that amount or a part thereof is not receivable, As a result in respect to this re-assessment for 1959 income, the appellant, because of the only position taken, namely, that this $30,000 profit was not income but instead a capital gain, did not adopt either the cash or accrual method of computing this "income from the business" within the meaning of section 85B(1)(*b*) of the *Income Tax Act* unless his failure to challenge the method chosen by the respondent, namely, the accrual method, was an adoption of that method within the meaning of those words in that subsection.

The appellant did not make any reference to this $30,000 profit or reserve in his 1960 income tax return and the respondent assessed the return on the basis that it was filed.

For the 1961 income tax year of the appellant, the respondent by re-assessment dated April 2, 1964, purported to treat this $30,000 reserve as follows, after the receipt by the appellant in that year of $15,000 of this $30,000 profit:

Add: Reserve deducted under section 85B in computing T/P's 1960 income	$30,000	
Less: Reserve allowable under section 85B in computing T/P's 1961 income ...	15,000	15,000.00

For the 1962 income tax year of the appellant the respondent by re-assessment dated April 2, 1964, purported to treat the $15,000 balance of this original $30,000 reserve, following the receipt by the appellant in that year of the balance of the $15,000 profit, as follows:

Add: Reserve deducted under section 85B in computing your 1961 income	15,000.00

(i) where the property sold is property other than land, until a day that is
(A) more than 2 years after the day on which the property was sold, and
(B) after the end of the taxation year, or
(ii) where the property sold is land, until a day that is after the end of the taxation year.
there may be deducted a reasonable amount as a reserve in respect of that part of the amount so included in computing the income that can reasonably be regarded as a portion of the profit from the sale; and
(*e*) there shall be included the amounts deducted under paragraphs (*c*) and (*d*) in computing the income of the taxpayer for the immediately preceding year.

[4] The appellant had income from other sources in 1959, and was assessed to income tax thereon in the amount of $1,395.03.—ED.

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On an accrual basis the respondent was consistent in applying the provisions of section 85B of the *Income Tax Act* in his respective assessments of the income of the appellant for each of the taxation years 1959, 1960, 1961 and 1962.

The amounts of tax actually assessed against the appellant in the taxation years 1959, 1960, 1961 and 1962 are identical with the amounts that would have been assessed if the respondent had in fact assessed the appellant on the basis that the appellant had adopted pursuant to section 85B of the *Income Tax Act* a cash basis for computing this profit from this "business".

The issue for decision is whether the amount of $15,000 which the appellant received in 1961 and the further amount which the appellant received in 1962 are subject to income tax in those respective years.

The determination of this issue is dependent (i) on the true interpretation of the provisions of section 85B(1)(*b*) of the *Income Tax Act* in relation to the question of whether the respondent may set up and employ a reserve under section 85B(1)(*d*), that is, assess the appellant on the basis that the appellant adopted an accrual basis for computing profit from this "business" when the appellant has taken no position either in any written document delivered to the respondent or verbally as to how he wished to compute the profit from this "business", that is, neither the position that he wished it computed by the cash method nor by the accrual method; and (ii) whether on the facts of this case this reserve of $30,000 was again deducted in 1960 by the appellant pursuant to section 85B(1)(*d*) of the *Income Tax Act* in computing his income for the taxation year so as to avoid including it in his 1960 income pursuant to section 85B(1)(*e*)[5] of the Act.

The conclusion I reach firstly, is that on a true interpretation of section 85B(1)(*b*) of the *Income Tax Act* the adoption of a method for computing income from a business and the acceptance of it by the respondent for the purpose of that subsection of the Act does not have to follow that chronology, that is, adoption first by the taxpayer and acceptance by the Minister. The reverse may obtain.

[5] ante, p —.

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In this case the re-assessment by the respondent of the 1959 income of the appellant categorized this profit from this "business" as on income account and not on capital account and also used an accrual method of computing this income; and in the circumstances of this case, the appellant's failure to challenge this was in my view an "adoption" of this method for the purpose of this subsection of the Act.

Secondly, I am of the opinion, again having regard to all the facts and surrounding circumstances of this case, that what was done here constituted in the taxation year 1960 a deduction by the appellant again of this $30,000 reserve pursuant to section 85B(1)(*d*) of the *Income Tax Act* in computing income for the 1960 taxation year so that it was not necessary for him to do so, and therefore he did not include this $30,000 profit as part of his income in computing his income for taxation purposes for that year.

It follows in the result therefore that the amount of $15,000 received by the appellant in the taxation year 1961 and the similar amount received in the taxation year 1962 are respectively subject to income tax in those years.

The appeal is dismissed with costs.

BRITISH COLUMBIA ADMIRALTY DISTRICT

MacMILLAN BLOEDEL LIMITED ....PLAINTIFF;

AND

CANADIAN STEVEDORING CO. LTD, and IAN HAUGHTON .... DEFENDANTS.

Ottawa 1969 — July 23 — Aug. 8

Shipping—Admiralty jurisdiction—Action against person for negligently loading ship—Damage to wharf in harbour—Whether action cognizable—Whether claim for "damage done by a ship"—Admiralty Act, R.S.C. 1952, c. 1, s. 18—Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.), s. 22(1)(a)(iv) and (b).

Plaintiff brought an action on the admiralty side against *H* as supercargo, claiming damages for his alleged negligence while in charge of loading a ship in Port Alberni, British Columbia. The ship rolled from side to side during loading, striking plaintiff's wharf and throwing lumber from her decks on to the wharf, which suffered damage. Plaintiff sued the ship in a second action. A motion by plaintiff that the two actions be tried together was dismissed by Sheppard D.J. *H* then applied to dismiss the action against him for want of jurisdiction.

Held (dismissing the application), the action against *H* was within the admiralty jurisdiction of the court both under paragraph (*a*)(iv) and

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pararaph (*b*) of s. 22(1) of the *Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.) 15-16 Geo. V*, c. 49, which is Schedule A to our *Admiralty Act*.

1. The action against *H* was for "damage done by a ship" within the meaning of s. 22(1)(*a*)(iv) of the U.K. statute.
2. The former jurisdiction of the High Court of Admiralty of England referred to in s. 22(1)(*b*) of the U.K. statute means the jurisdiction which existed prior to the limitations enacted in the reigns of Richard II and Henry IV, and therefore extends to torts committed in an ocean harbour.

   The "Zeta" [1893] A C. 468, referred to.

Quaere, whether jurisdiction is not also conferred by the first part of s. 18(1) of the *Admiralty Act*, which provides that the court's admiralty jurisdiction "extends to and shall be exercised in respect of all navigable waters...although...within...a county or other judicial district...".

Semble: The Exchequer Court's admiralty jurisdiction with respect to an action *in personam* against a person alleged to be responsible for exercising control over a vessel is not conditional upon such action being joined with an action against the vessel or her owner or operator.

The "Sparrows Point" v. Greater Vancouver Water District et al [1951] S.C.R. 396, discussed. *The "Zeta"* [1893] A.C. 468; *De Lovio v. Boit* 2 Gall. 398, considered.

APPLICATION.

Gerard F. Culhane for defendant Ian Haughton (applicant).

D. Brander Smith for plaintiff.

JACKETT P.:—On July 24, 1969, an application was made before me to dismiss this action as against the defendant, Ian Haughton, for want of jurisdiction.

It is common ground that the application must be disposed of on the assumption that the allegations of fact in the statement of claim are true. Those facts insofar as relevant are that, at a time when the defendant Haughton (who is a "supercargo") was in charge of the loading of a ship known as the *Archangel* and was personally supervising the loading of the cargo, "the ship, which was at that time listing to port, rolled over to starboard then back to port several times, striking the wharf", which belonged to the plaintiff[1], "and throwing lumber off her decks onto the wharf", thereby causing loss, damage and expense. The plaintiff alleges that the damage done to

[1] At Somass, Port Alberni, B C—ED.

the plaintiff's wharf was caused by the negligence of the defendant Haughton and gives particulars of the alleged negligence.

It was made clear during the course of argument that this is *not* an application to dismiss on the ground that the facts alleged disclose no cause of action. I must therefore consider the motion on the assumption that the facts alleged, if established, show a cause of action in negligence against the defendant Haughton for damage to the plaintiff's dock.

This application arises out of a decision rendered by Honourable F. A. Sheppard as a Deputy Judge of this court on an application by the plaintiff that this action and another action which is against the ship, arising out of the same incident, be tried together. In the course of that decision, Sheppard D.J. said:

> The first question is whether or not the second action is within the jurisdiction of this court. If beyond the jurisdiction, the Court being a statutory court "cannot proceed further in the case", *Mulvey vs. Neosho,* (1919) 19 Ex C.R. 1 at p. 6, and therefore cannot consolidate the second action.
>
> The plaintiff relies upon the *Admiralty Act,* Schedule A clause IV which confers jurisdiction in "any claim for damage done by a ship" and cites the ship *Sparrows Point* vs. *Greater Vancouver Water District* and *National Harbours Board* [1951] S.C.R. 396. There the vessel let down her anchor to check her way and to avoid hitting the bridge and thereby damaged the plaintiff's water main. Thereupon the plaintiff brought one action against the vessel and the National Harbours Board alleging that the negligence of the National Harbours Board in failing to signal that the bridge was open, caused the anchoring at that spot. The Supreme Court of Canada held that the Admiralty Court had jurisdiction against both parties under Clause IV of the Schedule to the *Admiralty Act* for the following reasons. Kellock J. stated:
>
> > "In my opinion, the statute, which *prima facie* confers jurisdiction upon the Admiralty Court in a case of this kind, should be construed so as to affirm the jurisdiction, at least in a case where the ship is a party."
>
> and at p. 404:
>
> > "On the other hand, all claims arising out of the damage occasioned by the ship should be disposed of in one action so as to avoid the scandal of possible different results if more than one action were tried separately. I therefore think that the statute is to be construed as clothing the Exchequer Court on its Admiralty side with the necessary jurisdiction."
>
> Rand J. stated on p. 411:
>
> > "As the jurisdiction of the Exchequer Court for this purpose is the Admiralty jurisdiction of the High Court in England, if the

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> action had been brought against the Harbour Commission as for an individual tort, the point taken might be formidable; but the cause of action alleged is, strictly, one against joint tort feasors: *The "Koursk"* [1924] p. 140; i.e. both the vessel and the Commission have concerted in directing and controlling the movement of the vessel down the harbour: it was a single act with joint participants. In such a case, a judgment against one merges the cause of action and would be an answer to an action brought against the other in another court."

That case is quite distinguishable.

1. Kellock J. stated that he construed clause IV to intend "to affirm the jurisdiction at least in cases where a ship is a party". The ship is not a party to the second action.

2. Rand J. made merger a basis for jurisdiction and stated: "it was a single act with joint participants. In such a case a judgment against one merges the cause of action".

In the two actions under consolidation the plaintiff alleged damage not caused by a ship but by each of the several defendants, that is for "individual torts" referred to by Rand J.

The cases hold that clause IV applies where a ship is the active cause of damage, where physical injury be done by a ship; where some act of navigation be the cause of the damage; where the ship be the instrument of mischief; *Mulvey vs. Neosho* (supra), *St. Lawrence Transportation Co. vs. Schooner Amedee T.*, [1924] Ex. C.R. 204.

In the latter judgment Maclennan L.J A. stated at p. 105:

> "The question to decide is: was the damage to the scow done by the schooner by any wrongful act or manoeuvre or negligent navigation on her part in such a manner that it could be said that the schooner was the active cause of mischief in what happened to the scow."

In *Toronto Harbour Com'rs* v. *The Ship Robert C. Norton et al* [1964] Ex. C.R. 498, Wells D.J.A. stated at p. 503:

> "It is to be observed that in all these cases it is some use or action of the ship in the course of its operation or navigation as a ship which must be the cause of the damage."

The two actions which plaintiff seeks to consolidate are founded on the several negligences of the various defendants and actions in negligence require that the damage be caused by the alleged negligence of the party to be charged. *Thompson* vs. *Ontario Sewer Pipe Co.* (1908) 40 S.C.R. 396. In such actions the damage is not necessarily restricted to that caused by the ship "in the course of its operation and navigation as a ship".

Therefore the plaintiff has not brought the second action within the clause IV of the Schedule to the *Admiralty Act* and not being within clause IV is not within Rule 44.

The conclusion so reached was only one of two grounds upon which Sheppard D.J. relied for dismissing the application. He has since made it clear to the parties and to me that he was only deciding that the plaintiff had failed to show him that the claim was within the court's jurisdiction and that in his view the decision so reached is tentative and should be reconsidered on an application to dispose of the action whether such an application were to come before him or some other judge. In addition, Sheppard D.J. has indicated that he prefers not to participate in any decision disposing of the action because he has an interest as a shareholder in the plaintiff company.

The provisions of the *Admiralty Act,* R.S.C. 1952, c. 1, upon which the plaintiff relied before me for the jurisdiction of the Court are:

> s. 18(1) The jurisdiction of the Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters are within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.
>
> (2) Without restricting the generality of subsection (1) of this section, and subject to the provisions of subsection (3) thereof, section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925,* of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, in so far as it can, apply to and be applied by the Court, *mutatis mutandis,* as if that section of that Act had been by this Act re-enacted, with the word "Canada" substituted for the word "England", the words "Governor in Council" substituted for "His Majesty in Council", the words "Canada Shipping Act" (with the proper references to years of enactment and sections) substituted, except with relation to mortgages, for the words "Merchant Shipping Act" (and any equivalent references to years of enactment and sections) and with the words "or other judicial district" added to the words "body of a county" wherever in such section 22 of such *Supreme Court of Judicature (Consolidation) Act, 1925,* any of the indicated words of that Act appear
>
> . . .

SCHEDULE A

Section twenty-two of Chapter forty-nine of 15-16 Geo. V of the Parliament of the United Kingdom, being the Supreme Court of Judicature (Consolidation) Act, 1925.

> 22. (1) The High Court shall, in relation *to Admiralty matters,* have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:
>
> (*a*) Jurisdiction to hear and determine any of the following questions or claims
>
> . . .
>
> (iv) Any claim for damage done by a ship;
>
> . . .
>
> (*b*) Any other jurisdiction formerly vested in the High Court of Admiralty;

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Counsel for the plaintiff bases the Court's jurisdiction in this case as falling

(a) within section 22(1)(*a*)(iv) of the *Judicature (Consolidation) Act, 1925,* as being a "claim for damage done by a ship", and

(b) within section 22(1)(*b*) of the 1925 Act as being a claim falling within "jurisdiction formerly vested in the High Court of Admiralty".

The latter ground was referred to by counsel as being based on the "inherent jurisdiction" of the Court[2].

The first of these grounds is that already considered by Sheppard D.J. The second was apparently not advanced before him. It may be more convenient to deal with the second ground first as it necessarily involves an examination of the history of admiralty jurisdiction in order to discover the jurisdiction "formerly" vested in the High Court of Admiralty.

Much has been said about the history of the High Court of Admiralty and its jurisdiction. Most of it is controversial and there is little that can be said that is not debatable. In what follows, therefore, while, for simplicity and conciseness, I will generally express my conclusions in unqualified terms, it must be borne in mind that I am aware that there is usually another view of any particular aspect of the matter to which I refer and that I am merely setting out, with regard to each aspect of the matter, the view that seems to me, on the best consideration that I can give the matter, to be the better one.

---

[2] Another possible ground which was not argued and on which I come to no conclusion, is that this Court has jurisdiction in this case by virtue of subsection (1) of section 18 of the *Admiralty Act,* which provides that the jurisdiction of this Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters "although such waters are within the body of a county or other judicial district". If one reaches the conclusion, as I do in these reasons, that the jurisdiction of the High Court of Admiralty originally extended over torts committed on the high seas and that, until cut down by the statutes of Richard II and Henry IV, this included torts committed in ocean ports, the obvious purpose of these words in section 18(1) would seem to be to restore to the Canadian successor of the High Court of Admiralty jurisdiction over torts committed on the high seas within the body of a county or other judicial district. Before reaching a final view on these words alone, however, a conclusion would have to be reached as to the effect of the latter half of section 18(1).

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The High Court of Admiralty was a court whose origins probably went back as far as the reign of Richard I. It had *inter alia* jurisdiction over torts committed on the high seas and, while the limit of the high seas for this purpose is not too clear, it would seem that this jurisdiction extended to torts in ports within the ebb and flow of the tide. See *De Lovio v. Boit*[3] per Story J., and *The "Zeta"*[4] per Herschell L.C. at pp. 480 *et seq.*

By two statutes in the reign of Richard II and one in the reign of Henry IV, the Admiralty Court was prohibited from taking jurisdiction with regard to anything done "within the realm" and restricted to taking jurisdiction over things "done upon the sea" and was further prohibited from taking jurisdiction in *inter alia* "quereles" arising within the bodies of counties "as well by land as by water". As interpreted by the English courts, these statutes prohibited the Admiralty Court *inter alia* from taking jurisdiction over torts in ports even within the ebb and flow of the tide. See *De Lovio v. Boit* (*supra*).

By two statutes, one passed in 1840 and the other in 1861, the jurisdiction so taken away from the High Court of Admiralty was partially restored.

For purposes of the present discussion, reference need only be made to two of the provisions enacted in 1840 and 1861. In 1840, by c. 65 of the Imperial Statutes of that year, it was provided, *inter alia,* that the High Court of Admiralty "shall have jurisdiction to decide all claims and demands whatsoever in the nature of...damages received by any ship or sea going vessel...whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the...damage received, in respect of which such claim is made". In 1861, by c. 10 of the Imperial Statutes of that year, it was provided *inter alia* that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship".

The jurisdiction of the High Court of Admiralty remained substantially unchanged by statute from 1861 to 1875.

By the *Supreme Court of Judicature Act, 1873,* (c. 66) which came into force November 1, 1875, the jurisdiction

[3] 2 Gall 398

[4] [1893] A C 468.

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of the High Court of Admiralty was transferred to the High Court of Justice that was created by that Act. The High Court was divided into divisions, one of which was called the Probate Divorce and Admiralty Division and dealt *inter alia* with all matters that would have been within the exclusive cognizance of the High Court of Admiralty if the 1873 Act had not been passed. While this statute conferred no new Admiralty jurisdiction on the High Court, a judge of the Probate Divorce and Admiralty Division could, under that statute, exercise any jurisdiction conferred on the High Court so that there was, thereafter, no limitation on the English Court exercising Admiralty jurisdiction insofar as jurisdiction in a cause was vested in a superior court. See *Bow, McLachlan & Co. et al v. The Ship "Camosun"*[5] per Lord Gorell.

This was the situation when the provision contained in Schedule A of our *Admiralty Act* was enacted in England in 1925.

The *Supreme Court of Judicature (Consolidation) Act, 1925,* was enacted by c. 49 of the Imperial Statutes of that year to consolidate the *Judicature Act, 1873 to 1910,* and other enactments relating to the Supreme Court of Judicature in England and the administration of justice therein. Section 22(1) of this Act which is quoted, in part, above, sets out the "admiralty jurisdiction" of the High Court. Paragraph (*a*) of section 22(1) apparently consolidates the 1840 and 1861 jurisdiction provisions (I have not made a textual comparison to satisfy myself that there are no additions) and paragraphs (*b*) and (*c*) then provide for the court having

> (i) any other jurisdiction "formerly" vested in the High Court of Admiralty, and
> (ii) all admiralty jurisdiction conferred by unrepealed statutes passed since 1873.

The first question that has to be decided is whether section 22(1)(*b*) is so worded as to extend to any jurisdiction that the High Court of Admiralty possessed at any time in the past or whether it refers only to jurisdiction vested in the court at the time when its jurisdiction was transferred to the High Court.

[5] [1909] A.C. 597 at 608.

My conclusion is that section 22(1)(*b*) when it was enacted in 1925 was intended to sweep within the concept of the "admiralty jurisdiction" of the High Court any jurisdiction which at any time in the past was vested in the High Court of Admiralty.

In the first place, that view is the view that flows from the plain ordinary meaning of the word "formerly" in the context of section 22(1)(*b*) enacted in 1925 with reference to a court that ceased to exist in 1875.

In the second place, it is apparent from section 22(1)(*c*) that Parliament had in mind how to identify a particular point of time, and it is therefore a fair inference that if Parliament had intended to refer to the situation as it was in 1873, it would have done so.

Finally, the background against which the legislation was enacted helps one to reach a view as to what was meant. From early times until well into the nineteenth century there was a very strenuous contest between the High Court of Admiralty and the common law courts for jurisdiction and, when Parliament grudgingly gave back jurisdiction to the High Court of Admiralty as it did in 1840 and 1861, it did so in as restricted a manner as was consistent with permitting access to the Admiralty procedures in the cases where that was obviously expedient, apparently because it was deemed wise to encourage resort to the common law courts wherever possible. In 1925, however, there was only one English court in the picture and the apparent purpose of section 22(1), and particularly section 22(1)(*b*), was to make sure that that English court would have all the Admiralty jurisdiction that had ever been exercised in England.

I should say that I have not been referred to, and I have not found, any judicial decision touching on the interpretation of section 22(1)(*b*). This, however, is not as surprising as it might otherwise be in that, the old rivalry between courts having disappeared, it has probably been of no more than academic importance in England to decide a question such as the one arising here, namely whether a tort committed in an ocean harbour should be categorized as falling within Admiralty jurisdiction or not.

My conclusion is, therefore, that section 22(1)(*b*) extends to any matter that was within the jurisdiction of the High

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Court of Admiralty before the enactment of the Statutes of Richard II and Henry IV referred to above; and that, as that jurisdiction extended to torts committed in an ocean harbour (a conclusion that I do not pretend to be able to investigate as carefully as I should like in the time available), the jurisdiction of this court extends to such a tort. I have, therefore, come to the conclusion, not without some hesitation, that this court has jurisdiction over the plaintiffs' claim against the defendant Haughton as that claim is pleaded by the portion of the statement of claim summarized above[6].

I turn now to the question whether the claim in question falls within the words "claim for damage done by a ship" as used in section 22(1)(*a*)(iv) of the 1925 Act. These words, it will be recalled, had their origin in section 7 of *The Admiralty Court Act, 1861,* which gave the High Court of Admiralty jurisdiction over "any claim for damage done by any ship".

Before discussing the application of these words to the claim as pleaded against the defendant Haughton, I propose to refer to some of the authorities.

By 1893, it was established that the words "damage done by a ship" applied to "damage done by a ship to persons and things other than ships". See *The "Zeta"* (*supra*) per Lord Herschell L.C. at p. 478.

In *The Theta*[7], it was held by Bruce J. that, while the word "damage" in section 7 of the 1861 Act included personal injuries, injuries sustained by a sailor falling down a hold in a ship while crossing it to go to his own ship were not "done" by the ship that he was crossing. The words "damage done by a ship" in the view expressed by Bruce J. applied only where the ship was the "active cause". As he saw it, another way of saying the same thing was: "done by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument"[8].

In *Currie v. M'Knight*[9], the appellant had a judgment against the registered owner of a ship for damage to his

[6] I am of course only deciding that a claim has been pleaded within the court's jurisdiction. I am not necessarily deciding that the whole of the statement of claim falls within such jurisdiction.

[7] [1894] P.D. 280.

[8] These expressions were quoted from *The Vera Cruz,* 9 P.D. 96.

[9] [1897] A.C. 97.

ship caused when it was cut loose by the crew of the judgment debtors' ship in order to enable that ship to escape from a gale of exceptional violence. The question to be decided was whether the appellant had a maritime lien and was entitled to the proceeds of a judicial sale of the judgment debtors' ship in preference to a mortgagee. The case decided that there was only a maritime lien for damage "done by the ship" and that, on the facts, the appellant's judgment was not for damage done by the ship. Lord Halsbury L.C. said, at p. 101, "...in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage". Lord Watson said at p. 106 "I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequences of a wrongful act or manœuvre of the ship to which it attaches". Lord Herschell said at p. 108 that, in all cases where a maritime lien was found to exist "the ground of the decision was...that the vessel... had in maritime language, done the damage". At p. 110, Lord Shand speaks as though the test were that the vessel was "an offending ship in the course of navigation, or the instrument which caused the damage".

In *Toronto Harbour Com'rs v. The Ship Robert C. Norton et al*[10], Wells D.J.A. held that damage done by the handling of cargo after it was unloaded from a ship was not damage "done by a ship".

In *Anglo Canadian Timber Products Ltd v. Gulf of Georgia Towing Co. et al.*[11], Norris D.J.A. held that damage to a wharf caused by a barge listing during loading was "damage done by a ship" for which the owner and master of the tug who docked the barge without letting the owner of the berth know that it had been damaged and that it was dangerous to load it could be sued in this court.

I have left to the end of this review the decision on which the plaintiff mainly relies, namely *The Ship "Sparrows Point" vs Greater Vancouver Water District et al.*[12]. In that case, the owner of water mains that were damaged when a ship let go her anchor sued not only the ship but

[10] [1964] Ex. C.R. 498.
[11] [1966] Ex. C.R. 653.
[12] [1951] S.C.R. 396.

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the operator of a lift bridge for negligently causing the ship to let go her anchor where she did. The jurisdiction of this court to entertain the action against the bridge operator was challenged and it was held that the court has such jurisdiction. Kellock J., who delivered the judgment of the majority of the court, said that, in his opinion the statute, which *prima facie* confers jurisdiction upon the Admiralty Court in a case of this kind "should be construed so as to affirm the jurisdiction at least in a case where the ship is a party". He then discussed the cases concerning claims against pilots, which held that they could not be sued under section 7 of the 1861 Act, throwing some doubt on their soundness, and concluded by saying that all claims arising out of the damage occasioned by the ship should be disposed of in one action so as to avoid the scandal of possible different results if more than one action were tried separately and that the statute was to be construed as clothing the Exchequer Court with jurisdiction. Rand J. after discussing the problem, expresses his conclusion, as I understand him, in the following passage:

> The claim is for damage done "by a ship"; the remedies *in personam* are against persons responsible for the act of the ship; and I interpret the language of the statute to permit a joinder in an action properly brought against one party of other participants in the joint wrong.

In my opinion, there is no doubt that the claim as framed in this case is for damage "done by a ship" by "striking" the wharf and by "throwing lumber off her decks onto the wharf" and that it comes within the most restrictive of the various statements that have been made as to the effect of section 7 of the 1861 Act when those statements are considered in their context. The function of a freight vessel is to receive goods, carry them and discharge them. During all of the time that it is performing such functions, a ship is afloat in water and must be so managed and controlled as to make possible the achievement of her function. It is just as important so to manage a vessel when she is discharging or receiving goods that she will remain stable and not roll over as it is so to manage her when she is moving from one point to another that she will safely reach her destination. If as a result of a failure of those in charge of discharging or loading a vessel, the vessel breaks from her moorings and strikes the wharf or otherwise does damage, the damage is, in my view, "done by a ship" in exactly the same sense as is damage done by a ship in collision. In my view there could be no question that an action in this case against the ship itself or its operating owner would clearly fall within section 22(1)(*b*) of the 1925 statute.

If this is so, there seems to be no reason why an action against the person who is alleged to have been in charge of loading the vessel would not equally fall within that provision. As I read the allegations in the statement of claim, the plaintiff is asserting that the defendant Haughton was, in fact, in charge of the loading of the vessel and was therefore the person responsible for taking reasonable steps to ensure that the ship would not, during loading, roll over and injure the property of others. In effect, according to the allegation, this defendant was in the same position as the master or the chief officer would have been if one of them had been in charge of the loading of the vessel.

On that view of the matter, which is not the view that was apparently put to Sheppard D.J., I do not have to reach a conclusion as to whether the jurisdiction of this court according to the decision of the Supreme Court of Canada in *The "Sparrows Point"* (*supra*) is subject to the limitations that Sheppard D.J. finds in the judgments in that case. I do not read either judgment in that case as finally deciding that the jurisdiction in an action *in personam* against a person who is alleged to be responsible for exercising a control over the vessel is conditional upon such action being joined with an action against the vessel or her owner or operator. It does seem to me that, as a matter of principle, if the court has jurisdiction when the two actions are joined it must be because it has been vested with jurisdiction over each action taken by itself.

The application is dismissed with costs.

Ottawa 1969 Sept. 9

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... APPELLANT;

AND

QUEBEC AND ONTARIO TRANSPORTATION COMPANY, LIMITED RESPONDENT.

*Customs duty—Used ships imported for coastal trade—Whether duty payable on fair market value or on "value for duty" prescribed by Minister—Customs Tariff, item 44000-1—Canada Shipping Act, R.S.C. 1952, c. 29, s. 670—Customs Act, am. 1958, c. 26, secs. 35 to 40*B.

Section 3(1) of the *Customs Tariff*, R.S.C. 1952, c. 60, provides that "subject to the provisions of this Act and of the *Customs Act*" customs duty shall be imposed at the rates itemized in the tariff. A specific tariff item (now 44000-1) provides that in the case of foreign-built ships of British registry, on application for a licence to engage in the Canadian coasting trade customs duty shall be calculated on fair market value as provided in Part XIII of the *Canada Shipping Act*. That statute (as its predecessors have done since 1902) provides (secs. 669 and 670) that a licence shall be issued to any such ship on payment of 25% duty on fair market value. However, secs. 35 to 40B of the *Customs Act* as enacted in 1958 provide that "value for duty" of used goods shall be prescribed by the Minister (s. 38(1)(*b*)(ii)).

Held (affirming the Tariff Board), used ships within the language of tariff item 44000-1 are to be valued for customs duty at fair market value and not as prescribed by the Minister under s. 38(1) of the *Customs Act* as enacted in 1958.

1. The only duty imposed in the premises by s. 3(1) of the *Customs Tariff* is that now defined in tariff item 44000-1 which does not refer to "value for duty".
2. The provisions of secs. 35 to 40B of the *Customs Act* as enacted in 1958 respecting the calculation of "value for duty" must give way to a tariff item which prescribes its own basis for the calculation.
3. Section 3(1) of the *Customs Tariff* in stating that customs duty is imposed "subject to the powers of this Act and the Customs Act" does not extend but narrows the scope of taxation to the extent provided to the contrary in the statutes specified.

APPEAL from decision of Tariff Board in respect of the valuation of two vessels for customs duty.

D. H. Aylen and *J. E. Smith* for appellant.

Douglas K. Laidlaw, Q.C. for respondent.

THURLOW J. (*orally*):—I will not need to hear you, Mr. Laidlaw, because notwithstanding the very able presentation that Mr. Aylen has made I am of the opinion that the appeal cannot succeed. The question in this appeal, as I

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have appreciated it, is whether the Tariff Board erred in law in deciding that the duty payable in respect of two ships of Bermuda registry which were imported into Canada in 1963 for use in the Canadian coasting trade should be calculated on their "fair market value" rather than on their "value for duty" as the same would be determined for used goods pursuant to sections 35 to 40B of the *Customs Act*.[1]

Under these provisions, on the basis of replacement cost less adjustments for depreciation and obsolescence the Deputy Minister reached a value for duty of one of the ships of $460,476 and of the other of $439,353. On the evidence before it the Tariff Board found the fair market value of each of the ships at the material time to be $139,750. That the latter figure represents the fair market value of the ships at the material time is not in dispute in the appeal.

Customs duty in respect of goods imported into Canada is imposed by section 3(1) of the Customs Tariff[2] which reads as follows:

> 3. (1) Subject to the provisions of this Act and of the *Customs Act*, there shall be levied, collected and paid upon all goods enumerated or referred to as not enumerated, in Schedule A, when such goods are imported into Canada or taken out of warehouse for consumption therein, the several rates of duties of Customs, if any, set opposite to each item respectively or charged on goods as not enumerated, in the column of the tariff applicable to the goods, subject to the conditions specified in this section.

At the material time, item 440(1) of the tariff (now renumbered item 44000-1) read:

> 440 (1) Ships and other vessels built in any foreign country, if British registered since 1st Sept. 1902, on application for license to engage in the Canadian coasting trade; on the fair market value of the hull, rigging, machinery, boilers, furniture and appurtenances thereof, (as provided in Part XIII of the Canada Shipping Act).
>
> (Under the column "Most Favoured Nation Tariff" 25 p.c, under the column "General Tariff" 25 p.c.)

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[1] Section 35(1) and 38(*b*)(ii) of the *Customs Act*, R.S.C. 1952, c. 58 as amended by S. of C. 1958, c. 26, read as follows:—

> 35. (1) The value for duty of goods inspected shall be determined in accordance with the provision of sections 36 to 40B.
>
> 38. Where in any case or class of cases
>
> (*b*) The goods imported
>
> (ii) are used or absolute goods, ...
>
> The value for duty shall be determined in such manner as the Minister prescribes.—ED.

[2] R.S.C 1952, c 60

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Prior to the enactment of item 440(1), which first appeared as item 589 of The Customs Tariff, 1907[3] the granting to a foreign-built ship, which acquired British registry after 1902, of the right to engage in the Canadian coastal trade had been provided for by section 2 of chapter 7 of the Statutes of Canada, 1902, which was subsequently incorporated in the *Canada Shipping Act*[4] and now appears in Part XIII thereof without material change as sections 669 and 670. The material part of section 669(1) reads:

> 669 (1) No foreign-built British ship, whether registered in Canada or elsewhere, after the 1st day of September, 1902, is entitled to engage or take part in the coasting trade of Canada unless she has first obtained a licence for that purpose, which may be granted by the Minister of National Revenue,...

Section 670 then provides:

> 670: The Minister of National Revenue shall issue a licence to any such foreign-built British ship upon application therefor and upon the payment of a duty of twenty-five per cent *ad valorem* on the fair market value of her hull, machinery, furniture and appurtenances.

Pausing here, it seems perfectly clear that section 670 of the *Canada Shipping Act* contemplates payment of a duty of 25 per cent on the fair market value of the hull, et cetera, of ships to which it applies and not on a valuation arrived at on any other basis. It seems equally clear, from the reference, in item 440(1) of the Customs Tariff, to what is provided in Part XIII of the *Canada Shipping Act,* that the duty referred to in item 440(1) is the same duty required by the provisions of the *Canada Shipping Act,* that is to say a duty of 25 per cent on the fair market value of the hull, et cetera, of any ship to which the item applies. In this respect item 440(1) differs from other items of the tariff most of which contain no definition or specification of the valuation to which the rate is to be applied.

As I see it there is no basis for the application of the definition of "value for duty" found in sections 35 to 40B of the *Customs Act* with respect to a ship, whether used or unused, which falls within item 440(1). The only duty imposed by section 3(1) of the Customs Tariff in respect of such a ship is that defined in item 440(1) which itself specifies that the rate is to apply on the fair market value

[3] S. of C. 1907, c. 11.

[4] Now R.S.C. 1952, c. 29.

and reinforces this position by specifically referring to the provision of Part XIII of the *Canada Shipping Act* where the fair market value is prescribed as the basis for the necessary calculation. Nowhere in item 440(1) is there any use of the expression "value for duty" or any imposition of duty on the "value for duty".

Thus while the "value for duty" of the ships in question, as prescribed by the *Customs Act,* may be the amount estimated by the Minister nothing appears to me to follow from that since no duty is imposed in the case of such ships on the "value for duty" thereof.

Moreover I am in agreement with the view of the majority of the Tariff Board that any conclusion to the contrary to be drawn from the provisions of sections 35 to 40B of the *Customs Act,* which prescribe how "value for duty" is to be calculated, must give way before a statutory item which prescribes its own basis for the calculation and which does not contain the expression "value for duty" or any reference to it. Apart, however, from the general principles cited by the majority of the Board in support of this view their construction appears to me to be expressly provided for by section 3(1) of the Customs Tariff which, in imposing duties does so "subject to the provisions of" that Act and of the *Customs Act* one of which provisions is item 440(1) of the Customs Tariff which prescribes that the duty in the case of a ship to which the item applies is to be calculated on the fair market value of the hull, et cetera, of the ship. I read the initial proviso of section 3(1) of the Customs Tariff not as expanding on the scope of the taxation imposed by the subsection, but as meaning that the imposition of tax by the general words "there shall be levied, collected and paid upon all goods enumerated", et cetera, in Schedule A "when such goods are imported into Canada or taken out of warehouse for consumption therein", is to be narrowed to the extent that may be provided to the contrary, either elsewhere in the Customs Tariff, or in the *Customs Act.*

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

Halifax 1969

Sept. 16-17

Sept. 19

PICKFORD AND BLACK LIMITED .....APPELLANT;

AND

CANADIAN GENERAL ELECTRIC COMPANY LIMITED .... RESPONDENT.

Shipping—Damage to cargo—Insufficiency of stowage—Whether stevedores negligent—Evidence—Balance of probabilities—Tort.

A ship carrying heavy machinery returned to port (Halifax) after 24 hours because the cargo had shifted and suffered damage. The cargo had been stowed under the personal direction of an experienced superintendent of stevedores to the approval of the port warden and the ship's master. The stevedores who stowed the cargo were sued in tort for negligence. There was no evidence as to what caused the cargo to shift.

Held (reversing Pottier D.J.A.), it could not be found on the balance of probabilities that the cargo had been negligently stowed, and the action failed. The mere fact that cargo shifts is not proof of negligent stowing but, at most, that it was not fastened sufficiently to withstand the strains imposed on it, which was not inconsistent with the exercise of due care to do all that reasonably competent stevedores could foresee as necessary to prevent shifting.

APPEAL from Pottier D.J.A. (Nova Scotia) holding appellant liable in damages.

Donald D. Anderson for appellant.

Francis O. Gerity, Q.C. and *Gordon S. Black, Q.C.* for respondent.

THURLOW J. (CATTANACH AND KERR *JJ. concurring*):—This is an appeal from the judgment of Mr. Justice Pottier, Judge of the Nova Scotia Admiralty District, holding the appellant, a stevedoring firm, liable for damage to certain parts of a shipment of heavy electrical machinery loaded and stowed by the appellant in the ship *Lake Bosomtwe* in February 1965 for carriage to Ghana. The ship left Halifax on February 26th with the cargo safely on board but returned some 48 hours after leaving because in the meantime the cargo had shifted and sustained the damage in question.

As there was no contract between the appellant and the respondent with respect to the loading and stowing of the goods the only basis for liability of the appellant in these proceedings lies in tort and the case for such liability

*CORAM: Thurlow, Cattanach and Kerr JJ.

raised by the respondent was that the appellant had caused the damage by negligence in failing to adequately secure the cargo for the expected voyage.

That the cargo was in fact insufficiently secured to withstand the forces which were encountered is, in the circumstances, an obvious inference to draw. On the other hand as no member of the crew of the ship was called as a witness at the trial there is no evidence of what, if anything, the ship encountered or what it was that caused the cargo to shift. There was, however, some evidence of weather reports indicating that the weather had been relatively benign for the time of year and the judgment under appeal proceeds on the basis that nothing of an extraordinary nature that could account for the shifting had occurred.

In his reasons for judgment the learned trial judge said:

> It is admitted on the part of the defendant stevedores that the standard of care in stowing cargo is that to be expected of reasonably competent stevedores. I think that is a correct interpretation of the law. The evidence shows that the superintendent of stevedores had long years of experience in the stowage of cargo. The port warden gave evidence and also gave a certificate regarding the stowage. He said that he still thinks the stowage was proper. The bare facts are, however, that the cargo shifted and damage was caused. How it could be properly stowed and move the way it did, I fail to see.

Later in his reasons the learned trial judge also said:

> All that is necessary for the plaintiff to prove in this case is that on the balance of probabilities the damage was caused by defective stowage. That is a reasonable deduction from the evidence, it appears to me. There must have been negligence in the stowage of this cargo, otherwise it wouldn't have come back in the damaged condition it was within a few days of its departure from Halifax. I find that the known facts are sufficient to make a finding of negligence on the part of the defendants. I do not think the doctrine of *res ipsa loquitur* applies.

In my opinion, it is clear that a stevedore cannot be treated as an insurer that a cargo which he has stowed will not shift. It is, I think, equally clear that the mere fact that cargo does shift is not evidence of negligence on the part of the stevedore who has stowed it. Even in the circumstances that have been established in this case the shifting of the cargo, in my view, with respect, is not proof of negligence on the part of the appellant. It appears to me to be, at most, evidence that the fastening of the cargo was not sufficient to withstand the strains, whatever they may have been, that were imposed on it.

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This, however, is not enough to fix the appellant with liability. It is, of course, consistent with negligence on the part of the appellant in failing to take some measure or to do something of which a reasonably competent stevedore would have foreseen the need or in failing to do the same properly. If there were such a failure and if such failure were shown to be the cause of the damage the liability of the appellant might well be established. But the fact that the fastening of the cargo turned out to be inadequate or insufficient to prevent shifting is consistent as well with the exercise by the appellant of due care to do all that a reasonably competent stevedore would have foreseen as necessary to prevent shifting and with his having been guilty of nothing more than having been unable to foresee the necessity of doing something that reasonable competence would not have called upon him to foresee.

The learned trial judge did not mention this feature of the situation in his reasons. He referred to the balance of probabilities favouring the view that the damage was caused by defective stowage and he appears to have treated the fact of the shifting of the cargo in the circumstances, so far as established, as proof of negligence. He made no finding, however, as to what it was that was defective about the stowage.

In the view I take of the matter it was necessary, in order to reach a conclusion that the appellant was negligent, to weigh the probabilities, as well, of the defective stowage having been due to a negligent failure of the kind I have mentioned, of which I can find no direct evidence, against those of it having been due not to negligence but to the lack of something the necessity for which a reasonably competent stevedore would not have foreseen.

Here, to my mind, the fact that no one has offered so much as an opinion, let alone proved facts, as to what it was that was wrong with the stowage and that caused the damage, becomes of prime importance. The stowage of this cargo was carried out under the personal direction of a superintendent of stevedores of some 40 years experience, who had previously stowed two similar cargoes on the same ship without incident. The stowage in question was also done under the surveillance of the port warden of the port of Halifax who testified that he had personally tested the lashings and observed the chocking and shorings. Both regarded the cargo as properly stowed. But the stowage was also carried out under the supervision and direction of the master of the ship, who had the ultimate responsibility for its adequacy, and he appears to have been satisfied with it as well, after a final request for another wire in a particular place had been complied with. When three such persons, all concerned in one way or another with the stowage of this cargo, but representing different interests, have, in advance, nothing more to suggest as necessary, and when this is coupled with the fact that even after the event, that is to say even after it has turned out that the fastening of the cargo was inadequate, no one has been able to point to what it was that was wrong with the stowage it seems to me that the balance of probabilities favours the view that the fault lay in the lack of something, the necessity for which was not reasonably foreseeable and that this view is to be preferred to that of attributing the shifting of the cargo to failure to do properly some unspecified part of what could reasonably be foreseen to be necessary or to failure by three men of the experience and responsibility of the superintendent, the Port Warden and the Master of the ship to adequately carry out their duty to see that the stowage was done as well as any reasonably competent stevedore would have done it.

I should add that while there was evidence that a different method of shoring some parts of the cargo had been suggested and while there is a conflict of testimony as to whether or not this suggested method was carried out there seems to be no reason to think that the failure to shore as suggested, if indeed that is to be taken as having occurred, had anything to do with the shifting or damage or would have any difference in the result.

In my opinion, therefore, there was no proof of negligence upon which to hold the appellant liable.

I would allow the appeal and direct judgment in favour of the appellant with costs throughout.

Toronto 1969 Sept. 16-17

Ottawa Sept. 24

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... APPELLANT;

AND

BRASCOP PRODUCTS LIMITED ....RESPONDENT.

Customs duty—Canada-U.S. Auto Pact—Classification of parts—Wrong form for entry used—Right to reclassification—Motor Vehicles Tariff Order, 1965, P.C. 1965-99 of January 16, 1965.

On the importation of certain motor vehicle parts covered by s. 1 of the Motor Vehicles Tariff Order, 1965 (the Canada-U.S. Auto Pact), the importer's customs broker incorrectly used the white B-1 ordinary entry form instead of the prescribed form, the pink B-1 Special or the white B-1 ordinary with the word "Special" endorsed thereon, and incorrectly classified the goods under Tariff Item 40000-1 instead of 95004-1.

Held (affirming the Tariff Board), the importer was entitled to have the goods reclassified under Tariff Item 95004-1.

APPEAL from Tariff Board.

C. R. O. Munro, Q.C. and *J. E. Gilliland* for appellant.

Hon. R. L. Kellock, Q.C. and *C. W. Hately* for respondent.

GIBSON:—This is an appeal pursuant to section 45 of the *Customs Act,* R.S.C. 1952, c. 58 by the Deputy Minister of National Revenue for Customs and Excise from the declaration of the Tariff Board pronounced in the above cause on November 18, 1968.

By this declaration the Tariff Board found that the respondent Brascop Products Limited was entitled to have a reclassification of certain imported goods made in order to reclassify them in Tariff Item 95004–1[1] of Schedule "A" of the *Customs Tariff Act*; and declared such imported goods to be properly classified in Tariff Item 95004–1.

The respondent Brascop Products Limited, through its customs broker Russell A. Farrow Limited, acting as its agent, imported on the invoice of the exporter Essex Wire Corporation, C.P. Fittings Division, South Bend, Indiana,

[1] 95004–1 All parts, and accessories and parts thereof, except tires and tubes, when imported for use as original equipment in buses to be produced in Canada by a manufacturer of buses.

a quantity of pipe connections in fulfilment of orders in writing received by it from General Motors Diesel Limited of London, Ontario, a duly authorized manufacturer of automobiles, buses and commercial vehicles. These parts were within the meaning of "parts" in section 1 (4) of the *Motor Vehicles Tariff Order, 1965*[2], which implemented the so-called Canada-United States Auto Pact; and are now in said Tariff Item 95004–1 of Schedule "A" of the *Customs Tariff Act,* R.S.C. c. 44, s. 1. (As to numbering authorized by an amendment to *Customs Tariff Act,* S. of C. 1965, c. 17, s. 1 and the *Customs Tariff Re-numbering Order 1965-1*).

The importer at the time of importation classified the subject goods in and used incorrectly Tariff Item 40000-1 of said Schedule "A", *viz:*

> 40000–1 Fittings and couplings of iron or steel, n.o.p., for pipes and tubes; parts therefor

Invoking the provisions of section 43 of the *Customs Act,* the importer then asked for a reclassification to the correct one namely, in Tariff Item 95004–1. The Deputy Minister of National Revenue for Customs and Excise in his decision on this request by way of letter dated May 27, 1968, declined to do so. (See Exhibit "N" to the agreed statements of fact, filed.) But the Deputy Minister in his said decision reclassified the subject goods into Tariff Item 43829–1 of said Schedule "A", *viz.:*

> 43829–1 Parts, n.o.p., electro-plated or not, whether finished or not, for automobiles, motor vehicles, electric trackless trolley buses, fire fighting vehicles, ambulances and hearses, or chassis enumerated in tariff items 42400–1 and 43803–1, including engines, but not including ball or roller bearings,

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[2] MOTOR VEHICLES TARIFF ORDER 1965.

1. The rates of Customs duties on the following goods imported into Canada on or after January 18, 1965 from any country entitled to the benefit of the British Preferential Tariff or Most-Favoured-Nation Tariff, for which a special entry in such form and manner as is prescribed by the Minister has been made, are reduced to the rate set out as follows opposite the description of those goods:

. . .

(4) All parts, and accessories and parts thereof, except tires and tubes, when imported for use as original equipment in buses to be produced in Canada by a manufacturer of buses....Free

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> wireless receiving sets, die castings of zinc, electric storage batteries, parts of wood, tires and tubes or parts of which the component material of chief value is rubber.

The reason given by the Deputy Minister for not reclassifying the said imported goods into their correct Tariff Item of said Schedule "A" to the *Customs Act,* namely Tariff Item 95004–1 was that:

> ...under the Motor Vehicles Tariff Order 1965, re-classification into any of the tariff items of the 95000 series is precluded where, at time of first entry of the goods, a special entry, in such form and manner as prescribed by the Minister, has not been made. Consequently, as this particular requirement was not met, it is the decision of the Deputy Minister that these parts are dutiable under tariff item 43829–1 at 25% ad valorem, Most-Favoured-Nation Tariff.

By his said decision, what the Deputy Minister said in effect was that he could not reclassify these subject goods into their proper Tariff Item classification because they were not goods imported into Canada (specifying them) "for which a special entry in such form and manner as is prescribed by the Minister has been made, . . ." within the meaning of those words in section 1 of the *Motor Vehicles Tariff Order, 1965,* at the time of or "forthwith" after the time of such importation into Canada. What this means is that the customs broker's clerk used Bill of Entry form B-1 ordinary (authorized by the Minister under section 124 of the *Customs Act*) which is white in colour instead of form B-1 "Special" pink in colour or B-1 ordinary with the word "Special" endorsed on it, (the latter two also both authorized by the Minister under section 124 of the *Customs Act*).

Form B-1 ordinary is white in colour and form B-1 "Special" is pink. Both are similar except for two matters namely, as is obvious, one is white and the other is pink, and the pink one has the word "Special" printed on it. (But as stated, the B-1 ordinary white in colour can also be used provided the word "Special" is endorsed on it.) All of the printing on both forms is identical.

The customs broker's clerk in error not only used the B-1 ordinary white form instead of the B-1 "Special" pink form, (or instead of a B-1 ordinary white form with the word "Special" endorsed on it as he also could have used) but also in classifying the said imported goods and recording the same on the form, he wrote in the wrong Tariff Item (under Schedule "A" of the *Customs Tariff Act*) in the place for the Tariff Item on the form, namely 40000–1 instead of 95004–1.

Then this customs broker used what is called a B-2 form in an attempt to correct these two errors. Section 43(6) of the *Customs Act* authorizes the Governor-in-Council to prescribe this form for use in amending proceedings for re-determination of tariff classification or re-appraisal of the value for duty. This form on its face, is called a form for the purpose of "Amending Import Entry—Request for Re-determination or Re-appraisal by a Dominion Customs Appraiser—Re-Fund". In other words, it purports to be a form for use to serve three purposes, namely, to amend a customs entry, to request a re-determination or a re-appraisal and to request a re-fund (if applicable).

The appropriate customs officials when they received the said B-2 form from this said customs broker did purport to amend the customs entry in that they endorsed on the said B-1 Bill of Entry form (ordinary) used in error by the said customs broker which the customs official had given an entry number of 104707D, the words "Amended by Entry number 465276A".

The problem here is whether the words in section 1 of the *Motor Vehicles Tariff Order, 1965* "for which a special entry in such form and manner as is prescribed by the Minister has been made, . . ." were meant to be an enactment of law relating solely to the entry of such imported goods specified in the said order-in-council.

If such were the case, these words would not be an enactment of law relating to re-determination of tariff classification or re-appraisal of the value for duty of such imported goods. In that event, the appeal provisions permitting amendments to entries for classification and for appraisals of duty of any goods contained in the *Customs Act,* especially sections 43, 44 and 45 would not be affected in any way by these words.

As I view the problem, against this statutory background permitting amendments, these words were enacted in this order-in-council. As a result, they must be subject to the rule of strict construction. If it was intended that

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these words would have the effect of precluding an importer from recourse to these amendment procedures authorized by statute, more precise words, in my view, would have been employed than were employed[3].

As a consequence, I am of the view that these words in this order-in-council do not have such effect.

The conclusion therefore that I reach is that there was no error in law in the declaration of the Tariff Board in this matter.

The appeal is dismissed with costs.

Ottawa 1969
15 septembre
25 septembre

ROLLAND FORTIER .... APPELANT (APPELLANT);

ET (AND)

LE MINISTRE DU REVENU NATIONAL .... INTIMÉ (RESPONDENT).

Impôt sur le revenu—Cotisation maintenue par la Commission d'appel de l'impôt—Décision transmise par la poste à l'agent du contribuable—Insuffisance de l'avis d'appel à la Cour de l'Échiquier—Motion pour annuler l'appel—Loi de l'impôt sur le revenu, arts. 60(1), 98(2).

Un avis d'appel à la Commission d'appel de l'impôt d'une cotisation pour l'année 1964 fut rédigée au nom du contribuable par son agent, un comptable agréé. La décision de la Commission rejetant l'appel fut transmise par la poste au contribuable, aux soins et à l'adresse de l'agent. L'avis d'appel du contribuable à cette Cour fut signifié au Ministre 122 jours après la mise à la poste de la décision de la Commission. Le temps prescrit à ce sujet par l'art. 60(1) de la *Loi de l'impôt sur le revenu* est de 120 jours.

Jugé: La motion du Ministre pour annuler l'appel est rejetée. Tenant compte des dispositions de l'art. 60(1) (ainsi que de celles de l'art. 98(2)), la décision de la Commission aurait dû être transmise par la poste au contribuable, à son adresse personnelle, laquelle était clairement indiquée aux documents relatifs à l'appel; et non à son agent qui, n'étant pas membre du barreau, ne pouvait représenter de toute façon le contribuable devant cette Cour.

Income tax—Assessment affirmed by Tax Appeal Board—Decision mailed to taxpayer at agent's address—Insufficiency of—Notice of appeal to this court—Motion to quash—Income Tax Act, secs. 60(1), 98(2).

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[3] cf. Fauteux J. in *Goodyear Tire & Rubber Co. of Canada et al v. T. Eaton Co. et al* [1956] S.C.R. 610 at 614 where he refers to the "rule that a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness,...".

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A notice of appeal to the Tax Appeal Board from a 1964 assessment was prepared for the taxpayer by his agent, a chartered accountant. The decision of the Board dismissing the appeal was mailed to the taxpayer c/o his agent at the latter's address. The taxpayer's notice of appeal to this court was served on the Minister 122 days after the Board's decision was mailed. The time limited by sec. 60(1) of the *Income Tax Act* is 120 days.

Held, the Minister's motion to quash the appeal must be dismissed. Having regard to the provisions of sec. 60(1) (and also to those of sec. 98(2)), the Board's decision should have been mailed to the taxpayer at his own address, which was clearly stated in the appeal documents, and not to that of his agent, who, not being a member of the Bar, could in any event not act for the taxpayer before this court.

MOTION pour rejet d'appel/to quash appeal.

Jean-Paul Guertin pour l'appelant/appellant.

A. Garon, C.R. pour l'intimé/respondent.

*NOËL J.:—L'intimé, par motion, demande à cette Cour de casser l'avis d'appel de l'appelant en date du 15 mai 1969 par lequel ce dernier en appelait d'une cotisation pour l'année 1964, confirmée par une décision de la Commission d'appel de l'impôt, en date du 13 janvier 1969. L'intimé demande le rejet de cet avis d'appel pour les motifs que l'appelant ne s'étant pas conformé aux prescriptions des articles 60(1) et 98 de la *Loi de l'impôt sur le revenu,* S.R.C. 1952, chapitre 148, ne pourrait appeler de la décision de la Commission d'appel de l'impôt devant cette Cour.

L'appelant en effet n'aurait pas, tel que le veulent ces articles, signifié son avis d'appel au Ministre ni produit au registraire de la Cour de l'Échiquier et au registraire de la Commission d'appel de l'impôt, une copie de son avis d'appel dans les 120 jours de la date où le registraire de la Commission d'appel de l'impôt a transmis par la poste au Ministre et au contribuable la décision dont il est appel.

Les parties admettent que l'avis d'appel a été signifié au Ministre du Revenu national le 16 mai 1969 et qu'une copie de cet avis a été produite à la Cour de l'Échiquier et à la Commission d'appel le 21 mai 1969. Elles admettent aussi que la décision de la Commission d'appel de l'impôt a été rendue le 13 janvier 1969 et que le 14 janvier 1969 le regis-

*For English version of this judgment see page 405.

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traire de la Commission d'appel de l'impôt transmit, sous pli recommandé au Ministre, une copie de la décision de la Commission, en langue française, rejetant l'appel. Une autre copie dans la même langue fut transmise à la même date dans une enveloppe adressée comme suit:

M. Rolland Fortier,
a/s Edgar Levasseur,
45, rue Rideau,
Ottawa, Ontario.

Edgar Levasseur est l'agent de l'appelant qui prépara et présenta l'avis d'appel de ce dernier à la Commission d'appel de l'impôt et qui plaida cet appel devant ce tribunal. Cet avis d'appel est en deux parties, soit une feuille intitulée «Avis d'appel» en date du 5 juin 1968 et un autre document intitulé «Exposé des faits» comprenant les allégations de faits et les arguments de droit qui militent en faveur de l'appel du contribuable.

Ces deux documents sont signés par M^{e} Edgar Levasseur, C.A. (comptable licencié et licencié en droit bien qu'il ne soit pas membre du barreau) qui se déclare «dûment autorisé aux fins des présentes» et l'exposé des faits contient l'adresse de M. Levasseur à 45, rue Rideau, chambre 408, Ottawa.

La preuve révèle de plus que (conformément à une tradition de la Commission d'appel de l'impôt, cette dernière transmet toujours au contribuable subséquemment à l'envoi de la décision, une traduction de cette décision dans l'une ou l'autre des langues officielles du Canada, l'anglais ou le français, suivant le cas) le 27 janvier 1969 le registraire de la Commission transmettait à M. Levasseur, pour l'appelant, une traduction en anglais de la décision rendue en français, et le 29 janvier 1969, une traduction revisée de la traduction anglaise.

L'appelant, Rolland Fortier, dans une déclaration assermentée du 12 septembre 1969, déclare qu'il n'a jamais reçu ni lu ou même vu la décision de la Commission d'appel de l'impôt du 13 janvier 1969 qui fut adressée à M. Edgar Levasseur, qu'à la fin d'avril 1969, il fut informé du contenu de cette décision par M. Edgar Levasseur et qu'il lui demande de consulter ses procureurs sur l'opportunité d'en appeler de cette décision et que quelques jours plus tard, il requérait ses procureurs d'en appeler de ladite décision.

L'un des procureurs de l'appelant, Me Bernard Guertin, dans une déclaration assermentée déclare que les services de la société dont il fait partie, furent retenus par l'appelant le ou vers le 1er mai 1969 et, à ce moment, la décision de la Commission d'appel de l'impôt et autres documents furent livrés à sa firme dans une enveloppe portant la date postale du 29 janvier 1969 et cette date fut utilisée pour calculer le délai prévu pour porter cette cause en appel. Il déclare de plus que personne dans sa firme n'était au courant ou ne savait qu'une autre enveloppe avait été mise à la poste par la Commission d'appel de l'impôt avant le 31 juillet 1969 quand Me Alban Garon, C.R. du ministère de la Justice, l'avisa par téléphone que l'appel avait été logé une journée en retard.

En fait, tel que précédemment déclaré et admis, l'avis d'appel a été signifié au Ministre du Revenu le 16 mai 1969, soit 122 jours après la transmission de la décision de la Commission d'appel de l'impôt le 14 janvier 1969 et copie de cet avis a été transmise au Ministre du Revenu et à la Commission d'appel de l'impôt le 21 mai 1969, soit 127 jours après la décision de la Commission. Dans les trois cas, l'appelant n'aurait pas logé ni produit son appel dans les 120 jours de la transmission de la décision de la Commission selon les prescriptions des articles 60(1) et 98(1) et (2) de la *Loi de l'impôt sur le revenu* qui se lisent comme suit:

> 60. (1) Le Ministre ou le contribuable peut, dans les cent vingt jours de la date où le registraire de la Commission d'appel de l'impôt sur le revenu transmet par la poste, au Ministre et au contribuable, la décision concernant un appel prévu à l'article 59, interjeter appel à la Cour de l'Échiquier du Canada.
>
> ...
>
> 98. (1) Un appel à la Cour de l'Échiquier est introduit par la signification au contribuable ou au Ministre, selon le cas, d'un avis d'appel, en double exemplaire et sous la forme que peuvent déterminer les règles, par la production d'une copie de cet avis au registraire de la Cour de l'Échiquier, et si l'appel est interjeté contre une décision de la Commission d'appel de l'impôt sur le revenu, par la production d'une copie dudit avis au registraire de cette Commission.
>
> (2) Un avis d'appel est signifié au Ministre en étant expédié, sous pli recommandé, au sous-ministre du Revenu national pour l'impôt, à Ottawa, et peut être signifié au contribuable en personne ou en lui étant expédié, sous pli recommandé, à sa dernière adresse connue.

Le procureur de l'intimé soutient que le nom et l'adresse de l'agent du contribuable apparaissaient à l'avis d'appel

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devant la Commission et que l'envoi de la décision au contribuable aux soins de l'agent est conforme aux exigences de l'article 60(1) et doit lier le contribuable.

Il m'est, pour des raisons qui apparaîtront ci-après, impossible d'accepter cette prétention. Tout d'abord, l'article 60(1) dit bien que la décision doit être transmise par la poste au contribuable et non à son agent et comme l'adresse du contribuable apparaissait clairement et à l'avis d'appel et à l'exposé des faits comme étant au village d'Embrun, comté de Russell, province d'Ontario, il n'y avait aucune raison (le contribuable n'ayant pas élu domicile chez son agent) de la transmettre à l'agent qui l'avait, il est vrai, représenté devant la Commission d'appel de l'impôt mais dont le mandat avait alors cessé par la poursuite de l'appel devant la Commission. L'appel devant cette Cour étant une nouvelle instance, un nouveau mandat pour l'appel était requis, que Levasseur, d'ailleurs, n'étant pas un membre du barreau, ne pouvait poursuivre devant cette Cour. Au surplus, l'article 98(2) indique clairement qu'un avis d'appel «peut être signifié au contribuable en personne ou en lui étant expédié sous pli recommandé, à sa dernière adresse connue» et je ne vois pas pourquoi la décision ne lui serait pas transmise de la même manière.

Il me faut donc, pour ces raisons, renvoyer la motion de l'intimé avec dépens. Je suis d'autant plus porté à adopter cette solution que l'envoi de la décision à l'agent dans les circonstances que l'on connaît ainsi que l'envoi de la traduction de la décision ont en fait provoqué chez le contribuable, ou ses procureurs, une confusion qui n'est pas étrangère au dépôt en retard de son avis d'appel.

Les parties pourront, cependant, pour éviter des frais inutiles, consentir à ce que le présent avis d'appel soit utilisé pour les fins du présent appel sans qu'il soit nécessaire de transmettre la décision au contribuable, par la poste, tel que le veut l'article 60(1) de la Loi. A défaut de consentement, cependant, il faudra que le Ministre du Revenu national suive les prescriptions de la Loi.

NOËL J.:—The respondent, by motion, moves that this Court quash appellant's notice of appeal, dated May 15, 1969, by which the latter appealed from an assessment for the year 1964, confirmed by a decision of the Income Tax Appeal Board, dated January 13, 1969. The respondent moves that the notice of appeal be dismissed on the ground that as the appellant did not comply with the requirements of sections 60(1) and 98 of the *Income Tax Act*, he cannot appeal the decision of the Tax Appeal Board before this Court.

The appellant did not, it is alleged, as required by these sections, serve his notice of appeal on the Minister nor file a copy thereof with the Registrar of the Exchequer Court and the Registrar of the Tax Appeal Board within 120 days from the day on which the Registrar of the Tax Appeal Board mailed to the Minister and the taxpayer the decision which is appealed.

The parties admit that the notice of appeal was served on the Minister of National Revenue on May 16, 1969 and that a copy of this notice was filed at the Exchequer Court and at the Tax Appeal Board on May 21, 1969. They also admit that the decision of the Tax Appeal Board was rendered on January 13, 1969, and that on January 14, 1969, the Registrar of the Tax Appeal Board forwarded by registered mail to the Minister, a copy of the decision of the Board in the French language, dismissing the appeal. Another copy in the same language was forwarded on the same date in an envelope addressed as follows:

Mr. Rolland Fortier,
c/o Edgar Levasseur,
45 Rideau Street,
Ottawa, Ontario.

Edgar Levasseur is the agent of the appellant who prepared and presented the latter's notice of appeal to the Tax Appeal Board and who argued this appeal before this tribunal. This notice of appeal is in two parts, a sheet headed "Notice of appeal", dated June 5, 1968, and another document headed "Exposition of the facts" which contains the allegations of facts and the arguments of law which are favourable to the taxpayer's appeal.

Both of these documents are signed by Mr. Edgar Levasseur, C.A. (a chartered accountant and a law graduate, although he is not a member of the Bar) who states that

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he is duly authorized for these presents and the Exposition of facts contains the address of Mr. Levasseur at 45 Rideau Street, Room 408, Ottawa.

The evidence also discloses that (in accordance with a long practice of the Tax Appeal Board, the latter always sends to the taxpayer after sending the decision, a translation of this decision in one or the other of the official languages of Canada, English or French, whatever is the case) on January 27, 1969, the Registrar of the Tax Appeal Board sent to Mr. Levasseur, for the appellant, an English translation of the decision issued in French and on January 29, 1969, a revised translation of the English translation.

The appellant, Rolland Fortier, in an affidavit of September 12, 1969, states that he never received nor read or even ever saw the Tax Appeal Board's decision of January 13, 1969, which was addressed to Mr. Edgar Levasseur, that at the end of April 1969 he was informed of the contents of this decision by Mr. Edgar Levasseur and that he asked him to consult with his solicitor as to the advisability of appealing this decision and that a few days later he instructed his solicitor to appeal the said decision.

One of the appellant's solicitors, Mr. Bernard Guertin, in an affidavit, stated that his firm was retained by the appellant on or about May 1, 1969, at which time the decision of the Income Tax Appeal Board and other documents were delivered to his firm in one envelope which was post-marked January 29, 1969, and this date was used in computing the time within which the appeal had to be launched. He further stated that no one in his firm was aware or knew that another envelope had been mailed from the Income Tax Appeal Board until July 31, 1969, when Mr. Alban Garon, Q.C., of the Department of Justice, advised by telephone that the appeal had been launched one day too late.

As a matter of fact, and as hereinabove declared and admitted, the notice of appeal was served on the Minister of National Revenue on May 16, 1969, i.e., 122 days after the sending of the decision of the Tax Appeal Board on January 14, 1969, and a copy of this notice was sent to the Minister of National Revenue and to the Tax Appeal Board on May 21, 1969, which is 127 days after the decision of the Board.

In the three cases, the appellant did not launch or produce his appeal within 120 days of the sending of the decision of the Board as required by sections 60(1) and 98(1) and (2) of the Income Tax Act, which read as follows:

> 60. (1) The Minister or the taxpayer may, within 120 days from the day on which the Registrar of the Tax Appeal Board mails the decision on an appeal under section 59 to the Minister and the taxpayer, appeal to the Exchequer Court of Canada.
>
> ...
>
> 98. (1) An appeal to the Exchequer Court shall be instituted by serving upon the taxpayer or the Minister, as the case may be, a notice of appeal in duplicate in such form as may be determined by the rules, by filing a copy thereof with the Registrar of the Exchequer Court and, if the appeal is from the Tax Appeal Board, by filing a copy thereof with the Registrar of the Tax Appeal Board.
>
> (2) A notice of appeal shall be served upon the Minister by being sent by registered mail addressed to the Deputy Minister of National Revenue for Taxation at Ottawa and may be served upon the taxpayer either personally or by being sent by registered mail addressed to him at his last-known address.

Counsel for the respondent urges that the name and address of the agent of the taxpayer appear on the notice of appeal before the Board and that the sending of the decision to the taxpayer, care of the agent, is in accordance with the requirements of section 60(1) and does bind the taxpayer.

It is not possible for me to accept this submission for reasons which will appear hereafter. In the first place, section 60(1) states clearly that the decision must be mailed to the taxpayer and not to his agent and as the taxpayer's address appeared clearly in both the notice of appeal and the Exposition of the facts as being the village of Embrun, County of Russell, Province of Ontario, there was no reason (as the taxpayer had not elected domicile at his agent's residence) to send it to the agent, who had, it is true, represented him before the Tax Appeal Board, but whose mandate had then ceased by the prosecution of the appeal before the Board. As the appeal before this court was a new suit, a new mandate for the appeal was required, which Levasseur, in any event, not being a member of the Bar, could not accept before this court. Furthermore, section 98(2) indicates clearly that a notice of appeal "may be served upon the taxpayer either personally or by being sent by

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registered mail addressed to him at his last known address" and I cannot see why the decision should not be conveyed in a similar manner.

I must, therefore for these reasons, dismiss respondent's motion with costs. I am also prompted to adopt such a solution because the sending of the decision to the agent in the circumstances we now know of as well as the forwarding of a translation of the decision caused some confusion in the minds of the taxpayer and his solicitors which led to the late filing of his notice of appeal.

The parties may, however, for the purpose of avoiding unnecessary costs, consent to the present notice of appeal being used for the purpose of the present appeal without the necessity of sending the decision to the taxpayer, by mail, as required by section 60(1) of the Act. If there is no consent, however, the Minister of National Revenue shall have to follow the requirements of the Act.

Toronto 1969 Sept. 9-11 — Ottawa Sept. 25

SUSAN HOSIERY LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Employees' pension plan approved for registration—Payments for current and past service—Plan terminated in first year—Whether bona fide or masquerade—Contributions not deductible—Income Tax Act, secs. 11(1)(g), 76.

Appellant company, which had been in the hosiery manufacturing business in Toronto since 1956, was wholly-owned by *S*, his wife and two children, who were the directors and officers of the company. In December 1964 the company, in furtherance of a plan recommended by professional advisers, directed that a pension plan be set up for its four officers, and payments of $6,000 for current service and $15,000 for past service were made to the trustee of the plan. In January and March 1965 the company was advised by the Department of National Revenue of the acceptance of its pension plan, that the actuarial deficit for past service was $232,000 and that contributions for current and past service were deductible as provided by secs. 11(1)(*g*) and 76 of the *Income Tax Act*. On April 26, 1965, the company, in furtherance of its plan, borrowed $220,000 from a bank, paid the trustee the remaining $217,000 required for past service, and then caused the plan to be terminated. On the same day the pension funds were paid out to the four officers, who loaned the bulk of the funds to the company, which thereupon repaid the bank loan. The four beneficiaries of the plan knew that the pension funds distributed to them on April 26, 1965, would be taxable in their hands under the special relieving provisions of sec. 36 of the *Income Tax Act*. It was never intended by the company, its officers, or the trustee of the plan, to implement a *bona fide* pension plan with legal rights and obligations that the parties would act upon.

Held, in computing its income for 1964 and 1965 the company was not entitled under secs. 11(1)(*g*) and 76 of the *Income Tax Act* to deduct the $238,000 contributed to the pension plan. Appellant's purported employees' pension plan was a masquerade. The round-robin of payments on April 26, 1965, did not establish a pension plan, any relationship of trustee and *cestui que trust,* or any other legal or equitable rights or obligations in any of the parties, and none of the parties intended at any material time that there should be any.

Snook v. London & West Riding Investments Ltd [1967] 1 All E.R. 518; *C.I.R. v. Duke of Westminster* [1936] A.C. 1; and *M.N.R. v. Shields* [1963] Ex.C.R. 91, referred to.

APPEAL from income tax assessments for 1964 and 1965.

Wolfe D. Goodman, Q.C. and *F. E. Cappell* for appellant.

George W. Ainslie, Q.C. and *Ian H. Pitfield* for respondent.

GIBSON J.:—This is an income tax appeal against re-assessments for the taxation years 1964 and 1965 of the appellant company Susan Hosiery Limited arising out of the disallowance of a deduction of $238,000 described in the re-assessments as "contributions made to Employees' Pension Plan disallowed". These were claimed by the appellant to be (1) *current contributions* "... to or under a registered pension fund or plan in respect of services rendered by employees of the taxpayer in the year, ..." under the provisions of section 11(1)(*g*) of the *Income Tax Act,* and (2) *past service contributions* "... on account of an employees' superannuation or pension fund or plan in respect to past services of employees..." pursuant to section 76(1) of the Act.

These current contributions and past service contributions were composed of the following amounts:

On December 21, 1964	current	$ 6,000 00
	past services	15,000 00
On April 26, 1965	past services	217,000.00
		$238,000.00

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Sections 76 and 11(1)(*g*) of the *Income Tax Act* permit deductions by an employer of contributions to certain pension plans for employees. Section 76(1) permits a deduction of a lump sum past service contribution provided it is:

> ...a special payment in a taxation year on account of an employees' superannuation or pension fund or plan in respect of past services of employees pursuant to a recommendation by a qualified actuary in whose opinion the resources of the fund or plan required to be augmented by an amount not less than the amount of the special payment to ensure that all the obligations of the fund or plan to the employees may be discharged in full, and has made the payment so that it is irrevocably vested in or for the fund or plan and the payment has been approved by the Minister on the advice of the Superintendent of Insurance, there may be deducted in computing the income of the taxpayer for the taxation year the amount of the special payment.

Section 11(1)(*g*) permits the deduction for current service contributions by an employer in computing its income for a taxation year providing it is:

> ...an amount paid by the taxpayer in the year or within 120 days from the end of the year to or under a registered pension fund or plan in respect of services rendered by employees of the taxpayer in the year, subject, however, as follows:
>
> (i) in any case where the amount so paid is the aggregate of amounts each of which is identifiable as a specified amount in respect of an individual employee of the taxpayer, the amount deductible under this paragraph in respect of any one such individual employee is the lesser of the amount so specified in respect of that employee or $1,500, and
>
> (ii) in any other case, the amount deductible under this paragraph is the lesser of the amount so paid or an amount determined in prescribed manner, not exceeding, however, $1,500 multiplied by the number of employees of the taxpayer in respect of whom the amount so paid by the taxpayer was paid by him.
>
> plus such amount as may be deducted as a special contribution under section 76.

"A registered pension fund or plan" within the meaning of section 11(1)(*g*) of the *Income Tax Act* is defined in section 139(1)(*ahh*) as follows:

> ..."registered pension fund or plan" means an employees' superannuation or pension fund or plan accepted by the Minister for registration for the purposes of this Act in respect of its constitution and operations for the taxation year under consideration;

Since incorporation in 1956 under the Ontario *Corporations Act,* the appellant has carried on a business of manufacturing and distributing hosiery in what is now the Municipality of Metropolitan Toronto. In the years 1964 and 1965 the appellant had approximately 150 employees, which number included its officers and sole shareholders, four in number, from the same family group, namely Mr. and Mrs. Samuel Strasser, their son Alexander S. Strasser and their daughter Susan Strasser (now Susan Karol). The main subject matter in this appeal, namely, the pension plan, was for the benefit of these four persons only.

The fiscal year end of the appellant company was June 30.

The net trading profit of the appellant company for the year ended June 30, 1964, before provision for income tax, was $57,002.76. The surplus account as of June 30, 1964, according to the balance sheet of the appellant was in the sum of $82,813.67. As of the same time the liabilities by way of loan to the shareholders, namely, the four members of the Strasser family, were $136,000.

The net trading profit of the appellant for the year ended June 30, 1965, before taxes, was $213,965.44. From this sum the appellant in its tax return deducted the above referred to sum of $238,000 as its "contribution to Employees' Pension Plan".

By reason of what was done with this $238,000, which resulted in it being returned to the appellant company, the surplus account of the appellant, according to the balance sheet as of June 30, 1965, was in the sum of $15,918.05; and the liability to shareholders by way of loan or advances, being to the four members of the Strasser family, was in the sum of $310,394.39. The deduction of the $238,000 resulted in the appellant company showing a loss on its trading and profit and loss statement for the year ended June 30, 1965, in the sum of $24,034.56, which loss it deducted from its surplus account for the year ended June 30, 1965.

According to the evidence, towards the end of the year 1964, the appellant company through its directors, who were the four members of the Strasser family, commenced to take steps to establish a pension plan for the benefit of the said four members of the Strasser family.

It made arrangements with the Canada Trust Company to be trustee of its proposed pension fund and on December 18 paid over to the Canada Trust Company the sum of $21,000, being $15,000 on account of past service and $6,000 as a current contribution for the benefit of em-

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ployees to be designated. The letter of transmittal to the Canada Trust Company accompanying the cheque for this money reads in part as follows:

> Susan Hosiery Limited is presently in the process of establishing a pension plan for its employees, to be effective December 15th, 1964.
>
> . . .
>
> This deposit is irrevocable provided the plan as finally written is accepted for registration by the Minister of National Revenue. Should the plan not be accepted for registration, the money would of course revert to the Company.
>
> This letter will be sufficient authority for The Canada Trust Company to open a savings trust account in the name of "Pension Plan for Employees of Susan Hosiery Limited" and to deposit this remittance therein....

By resolution of the directors of the company dated December 24, 1964, it was resolved:

> 1. That the Employees' Pension Plan of Susan Hosiery Limited effective December 15th, 1964, in the form presented to the meeting, be approved and adopted subject to the approval for registration by the appropriate governmental authority.
>
> 2. That The Canada Trust Company be appointed as Trustee for the administration of the Pension Fund under the Plan, and that the President and Secretary be authorized and directed to execute and deliver on the Company's behalf a Trust Agreement in the form presented to the meeting.

This plan was filed on this trial as Exhibit A-4.

Subsequently, the following action was taken: Steps were taken to have the company's pension plan accepted for registration under section 139(1)(*ahh*) of the *Income Tax Act*. As a result, its plan was accepted by the Department of National Revenue as evidenced by letters dated January 25, 1965; and the appellant company was advised that its contributions to the plan in respect of services rendered in the year may be claimed as deductions to the extent set out in section 11(1)(*g*) of the *Income Tax Act*.

Then by letter from the Department of National Revenue dated March 22, 1965, the appellant company was advised that after submitting the plan for the purpose of considering the company's special payments to the plan in respect of the past services of employees for advice from the Superintendent of Insurance under section 76 of the *Income Tax Act*, that the advice of the Superintendent had been received and that "in effect he confirms your (the appellant company's) actuary's estimate of the total deficit in the plan in respect of past service pensions . . ."; and that "the Employer's special past service payments to the plan in respect of the . . . deficit may be claimed as deductions in determining taxable income as provided under section 76 of the Act".

On December 24, 1964, also, the directors of the appellant by enacting By-law No. 5 of the company set up a deferred profit-sharing plan. This purported to be a deferred profit-sharing plan within the meaning of section 79c of the *Income Tax Act*.

No moneys were ever paid into this plan and no other action was taken in respect of it other than to have enacted it as a by-law of the company.

On April 26, 1965, which was the date that a new budget by the federal government was brought down, the appellant company and its principal officers, the beneficiaries of the purported pension plan, Exhibit A-4, took certain action, namely, as follows:

The appellant borrowed from the Canadian Imperial Bank of Commerce the sum of $220,000.

It issued a cheque in the sum of $217,000 to the Canada Trust Company, the trustees of the purported pension plan.

The Canada Trust Company issued four cheques in the sums of $70,465, $26,690, $72,420 and $32,725 respectively to Samuel Strasser, Susan Karol, Helena Strasser and Alexander S. Strasser, totalling $202,300.

The Canada Trust Company withheld as withholding tax, $35,700.

Then on April 27, 1965, the said four members of the Strasser family issued cheques to the appellant company in the similar sums of $70,465, $26,690, $72,420 and $32,725 totalling again $202,300; and all these were deposited in the appellant's bank account immediately. The amounts of these cheques were credited on the company's books as loans from these shareholders.

At the same time, the loan obtained on April 26, 1965, from the Canadian Imperial Bank of Commerce by the appellant company in the sum of $220,000, was repaid to it.

The purpose of this round-robin of cheques on April 26, 1965, was, firstly, to pay in the sum of $217,000 to the credit of the said purported Employees' Pension Plan of Susan Hosiery Limited to be applied on account of past

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services; and to wind up immediately the said purported Employees' Pension Plan so that "the fund be distributed to the beneficiaries of the plan in accordance with their respective interests" (see Exhibit A-18, a copy of the minutes of a meeting of the Board of Directors of Susan Hosiery Limited; Exhibit A-21, being a letter from Susan Hosiery Limited to the Canada Trust Company, April 26, 1965, directing the trust company to terminate the Susan Hosiery Limited Employees' Pension Plan and to pay out the funds held under this plan to the employees of the company in accordance with the schedule attached to that letter; and Exhibits A-22, A-23, A-24 and A-25, being respectively letters to the Canada Trust Company dated April 26, 1965, from Alexander Strasser, Samuel Strasser, Susan Karol and Helena Strasser respectively requesting that the moneys at credit in their names under the pension plan be paid to each of them in lump sum).

It was argued by the appellant that its plan was in two parts, namely, firstly, "the Employees' Pension Plan of Susan Hosiery Limited" set up by resolution of the directors of the appellant on December 24, 1964, a copy of which had been forwarded to the Minister for the purpose of obtaining approval by the Minister of lump sum past service contributions to the pension plan under the provisions of section 76(1) of the Act, and for the purpose of registration of the plan under the provisions of section 139(1)(*ahh*) of the Act, so as to have current contributions to the plan qualify as a deduction for income tax purposes under the provisions of section 11(1)(*g*) of the *Income Tax Act;* and secondly, By-Law No. 5, being a purported deferred profit-sharing plan enacted by the appellant company as such a plan within the meaning of section 79c of the *Income Tax Act.*

In November 1964, the accountants and the solicitors for the appellant company advised the appellant and its officers, the four members of the Strasser family above referred to, that there were decided advantages in setting up a pension plan for the said officers and special advantages in having lump sum past service contributions made into such a plan before January 1, 1965. The reason for this date was the fact that the Ontario *Pension Benefits Act* was to come into force then and under that Act, payments made after that date could not be withdrawn as freely from a pension plan. Specifically, after that date moneys in a pension plan could not be invested in shares of the appellant.

The recommendation to the appellant and its said officers at that time was to set up a new pension plan for the said officers, to make lump sum payments into such a plan before December 31, 1964, and to withdraw the moneys paid into such a pension plan before December 31, 1964, by payments out to the beneficiaries of the plan and to immediately cause the beneficiaries thereafter to pay the moneys so withdrawn into a deferred profit-sharing plan which would at that time also be set up for the benefit of the said officers. The proposal was further that the proceeds of such a deferred profit-sharing plan would then be reinvested in preference shares of the appellant company. The advice given also was that the withdrawal of moneys by the beneficiaries from such a pension plan would ordinarily be fully taxable, but by reason of the then provisions of section 11(1)(*u*) of the *Income Tax Act* no net tax would be payable if the moneys were put into a deferred profit-sharing plan. (This subsection has since been repealed, namely, section 11(1)(*u*)(i)(C) by S. of C. 1966-67 c. 91, s. 3(5) applicable with respect to any amount paid after March 29, 1966. Clause (C) formerly read as follows:

(C) to a trustee under a deferred profit sharing plan,

Advice was also given that restrictions on investments of pension plans under the Ontario *Pension Benefits Act* were not applicable to deferred profit-sharing plans and that therefore any deferred profit-sharing plan set up by the appellant for the benefit of its said officers could hold or invest in shares of the appellant.

As indicated above, no steps were taken by the appellant to set up a pension plan prior to January 1, 1965, except to pay over on December 18, 1964, $21,000 to the Canada Trust Company with the request that the funds be held pending the establishment of such a plan; and the passing of a resolution by the directors of the appellant on December 24, 1964, to establish an Employees' Pension Fund; and the passing of By-Law No. 5, being the by-law to establish a deferred profit-sharing plan.

As a result, in 1965 there was no way that the trustee of any pension plan of the appellant could use funds to

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invest in shares of the appellant company. The only way at that time that any funds set aside purportedly for pension plan purposes for the said officers of the appellant could be invested in shares of the company was by arranging that such funds be put in a deferred profit-sharing plan within the meaning of section 79c of the Act.

It was finally decided just at budget time, which was April 26, 1965, after receiving the approvals for past service contributions under section 76(1) of the Act and approval for the deductibility of current contributions under section 11(1)(*g*), that funds would be put into this alleged pension plan and immediately that the plan would be wound up.

Mr. Alexander Strasser in evidence at this trial stated that it was always the scheme that the pension plan would be wound up immediately after the payment in of the moneys that were paid in, namely, $217,000 (plus the $21,000 that had been paid in on December 18, 1964) and immediately paid out to the purported beneficiaries of such a pension plan and that the beneficiaries would then be free to do what they wished with the funds. Mr. Strasser stated that it was the intention then to transfer the funds to a deferred profit-sharing plan. But none of the documentary evidence indicates that there was any such intention. On the contrary, By-Law No. 5, the by-law which set up the deferred profit-sharing plan, does not provide for any contributions to be made to it by any person other than the appellant company. In addition, there was no restriction put on the beneficiaries of the purported pension plan by way of contract or otherwise requiring them to do anything with any funds they received on the winding up of such pension plan.

The appellant and the purported beneficiaries of its pension plan on April 26, 1965, I am of the view on the evidence, knew that if they received payments out of such a pension plan as was purported to be set up in this case by the appellant they could receive substantial sums of moneys from such a plan and could take advantage of the relieving provisions then in existence of section 36 of the *Income Tax Act* by minimising their incomes for the three immediately preceding tax years. In 1965 at this time it is a reasonable inference, and I make it, that the appellant and the beneficiaries of its alleged pension plan, the said four members of the Strasser family, knew of these provisions.

It was also open to them, of course, and I am of the view that the appellant and the said beneficiaries knew that they could, as beneficiaries, having received such lump sum payments, pay such moneys so received into a deferred profit-sharing plan and obtain the benefit of the relieving provisions as then existing of section 11(1)(*u*) of the *Income Tax Act,* but nowhere is there any evidence that the appellant or the said four officers of it, the four members of the Strasser family, ever considered or intended to adopt this latter course of action.

Instead the appellant through its said executive officers, the four members of the Strasser family and the beneficiaries under the appellant's purported pension plan, caused this $217,000 to be paid into this purported pension plan on April 26, 1965 ($15,000 having been paid on December 18, 1964, in respect of past service contributions and $6,000 for current contributions, totalling $238,000) for the purpose of attempting to obtain for the company a deduction for income tax purposes under the provisions of section 76 of the *Income Tax Act* for that taxation year in the sum of $232,000 for past service contributions into such a purported Employees' Pension Plan ($15,000 paid on December 18, 1964, and $217,000 paid on April 25, 1965) and a deduction under section 11(1)(*g*) of the Act for current service contribution in the sum of $6,000 paid into the purported Employees' Pension Plan on December 18, 1964. They also caused, as indicated above, this money to be paid by the trustees to the beneficiaries of the alleged pension plan (after causing the trustees to withhold tax in the sum of $35,700) and caused these moneys to be loaned back to the company by them.

The result of all this was to move on the books of the company $238,000 from the surplus line of the balance sheet up to the advances from shareholders line so that no profit was shown by the company for the year ended June 30, 1965. The net trading profit, as mentioned above, prior to deducting this $238,000 was $213,965.44, which purported to result in a loss for the year ended June 30, 1965, of $24,034.56. The result, if this transaction was held

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to be legal within the provisions of the *Income Tax Act* would be that future profits could be repaid to the shareholders on the basis of capital payments, that is, the repayment of a shareholder's loans, and not as income receipts, and not through the surplus account of the appellant.

From a consideration of the whole of the evidence one crucial fact was proven, namely, that the appellant and its chief executive officers who, as stated, were also the main shareholders and the beneficiaries under the purported Employees' Pension Plan, the four members of the Strasser family, and the Canada Trust Company, the purported trustee, never intended at any material time to implement a *bona fide* "employees' superannuation or pension fund or plan" so as to enable the appellant company to qualify for a deduction in the current taxation year for a lump sum or special payment made in respect of past services of the employees of such a pension plan under the provisions of section 76(1) of the Act, or for current contributions under section 11(1)(*g*) of the Act. In other words, none of these parties nor Canada Trust Company, the named trustee of the subject Employees' Pension Plan, ever intended at any material time to set up any legal rights and obligations under Exhibit A-4, the so-called pension plan. They never intended that it be a document that the parties would act upon.

I say this notwithstanding that prior to December 31, 1964, the company and its executive officers considered setting up the pension plan and considered such pension plan in two parts, namely, one under the provisions of Exhibit A-4 into which funds would be paid and subsequently transferred or caused to be reinvested by the beneficiaries after pay-out into a deferred profit-sharing plan under the provisions of section 79c of the Act; obtained the Minister's approval for past service or special payment contributions to such a plan under section 76 of the Act; and obtained the registration of such a plan so as to be a plan within the meaning of a registered pension plan under section 139(1)(*ahh*) of the Act so as to qualify current contributions to such a plan as a deduction under section 11(1)(*g*) of the Act.

All these things, including the payment of the $21,000 on December 18, 1964, to the Canada Trust Company as trustee for a proposed Employees' Pension Plan prior to the

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final decision of all these parties, culminated in the action taken on April 26, 1965, which was the implementation of the joint intention of the appellant, its executive officers and the Canada Trust Company. Such intention was not to establish a *bona fide* pension plan within the said provisions of the Act. Instead, section 76(1) and section 11(1)(*g*) of the Act were employed by the company to obtain deductions from income for the year ended June 30, 1965, and a readjustment of tax by reason of the loss carry back to the fiscal year ended June 30, 1964. The beneficiaries of the alleged pension plan, the executive officers sole shareholders of the appellant company, the four members of the Strasser family, then caused the moneys so obtained by them by the purported winding up of this pension plan to be loaned back to the company. This purported to result in the company showing a liability to them in capital form of $217,000 more, which it was hoped would be available for payment out as a capital receipt to them in the future rather than as an income receipt. In doing so the tax disadvantages of paying out of surplus on behalf of the company and also the tax disadvantage of having such moneys from the surplus paid to these persons as an income receipt it was hoped would be thereby avoided.

What was done in respect of Exhibit A-4, that is, the purported Employees' Pension Plan of the appellant, at the material time as mentioned above constituted in essence a sham.

In this regard the words of Lord Diplock in *Snook v. London & West Riding Investments Ltd*[1] are apt:

> As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* ((1882), 21 Ch. D. 309); *Stoneleigh Finance, Ltd. v. Phillips* ([1965] 1 All E.R. 513; [1965] 2 Q.B. 537), that for acts or documents to be a "sham", with whatever legal

[1] [1967] 1 All E.R. 518 at 528.

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> consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived....

This language should also be compared with the *caveat* in the case of *Commissioners of Inland Revenue v. Duke of Westminster*[2] at page 21:

> There may, of course, be cases where documents are not bona fide nor intended to be acted upon, but are only used as a cloak to conceal a different transaction. No such case is made or even suggested here. ...(Lord Tomlin)

And also at page 21, Lord Russell of Killowen:

> It is conceded that the deeds are genuine deeds, i.e., that they were intended to create and do create a legal liability on the Duke to pay in weekly payments the annual sum specified in each deed, whether or not any service is being rendered to the Duke by the covenantee. Further, it is conceded that the sums specified in the deeds were paid to the covenantees under the deeds.

In this connection, also see *Minister of National Revenue v. Shields*[3] Cameron J. at page 96:

> I think it is settled law, however, that for income tax purposes it is insufficient to establish a partnership in fact merely by the production of a partnership deed. It must also be shown that the parties thereto acted on it and that it governed their transactions in the business being carried on.

And at pages 112-13:

> These facts lead me to the conclusion that while there was a partnership agreement, it was never considered by the respondent as binding on him. It was put aside and did not in fact govern the actions of the parties thereto, except to the extent that it was helpful in carrying out his scheme to reduce his own taxable income, namely, by making payments of income tax on account of Victor's alleged profits.

In this case Exhibit A-4, the purported Employees' Pension Plan of the appellant, was treated by all the parties to it, that is the appellant, the purported beneficiaries, the four executive officers and sole shareholders of the appellant, the four members of the Strasser family and the Canada Trust Company, the trustee, as a mere simulate. It masqueraded as an employees' pension plan but was nothing of the sort. The directions to pay in and to pay

[2] [1936] A.C. 1.

[3] [1963] Ex. C.R. 91.

out contemporaneously given to the Canada Trust Company on April 26, 1965 (see Exhibits A-17, A-22, A-23, A-24 and A-25) resulting in the round-robin of cheques above referred to, never established a pension plan, nor any relationship of trustee, *cestui que trust,* nor any other legal or equitable rights or obligations in any of the parties and none of the parties intended at any material time that there should be any.

It follows that the payments made by the appellant on April 26, 1965, in the sum of $217,000 do not qualify as deductions under either section 76(1) of the Act as past service contributions, nor do the payments made on December 18, 1964, in the sum of $21,000, being $15,000 in respect of past service contributions, and $6,000 in respect of current contributions, qualify as a deduction under section 76 or section 11(1)(*g*) of the Act, because in fact there was never at any time any *bona fide* Employees' Pension Plan established.

The $6,000 in respect of current contributions paid at that time also does not qualify under any general law for deduction or under section 11(1)(*g*) of the Act because again, there never was a *bona fide* pension plan established.

As to the pleading of the appellant in the alternative by paragraph 7 of its notice of appeal that:

> ...if the said payments are not otherwise allowable as deductions, as claimed above, (which is not admitted but expressly denied), they are nevertheless allowable as deductions under Sections 3 and 4 of the Income Tax Act, as remuneration paid to its officers and employees for services rendered to the appellant.

I am of the view that this pleading fails because no evidence was adduced at this trial to establish that these amounts were paid out to the four members of the Strasser family above referred to as salaries or other remuneration.

The appeal is dismissed with costs.

Ottawa 1969

Sept. 12

Sept. 30

UNION CARBIDE CANADA LIMITED ....PLAINTIFF;

AND

CANADIAN INDUSTRIES LIMITED .....DEFENDANT.

Patents—Pleadings—Patent infringement action—Concise description required of right claimed—Plaintiff's title to right claimed—How to plead—Exchequer Court Rules 88, 114(1)(a), (c) and (e).

A statement of claim in a patent infringement action does not disclose a cause of action and will be struck out under Exchequer Court Rule 114(1)(*a*) if it does not contain a concise description of the exclusive right of which enforcement is sought (Rule 88); and it will not suffice to refer to some unspecified and undescribed invention or to the patent number, whether with or without the addition of the name of the inventor or of the invention or both.

Semble: To describe the right asserted by setting out a number of lengthy and largely unintelligible patent claims might be insufficient, and such a description might be liable to be struck out under Rule 114(1)(*c*) and (*e*) as being likely to prejudice and embarrass the fair trial of the action or as being an abuse of the process of the court.

Semble: It is not necessary for the plaintiff to plead any stage in the acquisition of the right sought to be enforced prior to the grant of the patent, but unless the grant of the patent was to the plaintiff himself the subsequent steps by which the right to enforce it became vested in him are material facts which must be concisely stated.

Dow Chemical Co. v Kayson Plastics & Chemicals Ltd [1967] 1 Ex. C R. 71; *Precision Metalsmiths Inc. v. Cercast Inc. et al* [1967] 1 Ex. C.R. 214, referred to.

APPLICATION.

Roger T. Hughes for plaintiff.

Gordon F. Henderson, Q.C., for defendant.

THURLOW J.:—This is an application for an order:

that this action be dismissed and that the statement of claim and particulars of breaches be struck out under Rule 114 of the Rules of this Honourable Court on the grounds that:—

(a) it discloses no reasonable cause of action;

(b) it is frivolous and vexatious;

(c) it may prejudice and embarrass the fair trial of the action;

(d) it is an abuse of the process of the Court.

IN THE ALTERNATIVE, for an order that Union Carbide Corporation, parent of the plaintiff Union Carbide Canada Limited, be joined as a party plaintiff to this action on the grounds that Union Carbide Corporation retains residual rights in Canadian Patent 766,213 and that it has not been totally assigned to Union Carbide Canada Limited.

On the first branch of the motion three submissions were put forward by counsel for the defendant:

1. that the statement of claim contains no sufficient allegation of a right to be enforced,

2 that the allegations of infringement are insufficient to disclose a cause of action; and

3 that the particulars of breaches contain an admission that the plaintiff has no cause of action.

The statement of claim after describing the plaintiff in paragraph (1) and the defendant in paragraph (2) proceeds as follows:

3 The Plaintiff is the owner and patentee of Canadian Letters Patent No. 766,213 issued August 29, 1967 for an invention of George M Adams and Sidney J Wakefield entitled "Method Of And Apparatus For Treating Plastic Structures And Products Produced Thereby" by virtue of an assignment from Union Carbide Corporation, the assignee of the said George M. Adams and Sidney J. Wakefield, which assignment was made and dated May 20, 1968 and was recorded in the Canadian Patent Office on June 18, 1968 as No. 728,353. The Defendant has infringed the rights of the Plaintiff under the said letters Patent as set out in the Particulars of Breaches served herewith and threatens to continue the said infringement.

4 By reason of the assignment to the Plaintiff of Canadian Patent No 766,213 as aforesaid, the Plaintiff Union Carbide Canada Limited has the exclusive right of using the methods or processes described and claimed in the said Letters Patent in Canada and the exclusive right of making, constructing and vending to others to be used, the products of the said methods or processes and the products described and claimed in the said Letters Patent.

Paragraph (5) is the claim for relief.

The particulars of breaches read as follows:

1. The Defendant has since May 20, 1968 and prior to the date hereof, at a number of its plants in Canada, including Riviere des Prairies, Quebec; Brampton, Ontario; Winnipeg, Manitoba; and Vancouver, British Columbia; treated polyethylene film for the purpose of improving ink adhesion thereof by exposing a surface thereof to high voltage electric stress accompanied by corona discharge.

2 The acts of the Defendant referred to in paragraph 1 above are an infringement of claims 1, 2, 10, 11, 12, 16 and 17 of Canadian Letters Patent No. 766,213.

3 The Defendant has since August 29, 1967 and prior to the date thereof, sold in Canada polyethylene film treated in the manner referred to in paragraph 1 hereof. To the best of the knowledge of the Plaintiff the Defendant has or uses no standard or proprietory trade designation for such film but refers to such film at least on occassion, as "treated" film

4 The acts of the Defendant referred to in paragraph 3 hereof are an infringement of claims 4, 5, 6, 7, and 20 of Canadian Letters Patent No 766,213

5 The precise number and dates of the Defendant's infringements are unknown to the plaintiff but are known to the defendant. The plaintiff will claim an accounting in respect of all such infringements. The Plaintiff specifically pleads and relies however

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> under paragraph 3 hereof, on the sale by the Defendant to Brimley Litho Ltd, of 390 Progress Ave, Scarborough, Ontario of clear plain polythene rolls of tubing "treated one side" as evidenced by the Defendant's Invoice No. M11844 dated May 8, 1969, and under paragraph 1 above on the treatment of the film therein referred to.

The problem raised by the defendant's first submission was referred to by the President of this court in *Dow Chemical Co. v. Kayson Plastics & Chemicals Ltd*[1] where at page 80 he said:

> In general, under our system of pleading, a statement of claim for an infringement of a right should clearly show
>
> (*a*) facts by virtue of which the law recognizes a defined right as belonging to the plaintiff, and
>
> (*b*) facts that constitute an encroachment by the defendant on that defined right of the plaintiff
>
> If the statement of claim does not disclose those two elements of the plaintiff's cause of action, it does not disclose a cause of action and may be disposed of summarily.
>
> While, as far as I know, there is no special rule in relation to claims for infringement of a patent that would exempt such proceedings from this elementary requirement, there appears to be a practice, which is not peculiar to this country, whereby the statement of claim does not describe the particular monopoly right of the plaintiff which he claims to have been infringed but is limited to an assertion that the plaintiff is an owner of a patent bearing a certain number and having a certain title. This patent is not part of the pleadings so that the pleading tells neither the court nor the defendant anything about the rights of the plaintiff that, according to him, have been infringed. Furthermore, if the court or the defendant acquires a copy of the patent, which can be done at a price, more often than not, it will be found that the patent purports to grant to the plaintiff a large number of monopolies and the court and the defendant are left to guess which one or more is the subject matter of the action.
>
> It seems to follow from this departure from the ordinary rules of pleading that the plaintiff then adopts the device found in the statement of claim in this action of omitting to allege any facts that would constitute an infringement of the plaintiff's rights and the statement of claim is limited to a bare assertion that the plaintiff's rights have been "infringed".
>
> The question that occurs to me is whether there is any possible basis upon which such a Statement of Claim can be supported under our Rules.

In *Precision Metalsmiths Inc. v. Cercast Inc. et al*[2], where the attack on the pleading was restricted to the adequacy of the allegations of infringement and did not raise the point with respect to the assertion of the right infringed,

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1 [1967] 1 Ex. C.R. 71.

2 [1967] 1 Ex. C.R. 214.

the President after citing the foregoing passage from the *Dow Chemical* case said at page 220:

> At this point, it may be well if I re-state the basic principle involved A statement of claim must contain a concise statement of the "material facts" upon which the plaintiff relies as giving him a cause of action; it must not contain "the evidence". (Rule 88) Put another way, a statement of claim must contain a statement of the facts that give him a cause of action but must not contain the facts upon which he relies to prove those facts. If the material facts stated by a statement of claim clearly reveal no cause of action, it should be struck out In an action for infringement of a patent under the *Patent Act*, there must therefore be in the Statement of Claim allegations
>
> (a) of facts from which it follows as a matter of law that the Plaintiff has, by virtue of the *Patent Act*, the exclusive right to do certain specified things, and
>
> (b) that the defendant has done one or more of the specified things that the plaintiff has the exclusive right to do
>
> It is not a compliance with the requirement that the material facts be alleged merely to state the conclusions that the Court will be asked to draw, which are
>
> (a) that the plaintiff is the owner of one or more specified Canadian patents, and
>
> (b) that the defendant has infringed the plaintiff's rights under such patents.

The opening sentence of Rule 88 reads as follows:

> Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence; such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation

To my mind the requirement of this rule that the pleading state "the material facts upon which the party pleading relies" calls, in the case of a statement of claim, for a concise statement of every fact essential to the party's cause of action. Obviously such a statement must include, in a case where interference with a property right is to be the basis for the relief sought, a concise description of the right asserted with a statement of the facts as to how the right arose. What is required, moreover, is not a reference to where information as to the plaintiff's right can be found but a concise description of it sufficient to point unequivocally to what it is that the defendant has violated.

While I have the impression that pleadings of the kind filed in this action have not been uncommon in patent infringement cases this is the first occasion of which I am

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aware when such a statement of claim has been attacked on the ground of inadequacy of the allegation of the plaintiff's right and I was informed in the course of the argument that uncertainty exists among some members of the bar as to how the right should be alleged. Some, I was told, have taken to setting out at length the claims of the patent on which they propose to rely, while others take the view that it has become necessary to allege the making of the invention by the inventor named in the patent and the subsequent grant of the patent, et cetera, as alternatives to allegations of the kind in the statement of claim in his action.

In my opinion there is no necessity in a patent infringement action to plead any step in the acquisition of the right sought to be enforced prior to the grant of the patent itself, since its validity is presumed and it will therefore be for the defendant to raise matters which show invalidity. However, unless the grant of the patent was to the plaintiff himself the subsequent steps by which the right to enforce it has become vested in the plaintiff are material facts and, as I see it, must be concisely stated. That, however, is not the point raised on the present motion. There must be, as well, a concise description of the exclusive right of which enforcement is sought and this requirement in my opinion is not satisfied by a statement that the patent gives the plaintiff the exclusive right to make, construct, use and vend to others to be used some unspecified and undescribed invention.

Nor in my view is the matter advanced or the requirement fulfilled by a reference to the patent number whether with or without the addition of the name of the inventor or the name of the invention as set out in the patent or both. Such a reference is not a statement at all of what it is that the plaintiff has the exclusive right to do and which the defendant is to be alleged to have done. In my view it fails to concisely state an essential feature of the plaintiff's case and because of this, in my opinion, the present statement of claim as framed does not disclose a cause of action. However, even if, on reference to the patent, the scope of the plaintiff's right could be said to sufficiently appear, the paragraph, in my opinion, would still not be a concise statement of the material facts with respect to the right sought to be enforced and the service of such a statement of claim upon a defendant requiring him to file a defence within a time limited by the rules but at the same time making it necessary for him to search for a definition of the right asserted by obtaining at his own expense a copy of the patent and endeavoring to discern what in it is to be relied upon, in my opinion, constitutes an abuse of the process of this court.

The statement of claim in this action accordingly should not be allowed to stand but in my view it, as well as the particulars of breaches which accompanied it, should be struck out, with leave to the plaintiff to plead anew in compliance with the rules. I should add, however, that in many, if not in most cases the description of the right asserted by setting out a number of lengthy and largely unintelligible patent claims, while perhaps not so susceptible to the objection that no cause of action is disclosed might well be open to the objection that it was not a concise statement of a material fact and might be just as objectionable and liable to be struck under paragraphs (c) and (e) of Rule 114 as being likely to prejudice and embarrass the fair trial of the action or as being an abuse of the process of the Court. As I see it what is required is a succinct description, stripped of all unnecessary and irrelevant verbiage, of the essential feature which the defendant is to be alleged to have taken. To compose such a description may require time and effort but, as I see it, a plaintiff and his counsel should know before the action is commenced what the particular right is that they propose to prove has been infringed and should be able to compose a sufficient description of it.

As the statement of claim contains no sufficient description of the right asserted and as no evidence is admissible on the question (and none was offered), it is not possible, as I see it, to determine whether the allegation of infringement would have been sufficient to disclose a cause of action for the breach of such right if it had been adequately described. I shall therefore refrain from commenting on the sufficiency of such allegations beyond observing (a) that they appear to say more than the allegations which were struck out in *Precision Metalsmiths Inc. v. Cercast Inc.*

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et al[3] and (b) that no heed appears to have been paid to the caution expressed by the President in that case when he said at page 221:

> Reference should be made to Rule 20, which provides that, in an action for infringement of a patent, a plaintiff must deliver with his statement of claim "particulars" of the "breaches complained of". Strictly speaking, this rule and Rule 88, when read together, require that the statement of claim should allege the specific things that the defendant has done and that the plaintiff has the exclusive right to do, and the "particulars" delivered under Rule 20 should contain merely "particulars" of such breaches, or, in other words, "particulars" of the "breaches" that have been "complained of" in the statement of claim

The third point taken by the defendant was in substance that the plaintiff, by pleading that "the defendant has since August 29th, 1967 and prior to the date thereof sold in Canada polyethylene film treated in the manner referred to in paragraph 1 hereof," has disclosed that the defendant was using the plaintiff's process prior to the issue of the patent and was therefore entitled to continue to do so after its issue under Section 58 of the *Patent Act* having regard to the decision of this Court in *Libbey-Owens-Ford Glass Co. v. Ford Motor Co. of Canada Ltd.*[4] In replying to this submission counsel for the plaintiff stated that the word "thereof" was a typographical error and that the word "hereof" had been intended, as indeed appears in paragraph 1. On an affidavit to that effect being filed I would not hesitate to permit an amendment to withdraw any admission implicit in the mistaken use of the word "thereof", if indeed leave to make such an amendment is necessary at this stage under the rules. Moreover, I do not agree with Mr. Henderson's suggested interpretation of paragraph 3 of the particulars of breaches as meaning that the defendant used the process before issue of the patent and it appears to me as well that the point taken by the defendant raises a matter of defence which cannot be resolved without an investigation of the facts and which the court will not determine on a summary application such as this.

In view of the result of the first branch of the defendant's motion the alternative request does not arise but I think I should say, in case the defendant should consider renewing the application at a later stage, that on the material

[3] [1967] 1 Ex. C.R. 214.

[4] [1969] 57 C P.R. 155.

now before the court, including the statement of Mr. Hughes that he represented Union Carbide Corporation, that that corporation has no interest in the action, does not wish to be heard and will consider itself to be bound by the judgment in the action I would not make an order requiring that corporation to be joined either as a plaintiff or as a defendant in the action.

In the result paragraphs 3 and 4 of the statement of claim and paragraphs 1, 2, 3, 4 and 5 of the particulars of breaches will be struck out with costs and the plaintiff will have leave to plead anew in accordance with the rules of the court.

BRITISH COLUMBIA ADMIRALTY DISTRICT

MARPOLE TOWING LTD ....PLAINTIFF;

Vancouver 1969
Sept. 16-17
Oct. 1

AND

BRITISH COLUMBIA TELEPHONE COMPANY and all other persons claiming or being entitled to claim damages by reason of or arising out of the navigation of the tug *Chugaway II* resulting in the collision on June 23rd, 1966 between the barge *V.T. NO. 154* in tow of the said tug, and the Fraser Street fixed span bridge in the Fraser River ....DEFENDANTS.

Shipping—Ship colliding with bridge—Limitation fund—Whether "actual fault or privity" of owner—Canada Shipping Act, R.S.C. 1952, c. 29, s. 657(2) am. 1960-61, c. 32, s. 32—Whether Provincial Crown bound by limitation of liability—Damage caused by barge under tow of tugboat—Calculation of liability—Only tonnage of tugboat taken into account.

Crown—Costs—Ship causing damage to property of Province—Whether Crown affected by statutory limitation on shipowner's liability—Provincial Act depriving Crown of costs of litigation—Effect on federal cause of action—Crown Costs Act, R.S.B.C. 1960, c. 87, s 2.

On June 23, 1966, a chip barge being towed up the Fraser River by a tugboat struck the Fraser Street Bridge, causing injuries to persons on the bridge and damage to the bridge and other property. The tug was owned by plaintiff company which was under the supervision of *L*, who with his son held all its shares and was its president and general manager. The master and crew of the tug were competent and experienced and the tug was well found. The accident occurred because the tug's master, who estimated the clearance of the Fraser Street bridge by the navigators' usual practice of counting the visible planks of the preceding bridge, either miscounted or forgot the count. Plaintiff sued to limit its liability under s. 657(2) of the *Canada*

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Shipping Act. The only claimant who contested the action was the Crown in right of the Province of British Columbia, which owned the damaged bridge.

Held: (1) The accident occurred without the "actual fault or privity" of the tug's owner, whose liability was therefore limited by s. 657(2).

Robin Hood Mills Ltd v. Paterson Steamships Ltd (P.C.) [1937] 3 D.L.R. 1; 58 Ll. Rep. 33, applied.

(2) The provisions of the *Canada Shipping Act* for limiting liability are binding on the Crown in right of the Province.

Gartland Steamship Co. v. The Queen [1960] S.C.R. 315, followed.

(3) The amount of the liability under s. 657(2) is to be determined by reference to the tonnage of the tug alone, and does not include that of the tow in the circumstances of this case

The *Bramley Moore* [1963] 2 Ll. Rep. 429, followed.

(4) Whether or not the *Crown Costs Act*, R.S.B.C. 1960, c. 87, applies to this action, sec. 2 thereof, which provides that the Crown shall not pay or receive costs, may be given effect as declaring the Crown's policy, and the Crown directed to pay its own costs even though its defence was reasonably required.

ACTION for limitation of liability under *Canada Shipping Act.*

John R. Cunningham and *J. L. J. Jessiman* for plaintiff.

John I. Bird, Q.C., for the Crown in right of the Province of British Columbia.

SHEPPARD D.J.:—This proceeding is by the Marpole Towing Ltd. as plaintiff, to limit its liability under the Canada Shipping Act, R.S.C. 1952 c. 29, secs. 657 to 663 inclusive and amendments thereto, in respect of damages caused by the plaintiff's tug *Chugaway II* towing empty chip barge *V.T. No. 154* against the Fraser Street Bridge, Vancouver, B.C., the property of the Crown in the right of the Province.

On the 23rd June, 1966, the day in question, the weather was clear, the visibility good with slight wind. At 09:05 (daylight time) on that day the tug *Chugaway II*, owned by the plaintiff and of a tonnage of 9.87 took in tow the chip barge *V.T. 154* (of Vancouver Tug Boat Co. Ltd.) at Musqueam scow berth, Fraser River, Vancouver, B.C., for the purpose of towing her to New Westminster. On the tug were Captain Forsyth, the master, at the wheel, and a full crew consisting of Mr. Taylor, the mate, who initially remained aft at the winch, and a deckhand. The Fraser River at the relevant places flows generally from east to west and the voyage of the tug and tow led easterly up the Fraser River successively past the following bridges; the Railway Bridge, also called the Marpole Bridge, the Oak Street Bridge with clearance of 66 feet above high water, and the Fraser Street Bridge with clearance of 24 feet above high water according to the chart 6. The tide at that time was approximately high. At Point Atkinson the tide was 10.8 feet at 07.05, 1.0 feet at 14.42 and as the Fraser Street Bridge is about one hour later the tide at the Fraser Street Bridge would be approximately full at 09.05, the time of the accident. The chip barge in tow was 27½ feet from the top of the box to the bottom of the barge, and being empty had a draught of 1½ feet, hence from the top of the box to the water line was 26 feet. Those dimensions of the chip barge were known to Captain Forsyth from the list, posted upon the tug and elsewhere.

Amongst those familiar with the navigation of the Fraser River it was common practice to determine the clearance of the Fraser Street Bridge by counting the visible planks of the Oak Street Bridge, allowing approximately one foot for each plank and adding 19 feet as indicating the height of the Fraser Street Bridge above the current level of the water.

The tug having picked up the chip barge at the Musqueam scow berth, proceeded up the Fraser River with the master, Captain Forsyth, at the wheel, and Mr. Taylor aft at the winch. At the Oak Street Bridge Captain Forsyth counted the visible planks and while at the trial he had forgotten the count, the mate reported the Captain had told him nine planks for nine feet plus nineteen feet (twenty-eight feet) as being the clearance of the Fraser Street Bridge. Having passed the Oak Street Bridge, the mate, Mr. Taylor, took the wheel and Captain Forsyth remained in the wheelhouse. The tug was then proceeding up the main channel for tugs and tows, to the south of Mitchell Island and having been told that nine planks were visible, the mate would expect that there would be a clearance of twenty-eight feet at the Fraser Street Bridge and therefore the tug and tow would have ample clearance to pass underneath the bridge. In the actual passing under the bridge the top eighteen inches of the chip barge then in tow struck the middle span and carried it into the river, fortunately without loss of life but with personal injury to those

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Sheppard, D J.

on the span and damage to the bridge and other property. The plaintiff has settled all claims of personal injuries of which the plaintiff had notice without exhausting the limited sum fixed by the statute. In December, 1968, the plaintiff applied under the *Canada Shipping Act* to limit its liability and gave notice to all the claimants of which the plaintiff had notice. The crown in the right of the Province alone appeared and contested the plaintiff's right to limit its liability. Then followed a statement of claim, and a statement of defence of the Crown in the right of the Province. A copy of the statement of claim was given to all the claimants and also notice of the date of trial. At the trial there appeared only counsel for the plaintiff and for the Crown in the right of the Province.

The onus is on the owner of the ship as applicant to bring himself within the sections of the *Canada Shipping Act*. Here Marpole Towing Ltd as owner seeks to limit its liability under the statute which reads in part as follows (R.S.C. 1952, c. 29, s. 657(2) as amended 1960-61, c. 32, s. 32):

> 657 (2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely: . . .
>
> (*c*) where any loss of life or personal injury is caused to any person not on board that ship through
>
> (i) the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or
>
> (ii) any other act or omission of any person on board that ship; or
>
> (*d*) where any loss or damage is caused to any property, other than property described in paragraph (*b*), or any rights are infringed through
>
> (i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or
>
> (ii) any other act or omission of any person on board that ship;
>
> liable for damages beyond the following amounts, namely:
>
> (*e*) in respect of any loss of life or personal injury, either alone or together with any loss or damage to property or any infringement of any rights mentioned in paragraph (*d*), an aggregate amount equivalent to 3,100 gold francs for each ton of that ship's tonnage;

to be distributed 21/31sts to the claimants for loss of life or personal injuries and 10/31sts to claims for damage to property or infringement of rights. (Sec. 658 (1*a*), added by S. of C. 1964-65, c. 39, s. 34.)

Here the real issue turns upon the words "without his actual fault or privity" (657(2)). Those words have been defined in *Robin Hood Mills Ltd v. Paterson Steamships Ltd*[1] by Lord Roche as follows:

> The meaning of fault and privity in s 502 of the Act, which in that respect is identical with s 503, has been authoritatively declared by the Court of Appeal and the House of Lords in the case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co. Ltd,* [1914] 1 KB 419 and [1915] AC 705 'The words "actual fault or privity" . . . infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as fault or privity of his servants or agents' (per Buckley, LJ [1914] 1 KB at p 432). 'Actual fault negatives that liability which arises solely from the rule "respondeat superior"' (*per* Hamilton, LJ (p. 436). So in the case of a company 'it must be the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself (per Viscount Haldane, LC, [1915] AC, at pp 713-4) The burden of showing that no such fault or privity subsisted was said in *Lennard's* case to rest upon the shipowners and the respondents here did not seek to question that proposition as applying to the present case But another and very important principle is to be derived from a consideration of the section, namely, that the fault or privity of the owners must be fault or privity in respect of that which causes the loss or damage in question, a proposition which was acted upon and illustrated in *Lennard's* case.

The duties of the owner have been defined as follows: In the Norman [1960] 1 Lloyd's Rep. 1, Lord Keith of Avonholm stated at p. 16:

> One of the clear duties of an owner is to provide the ship with navigational aids reasonable for and appropriate to the nature and purpose of the voyage One of the most obvious of these is an up-to-date chart
>
> Where the owners were in touch with the Norman by radio as they were here, and the crew were engaged in a hazardous occupation off a hazardous coast I think there was a duty to communicate to the ship the latest information that would assist navigation including anything relating to the chart with which she was sailing In failing to do so, the owners, in my opinion, were in fault and I am unable to say that this fault did not conduce to the disaster of the vessel

In the *Lady Gwendolen* [1965] 1 Lloyd's Rep. 335, Sellers, L.J. stated at p. 339:

> In their capacity as shipowners they must be judged by the standard of conduct of the ordinary reasonable shipowner in the management

[1] (PC) [1937] 3 DLR 1 at p 6, 58 LlL Rep 33 at p. 39

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> and control of a vessel or of a fleet of vessels A primary concern of a shipowner must be safety of life at sea That involves a seaworthy ship, properly manned, but it also requires safe navigation

and Winn, L.J. at p. 348:

> in a number of different sets of circumstances and situations Courts have determined the presence or absence of such actual fault or privity, it appears to me that two guiding principles are plain
>
> First an owner who seeks to limit his liability must establish that, although for the immediate cause of the occurrence he is responsible on the basis of respondeat superior, in no respect which might possibly have causatively contributed was he himself at fault An established causative link is an essential element of any actionable breach of duty therefore "actual fault" in this context does not invariably connote actionable breach of duty.
>
> Second an owner is not himself without actual fault if he owed any duty to the party damaged or injured which (a) was not discharged, (b) to secure the proper discharge of which he should himself have done but failed to do something which in the given circumstances lay within his personal sphere of performance

In the *Anonity* [1961] 1 Lloyd's Rep. 203, Hewson J. stated at p. 209:

> Having reached that conclusion, it is for the plaintiffs to satisfy me that if such a notice had been issued it would have made no difference on the fateful day.

and on appeal reported at [1961] 2 Lloyd's Rep. 117, Willmer, L.J. stated at p. 124:

> I cannot but feel that the situation that now exists could and should have been produced before It was reasonably foreseeable how dangerous it was to have the galley fire on at an oil jetty The circular does not seem to me an adequate way of dealing with the situation

That onus therefore requires the plaintiff to prove:

(1) the person whose very action is the action of the company (*Robin Hood Mills Ltd. v. Paterson Steamships Ltd., supra*);

(2) that such person has not been guilty of a fault or privity as previously defined (*Robin Hood Mills Ltd. v. Paterson Steamships Ltd., supra, The Norman, supra, The Lady Gwendolen supra*);

(3) or if there be a fault it did not contribute to the accident (*Robin Hood Mills Ltd. v. Paterson Steamships Ltd., supra, The Anonity, supra,* per Hewson J. at p. 209, *The Norman supra*).

In the light of these principles it remains to consider the relevant facts of this case. Whether there was fault or privity of the plaintiff must depend upon whether there was such a fault or privity of Captain Lowry. He was president and general manager of the plaintiff. In 1934 he started the business in a partnership. In 1953 the plaintiff was incorporated and Capton Lowry and his son were the owners of all the shares at the time of the accident. Captain Lowry, being the president and general Manager, has been throughout the supervisor for the plaintiff. He had issued no written standing orders but had from time to time issued oral instructions to the various masters as to the use of life jackets, bridles, travelling at reasonable speed, authority to the masters to employ help if needed and instructed to navigate at safe speed. Within these limits the master was to have discretion in navigation.

The master and crew of the tug were competent. Captain Forsyth as the master was experienced in river navigation. He had twenty-one years' experience on tugs sailing the Fraser River and he was master thereof for eighteen years. During that period he had navigated the river continuously and this was the only accident during that period. The mate, Mr. Taylor, had ample experience on the river as he had sailed thereon for five or six years and he had been nine months with the plaintiff. At the time of the trial, Mr. Taylor owned and operated his own towing business which was engaged in towing on the river. The crew was not overworked or tired. Immediately before the day of the accident they had had four days off and had returned to work at 07.00 hours. Hence they had only worked two hours prior to the accident. It was customary to work five days in the week, on shifts of six hours on and six hours off.

The tug, *Chugaway II* was well found. The mate, Mr. Taylor, gave evidence that the navigation equipment was very good and the navigation aids were also good. This included chart, radar, compass, and everything required.

The arguments of the defendant were as follows:

That Captain Forsyth should have been instructed to use the chart going under Fraser Street Bridge, as the chart showed the clearance of the Fraser Street Bridge to be 24 feet at high water. Hence this argument is that the use of the chart would have warned the master that there was not sufficient clearance of 26 feet for the tow. On the other hand, the chart had been supplied to the tug and the chart table was in the wheelhouse. The use of a chart on any occasion is a matter for the master: it is a matter of navigation in which he has to use his discretion based on his experience, and a master knows what a chart is for without

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being told. Moreover, the master would acquire no additional knowledge from the use of the chart. The master knew the actual clearance of the Fraser Street Bridge. He had measured it four or five times and had checked the measured clearance against the Oak Street Bridge. This had been done for the benefit of new crews. In that way he knew the clearance of the Fraser Street Bridge was determined by counting the visible planks of the Oak Street Bridge and adding nineteen feet. Further, the master had tested this method of measuring the clearance of the Fraser Street Bridge on hundreds of times in navigating the Fraser River. Again, his actual experience was superior to any knowledge to be learned from the chart. From the chart he could learn the clearance of the Fraser Street Bridge was 24 feet at high water but that was not necessarily true because the wind could raise the waters of the Fraser River two feet and that would reduce the clearance. Moreover, the master knew that the chart was also fallible in that the channel of the river changed from time to time. As the Oak Street Bridge was closer to the mouth of the Fraser River than the Fraser Street Bridge, any tide would be registered at the Oak Street Bridge before reaching the Fraser Street Bridge. Freshets at that time of the year would be no problem as they would amount to only four or five inches and would be registered at the Oak Street Bridge. Hence the counting of the visible planks at the Oak Street Bridge and adding nineteen feet would be more precise and accurate than the chart.

This accident was due to Captain Forsyth failing to count accurately the number of planks or failing to remember the actual count. The failure was not in any sense due to the method employed by the master for deciding the clearance of the Fraser Street Bridge.

The defendant contends that the plaintiff was at fault in that Captain Lowry should have instructed the masters that at high water or in the event of a tide of ten feet at Point Atkinson, the masters were not to tow under the Fraser Street Bridge but were to proceed up the channel to the north of Mitchell Island and thereby through swing bridges and not through the usual channel to the south of Mitchell Island through the Fraser Street Bridge. However, there were difficulties in using the other channel to the north of Mitchell Island. The channel was called 'the slough'. It was narrow, and there were five or six lumber mills thereon, each with log berths which might have blocked the channel and in any event would require the tug and tow to proceed slowly so the wash could cause no damage in such narrow waters. Hence that channel was not usually used by tugs and tows.

The channel to the south of Mitchell Island was usually used by tugs and tows and the Oak Street Bridge was used as giving the correct clearance of the Fraser Street Bridge as Captain Lowry, Captain Forsyth and Mr. Taylor then knew.

The choice of channel was therefore a matter of navigation within the discretion of the master.

The defendant, however, contends that Captain Lowry should have given instructions not to take the barge through the Fraser Street Bridge at high water, that the oral instructions of Captain Lowry were directed to safety features such as the use of life jackets, bridles, the use of radar, moderate speed, but such instructions should have gone further and ordered the masters not to use the Fraser Street Bridge with a tow at high water. The defendant also contends that Captain Lowry admitted it would have been prudent to have instructed his masters not to take the barge through the Fraser Street Bridge at high water. On the other hand, such instructions as suggested by the defendant require the master to determine whether there was high water and that was properly determined by counting the visible planks of Oak Street Bridge and adding nineteen feet. Hence those instructions would not have avoided the possibility of the same mistake made by Captain Forsyth. Further, the accident was not due to the method used by the master in determining the clearance of Fraser Street Bridge but was due to the failure of the master to count accurately the visible planks at Oak Street Bridge or his failure to remember the count as made by him. That error of the master was not a matter which could be foreseen by Captain Lowry.

The question here is whether or not the care of "the ordinary reasonable shipowner in the management and control" of this tug had been exercised by Captain Lowry and it is evident that he could not have foreseen the mistake of the master but could foresee that the method used by the master was superior to the use of any chart. That method of estimating the clearance of Fraser Street Bridge

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by counting the visible planks of Oak Street Bridge and adding nineteen feet was without objection and was in fact superior in that it showed the actual level of the water at the time of observation, and not at some time previously. Further, that method had been used and tested many times by Captain Forsyth without accident and there was no reason for Captain Lowry to have foreseen the mistake that led to this accident. Therefore Captain Lowry did use the care of the ordinary reasonable shipowner.

As to causation, there was no fault of Captain Lowry or of the plaintiff which contributed to the accident. The counting of the planks of Oak Street Bridge and adding nineteen feet was the proper method. The failure was that of the master in failing to count correctly or remember correctly and that could not have been foreseen by Captain Lowry. The judgments cited by the defendant are distinguishable.

In *Northwestern Dredging Co. v. Pioneer Towing Co.* [1959] 28 W.W.R. (N.S.) 140 a dredge blocked the narrow channel which the shipowner knew but failed to warn the master of that danger.

In the *Anonity* [1961] 2 Lloyd's Reps. 117, Willmer L.J. stated at p. 124:

> It was reasonably foreseeable how dangerous it was to have the galley fire on at an oil jetty.

Therefore the owner was held at fault in failing to have issued orders against such fire while at the jetty.

In the *Norman* [1960] Lloyd's Rep. 1, after the vessel had set sail the chart for the waters in which she was to navigate was amended so as to show the exact location of certain rocks, which amendment could have been communicated by the owner to the master by radio but which the owner failed to communicate. It was held therefore that the owner was at fault. Lord Keith of Avonholm said on page 16:

> In failing to do so, the owners, in my opinion, were in fault and I am unable to say that this fault did not conduce to the disaster to the vessel.

In the *Lady Gwendolen* [1965] 1 Lloyd's Reps. 335, the master was accustomed to sail at excessive speeds in fog in order to keep schedule, relying on the radar to provide the required safety from the danger of speed. That fault of the master could obviously be foreseen by the owner from

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the log. In all these cases cited the error of the master was foreseen by the owner and could then have been avoided by forbidding this practice. In the case at bar the error of the master was on this one occasion, and not in his method, and therefore could not have been foreseen by Captain Lowry or the owner.

It was further contended that the sections of the *Canada Shipping Act* do take away from the Crown in the right of the Province a cause of action vested in the Crown and therefore the statute purports to restrict the Crown's prerogative. That contention of the defendant fails for the reason that in *Gartland Steamship Co. v. The Queen* [1960] S.C.R. 315, it was held that these sections of the *Canada Shipping Act* do not take away any cause of action from the Crown so as to affect the prerogative but rather such sections merely define the extent of the liability of the shipowner. There, Locke, J. stated at page 345:

> The effect of the sections of the Canada Shipping Act, however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limits of the liability effectively declared by law.

The dissenting judgment of Locke J. was approved in this respect by the majority in that Judson J. for the majority stated at page 343:

> The respondent cross-appealed against that part of the judgment which declared the defendant entitled so to limit its liability. For the reasons given by my brother Locke, I would dismiss the cross-appeal with costs.

It follows that the sections in question do not affect the Crown's prerogative as they do not deprive the Crown of any cause of action but merely fix the liability of the owner of the tug under the circumstances.

In the *Bramley Moore* [1963] 2 Lloyd's Reps. 429, the tonnage to be applied is the tonnage of the towing tug alone and does not include that of the tow under the circumstances of this case. As the tonnage of the tug is 9.87 the tonnage will be taken at 300 tons as required by 661(1)(*a*).

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In conclusion, it is declared that the liability of the Plaintiff as owner of the tug *Chugaway II* arising out of collision with the Fraser Street Bridge on 23 June, 1966 shall be limited to the sum computed by the multiple of 300 tons (661(1)(*a*)) and the sum fixed as the equivalent in Canadian dollars of 3100 gold francs. The amount in Canadian dollars will be determined later as required by the Statute as it was not available to the plaintiff at the time of the trial and that amount so fixed will be stated in the formal judgment. The plaintiff will publish a notice in the Vancouver papers, the Sun and Province, after one week and within two weeks from the date of entry of the formal judgment and a like notice one week later, calling upon all persons claiming for loss of life or personal injuries or loss or damage to any property or any infringement of any rights caused by the tow of the tug *Chugaway II* striking the Fraser Street Bridge on the 23rd June, 1966, to file their claims with the Deputy Registrar at the Court House, Vancouver, B.C. within one month from the date of such first notice. As the plaintiff will know the precise date of entry of the formal judgment, the plaintiff's counsel may substitute the precise dates for the publication of these notices and the date for filing claims with the Deputy Registrar.

The amount payable under all claims filed will be determined by the Registrar who will allow interest at 5 per cent per annum from the date of the accident. As no loss of life occurred and the plaintiff has settled all claims for personal injuries, it is not necessary that the plaintiff pay into court such amounts so disbursed and in respect of personal injuries the plaintiff will pay into court only such amounts as may be claimed pursuant to the notices aforesaid, up to the remainder of the sum as limited for the payment of personal injuries.

The plaintiff will pay into court the equivalent of 1000 gold francs for damage to property or infringement of other rights. The amount of these claims will be determined by the Deputy Registrar and the moneys in court for such claims will be paid out to each claimant for damage to property or infringement of rights at his ratable share of the equivalent of 1000 francs so limited for the owner's liability.

In respect of personal injuries, it is probable that no claims will be filed but the Deputy Registrar may fix the amount which each such unpaid claimant is entitled to up to the limits fixed, and that amount will be paid to the claimants out of such monies in court. As to costs, the plaintiff is obtaining an order of the court fixing his liability and for such purpose will pay his own costs.

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As to the costs of the defendant, the Crown in the right of the Province, the *Crown Costs Act,* R.S.B.C. 1960 c. 87, s. 2 provides that the Crown in the right of the Province shall not pay or receive costs. Irrespective of whether that statute here applies that section may be regarded as declaring the policy of the Crown in the right of the Province and may be given effect by providing that the Crown do pay its own costs irrespective of the defence being reasonably required in this instance. Liberty to all parties and claimants to apply.

WEST HILL REDEVELOPMENT COMPANY LIMITED .... APPELLANT;

Toronto 1969
June 26-27
Ottawa Oct. 6

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Pension plan—Contributions for present and past service—Deductibility—Bona fides of plan—Registration of plan—Approval of lump sum contribution for past service—Revocation of by Minister—Whether income "artificially" reduced—"Pension"—Income Tax Act, secs 11(1)(g), 76(1), 139(1)(ahh).

In December 1964 appellant, a private company incorporated in Ontario, set up a pension plan and a deferred profit sharing plan for its two executive officers, *W* and *J,* who were its controlling shareholders and also directors of the company and the trustees of both plans The company made application under sec. 139(1)(*ahh*) of the *Income Tax Act* for registration of the pension plan and under sec 76(1) for approval of a lump sum contribution of $195,244 for past service. While the applications were pending the company paid $6,000 to the plan for current service and in March 1965 $195,244 for past service Such payment was made conditional upon registration of the plan and approval of the lump sum contribution, which occurred in April and September 1965 respectively. In March 1965, immediately following payment of the lump sum contribution of $195,244, the pension plan was terminated and the funds therein paid to *W* and *J,* who paid an equivalent amount to the deferred profit sharing plan, whose trustees (*W* and *J*) invested it in preference shares of appellant.

According to appellant this course was followed to overcome a provision in an Ontario statute prohibiting the investment of pension funds in a private company.

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In computing its income for 1964, 1965, and 1966 appellant sought to deduct the amounts paid to the pension plan as described. In July 1967 appellant was advised of the Minister's withdrawal of the registration and approval previously given, and the deductions claimed were disallowed. In the belief that *W* and *J* would in consequence be personally subject to tax unless the funds were returned to the pension plan, the preference shares were then redeemed, the deferred profit sharing plan terminated, and its assets returned to the company.

Held, the company was not entitled to deduct the payments to the pension plan.

While the company's by-laws and agreements and its two plans purported to create legal rights and obligations and to establish a pension plan and a deferred profit sharing plan, the surrounding circumstances and the course followed show that it did not intend to establish and did not establish real and true plans of that character. There was no intention that the pension plan would operate long enough to make annuity or periodical payments, which was requisite having regard to the meaning of "pension" in secs. 11(1)(*g*), 76(1) and 139(1)(*ahh*). The plans as submitted by the company were simulates. Moreover, deduction of the payments would artificially reduce the company's income and so violate s. 137.

Dominion Taxicab Ass'n v. M.N.R. [1954] S.C.R. 82; *Atlantic Sugar Refineries Ltd v. M.N.R.* [1949] S.C.R. 706, referred to.

The Minister on becoming aware that the payments in their true character were not deductible was entitled to withdraw the registration and approval previously given.

INCOME tax appeal.

Wolfe D. Goodman, Q.C. and *Franklyn E. Cappell* for appellant.

George W. Ainslie, Q.C. and *Ian H. Pitfield* for respondent.

KERR J.:—This is an appeal from income tax assessments in respect of the appellant's taxation years 1964, 1965 and 1966[1] whereby the respondent disallowed deductions claimed by the appellant in computing its income as having been paid by it into a pension plan for its executive employees. I shall refer to that pension plan as "the pension plan" or "the plan". It is distinguished from a deferred profit sharing plan which is referred to elsewhere herein.

The appellant is a private company incorporated under the Ontario *Corporations Act.* Its principal officers, at all times relevant to this appeal, were two brothers, Wolf Lebovic and Joseph Lebovic. Wolf was president and Joseph was secretary. They held all the issued common shares (except for two nominee shares held in trust, one

[1] The appellant's fiscal year ended on the last day of February.

for each brother) and were in control of the company. They also were the executive employees for whose benefit the pension plan and the deferred profit sharing plan were established. They were trustees of both plans.

The appellant says that the plans were established on the advice of an auditor and that the intention was to make payments into the pension plan for current and past service of the brothers Lebovic, then to pay out the money to them and terminate that plan, whereupon they would pay the money into the deferred profit sharing plan, of which they would be trustees, and as such trustees they would use the money to purchase preference shares of the company as an investment, which shares when redeemed would provide money for retirement benefits for themselves; and that, pursuant to that intention, the appellant established the pension plan by its By-law No. 5 on December 28, 1964, and appointed the brothers as trustees of the plan; that it applied to the respondent for registration of the plan under section 139(1)(*ahh*) of the *Income Tax Act* and it was so registered by the respondent on April 5, 1965, under that section; that the appellant also applied to the respondent for approval of a lump sum contribution of $195,244.20 to the plan in respect of past service of the brothers pursuant to section 76 of the Act and to a recommendation by a qualified actuary, and was advised by a letter from the respondent dated September 8, 1965, that the actuary's calculations had been confirmed and that payments made to liquidate the liability in that respect could be claimed as a "special payment" under section 76; that, acting in reliance on the anticipated approval of the plan and the lump sum past service contribution, the company had paid the following amounts into the plan:

(a) Current service contributions:	
December 29, 1964	$ 3,000
March 3, 1965	$ 3,000
(b) Past service contributions:	
February 26, 1965	$ 60,000
March 2, 1965	$135,244.20

and in filing its income tax returns it claimed deductions on account of the said payments.

By a letter dated July 21, 1967, the Department of National Revenue advised the appellant that the respondent's previous registration of the pension plan and the

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approval of the special payment of $195,244.20 were both withdrawn and that the plan was considered to be in the same position as if it had never been registered. And, eventually, after disallowance of the claimed deductions and dispute thereover, the amount that was paid out by the appellant, and which went by a circuitous route through the pension plan and the deferred profit sharing plan and then back to the company in payment of preference shares, was refunded to the company by an equally circuitous reverse route in which the company redeemed the shares from the deferred profit sharing plan and caused the assets of that plan to be transferred back to the company.

The respondent says, *inter alia,* that the pension plan was neither a superannuation or pension fund or plan within the meaning of section 11(1)(*g*) of the Act, nor an employees' superannuation or pension fund or plan within the meaning of section 76, but was a mere sham designed for the purpose of cloaking or disguising the payment by the appellant of $63,000 and $135,244.20 to the brothers as trustees of a deferred profit sharing plan; that the registration of the pension plan with the respondent was a nullity because the appellant failed, at the time it sought registration, to disclose all material facts, and therefore was not entitled to any deduction under the said provisions of the Act; that there was no legitimate business purpose or business reason for the pension plan and therefore the appellant was not entitled to any deduction under the said provisions; that the payments of $60,000 and $135,244 in respect of past service of the brothers were not payments which had irrevocably vested in or for the pension plan nor were they payments which had been approved by the respondent and therefore the appellant was not entitled pursuant to section 76(1) to deduct either amount in computing its income; and that the deduction of any of the amounts paid to the brothers as trustees of the pension plan would unduly or artificially reduce the appellant's income and therefore any such deduction is prohibited by section 137(1) of the Act.

Sections 11(1)(*g*), 76(1), 79C(1)(*a*) & (*b*), 137(1) and 139(1)(*ahh*) of the Act read as follows:

11. (1) Notwithstanding paragraphs (a), (b) and (h) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

. . .

(*g*) an amount paid by the taxpayer in the year or within 120 days from the end of the year to or under a registered pension fund or plan in respect of services rendered by employees of the taxpayer in the year, subject, however, as follows:

(i) in any case where the amount so paid is the aggregate of amounts each of which is identifiable as a specified amount in respect of an individual employee of the taxpayer, the amount deductible under this paragraph in respect of any one such individual employee is the lesser of the amount so specified in respect of that employee or $1,500, and

(ii) in any other case, the amount deductible under this paragraph is the lesser of the amount so paid or an amount determined in prescribed manner, not exceeding, however, $1,500 multiplied by the number of employees of the taxpayer in respect of whom the amount so paid by the taxpayer was paid by him,

plus such amount as may be deducted as a special contribution under section 76;

76. (1) Where a taxpayer is an employer and has made a special payment in a taxation year on account of an employees' superannuation or pension fund or plan in respect of past services of employees pursuant to a recommendation by a qualified actuary in whose opinion the resources of the fund or plan required to be augmented by an amount not less than the amount of the special payment to ensure that all the obligations of the fund or plan to the employees may be discharged in full and has made the payment so that it is irrevocably vested in or for the fund or plan and the payment has been approved by the Minister on the advice of the Superintendent of Insurance, there may be deducted in computing the income of the taxpayer for the taxation year the amount of the special payment

79c. (1) In this Act,

(*a*) "deferred profit sharing plan" means a profit sharing plan accepted by the Minister for registration for the purposes of this Act, upon application therefor in prescribed manner by a trustee under the plan and an employer of employees who are beneficiaries under the plan, as complying with the requirements of this section, and

(*b*) "profit sharing plan" means an arrangement under which payments computed by reference to his profits from his business or by reference to his profits from his business and the profits, if any, from the business of a corporation with whom he does not deal at arm's length are or have been made by an employer to a trustee in trust for the benefit of employees of that employer or employees of any other employer, whether or not payments are or have been also made to the trustee by the employees.

137. (1) In computing income for the purposes of this Act no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

139. (1) In this Act,

. . .

(*ahh*) "registered pension fund or plan" means an employees' superannuation or pension fund or plan accepted by the Minister

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for registration for the purposes of this Act in respect of its constitution and operations for the taxation year under consideration;

Certain by-laws and minutes of meetings of the appellant's directors and shareholders and other books and records were introduced in evidence in one form or another and, in addition, Joseph Lebovic gave evidence as to what took place and as to events in issue. I shall set forth next the more significant actions and transactions, as I appreciate the evidence and try to piece it together.

December 28, 1964, 11 a.m. Meeting of Directors. The minutes state that By-laws No. 5 and No. 6 were enacted. No. 5 established the pension plan. No. 6 established the deferred profit sharing plan. The records sometimes designate the latter By-law as No. 5 and sometimes refer to it as No. 6. I am satisfied that the correct number is No. 6.

December 28, 1964, 11:30 a.m. Special General Meeting of the Shareholders. The minutes state that the By-laws, No. 5 and No. 6, were by resolution approved, adopted, sanctioned and confirmed.

December 28, 1964. The appellant appointed Wolf and Joseph Lebovic as trustees of the pension plan by a trust agreement and appointed them as trustees of the deferred profit sharing plan by another trust agreement (Exhibit 43), both agreements bearing date of December 28, 1964.

December 28, 1964. The appellant sent to the respondent an application under section 139(1)(*ahh*) for registration of the pension plan, with certain supporting documents and information as to the salaries of the brothers Lebovic. A letter from the Department of National Revenue, dated April 5, 1965, advised the company that the plan had been registered under that section.

December 29, 1964. The appellant issued a cheque for $3,000 to the trustees of the pension plan, and they endorsed it to Industrial Life Insurance Company in payment of a premium on a group retirement annuity policy issued by that company, effective December 29, 1964, for the benefit of the brothers Lebovic.

January 27, 1965. Meeting of Directors. The minutes state that the treasurer reported that the company was now in a position to fund its obligation to the pension plan and that the amount of past service liability was $99,444.89 for Joseph Lebovic and $95,799.31 for Wolf Lebovic, a total of $195,244.20; and that the directors approved the treasurer's report and directed that arrangements be made for the company to make contributions to the plan.

February 16, 1965. Meeting of Directors. The following appears in the minutes of the meeting:

> The Treasurer advised that the Company now wished to make a contribution to the recently established executive pension plan on behalf of Messrs. Joseph Lebovic and Wolf Lebovic. He stated at this time it was not known how much of the estimated past liability in the amount of $195,244.20 would be approved as being a deductible expense under Section 76 of the Income Tax Act and he stated that the Company should now make a contribution to the pension plan in the amount of $60,000.00, upon condition that if the plan is not accepted for registration with the Department of National Revenue or to the extent that the contribution is not allowed as a deduction from income as provided by Section 76 of the Income Tax Act, the surplus amount, if any, being the over contribution, would be refunded by the Trustees to the Company. He pointed out that he had already discussed this with the Trustees and they had agreed to accept the contribution on that basis.
>
> A full discussion ensued, following which it was decided to proceed along the lines outlined by the Secretary-Treasurer.

February 25, 1965. The appellant filed an application with the Department of National Revenue under section 79c(1)(*a*) of the *Income Tax Act* for registration of the company's deferred profit sharing plan. The Department advised the company by letter dated June 17, 1965, that the plan had been accepted by the Minister for registration under that section.

February 26, 1965. The appellant issued a cheque for $60,000 to the brothers as trustees of the pension plan in respect of their past service. The appellant's account with the Bank of Montreal shows this amount debited on March 1, 1965. The pension plan's account with that bank shows that amount credited on that same day.

March 2, 1965. Meeting of Directors. The following appears in the minutes of the meeting:

> The Secretary-Treasurer advised that the Company now wished to make a further contribution to the recently established executive pension plan on behalf of Mr. Joseph Lebovic and Mr. Wolf Lebovic, on the same basis as the previous contribution, namely, if the plan is not accepted for registration with the Department of National Revenue or to the extent that the contribution is not allowed as a deduction from income as provided by Section 76 of the Income Tax Act, the surplus amount, if any, being the over contribution, would be refunded by the Trustees. He pointed out that he had already discussed this with the Trustees and they had agreed to accept the contribution on that basis.
>
> A full discussion ensured, following which it was decided to proceed along the lines outlined by the Secretary-Treasurer.

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March 2, 1965. The appellant issued a cheque for $135,242.20 to the brothers as trustees of the pension plan in respect of their past service. The company's account with the Bank of Montreal shows this amount debited on March 3 and another debit of $2 on March 4. The pension plan's bank account shows credits of similar sums on March 2 and March 4, respectively[2].

March 3, 1965, 11 a.m. Meeting of Directors. The minutes state that the chairman indicated that it was in order for the company to agree with the trustees of the pension plan that the plan be wound up and that the amounts contributed thereto by the company be paid out to the participants; and that the following resolution was passed:

> THAT the company enter into an Agreement with the Trustees of the West Hill Redevelopment Company Limited Executive Pension Plan amending the Trust Agreement to the end that the Executive Employee Pension Plan is hereby terminated and the amounts contributed thereto by the company be paid out to the participants of the Plan.

Cheques, dated March 3, 1965, for $95,799.31 and $99,444.89, payable to Wolf Lebovic and Joseph Lebovic, respectively, were issued by the trustees of the pension plan. The plan's bank account shows debits of those amounts on March 3 and no money in the account thereafter.

Cheques, dated March 4, 1965, for similar amounts were issued by Wolf Lebovic and Joseph Lebovic, respectively, payable to the deferred profit sharing plan.

March 3, 1965, 1:30 p.m. Meeting of Directors. The minutes state that the meeting was called for the purpose of considering a subscription for preference shares of the company which had been received from the trustees of the deferred profit sharing plan, together with a cheque for $195,240.00, and a resolution was passed accepting the subscription for 19,524 preference shares at $10 each and the shares were allotted and issued to the said trustees; and the Board approved the decision of the trustees to make the investment in the preference shares of the company. The company's account with the Bank of Montreal shows $195,244.20 credited on March 5.

March 2, 1965. A share certificate dated March 2, 1965, issued by the company shows the trustees of the deferred profit sharing plan as registered owner of 19,524 preference shares.

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[2] These sums and the previous $60,000 make a total of $195,244 20.

March 2, 1965. The share register of the company shows entries of various issues of shares on November 1, 1963, and May 10, 1965, in that sequence, followed by an issue on March 2, 1965, of 19,524 preference shares to the trustees of the deferred profit sharing plan. From its position on the register the latter entry appears to have been made subsequent to May 10, 1965. The only other issue of preference shares shown in the register is 6,390 shares issued on November 1, 1963. The register does not show redemption or cancellation of any preference shares, but the minutes of a meeting of directors held on December 28, 1967, state that a resolution was passed to redeem on that date 4,000 of the preference shares issued in the names of the trustees of the deferred profit sharing plan and that the trustees consented to such redemption, and the minutes of a meeting of directors on May 24, 1968, state that a resolution was passed redeeming 15,524 preference shares issued to the trustees.

The letters patent of the appellant, issued on December 12, 1955, provide for an authorized capital of 9,000 preference shares with a par value of $10 each and 10,000 common shares without par value. Supplementary letters patent, dated March 3, 1965, increased the authorized capital by an additional 20,000 preference shares with a par value of $10 each, and an additional 30,000 common shares without par value. Evidence was received that the original application for supplementary letters patent, dated March 2, 1965, contained errors and was corrected on March 8 and that the supplementary letters patent were actually signed, engrossed and gazetted on March 10, 1965, although dated March 3.

The appellant sent returns of information and particulars, as of March 31 in each of the years 1964 to 1968, inclusive, to the Provincial Secretary of Ontario, certified by either Joseph or Wolf Lebovic as true and correct. They state that 6,390 preference shares and 10,000 common shares had been issued by the company. Obviously the returns did not include the 19,524 preference shares issued to the trustees and to that extent are incorrect.

The preference shares are non-voting, non-cumulative 5% dividend shares redeemable at the option of the company on payment of the amount paid up thereon plus a

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premium of $1.00. The right to transfer shares of the company is restricted in that no shares shall be transferred without the express sanction of the holders of a majority of the shares, to be signified by a resolution passed at a meeting of the shareholders.

Exhibit 54 consists of sheets from the appellant's account book in respect of the pension plan. They show receipt of $60,000 on February 26 and $135,242.20 and $2 on March 2, 1965; and disbursements on March 3 of $95,799.31 to Wolf Lebovic and $99,444.89 to Joseph Lebovic. The sheets also show as of December 29, 1964, a credit of $3,000 and a corresponding debit in respect of the premium on the Industrial Life policy, and similar entries for March 3, 1965.

Exhibit 53 consists of sheets from the appellant's account book in respect of the deferred profit sharing plan. They show receipts of $95,799.31 from Wolf Lebovic and $99,444.89 from Joseph Lebovic on March 3, 1965; disbursement of $195,244.20 to the appellant on March 5, 1965; and an investment of $195,240 in preference shares of the appellant and a loan of $4.20 to the company.

February 28, 1968. Meeting of Directors. The minutes state that an agreement of that date between the company and the brothers Lebovic personally and as trustees of the pension plan and of the deferred profit sharing plan was approved and the officers of the company were authorized to execute it. All the voting shareholders ratified and confirmed the acts and resolution set forth in the minutes. This agreement was entered into after the respondent had disallowed the deductions claimed by the appellant, and the brothers had reason to believe that they would be assessed income tax on the sums paid to them unless the assets of the deferred profit sharing plan were returned to the company. The agreement provides for a revival of the pension plan, redemption of 15,524 preference shares of the company then held by the deferred profit sharing plan, an assignment of all the assets of the deferred profit sharing plan to the brothers Lebovic and an assignment in turn by them of the said assets to the pension plan and, finally, an assignment of the assets back to the company as a refund of the $195,244.20 paid by the company to the pension plan.

That agreement also recited that the trustees of the deferred profit sharing plan had purchased 1,000 common shares of Revenue Properties Company Limited at a cost of $19,700 and 700 common shares of Alcan Aluminum Limited at a cost of $20,302.19, and held them, along with 15,524 preference shares of the appellant as of the date of the agreement. There was a paucity of evidence otherwise respecting the purchase of Revenue Properties and Alcan shares.

May 24, 1968, 10 a.m. Meeting of Directors. The minutes state that resolutions were passed (*a*) reviving the pension plan, (*b*) redeeming at par 15,524 preference shares issued in the name of the trustees of the deferred profit sharing plan, and (*c*) directing the trustees of the deferred profit sharing plan to refund to Wolf Lebovic $96,699.31 and to Joseph Lebovic $100,344.89 by distribution of the following assets to them *pro rata:*

To Joseph Lebovic	– cheque ...	$ 79,443 79
	– 350 shares Alcan ...	10,151.10
	– 1,000 shares Revenue Properties	10,750,00
		$100,344.89
To Wolf Lebovic	– cheque ...	$ 75,798.22
	– 350 shares Alcan ...	10,151.10
	– 1,000 shares Revenue Properties	10,750.00
		$ 96,699 31

and to transfer to the brothers the ownership of certificates of the policy issued by Industrial Life Insurance Company on their lives.

May 24, 1968, 10:30 a.m. Meeting of Directors. The minutes state that a resolution was passed directing the trustees of the revived pension plan to refund to the company the following assets:

cheque ...	$155,242 01
2,000 shares Revenue Properties ...	21,500 00
700 shares Alcan ...	20,302.19

and the certificates of the Industrial Life policy.

May 24, 1968, 11 a.m. Meeting of Directors. The minutes state that the chairman reported that the company had received from the trustees of the pension plan the assets last above mentioned representing a refund of contributions.

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The following cashed cheques all dated May 24, 1968, were put in evidence as having been issued pursuant to the agreement of February 28, 1968:

From	*To*	*$ Amount*
Appellant	Trustees of deferred profit sharing plan for redemption of preference shares	155,240 00
Trustees of deferred profit sharing plan	Wolf Lebovic	75,798 22
Trustees of deferred profit sharing plan	Wolf Lebovic	100 00
Trustees of deferred profit sharing plan	Joseph Lebovic	79,443 79
Trustees of deferred profit sharing plan	Joseph Lebovic	100 00
Wolf Lebovic	Pension plan	75,798 22
Wolf Lebovic	Pension plan	100 00
Joseph Lebovic	Pension plan	79,443.79
Joseph Lebovic	Pension plan	100 00
Trustees of pension plan	Appellant	155,242 01
Trustees of pension plan	Appellant	200 00
Joseph Lebovic	Deferred profit sharing plan	4.10
Wolf Lebovic	Deferred profit sharing plan	4 10

Mr. R. M. Anson-Cartwright, a chartered accountant and partner in Price Waterhouse & Co., was called as an expert witness by the respondent. He expressed his opinion that the appellant's preference shares "had, marketwise, only a nuisance value". He agreed, however, that the value of the shares to the holder is not necessarily the same as the fair market value and that the Lebovic brothers, by virtue of their control of the company, could have been in a position to cause the company to redeem the shares and, in that event the company would, if solvent, pay out $11 per share in redemption of the shares held by the deferred profit sharing plan.

Counsel for the appellant submitted that the Minister's withdrawal of the registration of the pension plan and of the approval of the payment of $195,244.20 was unwarranted and ineffective and that by reason of such registration and approval the Minister is precluded from contesting the deduction of that payment in computing the appellant's income. In that respect my view is that if by reason of its true character the payment was not one that could be deducted pursuant to the Act it was proper for the Minister, when he became aware that such was the case, to withdraw the registration and approval which he had previously given at a time when he was not aware of the true character of the payment and of the transaction of which it was a part. It was in March 1965 that the money was paid by the appellant to the pension plan and was almost simultaneously paid out of that plan by its trustees and used to purchase preference shares of the company. All this was done before the Minister notified the appellant of the registration of the pension plan and approval of the payment into it, and all of it was done on the appellant's anticipation that the Minister would give his approval. It was not done in reliance upon any representation by the Minister of registration or approval, for he had made no such representation. In the circumstances there is no estoppel of the Minister in favour of the appellant in that respect. Nor does the approval which the Minister gave and later withdrew defeat the statutory liability of the appellant in respect of payment of income tax[3].

One of the requisites for deduction of a "special payment" pursuant to section 76 is that the taxpayer has made the payment so that it is "irrevocably vested" in or for the employees' superannuation or pension fund or plan. Counsel for the respondent argued, as one point of attack on the deduction of the payment of $195,244.20, that it had not been "irrevocably vested", within the meaning of the section, inasmuch as it had been paid conditionally upon the anticipated approval of the pension plan and of the lump sum past services contribution. Counsel for the appellant argued that the registration of the plan under section 139(1)(*ahh*) and the Minister's approval of the payment under section 76 satisfied the condition and the payment was irrevocably vested in the plan. As I am disposing of the appeal on other grounds it is not necessary for me to express an opinion on this point.

Counsel for the appellant submitted that the deferred profit sharing plan was a pension plan within section 76, even although for some purposes it is called a deferred profit sharing plan, that a special payment to a pension plan in

[3] On a question of estoppel and statutory obligation, see *Maritime Electric Co. v. General Dairies* [1937] A.C. 610.

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respect of past services of employees may be deducted pursuant to the section even if the plan is unregistered, and that, looking at both plans of the company and the arrangements in question as a group, it is evident that the company's intention was to set up a pension plan to provide retirement income for the brothers. However, it was the pension plan, not the deferred profit sharing plan, that the appellant sent to the Minister for registration and for approval of the payment of the said $195,244.20 pursuant to section 76; and the actuary's certificate was in respect of the pension plan. Whatever part the deferred profit sharing plan played in the arrangements, there was no special payment approved by the Minister pursuant to section 76 of that plan.

Counsel for the respondent submitted that the appellant had no power to issue the 19,524 preference shares to the trustees on March 2 or 3, 1965, because the supplementary letters patent increasing the capital of the company were not actually signed and engrossed or gazetted until March 10, 1965, although they bore an issue date of March 3. He cited a decision of Cattanach J., of this Court, in *Oakfield Developments (Toronto) Ltd. v. M.N.R.*[4], (on appeal) which held, in effect, that shares issued on December 21, 1960, by a company incorporated by letters patent under the laws of the Province of Ontario were not validly issued inasmuch as supplementary letters patent creating the shares did not issue until February 1961 although dated December 20, 1960. However, I do not think that the determination of the issue whether the deductions claimed by the appellant were allowable depends on or requires a decision on the question whether the company had power to issue those preference shares or whether the allotment of them was effective, for, if the payment into the pension plan qualified for deduction pursuant to section 76 the right to that deduction would not be lost by reason of an ineffective issue of the preference shares; and if, on the other hand, the payment did not so qualify for deduction, the issue of the shares, whether effective or not, would not change that situation. The issue of the shares is, nevertheless, a factor in considering the broader question of the true character of the payment and the transaction of which it was a part.

[4] [1969] 2 Ex. C.R. p. 149.

Coming now to consideration of the question of the character of the transaction or arrangements by which the payments in question were made, it is well settled that in considering whether a particular transaction brings a party within the terms of the *Income Tax Act* its substance rather than its form is to be regarded, and also that the intention with which a transaction is entered into is an important matter under the Act and the whole sum of the relevant circumstances must be taken into account[5]. Consequently I must endeavour as best I can to ascertain the real character and substance of the transaction or arrangements by which the payments in question were made and in doing so I must consider individually and collectively the agreements that were entered into and the surrounding circumstances and the course that was followed.

I think that in the final analysis what I must determine is whether the appellant established a true superannuation or pension plan and made thereto the payments in question for the purposes of such plan, or whether its pension plan was a sham designed to give an appearance of *bona fides* to the payments which would enable the appellant to deduct them in computing its income and thereby escape some payment of income tax.

In the context in which the words "pension fund or plan" are used in sections 11(1)(*g*), 76(1) and 139(1)(*ahh*) for the purposes of the Act, I think that the word "pension" is used in the fourth sense defined by the *Shorter Oxford English Dictionary* as follows:

> 4. An annuity or other periodical payment made, esp. by a government, a company, or an employer of labour, in consideration of past services...

It is not disputed that there can be a sufficient business reason for the establishment of a superannuation or pension plan for employees and that such a plan can have a legitimate business purpose. But the respondent disputes that in the present instance there was such a reason or legitimate business purpose. The answer depends largely on whether there was a true pension plan.

The respondent disputes that the appellant's purpose was to establish a true pension plan. The appellant's explanation for the roundabout arrangements and course

[5] *Dominion Taxicab Ass'n v. M.N.R.* [1954] S.C.R. 82; *Atlantic Sugar Refineries Ltd v. M.N.R.* [1949] S.C.R. 706.

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is that under the laws of Ontario the investment of pension funds in a private company was not permitted, and, as the brothers preferred investment of the available money in their own company, the money was paid into the pension plan and then was "rolled over" (to use counsel's expression) into the deferred profit sharing plan where it could be used to accomplish a lawful investment in the preference shares of the appellant company. The company's auditor, who was said to have advised the company respecting the establishment of the plans and who conceivably might have been able to shed light on their inception and the reasons for them, was not called to testify in that respect.

By-laws No. 5 and No. 6, the pension plan, the deferred profit sharing plan and the trust agreements, taken at their face value, purport to create legal rights and obligations and to establish a pension plan and a deferred profit sharing plan. But, considering them in all the circumstances and in the course that was followed, it is my conviction that the appellant did not intend to establish and did not establish real and true plans of that character. There was no intention that the pension plan would operate long enough to make annuity or periodical payments. It was in fact terminated and its funds were disbursed within a short time after it was established, and when eventually the money was put back into the revived plan it was immediately taken from it and returned to the company rather than left in the plan or invested by the plan for the purpose of paying pensions. It is my conviction that the plans were, as submitted by the respondent, simulates used as a cloak to disguise the payments in question and make them appear to be what they really were not, namely, payments into a pension plan which would qualify for deduction in computing the appellant's income for income tax purposes. In my view, also, the payments, if allowed to be deducted, would artificially reduce the appellant's income; and section 137 prohibits their deduction.

The appellant's records are less satisfactory than one would like to see when they are pertinent to and may influence the outcome of proceedings in court. For example: the minute book does not contain the originals of By-laws No. 5 and No. 6; waivers of notice of meetings of directors were signed by the brothers Lebovic but not by the other directors; the minutes of directors' meetings show meetings held on March 2, 1965, at the same time in two separate buildings; the share certificate for the 19,524 preference shares issued to the trustees of the deferred profit sharing plan is dated March 2, 1965, but the minutes of the meeting at which they were allotted say that it was held on March 3; the notation of the issue of the shares in the share register follows the notation of a later issue of shares; although the shares were said to have been redeemed, the share register does not show their redemption and the share certificate is not endorsed as having been cancelled or redeemed; the company's returns to the Province of Ontario for the years ending March 31, 1965 to 1968, although certified thereon as correct, do not include those preference shares; the books produced do not show any purchase of Revenue Properties or Alcan shares; the agreement dated February 28, 1968, recites that the trustees of the deferred profit sharing plan had purchased 1000 shares of Revenue Properties but the minutes of the two meetings of directors on May 24, 1968, refer to 2000 shares of Revenue Properties; the copy of the trust agreement in respect of the deferred profit sharing plan shows two trustees, but the copy in the minute book shows three trustees. It is possible that some of those are mere clerical errors or irregularities or deficiencies which are not significant. But the court is left to conjecture in respect of them.

Although there is no affirmative evidence directly contradicting the evidence of Joseph Lebovic, secretary-treasurer of the company, that the agreements and arrangements were what they purported to be, his evidence to that effect was not convincing to me. For one who occupied the position of secretary-treasurer and director and with his brother owned the company and controlled and managed its affairs, and who also was the only witness called by the company in support of its appeal, he showed a lack of knowledge and memory respecting the affairs of the company and an inability to explain things which called for explanation, which was, to me at least, surprising.

The dividing line between the brothers Lebovic as directors and shareholders and trustees and in their personal capacity could be crossed at any time at their will and pleasure. They were answerable only to themselves. The intentions of the company and themselves were one and the same. The company has no mind of its own, its will

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must be sought in the brothers who were really the directing mind and will of the company. In my view the course that was followed was devious and unnatural and not in accordance with normal business practice. I think that in retrospect it shows that what was intended was to provide the brothers with a retirement insurance policy with Industrial Life and to obtain an income deduction of nearly $200,000 for the company, without involving any real payment out by it, except for the sum paid to the insurance company. The various payments were accomplished by practically simultaneous exchange of cheques. The cheques from the company to the pension plan were matched by a cheque for a like amount back to the company, which in effect made no reduction in the company's funds. The cheques went through the bank and were entered in bookkeeping records, but each cheque out was taken care of by a corresponding cheque in. Care was taken to make the $195,244.20 payment to the pension plan conditional on tax deduction and the amount was simultaneously given back to the company without awaiting a reply from the Minister. The choice of the company's preference shares as the best or a good investment is very questionable. There is a paucity of evidence as to when and with what funds any shares of Revenue Properties and Alcan were purchased. The scheme was ingenious and was pursued step by step, but the steps add up to one large stride intended, in my opinion, not really to provide pensions but predominantly to achieve for the company a substantial deduction from income. While a taxpayer may arrange his affairs so as to legitimately obtain a deduction from income, he is not entitled to it if he does not clearly bring his claim for deduction within the terms of the provision conferring the right of deduction from what would otherwise be taxable income[6]. If a claim for deduction of payments into a pension plan is to succeed the plan must be a true pension plan and not a plan which masquerades as a true pension plan but is not one.

In the result the appeal will be dismissed with costs; but in accordance with an agreement of the appellant and respondent filed at the hearing of the appeal the assessments will be referred back to the respondent so that he can reassess so as to implement the terms of the agreement.

[6] *Sheaffer Pen Co. v. M.N.R.* [1953] Ex. C.R. 251.

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

Vancouver 1969 Oct. 10 — Oct. 21

AND

E. ROSS HENRY .... RESPONDENT.

Income tax—Professional practice—Anaesthetist's services rendered at hospital—Billing done at downtown office—Travel by car between home and hospital—Whether expense deductible—Income Tax Act, s. 12(1)(a) and (h).

An anaesthetist who practised exclusively at a hospital in Victoria had a home in the city and an office downtown where accounts were made out and mailed to patients.

Held, the expense of driving his car between his home and the hospital was not an expense of his practice so as to be deductible under s. 12(1)(*a*) of the *Income Tax Act,* but was a personal and living expense within the meaning of s. 12(1)(*h*) and therefore barred from deduction.

Cumming v. M.N.R. [1968] 1 Ex C.R. 425; *Owen v. Pook* [1969] 2 W.L.R. 775 (H.L.), distinguished; *Royal Trust Co. v. M.N.R.* [1956-60] Ex. C.R. 70, referred to.

APPEAL from Tax Appeal Board.

T. E. Jackson for appellant.

G. F. Jones for respondent.

SHEPPARD D.J.:—This appeal is by the Minister of National Revenue on the issue whether or not the respondent, an anaesthetist, should be allowed for the year 1965 automobile expenses for two round trips each day from his home to the Royal Jubilee Hospital in Victoria, B.C.

The facts follow:

The respondent is a duly qualified medical practitioner who confined his practice to that of an anaesthetist, which practice he carried on as one of a group. During the taxation year 1965 the respondent had a house at 2025 Lansdowne Road where he lived with his wife and two daughters, at a distance of about one and one-half miles from the Royal Jubilee Hospital. The respondent also had an office at 1207 Douglas Street which was occupied by a group of anaesthetists including the respondent. There they kept their records and had a secretary employed to send out their accounts. The respondent had two automobiles, one for his wife and the other for himself and in respect of the latter the claim for expenses arises.

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Sheppard D.J.

By agreement dated 6th June, 1961 between the Royal Jubilee Hospital of the first part and the group of anaesthetists, including the respondent, of the second part, the parties agreed as follows: that the group would supply at all times anaesthetic services required by the hospital; that the services were to be rendered in the hospital and the group were to have the exclusive right to administer such services; that any such services by one of the group outside of the hospital would be only with the written consent of the hospital; that all accounts were to be rendered to the patient and the hospital was not to be liable. Following the agreement the respondent confined his practice to supplying his services at the hospital and although he did supply anaesthesia for some dentists, those are not here relevant. No patients were received at the respondent's office or at his home.

The routine of his practice so far as relevant was as follows. At 7:30 a.m. he left his house in Lansdowne Road for the hospital. At 7:45 a.m. the operations commenced at the hospital and continued to three, five or six o'clock in the afternoon. The respondent then returned to his house for dinner and in the evening would return to the hospital to find out from the operating schedule for the next day the operations which he would attend. He would also visit at the hospital the patients to be operated on the next day and would return to his house after $1\frac{1}{2}$ to 2 hours. The operations at the hospital were on the basis of a five day week, Monday to Friday inclusive. The respondent might be called for consultations at any time if a particular patient went into shock but generally during the weekends would only be required for emergency operations. All facilities which he required were provided by the hospital. At the hospital there were a locker for his clothes, lounge, desk, reference library; the equipment used for anaesthetics was likewise provided by the hospital and was the property of the hospital.

The respondent visited his office on Douglas Street once or twice a week. There he had no medical books and no patients came there. At the office the records including cards in the form Ex. R3 were kept, and there accounts were typed by the secretary and sent to patients as instructed by the respondent. For each patient a card (Ex. R3) was filled out by the respondent. The first four items being headed respectively, name of the patient, address, responsible person, occupation, were obtained from the hospital chart. The items headed surgeon, and nature of the operation, might be obtained by the respondent from the chart or from actual observation. The items headed anaesthetic, time and anaesthetist were filled in by the respondent from his own knowledge learned at the hospital. The amount of the item of charge for the anaesthetic was obtained from the Medical Association schedule. From the particulars on the card the secretary would make up the respondent's account at the office and would mail it to the patient.

The Minister made an assessment for the taxation year 1965 disallowing the expenses here in question. On appeal by the respondent to the Tax Appeal Board those expenses were allowed, then followed the appeal to this court. The parties have here admitted (Ex. Al) that the total mileage travelled for the calendar year by the automobile in question were 5,180 miles rather than 6,218. The Minister has allowed the respondent

96 return trips between the hospital and the office (4 5 miles)	432
299 emergency return trips between home and the hospital (3 miles)	897
Notional additional mileage	400
Total business miles	1,729

and has conceded that the allowance therefor of $651.63 should be increased by $128.62 to the sum of $780.25. The issue on this appeal is restricted to whether or not the respondent may deduct an allowance for automobile expenses for two trips daily between the respondent's home and the hospital. The respondent here contends that he should be allowed an additional mileage for 730 round trips from his house to the hospital, each of three miles, making a total of 2,190 miles, and that this allowance should be made under Section 12(1)(*a*) of the Income Tax Act which reads in part:

> Except to the extent that it was made or incurred by the tax-payer for the purpose of gaining or producing income from property or a business of the tax-payer.

The respondent contends that the allowance comes within that section on the ground that his house was a base of his operations as an anaesthetist, within *Cumming v. M.N.R.* [1968] 1, Ex. C.R. 425 in that the den at the respondent's

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house was used for the purpose of filling out cards later taken to the respondent's office and from which cards the secretary there typed out the respondent's accounts and kept the cards amongst the records.

In the *Cumming* case (supra) a doctor carried on practice exclusively as an anaesthetist at Ottawa Civic Hospital. The administrative functions of his practice, such as billing, were carried out at his home about half a mile from the hospital and the learned judge allowed the expenses of using his automobile to travel between his home and the hospital.

There Thurlow J. stated at page 437 "It was, however, admitted in the course of argument that the appellant conducted part of his practice at his home, that the nature of the business was such that the bookkeeping and financial activities had to be carried on at a location different from that where the patients were treated and that there were no office facilities available to him at the hospital where he might have carried out this part of his business".

At page 438, "In my opinion the base of the appellant's practice, if there was any one place that could be called its base, was his home".

And at page 440, "All such expenses, in my view, fall within the exception to section 12(1)(*a*) and are properly deductible and none of them in my opinion can properly be classed as personal or living expenses within the prohibition of section 12(1)(*h*)".

Hence the question here is whether or not the home of the respondent, 2025 Lansdowne Road, was a base of this respondent's operations as in the *Cumming* case.

On the facts it would appear that the house was not a base of operations of this respondent for the following reasons:

1. The agreement of the 6th June, 1961 provides that all the anaesthetic services would be performed in the hospital and not elsewhere except with the written consent of the hospital. Writing may have been waived in favour of an oral permission but that is here irrelevant. In any event, no patients were treated at the house in question and all services for which charges were made were performed within the limits of the hospital.

2. The information contained in the card shows that none of that information was obtained at his house. The first items were obtained from the hospital chart, further items from the knowledge of the respondent in attending the operation and the charges were those fixed by the Medical Association. Therefore no information on the card was necessarily filled out at the house and it was from this card that the secretary made the account charged to the patient.
3. This respondent had an office which alone distinguishes the *Cumming* case. All records were kept at the office and the account was made out there and which office the respondent visited only once or twice a week but on those occasions he would deliver to the secretary the card from which she would make out the account to mail to the patient.
4. The respondent stated that at the conclusion of the day's operation—around three, five or six o'clock p.m., he returned home to dinner, therefore he returned to his house not as a base of his operations nor for the purpose of completing cards.

The work of the respondent at the hospital and not at his house was the basis for the charge to the patient. There was nothing that required the respondent to perform any part of those services at his house: in fact he was precluded from rendering anaesthetics elsewhere than in the hospital without the consent of the hospital. Further the respondent could fill out the card at the hospital or at his office; there was nothing which required his filling out a card at his house and if so done was entirely a matter of his own convenience. In returning to his house for dinner the respondent regarded the house as a home, not as a base of his professional operations. Hence both objectively and subjectively the house was a home and not a base of professional operations.

The respondent has cited *Owen v. Pook* (Inspector of Taxes) [1969] 2 W.L. R.775, (H.L.) but that case is distinguishable in that the taxpayer had two bases of operation namely the hospital and also his house if he were telephoned by the hospital to remain on call. Lord Guest at p. 782 stated, "There are two places where his duty is performed, the hospital and his telephone in his consulting

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room. ... The travelling expenses were in my view necessarily incurred in the performance of the duties of his office".

Lord Wilberforce at p. 787 stated:

> What is required is proof, to the satisfaction of the fact finding commissioners, that the tax-payer in a real sense in respect of the office or employment in question, had two places of work, and that the expenses were incurred in travelling from one to the other in the performance of his duties. In my opinion Dr. Owen has satisfied this requirement.

At page 788:

> A finding that the expenses necessarily arise from this duality appears to me legitimate and the undemonstrated possibility that a nearer practioner might have been selected to be irrelevant.

The expenses of the automobile trips between the respondent's house and the hospital are excluded for the reason stated in *Royal Trust Co. v. M.N.R.* [1956-60,] Ex. C.R. 70 by Thorson P. at p. 83 as follows:

> The essential limitation in the exception expressed in section 12(1)(*a*) is that the outlay or expense should have been made by the taxpayer for the purpose of gaining or producing income from the business. It is the purpose of the outlay or expense that is emphasized but the purpose must be that of gaining or producing income from the business in which the taxpayer is engaged.

The obligation to pay for an anaesthetic and the respondent's corresponding right to receive payment vest upon the respondent administering the anaesthetic to the patient. There is no evidence that the obligation and corresponding right were subject to a condition precedent of vesting only if the respondent fill out a card at his home and not elsewhere or that the respondent travel from his home to the hospital by automobile. Further the expense of living at 2025 Lansdowne Road and of travelling therefrom to the hospital where the respondent carried on his professional services are excluded by section 12(1)(*h*) of the *Income Tax Act* which precludes deductions for "personal and living expenses of the taxpayer".

In conclusion the home of the respondent at 2025 Lansdowne Road, Victoria, B.C. was not a base of the operation of his profession and the expenses in question, namely the two daily trips between his home and the hospital, are not to be deducted from his income. The assessment will be referred back to the Minister to allow the additional sum of $128.62, otherwise the appeal is allowed with costs payable by the respondent to the appellant.

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