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Exchequer Court of Canada

RALPH M. SPANKIE, K.C.
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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON

(Appointed, October 6, 1942)

PUISNE JUDGE:

THE HONOURABLE EUGENE REAL ANGERS

(Appointed, February 1, 1932)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

His Honour DONALD MCKINNON, Prince Edward Island Admiralty District—appointed, July 20, 1935.

do LEONARD PERCIVAL DEWOLFE TILLEY, New Brunswick Admiralty District—appointed, August 14, 1935.

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

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

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

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

DEPUTY DISTRICT JUDGES:

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

do J. B. M. BAXTER—New Brunswick Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

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

CORRIGENDA

P. 133. Footnote should read: (1) 129 A.L.R. 905 at 909.

P. 180. Footnote should read: (1) (1929) 2 K.B. 85.

P. 184. Footnote should read: (1) (1584) 2 Coke's Reports 18; Part 3 (7b).

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

DAVID HUNTER MILLER.....DEFENDANT.

1941
Sept. 19 & 20
1942
April 17.

Expropriation — Measure of damages sustained due to severance of property — Depreciation in value of premises.

Held: That where, in expropriation proceedings, there has been a severance of the land expropriated from other land owned by the expropriated party, the measure of compensation for damages sustained by reason of the severance is the depreciation in value of the premises damaged, assessed not only in reference to the loss occasioned by the construction of works on the land expropriated, but also in reference to the loss which may probably result from the nature of their user.

INFORMATION by the Crown to have certain property expropriated on Vancouver Island, B.C., for public purposes, valued by the Court.

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

H. A. Beckwith for plaintiff.

H. W. Davey for defendant.

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

THE PRESIDENT, now (April 17th, 1942) delivered the following judgment:

This proceeding relates to the expropriation by the Crown, under the provisions of the Expropriation Act, Chapter 64 of the Revised Statutes of Canada, 1927, of

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Maclean J.

certain lands, being parts of Lots 66, 61 and 60, in what is known as Metchosin District, Vancouver Island, in the Province of British Columbia, distant about 20 miles from the City of Victoria, B.C. Though the amount of compensation in dispute is comparatively small, yet the case presents several points of difficulty, later to be mentioned and discussed.

On December 12, 1939, 162 acres of Lot 66, 7·9 acres of Lot 61, and 7·9 acres of Lot 60 were expropriated by the Crown for the purposes of a public work, described as a Forward Observation Post, and designed for national defence purposes. Subsequently, in August of 1940, part of the lands so taken having been found unnecessary for the purposes of the public work for which the same were taken, the Minister of National Defence did, by an amended plan and description, declare that all those parts of the said land save and except a parcel of 34·54 acres thereof, and a right of way therein described, were not required and were abandoned by the Crown, and that it was intended to take and retain only 34·54 acres (hereafter to be referred to as 34 acres) out of the lands taken in December, 1939, and which said 34 acres formed a part of Lot 66; and also a right of way in perpetuity, passing through Lots 66, 60, 61 and 66, "for all and any members, officers and servants of the Department of National Defence of the Dominion of Canada, or its said naval or military services, and all other persons duly authorized by the said Department of National Defence or by any proper officer thereof to pass and repass with or without horses, carriages, carts, motor vehicles and other vehicles over and along the road through the said lots . . . ." The right of way, a continuous strip 30 feet wide, starts from the 34 acres taken and meanders through Lots 66, 61, 60, and back again to Lot 66, until it connects with a public highway some distance off in an easterly direction. The total length of the right of way is, I understand, about 4,500 feet, and comprises, according to the amended plan of expropriation, about 3·07 acres. The lands taken under the original expropriation comprised 162 acres in Lot 66 and which had a shore line of about 11,200 feet on its southwesterly side, and 15·5 acres in Lots 60 and 61, making altogether about 177 acres. The shore line of the

34 acres taken under the amended expropriation, so far as I can make out, is 1,150 feet in length.

The 34 acres taken is rectangular in form, having a mean length of about 1,499 feet from the shore line to the rear, a width of 9,800 at the rear, and, following the sinuous shore line, a width of about 1,150 feet on the Straits of Juan de Fuca. Along the greater part of the shore line of Lot 66 there is formed a narrow bench of low land. The 34 acres taken are hilly and rocky practically from the shore line, incapable of any cultivation, and were said to be the roughest portion of Lot 66. The 34 acres taken were described as the side of a hilltop, which, as I recall it, is a fair description of it, the highest point being called Church Hill, the elevation of which above sea level I cannot recall. Possibly the name of Church Hill is applicable to the whole 34 acres. As already suggested the right of way is very irregular in its course, and is composed of rough, rocky and undulating land.

At the date of the first expropriation the defendant was the owner of about 770 acres of contiguous lands. The greater portion of these lands the defendant acquired by purchase in 1928, paying therefor the sum of $13,000. A year later he acquired 33 acres in Lot 57 for which he paid $3,300. On a portion of the area first purchased, Lots 59 and 60 I understand, the defendant claims to have expended about $28,000 in improvements upon certain farm lands and on buildings of various kinds thereon. About 100 acres of the property were cleared, drained and arable, and about 200 acres adjacent were partly cleared, and they or a portion of them might be called pasture lands; and this much of the defendant's total holdings constituted a farming area and were occupied and operated as such at the material time, and such farm lands were, I think, about a mile distant from the 34 acres taken. The balance of the defendant's land was rough and rocky and not capable of cultivation. It is claimed by the defendant that the whole of his holdings, the 700 odd acres, were acquired and enjoyed as a unit and that the improvements made on what we may call the farm lands were for the benefit and purpose of the whole area. The whole water front or coast line of the defendant's entire property was on Lot 66, which did not comprise any portion of the arable or farm lands, and the defendant stated he had intended erecting a residence on

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that lot, somewhere near the shore line I assume, but that on account of the taking of the 34 acres from within the larger area of some 450 acres of non-arable lands, for military purposes, and because it broke the continuity of his shore line, these particular lands no longer had any attraction for him for the purposes he had in mind, and he felt obliged to abandon the idea of building a residence thereon. I understand that apart from the farm and pasture lands no improvements of any kind had ever been made on the balance of the defendant's holdings, particularly on Lot 66, but it was attempted by some of the defendant's witnesses to associate this portion of the property as a useful adjunct to the farm lands on the ground that cattle and sheep roamed thereon. I may at once say that I do not think that these lands can properly be regarded as an essential or useful adjunct to the farm lands, or for grazing purposes for farm animals, and I think in the end Mr. Davey felt obliged to abandon this contention. These lands would, of course, provide a certain amount of wood required for fuel or for other purposes in the conduct of the farming operations, but such requirements of the farm lands were not in any sense curtailed by the taking of the 34 acres, because there would be an ample wood supply on the remaining lands and much more accessible.

The defendant and his witnesses envisaged and described the whole land area as a "Farm Estate" or a "Home Estate", and that I understand generally to mean a relatively small area of farming lands combined with a much larger area of rough non-arable lands, with some shore or coast line. Apparently such descriptive terms have some significance in the southern part of Vancouver Island, and perhaps elsewhere, in connection with such a combination of arable and non-arable lands, and comprising also some shore line. The terms mentioned have reference apparently to large holdings of lands of the character I have just mentioned, in the hands of a proprietor whose circumstances are such that he does not have to rely upon any net earnings from such a property. Mr. Hall and Mr. Carmichael, witnesses for the defendant, stated that if the entire property of the defendant were treated as a Farm Estate, and operated as a hobby, it would have a value of $37,600, but if the arable lands were operated as a farm

only, and severed from the remaining lands, their value would be $20,440, thus causing a loss of $17,160 in the value of the defendant's property as a Farm Estate, a loss that is not here directly claimed as damages. I assume this difference in value is based on the fact that the improvements made on the farm lands and buildings cost so much that no farmer could afford to pay the owner what such farm lands had cost the owner, that is, if the farm were to be profitably operated. It was contended from this, by some witnesses at least, that the whole of the defendant's interest in Lot 66, which I understand would be about 265 acres, should be included in the 34 acres taken in computing the compensation here, as the 34 acres taken destroyed the value of the whole 265 acres in that lot, if viewed as a part of a Farm Estate.

Mr. Hall, who is a dealer in real estate, testified that the 34 acres taken were broken, rough, rocky and wild lands, with rocky ridges. The top of Church Hill he described as "beautiful", "panoramic", if viewed as part of a "Farm Estate", and that there was a certain demand for such "Estate" properties. He stated that the 34 acres taken not only detracted from the price which any person would pay for the whole property as an "Estate", but that on such account the same could not now be sold as such, because a good part of the water-front had been taken, and altogether that the value of the defendant's property as a whole had been greatly diminished by the expropriation. The value of the 34 acres taken he put at $50 per acre at the date of the expropriation, about $1,700, for residential purposes, and he stated that the portions of Lot 66 lying southwest and northeast of the lands taken had either become unsaleable or very much depreciated in value because of the severance in the shore line of the property caused by the expropriation, which, he said, would be a prime factor in selling any portion of Lot 66 for residential purposes. He stated also that the taking of Church Hill destroyed or injured the property as an "Estate" because of the extensive view it afforded along the Straits of Juan de Fuca, and across the Straits to the American side, and that this injured the value of the balance of the shore front, on either side of the shore front included in the expropriation.

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Mr. Shanks, manager of the B.C. Land and Investment Co. Ltd., a company which has been in existence for 75 years, and with which Mr. Shanks has been associated for 36 years, described the lands taken, the 34 acres, as a side hill running from the shore line upwards to the summit of Church Hill, and a little over the top of the hill, and that is a fair description of that expropriated area. He was of the opinion that the whole property of the defendant should be considered as consisting of a farm of roughly about 250 acres, and the remainder—including the 34 acres taken—as sites for buildings, which he classified as " home sites ". He stated that there was a demand for home sites running from 5 to 10 acres, and he suggested that the lands of the defendant, other than the farm lands, could be divided into small holdings of 5, 10, or 25 acres, as the land would permit, on both sides of the right of way recently constructed by the Crown. Due to various causes he said that people were departing from the idea of holding large estates as playthings, and that the market for such properties was now very limited unless they could be utilized on a revenue-producing basis, but, he said, there was a demand for home sites, and that home sites of the sizes mentioned were marketable particularly if located on the shore line, at $100 per acre. The marketing of small holdings of rough lands along the shore line as home sites appears to be a condition obtaining on Vancouver Island, and perhaps elsewhere in British Columbia, rather than in Eastern Canada, probably due to climatic conditions, but in any event it appears to be a fact that cannot be ignored, and Mr. Shanks stated that people will go long distances to procure such home sites. Mr. Shanks put the value of the 34 acres taken at $10 per acre—which acreage he said was not of a great deal of importance as a home site because it was a high rocky knoll, unless associated with another piece of land—but he said that its value " would be three times that amount because it comes out of the whole and causes injurious affection to the property ". By that I understood him to mean that $20 per acre was the injury caused to the balance of Lot 66, and he put this at 7 or 8 hundred dollars, that is to say, he estimated the injurious affection to the rest of the property on the basis of the value

of the lands taken, and which lands he valued at $10 per acre. This method of estimating the injury caused lands contiguous to those expropriated is one entirely new to me and I am not presently prepared to accept it as a sound or practical principle, though according to Mr. Shanks, it is a practice sometimes adopted by land valuators in Victoria. If this practice has merits or is sound in principle it was not made clear to me, though possibly in particular cases it might function as a practical or rough and ready rule. Mr. Shanks admitted great difficulty in estimating the probable injury done the adjacent lands, or the whole property, by the taking of the 34 acres, but in any event he thought it somewhere between $700 and $800. He also expressed the opinion that the use of the 34 acres for military purposes might have a detrimental effect upon the sale of home sites contiguous thereto. He also pointed out, I might add, that the rough lands of the defendant which I have been discussing could not be sold readily unless the same were subdivided, and provided with roads, which would be very expensive of construction, and he suggested that if any sub-division were decided upon it might be based upon the right of way constructed by the Crown, which would save the defendant the cost of a road amounting to some $4,000. It is difficult to say just how practical that suggestion is, and I am inclined to think it is of little assistance at the moment in determining the quantum of compensation in this case.

It seems to me that, as was stated by Mr. Shanks, in forming any estimate of the compensation to be allowed here we must make a distinction between the farm and pasture lands and the balance of the defendant's property; they differ materially in character, in their present or potential uses, and the boundaries of each may be pretty well defined. The farm and pasture lands are in no sense dependent for their operation upon the remainder of the property; they form a distinct operating unit and no doubt this had its beginning back many years. It does not appear to me sound in principle to say that in the expropriation of the 34 acres of rough non-arable lands, out of a much larger area, the same should not be valued apart from the farm and pasture lands. Nor does it seem tenable to me, upon the facts here, to say that the farm

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lands have suffered in value, or that the non-arable lands to be found in Lot 66 have been rendered valueless or unsaleable, or that the entire property of the defendant as a unit has been rendered entirely unsuitable for the purposes to which it was devoted at the date of taking, by reason of the expropriation of the 34 acres and the right of way. One answer to all this is that the defendant's particulars of claim do not rest on such foundations, nor do they seem to have been in contemplation. I do not mean by this to exclude any claim for injurious affection occasioned any lands other than those expropriated. Referring more specifically to the contention that the entire property should be regarded as one estate, a combination of arable and non-arable lands, to be used for the purposes of a well-to-do proprietor who is not compelled to use or operate the same with a view to profit or gain, I might observe that I can conceive of cases where such a contention might have great weight, but I am not satisfied that this case falls within that category. Whatever injury may be caused the defendant's property, if viewed as an indivisible unit, that must, I think, fall under the head of injurious affection. And the basis of the defendant's claim for compensation, as shown in the particulars of his claim, would seem to support that view.

Before turning directly to a consideration of the compensation to be allowed here a few preliminary observations might usefully be made concerning certain matters which had their origin immediately following the original expropriation, and before the present proceedings were launched, but into which they now enter. No Information was exhibited following the original expropriation of December, 1939, in fact none followed the amended expropriation of August, 1940, until August of 1941, and then only after the defendant had petitioned His Majesty, under the provisions of the Petition of Right Act, for the granting of a fiat enabling the defendant to proceed against the Crown for the determination of the compensation or relief to be allowed him for the lands taken. However, soon following the original expropriation negotiations were entered into between Mr. Fowkes, solicitor for the defendant, and Mr. Beckwith, solicitor for the Crown, respecting the matter of compensation, and it appears that Mr. Beckwith made an offer of compensation on behalf of

the Crown, in the sum of $3,500, but this offer was rejected. Later Mr. Fowkes offered to accept the sum of $6,000 in full settlement of any compensation to which his client might be entitled, but apparently no agreement was reached and this offer was never accepted. Then, when the amended plan and description were filed Mr. Beckwith made to Mr. Fowkes an offer of compensation by letter for the 34 acres taken thereunder, in the sum of $1,116.10, which was at the rate of $32.80 per acre, and which was the rate per acre claimed by Mr. Fowkes for his client in respect of the 172 acres taken under the original expropriation, and Mr. Beckwith offered an additional sum of $500 for the right of way, altogether $1,666.10, but this offer was not accepted. Mr. Fowkes then claimed, *inter alia,* that the defendant should be paid any expenses he had incurred in connection with the first and partially abandoned expropriation, in cruising the lands then taken and in having the timber thereon valued, and a sum paid his solicitor for his charges for consultations regarding the original taking and for the negotiations carried on with Mr. Beckwith in resepect of the matter of compensation. The solicitors in good faith were endeavouring to negotiate by private treaty a settlement of the amount of compensation, prior to any Information proceedings taken, and that would seem quite a proper and desirable step to take, and it is on that account that such expenditures are claimed as damages in the defendant's particulars of compensation in the present proceeding, and which particulars I shall presently mention. I should point out that it was but natural and proper that the defendant should, following the original expropriation, consult a solicitor as to his rights in the premises, and being an American citizen it is unlikely that he would be acquainted with such rights or as to what steps he should take in the matter.

The amount tendered by the Crown in the Information here is $1,666.10, the precise amount officially authorized and mentioned in the letter of August, 1940, from Mr. Beckwith to Mr. Fowkes, and to which I have already made reference. This amount was reached first by deducting from the sum of $6,000 (the compensation demanded by the defendant under the original expropriation) the sum of $1,700, which was the amount claimed for standing timber on the 177 acres taken under that expropria-

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tion, thus leaving a balance of $4,300; that balance, as mentioned in the letter, would give $33.80 per acre for the 34-acre parcel taken under the amended expropriation, or $1,166.10, but apparently that was not intended to include any allowance for the acreage involved in the right of way, nor did the letter indicate that. Then, the balance of the offer of compensation mentioned in the said letter, $500, was for the right of way taken, and that sum of $500 added to the sum of $1,166.10 makes precisely the sum of $1,666.10, the amount of the tender made here by the Crown. In the Information the tender is referred to as "in full satisfaction . . . for the said parcel of land and for the said right of way and in full satisfaction and discharge of all claims of the defendant in respect of the damage or loss, if any, that may have been occasioned to him by reason of the said expropriation and the location and erection of the said signal station on the said lands and by reason of the other lands of the defendant having been injuriously affected by the said expropriation". At the trial Mr. Beckwith contended that the Crown should not be held strictly to the reference to an acreage rate, as made in his letter I assume, and that the actual tender of the Crown was that set forth and described in the Information. In his written argument following the trial Mr. Beckwith contended that $600 would be ample for the value of the lands taken, presumably including the right of way acreage, thus allowing, to use his own words, "$1,000 for injurious affection from the 34 acres parcel and the right of way". There is much, of course, to say for the suggestion that we should be guided entirely by the statutory tender contained in the Information, and not by the offer contained in the letter, though they both seem to be the same in effect. This departure from the terms of the offer of compensation contained in the letter mentioned might be calculated to mislead the defendant in giving consideration to the tender made in the Information, but Mr. Davey, I think, must have understood the position taken by Mr. Beckwith at the trial, and that it was in conflict with the terms of the offer contained in the letter to him, and apparently he acted accordingly, at least to some extent. But there remains the difficulty of determining the exact position of the Crown in respect of an allowance for compensation

for the 3 acres contained in the right of way, which is still far from clear, that is to say, whether the Crown's offer of $500 for the right of way were still open and effective, or whether any of the compensation tendered were intended to include an allowance for the right of way. I do not know if there is any well founded escape from this confusion but at any event there I leave it for the moment.

The amount of compensation claimed by the defendant is $7,650, the particulars of which were filed just before the commencement of the trial, and they are as follows:

1. Value of land contained in parcel 34·54 acres.....	$ 1,166 10
2. The value of right of way, 3 acres.....	101 40
3. Cost of fencing right of way and parcel 34·54 acres....	1,650 00
4. Injurious affections of remaining land, and expenses incurred by defendant in connection with expropriation and negotiations with plaintiff's solicitor concerning amount of compensation to be allowed for parcel referred to in paragraph one of the Information, and expenses of real estate valuators and timber cruise in connection with paragraphs 1 and 2 of Information..	4,732 50
	$ 7,650 00

It will be observed that the defendant places the same valuation on the 34-acre parcel as did the Crown. Then in respect of item No. 3 the cost of fencing relates to both the 34-acre parcel and the right of way. However, counsel for the Crown stated at the opening of the trial that the Crown was undertaking to fence the 34 acres, so that much of this item is now eliminated. The greater part of the remaining item, No. 4, must relate to the subject-matter of "injurious affection", after deducting the items of expense which I have already explained and which related to expenditures incurred in connection with the original expropriation, and later in connection with the amended expropriation.

With the foregoing comment upon the amount of the tender of the Crown, and the particulars of the defendant's claim for compensation, I may now proceed to a final disposition of the matter of compensation, under the heads and in the order named in the defendant's particulars of claim. I propose allowing the defendant the amount claimed by him for the taking of the 34 acres, $1,166.10. There was evidence that the value of this parcel of land was of some less value, and there was evidence that it

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was of greater value. I do not think the sum of $1,166.10 is at all an unreasonable amount to allow, and the fact that the Crown made an offer in this amount for this parcel of land, following the amended expropriation, would appear to lend support to this conclusion.

I allow the defendant also the amount of compensation claimed for the right of way, $101.40. By doing so I do not wish to be held as saying that the method followed in estimating the value of the perpetual right of way taken in this case is right in principle, but that is the amount the defendant claims, and I am not sure of the Crown's position in respect of this item of compensation. In any event it is hardly conceivable that it could be said that this amount is excessive, and I must say I have had some anxiety as to its sufficiency.

Now, as to the claim for the fencing of the right of way, and this is not wholly free from difficulty. I was informed by counsel that there was no statutory enactment in British Columbia applicable to such a situation as here obtains, and I am unable myself to find any authority to assist me in this matter. I have no doubt but that there may be cases where an easement is compulsorily taken that the fencing of the same would be obviously necessary, and that the cost of the same should fall upon the expropriating party, but that, I think, would always be a question of fact to be determined by the circumstances of the particular case. I have not been convinced that in this case the fencing of the right of way is necessary, or that any practical or useful purpose would be served by doing so. The reasons advanced in support of such a requirement did not impress me, and I hope I have properly weighed them. As I have already stated, the lands through which the right of way runs are wild and rough lands and never can in any real sense be cultivated, and I cannot quite appreciate how the defendant's interests, presently or in the future, can really be injured by the right of way being unfenced, or how they would be protected by fencing. I do not think therefore this claim can be allowed. In the settlement of the minutes of judgment provision should, of course, be made in respect of the undertaking given by the Crown for the fencing of the 34-acre parcel.

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I now turn to the item of claim referable to legal and other expenses incurred and disbursed in connection with the original expropriation, and also expenses entirely attributable to the amended expropriation and the trial of this suit. Evidence was given of the particulars of such disbursements and expenses, but they do not appear in the defendant's particulars of claim, being bulked with a claim for the injurious affection of the remaining lands of the defendant. As I have already explained, no Information was ever exhibited in connection with the original expropriation, but notwithstanding this the solicitors of the respective parties endeavoured to agree upon the compensation to be paid the defendant therefor, and in doing so the defendant incurred an expense of $68 in a cruising of the timber on the 177 acres taken in that expropriation, and, he paid his solicitor $350 for legal expenses for consultations in respect of that expropriation, and his solicitor's negotiations with the Crown's solicitor in respect of the matter of compensation. I am now referring solely to the original expropriation. When the amended expropriation was made, the situation was altered very much because the area taken was only 34 acres instead of 177 acres, and the matter of the right of way arose for the first time. In the second expropriation the defendant abandoned any claim as to the timber on the 34-acre parcel and on the right of way, because he regarded any small amount of timber on the 34-acre parcel and the right of way as of little value and not worth pressing. In preparation for the hearing of this proceeding the defendant incurred certain expenses, in connection with the services of three different persons who gave opinion evidence in respect of the value of the lands taken, and generally upon the question of compensation. I think that any expenses incurred by the defendant, and referable to the original expropriation constitute a fair claim for damages in this proceeding and I allow the sum of $68 paid by the defendant for cruising the timber on the 177 acres taken under the first expropriation. I do not think this amount could well be taxed in the present proceeding. As to the solicitor's bill of $350 paid by the defendant I allow one-half of that amount because it cannot be said that the whole of this amount is attributable to the original expropriation. In respect of expenses incurred in

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preparation for the present case, those must be taxed in the usual way, if taxable. I may dispose of this point by quoting what I said in respect of a similar claim in the case of *The King* v. *Shapiro* (unreported). I there said:

> Now, as to the claim for the two items of damages which I have earlier mentioned. I agree that there should be some provision whereby the expropriated party, when recovering more than the amount tendered, should be allowed a reasonable amount, by the Court or the taxing officer, for necessary, relevant and useful services performed by real estate experts in establishing what is the fair valuation of any property expropriated. In the case of *The King* v *Messier* (1), an expropriation case, my brother Angers J included in his award of compensation an allowance for some such services. I have not been able to convince myself that there is authority for this, and up to that time, so far as I know, such had not been the practice in this Court. The tariff of taxable costs pertaining to opinion evidence in expropriation proceedings is entirely inadequate and I and my brother judge agree that this tariff should be amended and this will be done, and we agree that this method will best tend to remove any doubt as to the authority for some allowances in such cases. I think it is preferable that this matter be under the direction and control of the taxing officer. Presently I do not see my way clear to entertain this particular claim of the defendants, some of which I assume, is taxable.

There remains for consideration the final item of the defendant's claim for compensation, namely, that for compensation for damages to be sustained by him by reason of the severing of the lands taken from his other lands, or otherwise injuriously affecting such lands, and which lands are in physical contiguity with the lands taken. This is, I think, a case where the measure of compensation is the depreciation in value of the premises damaged, assessed not only in reference to the loss occasioned by the construction of the authorized works, but also in reference to the loss, which may probably result from the nature of their user. In other words, the use for which the works have been constructed is an element in determining the amount payable to the owner, so far as such use has a tendency to depreciate the value of the lands which are affected. This is, of course, a difficult question to determine with any precision, and one, considering the relatively small amount in debate, that the parties themselves might well have settled between themselves. The Crown in its tender made no specific admission of or allowance for such a claim in his Information, although Mr.

(1) (1941) Ex. C R p 30

Beckwith in his written argument stated that if the compensation for the lands taken were fixed at $600, the amount of the tender would leave "$1,000 for injurious affection for the 34-acre parcel and the right of way". It would be difficult to construe this as an admission that the lands of the defendant not taken had been injuriously affected by the taking of the 34-acre parcel and the right of way, because if the value of the lands taken exhausted the tender there would be nothing remaining applicable to compensation for the lands injuriously affected. However, it was a concession that in a certain event a portion of the tender might be applied as compensation for lands injuriously affected. I am of the opinion that the defendant is entitled to some compensation under this head although I find some difficulty in determining the amount, but that is usual in such cases. Mr. Shanks, a witness on behalf of the Crown, stated that what I have been referring to as the rough lands, the lands of the type contained in Lot 66, were in demand for small home sites, and I understood him to say that sites adjoining the shore line would particularly be in demand. Now to take 34 acres out of these lands, one end of which bounded on the shore line, and sever them from the other lands, is not a matter of little consequence, and the fact that the defendant acquired his entire holdings of land to be held as a unit by himself, is one not to be entirely disregarded. The taking of this area severed its shore line from the shore line on either side, and to the extent I have already described. While the shore line of the 34-acre parcel, or even the whole parcel, may not have been suitable for home sites on account of the fact that the land rose rather abruptly from the shore, still it would not follow that communication from and along the shore line of this parcel, to the shore line on either side, was not possible, or could not be made possible. Moreover, as Mr. Shanks stated, the 34-acre parcel along with a certain quantity of adjacent lands might have been quite suitable and attractive as a home site. In any event, the expropriation of this area severs quite an area of land from adjacent lands, and it breaks the physical contiguity of the shore line which is not a matter to be treated at all lightly, and this must, I think, injuriously affect at least quite a portion of the lands not taken. While I am not disposed to attach

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much value to the panoramic view from Church Hill, yet I should not like to say it would not be an element in the valuation of immediately adjacent lands if Church Hill were still a part of it. Again the use of the 34 acres for military purposes, cannot but fail, in my opinion, to cause some injury to the value of the remaining lands. The occupation of the 34 acres for military purposes is not, at least, calculated to enhance the value of or promote the sale of the surrounding lands, and in fact I think it must tend to depreciate somewhat the valuation of the other lands. The fact that the 34-acre parcel is to be occupied and used as a "Forward Observation Post" may mean that guns are not to be employed on that public work, but rather somewhere in the rear. This was a matter which was not made too clear but I feel that I must assume that for the present guns are not to be employed on this public work, but if they were that would, of course, be a more serious matter, as Mr. Shanks pointed out. But in any event, the occupation of this area for military purposes is not likely to be acceptable to persons contemplating the purchase of small home sites on the defendant's other lands near by, and I think it must to some extent affect such other lands. Then the meandering right of way, well on to a mile in length, obviously must cause some injury to the lands through which it runs. It is hardly the sort of road or highway the owner of the land would construct if he were contemplating a subdivision of his lands through which it runs. I think it may fairly be said that the right of way was not laid out with any view whatever as to the interests of the defendant in the area which it traverses. The right of way not only causes a severance but I think it must injuriously affect somewhat the adjacent lands, in the eyes of potential buyers. While this right of way is intended solely for the use of the Crown, yet, it is well known that in such cases a right of way usually becomes more or less a public right of way, and the public soon come to disregard the fact that the Crown has an easement only in the right of way lands, and this invasion by the public is seldom discouraged or restrained by the Crown. The right of way may prove ultimately to be of some value to the defendant, but I have no right upon any evidence before me to assume any probable realization of this. On

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the whole, I think the defendant is entitled to some allowance for compensation under the head of this claim, and this I fix at $2,000.

There will therefore be judgment for the defendant for the total of the several amounts I have allowed as compensation, which I calculate to be $3,510.50. The defendant will be entitled to interest at the usual rate upon the compensation allowed from the appropriate date or dates. There would seem to be some confusion as to the date of the taking of the 34-acre parcel but I have no doubt counsel will be able to agree upon this upon the settlement of the minutes of judgment. The defendant will have his costs of the proceeding.

Judgment accordingly.

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Feb. 17.
Feb. 27.

BETWEEN:

MAURICE SAMSON ..... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE.. RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, secs, 3, 5 (j), 6 (a) and 6 (j)—"Income"—"Net" profit or gain—"Ascertained" and "Unascertained"—Test of taxability of annual gain or profit or gratuity—Deductions—Statutory allowances—Appeal allowed.

Appellant was appointed as Hides and Leather Administrator of the War-time Prices and Trade Board by an Order in Council deriving its authority from the War Measures Act, under the provisions of which he was to receive a salary of one dollar per annum and his actual transportation expenses and a living allowance of twenty dollars per diem while absent from his place of residence in connection with his duties

The appellant was assessed for income tax purposes on the amount of such allowances received by him less a deduction of two dollars per day. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court

Held: That the allowances received by appellant were not "income" as defined by the Income War Tax Act.

2 That under the Income War Tax Act income is not necessarily net income and therefore taxable under the Act merely because it is of a fixed amount: nor does the Act preclude the possibility of deductions from fixed incomes in order to determine the taxable amount thereof.

3 That the test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained" but whether it is "net". *In re Salary of Lieutenant Governors* (1931) Ex. C.R. 232, commented upon.

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4. That where a statute or its equivalent, having the same legislative authority as the taxing statute, has made it clear that allowances authorized by it are made for purposes other than those of gain or profit or gratuity to the recipient, such allowances are not taxable income and do not become such because the amount thereof is fixed; where the amount of the allowance is authorized for expenses, the fixed amount is to be regarded as the amount of expenses beyond which no reimbursement is authorized.

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

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

L. A. Forsyth, K.C. and *C. S. Richardson* for appellant.

H. H. Stikeman for respondent.

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

THE PRESIDENT, now (February 27, 1943) delivered the following judgment:

The appellant in this case is a chartered accountant whose place of residence is in the City of Quebec. By Order in Council P.C. 2975, dated October 3, 1939, and made on the recommendation of the Minister of Labour on the advice of the Wartime Prices and Trade Board, he was appointed as Hides and Leather Administrator of the Wartime Prices and Trade Board. The operative part of the Order in Council sets out his duties as follows:

(1) That the appointment of Maurice Samson, Esquire, of the City of Quebec, as Hides and Leather Administrator be approved; and that he be responsible, in co-operation with the industries concerned and under the direction of the Board, for the conduct of negotiations with the United Kingdom Leather Controller, for arranging for supplies of hides and leather to be imported into Canada, for supervision of the purchase, shipment, delivery and allocation of hides and leather, whether domestic or imported, and for such other duties as may be assigned to him by the Board.

It also contained the following provisions with regard to the payments to be made to him:

(2) That the recommendation of the Wartime Prices and Trade Board that the said Maurice Samson shall receive a salary of one dollar per annum and his actual transportation expenses and a living allowance of twenty dollars per diem while absent from his place of residence in connection with the duties aforesaid, be approved.

The issue in this appeal is whether the said amounts of $20 per diem received by the appellant are taxable as

income under the provisions of the Income War Tax Act, R.S.C., 1927, chap. 97, as amended, either in whole or in part.

The facts are not in dispute. During the income tax year ending December 31, 1939, the appellant spent 24 days away from his place of residence in Quebec in connection with his duties as Hides and Leather Administrator, and received therefor the sum of $480; similarly, during the income tax year ending December 31, 1940, he spent 73½ days for which he received the sum of $1,470. The appellant did not include any sums in respect of these allowances in his return for the 1939 income tax year but, on the direction of the income tax authorities, he did include them all in his return for the 1940 income tax year. In that return he included the sum of $1,950 as allowance "pour dépenses de voyages" received from the Wartime Prices and Trade Board, from October 3, 1939, to December 31, 1940, less such expenses to the extent of the same sum of $1,950, stating on his return that his expenses had been about $2,500. In effect, therefore, while reporting the amounts he had received, he claimed that he was not assessable for income tax in respect of them.

The income tax branch of the Department of National Revenue broke up the total item of $1,950 and in respect of the 1939 income tax year assessed the appellant in the sum of $480 in respect of the allowances received by him for that year without allowing any deductions. Subsequently it reassessed him and allowed him a deduction of $2 per diem. Similarly, in respect of the 1940 income tax year, it first assessed him in the sum of $1,470 and subsequently reduced the amount of this assessment by allowing him a deduction of $2 per diem. In the evidence before me, the reason for this reduction did not appear, but that is not material.

From these assessments for the years 1939 and 1940, the appellant appealed, and the issues involved in his appeal are now before the Court for determination.

It is not disputed that the appellant actually disbursed while absent from his place of residence in connection with his duties as Hides and Leather Administrator more than the total amounts received by him by way of allowance. He says also that he kept no vouchers in respect of these expenditures since he never expected that the

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amount of the allowances would be taxable and it had never been his practice to produce itemized accounts of travelling expenses. The amounts expended by him were for payment, while he was absent from his place of residence in connection with his duties, of hotel bills, meals, seats or berths on the train from Quebec to Ottawa and elsewhere and back, tips and other expenses incidental to such absences.

In the appellant's statement of these expenses he excluded items of expense that were purely transportation expenses, such as for railway tickets and taxi fares from his residence in Quebec to the station and back. His "actual transportation expenses" were, of course, not included in his income tax returns and no issue with regard to such expenses arises in this appeal.

The appeal involves a number of important income tax questions calling for careful consideration of certain sections of the Income War Tax Act. In the first place, are the per diem living allowances "income" at all within the meaning of the statute? If they do constitute income to the recipient, is he entitled to make any deductions therefrom in view of the provisions of section 6, paragraph (*a*) or under section 5, paragraph (*f*) or are deductions prohibited under section 6, paragraph (*f*)? The effect of these sections of the Income War Tax Act, as well as section 3 thereof, which defines taxable income, was fully argued on the hearing of the present appeal.

After consideration of the notice of appeal herein, the decision of the Minister of National Revenue, the respondent, was that the amounts received by the appellant as living allowance of $20 per diem were taxable under the provisions of sections 9 and 3 of the Income War Tax Act and that deductions therefrom were not allowable under the Act. Accordingly, he affirmed the assessments as being properly levied. No question under section 9 of the Statute arises.

On the argument of the appeal, counsel for the respondent contended that the per diem living allowances received by the appellant were taxable "income" within the meaning of the Income War Tax Act and that no deductions were permissible either under section 6 (*a*) or section 5 (*f*) of the statute.

In the course of his argument on the meaning and effect of section 6 (*a*) counsel for the respondent referred to the judgment of this court in *In re Salary of Lieutenant-Governors* (1) in which Audette J. had before him a claim for deductions from a salary of a fixed amount. The claim was disallowed, but in the course of giving his reasons for judgment, Audette J. made some observations of a general nature which require comment. While counsel for the respondent cited this case only in support of his contentions under section 6 (*a*), with which I shall deal later, it is important to consider some of the general statements made in this case from the point of view of ascertaining the meaning of the term "income" and of determining whether the allowances in question in this appeal, being of a fixed amount per diem, are, therefore, of necessity net or taxable income. It will not be possible to deal with the general statements made by Audette J. in the *Lieutenant Governors' Case* (*supra*) without dealing with the specific issue that was before the court, even although this involves an anticipation of the effect and meaning of section 6 (*a*) of the statute. In that case the appellant in making his income tax return had declared his salary as Lieutenant-Governor, which was fixed by the Revised Statutes of Canada, 1906, chapter 4, section 3, and claimed a deduction therefrom of the sums expended by him as Lieutenant-Governor for social entertainments, and gave the particulars of such expenditures. He contended that he should not be assessed on the gross salary, but on the net, after having deducted the amount of his expenditures for social entertainments which, he alleged, were necessarily laid out for the purpose of earning the income, outside of his living expenses.

The claim involved a consideration of subsection 8 (*a*) of section 3 of the Income War Tax Act, as amended by 13-14 Geo. V, chap. 52, reading as follows:

> (8) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of—
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

It is to be noted that this subsection 8 (*a*) is now section 6 (*a*) of the statute. All that the court had to decide was

(1) (1931) Ex C R 232

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the narrow issue as to whether a deduction of expenditures for social entertainments was allowable under the subsection or not. No other question was before the court.

Audette J. held against the appellant Lieutenant-Governor on the ground that there was no legal obligation on his part either contractual or otherwise to make the social expenditures in question. In effect, he held that the Lieutenant-Governor would have been entitled to the whole of his salary even if he had not made any expenditures on social activities. They were not "wholly, exclusively and necessarily" laid out or expended for the purpose of earning the income and were, therefore, not deductible. At page 235, he said:

—and after all are not these disbursements measured by the hospitable disposition of each Lieutenant-Governor, and are they not freely and voluntarily incurred and so not enforceable by law.

and further on the same page:

The question or policy of spending for social purposes is of a personal character and in no way affected by any legal obligation. No action can lie to enforce the same

The generous hospitality with which the present appellant entertains is of itself a commendable thing and reflects much lustre upon the office he holds; but I fail to find either within the spirit or the language of the Act any ground for holding that it comes under the expression disbursements or expenses *wholly, exclusively* and *necessarily* laid out or expended for the purpose of earning the income.

and at page 236, he said:

Dealing with the second contention of the appellant which is based on an implied contract between the Crown and the Lieutenant-Governor as flowing from his oath of office, and the instructions supplied to him, as to his duties to be performed which are part social, I must find that such a proposition does not rest on sound legal principles. There was no concensus between the parties in respect of the matters in question herein from which could flow any obligations with respect to this expenditure for social entertainment attached to the office by custom and tradition.

The failure of the Lieutenant-Governor to entertain could not be a cause for renewal or dismissal.

The *ratio decidendi* of the judgment in this case is to be found in these extracts from the reasons for judgment given by Audette J. for disallowing the contentions of the appellant Lieutenant-Governor. No appeal was taken from this judgment.

Mr. Justice Audette did, however, make certain general statements, which were not necessary to the determination of the issue that was before him and are, in my opinion,

subject to critical comment. For example, at page 235, after referring to subsection 8 (*a*) of section 3 of the statute and stating that it was obvious that the section did not apply to a case of the kind that was before him, he said:

> The disbursements that must be made to earn profit are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and the will of the taxpayer,

and later, on the same page, he also said:

> What that section means is that in "a trade or commercial or financial or other business or calling", before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted.

and then made the following distinction and statement to which I draw particular attention:

> But it is otherwise in the case where a person received an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income.

The words which I have underlined contain the statement, which, with all respect, I consider much too broad. It seems that ever since the decision in the *Lieutenant-Governors' Case* (*supra*), which was decided in 1924 but not reported until 1931, the income tax branch of the Department of National Revenue relying upon this statement of Audette J., has not allowed deductions from salaries or similar income of a fixed amount, except such deductions as are specifically allowed by some provision of the statute, on the ground that it was decided by Audette J. in the *Lieutenant-Governors' Case* (*supra*) that such an income being an ascertained one constitutes "of itself" a "net" income and, therefore, taxable under the statute. This is likewise the basis for the contention in this case, that the allowances being of the fixed amount of $20 per diem, are, therefore, net income and taxable as such, without deductions other than those specifically authorized.

The general statement made by Audette J., that an annual salary from any office or employment, being an amount which is duly ascertained and capable of computation, is, therefore, "of itself" a "net" income, was not necessary to the determination of the issue before the court. Indeed, it went beyond the *ratio decidendi* of the

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judgment, namely that there was no legal obligation of any kind on the part of the Lieutenant-Governor to incur the expenses for social entertainments, and that accordingly, they were not "wholly, exclusively and necessarily" laid out or expended for the purpose of earning the gross income. The general statement was, as a matter of law, *obiter* and becomes an expression of personal view with no binding character as a judicial pronouncement.

The decision in *In Re Salary of Lieutenant-Governors* (*supra*) is not authority for the view that sums of money received by a taxpayer, "as being wages, salary, or other fixed amount", are necessarily "net" or taxable income. It may well be that sums of money received by a taxpayer as wages or salary, even although they are of a fixed amount, may be subject to deductions other than those specifically permitted, such as charitable donations and the like, in order to determine the amount that is properly assessable for income tax purposes under the provisions of the Income War Tax Act.

Furthermore, the statement that an annual salary, being an amount duly ascertained and capable of computation is "of itself" a "net" income, and taxable as such under the statute, is, in my opinion, at variance with the definition of "income" contained in the taxing statute itself. Section 3 of the Income War Tax Act defines taxable income. In part it reads as follows:

> 3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, . . .

From this definition it appears that there are broadly two types of incomes, namely, those which are "ascertained" and capable of computation as being wages, salary, or other fixed amount, and those which are "unascertained" as being fees or emoluments, or as being profits, etc. The term "net" is an integral part of the statutory definition of taxable income. It is the annual "net" profit or gain or gratuity that is "income" for the purposes of the taxing statute. The statement made by Audette J. in the *Lieutenant-Governors' Case* to the effect that an income, such

as an annual salary, which is duly ascertained and capable of computation, constitutes "of itself" a "net" income, is in my opinion at variance with the statutory definition in that it does not give proper effect to the relationship of the word "net" in the statutory definition to the words that follow. The statement assumes that it is only with respect to "unascertained" incomes that there is any necessity to consider deductions in order to arrive at the amount of the annual "net" profit or gain or gratuity that is taxable income. The statute, in my opinion, shows clearly that it is the "net" profit or gain or gratuity that is taxable income whether the profit or gain or gratuity, of which only the "net" is taxable income, is ascertained or unascertained. The test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained", but whether it is "net". The word "net" in the statutory definition of taxable income is just as referable to what is ascertained as it is to what is unascertained.

There is nothing in the Income War Tax Act to justify the view that merely because an income, in the ordinary sense of the term, is of a fixed amount it is necessarily "net" income and taxable under the statute; nor does the statute preclude the possibility of deductions from fixed incomes in order to determine the amount thereof that is taxable under it.

Whether an income of a fixed amount is subject to deductions or not in order to determine the amount that is taxable income under the statute cannot be stated in general terms. In income tax matters generalizations are dangerous. Each case must be considered on the merits with all its attendant facts and circumstances. It is not necessary for me to go further for the purposes of this case than to hold that an income is not necessarily a "net" income and taxable as such under the statute merely because the amount of it is fixed.

If, therefore, the amount of the allowances received by the appellant in this case constitute income, they do not necessarily constitute "net" or taxable income within the meaning of the taxing statute merely because they are stated to be allowances of a fixed amount per diem. It remains to consider whether deductions from the total amounts received by the appellant are permissible under

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any of the provisions of the statute. Such consideration will also be helpful in determining whether in this case the allowances in question are taxable income at all, within the meaning of the statute.

Section 6 (*a*) of the Income War Tax Act provides as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

It will be observed that section 6 (*a*) contains a double negative. It does not define what disbursements or expenses may be deducted except in a negative way. The taxpayer may therefore make deductions for disbursements or expenses from what would otherwise be his taxable income only if they are outside the exclusions of the section. Why the statute should be couched in this double negative form, when statutes in other jurisdictions with similar objects are framed in positive terms, does not appear. This is, however, not a matter for the Court. Opposing views as to the effect of this section were strongly advanced by counsel. It was contended for the appellant that if the allowances in question were income the living expenses of the appellant while absent from his place of residence in connection with his duties were deductible, and in support of such contention he cited the definition of the section by the Supreme Court of Canada in *Minister of National Revenue* v. *Dominion Natural Gas Company Limited* (1), where Sir Lyman Duff C.J.C., in speaking of this statutory provision, said:

> First, in order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning "the income".

Counsel for the respondent, on the other hand, contended that this section had been very strictly interpreted and that under the authorities, the disbursements and expenses of the appellant in this case did not fall outside the exclusions of the section. In support of such contention he cited in addition to *In Re Salary of Lieutenant-Governors*

(1) (1941) S.C.R. 19, at 22

(*supra*), which has already been discussed, *Ricketts* v. *Colquhoun* (1); *Cook* v. *Knott* (2); *Jardine* v. *Gillespie* (3); and *Nolder* v. *Walters* (4).

In *Ricketts* v. *Colquhoun* (*supra*) a decision of the House of Lords, the facts before the court were that a barrister residing and practising at London, who held the office of Recorder of Portsmouth, which carried an annual emolument of £250 per year, claimed the right to deduct from the amount at which the emoluments of his office had been assessed, his travelling expenses incurred in travelling from London to Portsmouth and back and his hotel expenses incurred while at Portsmouth. The claim was made under the Income Tax Act, 1918, Schedule E, rule 9, reading as follows:

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

The House of Lords unanimously disallowed the claims and held that the travelling expenses were attributable to the exercise by the Recorder of his own volition in choosing to reside and practise in London and were not expenses which he was "necessarily obliged" to incur and defray in the performance of his duties as Recorder. Similarly it was held in respect of his expenses while at Portsmouth that none of these was expended "wholly, exclusively and necessarily in the performance" of his duties within the meaning of the rule. Viscount Cave L.C., said, at page 4, with regard to the travelling expenses:

> In order that they may be deductible under this rule from an assessment under Sch. E, they must be expenses which the holder of an office is necessarily obliged to incur—that is to say, obliged by the very fact that he holds the office and has to perform its duties—and they must be incurred in—that is, in the course of—the performance of those duties.
>
> The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties,

(1) (1926) A.C. 1.
(2) (1887) 2 Tax Cases, 246
(3) (1906) 5 Tax Cases 263.
(4) (1930) 15 Tax Cases 380.

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but partly before he enters upon them, and partly after he has fulfilled them. No doubt the rule contemplated that the holder of an office may have to travel in the performance of his duties, and there are offices of which the duties have to be performed in several places in succession, so that the holder of them must necessarily travel from one place to another, That was no doubt the case of the minister whose expenses were in question in the case of *Jardine* v. *Gillespie* (1) But it rarely, if ever, happens that a Recorder is in that position, and there is no suggestion that any such necessity exists in the case of the present appellant

and, at page 5, with regard to the hotel expenses:

Passing now to the claim to deduct the hotel expenses at Portsmouth, this claim must depend upon the latter part of r 9, which allows the deduction of money, other than travelling expenses, expended "wholly, exclusively and necessarily in the performance of the said duties". In considering the meaning of those words it is to be remembered that a decision in favour of the appellant would operate in favour, not only of Recorders, but of any holder of an office or employment of profit who is liable to be assessed under Sch E, and would or might enable every holder of such a position to deduct his living expenses while away from his home. It seems to me that the words quoted, which are confined to expenses incurred in the performance of the duties of the office, and are further limited in operation by the emphatic qualification that they must be wholly, exclusively and necessarily so incurred, do not cover such a claim A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment, nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.

Lord Blanesburgh pointed out that the expenses incurred by the Recorder were personal to himself and had nothing to do with his duties as Recorder, for the performance of which he received his emolument. At page 9 he said:

It seems to me, expenses incurred by him in going from and returning to his London professional chambers cannot in any true sense be described as money expended "wholly, exclusively, and necessarily" in the performance of his judicial duties. Rather are they expenses incurred by him because, for his own purposes, he chose to live in London; in other words they are purely personal to himself

And further:

Nor of the appellant's hotel expenses at Portsmouth can it, in my judgment, be said that they were incurred "wholly, exclusively, and necessarily, in the performance" of the duties of the office of Recorder of Portsmouth.

And later on the same page:

I cannot myself see why the appropriate expenditure by a Recorder living at Portsmouth in his own home during sessions is not as much

(1) (1906) 5 Tax Cas 263

wholly, exclusively, and necessarily expended in the performance of his duties as is the cost of the appellant's room at a hotel. The truth is that these expenses cannot in either case be properly so described; they are personal in each case to the Recorder—expenses to be defrayed, out of his stipend, but in no way essential to be incurred that he may earn it.

I need not refer in detail to the other cases. Both the *Lieutenant-Governors' Case* (*supra*) and *Ricketts v. Colquhoun* (*supra*) show how closely the words "wholly, exclusively and necessarily" have been construed. Counsel for the respondent contended that under the authorities cited by him, the expenses incurred by the appellant while absent from his place of residence in connection with his duties were not necessarily incurred by him in the performance of his duties as Hides and Leather Administrator, and were consequently not wholly, exclusively or necessarily expended by him to earn the income.

I cannot accept this contention in its entirety in relation to the facts of this case for it begs the basic question as to what the income was paid for, if, indeed, the allowances in this case are really taxable income at all. I have referred to *Ricketts* v. *Colquhoun* (*supra*) at some length, for the purpose of shewing how carefully the courts have considered what the income is paid for, and how closely the disbursements and expenses must be referable to the "process of earning the income". The facts in this case are fundamentally different from those in *Ricketts* v. *Colquhoun* (*supra*). In that case the London barrister received an annual emolument for the performance of his duties as Recorder of Portsmouth and the income for which he was being assessed was the amount which he received for the performance of his duties as such Recorder. In the present case, the appellant received no emolument for the performance of his duties as Hides and Leather Administrator, other than the purely nominal salary of one dollar. His duties required his attendance from time to time in Ottawa, and on one occasion, at least, he was required to go to Washington to confer with officials there. The per diem allowances that were paid to him were not referable to the performance of duties at all, and they were not income to him for the performance of duties. The per diem allowances were paid to him as living allowance for the days, while absent from his place of residence in connection with his duties. The payments were referable to

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his absence from his place of residence and were not referable to the performance of duties. If such payments, referable as they are only to absence from the appellant's place of residence, nevertheless, constitute income to him he is not debarred from deducting disbursements and expenses therefrom merely because the amount of the allowances is a fixed amount per diem, if they are wholly, exclusively and necessarily laid out or expended in the "process" of earning the "income", namely the payments for living allowances in respect of his days of absence. In that view of the object for which the so-called income was paid, and on that assumption that the amounts of the allowances are income to the appellant, I am of the opinion that he may deduct such disbursements and expenses as are "wholly, exclusively and necessarily" referable to the absences in respect of which the income was paid. In that sense there could not be any income to the appellant at all without absence from his place of residence and there could not be absence without some expense being "wholly, exclusively and necessarily" laid out or expended in the course of such absence. That some amount is deductible for such expenses seems to me beyond dispute. Such amount may not be easy of ascertainment, since some items of living expense would have been incurred by the appellant even if there had been no absences, but the administrative difficulty involved in ascertaining the amount of a deduction that should be allowed is no reason for its disallowance. Some solution of the administrative difficulty will have to be found.

It was also contended on behalf of the respondent that section 6 (*f*) of the Income War Tax Act should be read with section 6 (*a*). The former section provides as follows:

> 6 In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*f*) Personal and living expenses;

It was urged that the paragraphs of section 6 should be read conjunctively and that while an expense item might be deductible as falling outside the exclusion of paragraph (*a*) it might still be disallowed by reason of failing to fall outside the exclusion of some other paragraph of the section such as paragraph (*f*). I think that this contention may be accepted and that the form of stating it is likewise correct in view of the phraseology of the section, but

I do not agree that it is applicable to the facts of this case. The personal and living expenses referred to in section 6 (*f*) are those over which the taxpayer has a large amount of personal control, depending upon the scale of living which he may choose. Such expenses would probably not be deductible even if there were no provision in the statute relating to the matter, for if personal and living expenses were deductible from income and only the balance left for taxation purposes, the amount of net or taxable income would depend upon the taxpayer's own choice as to the scale of living that he might adopt and in many cases there would be no taxable income at all. It is obvious that the determination of what the taxable income of a taxpayer shall be cannot depend upon or be left to the taxpayer's own choice as to whether his personal and living expenses shall be up to the extent of his income or not. It is, I think, clear that the expenses of the appellant during his absences from his place of residence in connection with his duties, for which he received the per diem allowances, are not the kind of personal and living expenses referred to in section 6 (*f*), or rather, they are over and above the personal and living expenses contemplated by that section. It is only to a limited extent that the appellant in this case could control the expenses incidental to his absences from his place of residence. On the assumption that the per diem allowances are income, it may well be that to the extent that the expenses are the result of the appellant's choice, and are purely personal to him, and likewise to the extent that some expense would have been incurred even if he had not been absent from his place of residence, they are not deductible by reason of the exclusion by section 6 (*f*) of personal and living expenses, but that is not the case with respect to the items of expense that are inseparably connected with the absences and would not have to be incurred without them. Such expenses, being wholly, exclusively and necessarily laid out or expended in the course of and referable only to the absences in respect of which the allowances were paid, do not, in my view, fall within the exclusion of section 6 (*f*).

There remains for consideration one further section of the Income War Tax Act. Section 5 (*f*) thereof provides:

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5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions.—

(*f*) Travelling expenses, including the entire amount expended for meals and lodging, while away from home in the pursuit of a trade or business;

Counsel for the appellant relied on the provisions of this section, but I am of the view that it does not apply to the facts of this case. The travelling expenses to be deductible must have been incurred "in the pursuit of a trade or business". The appellant was not engaged in the pursuit of trade. His duties did not involve buying or selling or manufacturing. They were solely of an administrative nature; and clearly not in the nature of trade. Were they in the nature of business? The word "business" is not defined in the statute. It has, of course, a more extensive meaning than that which is given to the word "trade". In *Smith* v. *Anderson* (1), Jessel M.R., after citing certain dictionary definitions of "business", said:

> Anything which occupies the time and attention and labour of a man for the purpose of profit is business.

and in *Erichson* v. *Last* (2), Cotton L.J. said:

> When a person habitually does a thing which is capable of producing a profit for the purpose of producing a profit, he is carrying on a trade or business

The definition of the word "business" in *Smith* v. *Anderson* (*supra*) was approved and adopted by Osler J. in *Rideau Club* v. *City of Ottawa* (3) and by Godfrey J. in *Shaw* v. *McNay* (4) where the word "business" was also described as "a word of large and indefinite import".

The word "business" may also include an activity without pecuniary profit being contemplated at all. In such a connection, as was pointed out by Pearson J. in *Rolls* v. *Miller* (5) "business" is a very much larger word than "trade" and is employed in order to include occupations which would not come within the meaning of the word "trade"—the larger word not being limited by association with the lesser.

(1) (1880) 15 Ch. D. 247 at 258.
(2) (1881) 4 Tax. Cases, 422 at 427.
(3) (1908) 15 O.L.R. 118 at 122.
(4) (1939) O.R. 368 at 371.
(5) (1883) 53 L.J. Ch.D. 99 at 101.

In the United States, the Treasury has provided a definition of "trade or business" by a regulation contained in Article 8, Regulation 41, as follows:

> In the case of an individual, the terms "trade", "business", and "trade or business" comprehend all his activities for gain, profit, or livelihood, entered into with sufficient frequency, or occupying such portion of his time or attention as to constitute a vocation, including occupations and professions. When such activities constitute a vocation they shall be construed to be a trade or business, whether continuously carried on during the taxable year or not. *Vide* Federal Income Tax Handbook—Montgomery, page 303.

In my view, the term "trade or business" as it is used in section 5 (*f*) contemplates an activity in which the prospect of gain or profit is involved and "the pursuit of a trade or business" involves the pursuit of gain or profit. If that view is sound, then clearly the section does not apply to the facts of the appellant's case. His duties as Hides and Leather Administrator were not in the nature of trade or business contemplating the prospect of gain or profit, nor did he incur expenses in connection with such duties with a view to profit or gain therefrom. His duties as Hides and Leather Administrator for the Wartime Prices and Trade Board were in connection with the policies of price control which were entrusted to that body for administration and had no relation to trade or business with the prospect of gain or profit. If the allowances are income to the appellant it cannot be said that he received such income in respect of the trade or business of being Hides and Leather Administrator or that he was entitled to deduct his travelling expenses under section 5 (*f*) on the ground that he incurred them in the pursuit of such trade or business. Such a contention would involve the statement that he incurred the expenses with a view to earning the income. It is obvious that he did no such thing. He did not make the expenditures in order to get the allowances. I cannot, therefore, accept the contention of counsel for the appellant that he is entitled to deduction under section 5 (*f*) of the statute.

The answer to the difficulties that arise in considering the application of section 6 (*a*) and section 5 (*f*) to the facts of this case on the assumption that the payments of per diem allowances constitute income in the ordinary sense, and taxable income under the statute, after the proper deductions have been made, in order to determine

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the amount of net gain or profit or gratuity involved in the allowances, lies in the fact that the per diem living allowances in this case are not taxable income at all within the meaning of the Income War Tax Act.

An analysis of the terms of the Order in Council under which the appellant was appointed, and careful consideration of the duties he was called upon to perform, together with all the attendant circumstances including the financial conditions attached to the appointment, lead me to the conclusion that no remuneration to the appellant other than the purely nominal salary of one dollar per year was involved in the appointment or contemplated by the Order in Council, and that the per diem living allowances in this case were not taxable income at all within the meaning of the Income War Tax Act, but were intended to be reimbursement to the appellant for the additional living expenses to which he would be put by reason of his necessary absences from his place of residence in connection with his duties.

The Order in Council breaks up the payments which the appellant was to receive in a three-fold way, namely, (1) a salary of $1 per year, (2) his actual transportation expenses, and (3) a living allowance of $20 per diem while absent from his place of business in connection with his duties. It is obvious that the reimbursement which the appellant received for his actual transportation expenses cannot be considered as taxable income to him. The other reimbursement which he received, namely, the per diem living allowances, is also reimbursement to him of additional living expense, and does not cease to have the character of reimbursement merely because the amount is set at a fixed amount per diem. All that is meant thereby is that a top limit of reimbursement of additional living expense has been fixed by the Order in Council.

It was contended on behalf of the appellant that the term "living allowance" as used in the Order in Council was different from any of the terms used in section 3 of the Income War Tax Act, which is the section of the taxing statute that defines "income" for the purposes of the statute and also specifies what it shall include. While a careful examination of terms is desirable, such examination is helpful in income tax disputes only in so far as it makes for a correct analysis of the true and real nature of the

amount received by the taxpayer. The assessability for income tax purposes of any particular amount does not depend upon what it is called, but rather upon what it really is. It cannot be too strongly stressed that great care must be taken in construing the terms of the Income War Tax Act. The word "income" in its popular and ordinary sense has a wide import, but the word "income" as used in the Income War Tax Act has only the restricted meaning which the statute gives to it. It has been repeatedly emphasized by the courts, that both the taxing authorities and the courts in considering whether a particular amount received by a taxpayer is taxable income within the meaning of the taxing statute, must first give close attention to the definition of taxable income contained in the statute and then look at the real nature of the amount received by the taxpayer in order to determine whether it comes within the statutory definition. If it does not, the amount, while it might be income in the popular sense of the word, is not "income" for the purposes of the taxing statute. It follows, therefore, that an amount received by a taxpayer that is not "income" under the statute, cannot become such by calling it income nor can an amount that is really "income" under the statute cease to be such through being called by some other name. Nothing, therefore, turns on the fact that the payments made to the appellant in this case are called allowances nor does the fact that the word "allowance" does not appear in section 3 of the taxing statute have any significance. The word is used in a number of statutes with different meanings. Its use is not conclusive for the purpose of determining whether a receipt of money in the hands of a taxpayer is really in the nature of remuneration to him resulting in net gain or profit or gratuity or is really reimbursement to him of expenses.

Ordinarily, it may be assumed that neither the intention of the payer of an allowance nor that of the recipient of it as to whether it shall be taxable income or not can determine whether the amount of the allowance when it reaches the recipient is taxable income or otherwise. The intention of the parties cannot determine what is and what is not taxable income under the taxing statute.

It is otherwise, in my opinion, in the case of a statutory payment made under a statute having equal legislative

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authority to that of the taxing statute itself, where such statute has made it clear that the payment which it has authorized is not of such a kind as to be considered taxable income under the taxing statute.

Certain provisions of The Senate and House of Commons Act, R.S.C. 1927, chap. 147, will serve as illustrations of what I mean. That statute provides for the payment of certain allowances; it uses the word "allowance" with a variety of meanings, sometimes in a sense that clearly contemplates a payment by way of remuneration and elsewhere in a quite different sense. For example, it is provided by section 33 that for every session of Parliament which extends over a period of sixty-five days or more there shall be payable to every member of the Senate and House of Commons, attending such session, a sessional allowance of four thousand dollars and no more. While the section is under the head note "Indemnity" and the payment is generally referred to as a sessional indemnity, the section of the statute authorizing its payment describes it as a sessional "allowance". It may be noted that this statutory payment is within the purview of the Income War Tax Act for section 3 thereof, in addition to defining "income" for the purposes of the Act, as meaning annual net profit or gain or gratuity, also states that "income" shall include:

> And also the annual profit or gain from any other source including
>
> (*d*) the salaries, indemnities or other remuneration of
>
> (i) members of the Senate and House of Commons of Canada and officers thereof, etc.

Apart entirely from what Parliament may have intended by the statutory provision for the payment of a sessional indemnity or sessional allowance, the Income War Tax Act has specifically provided or declared that the annual profit or gain from this source is included in "income" for the purposes of the Act. It may be interesting to note that in *Caron* v. *The King* (1), which upheld the right of the Parliament of Canada to enact the Income War Tax Act, 1917, and the amending Act of 1919, by which the above and other "salaries, indemnities or other remuneration" were included under the Act, Lord Phillimore in delivering the judgment of their Lordships of the Privy

(1) (1924) A C 999.

Council, expressed doubt as to whether the specific amendment of 1919 had been necessary. At page 1005 he said:

> It may be doubted whether it was necessary to amend the original Act in order to bring the various officers mentioned in s. 2 of the Act of 1919 within the scope of the Act of 1917. But assuming that this amending legislation was necessary, it is not to be regarded as in the nature of specific legislation directed against certain public officers, but merely as declaratory that certain classes of income are, as they certainly would be in this country, liable to taxation and not exempt.

Then section 42 of the same statute authorizes a payment to the member occupying the recognized position of the Leader of the Opposition in the House of Commons, in addition to his sessional allowance, and describes it as "an annual allowance of ten thousand dollars". The fact that this payment is referred to in the statute as an "allowance" does not prevent the amount of it from coming within the ambit of the term "the salaries, indemnities or other remuneration" as used in section 3 (*d*) of the Income War Tax Act. Of that there can be no doubt. But there is still another kind of allowance authorized by the Senate and House of Commons Act which is of an entirely different character. Section 43 provides:

> For each session of Parliament, there shall also be allowed to each member of the Senate and of the House of Commons his actual moving or transportation expenses, and reasonable living expenses while on the journey between his place of residence and Ottawa, going and coming, once each way.

It is obvious that this statutory allowance is not taxable income. Thus far there is no difficulty. Subsection 3 of section 43, however, provides for the commutation of these travelling and living expenses as follows:

> 43 (3) Any member residing at a greater distance than four hundred miles from Ottawa may commute such allowance for travelling and living expenses, receiving in lieu thereof an allowance of fifteen dollars per day for each day necessarily occupied in the journey between his place of residence and Ottawa, going and coming, once each way, the day of departure and the day of arrival being counted each as a full day.

The statute has made it clear that this statutory payment, also described as an "allowance", is not in any sense to be regarded as remuneration, whether the allowance is paid for "actual moving or transportation expenses, and reasonable living expenses" in the case of members residing within 400 miles from Ottawa or as a commuted allowance for such expenses at the fixed rate of $15 per day, in the case of members residing farther away. The commuting

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of the reimbursement at a fixed rate per day does not change its essential character as a reimbursement or have the effect of turning into taxable income what was never intended by the statute to be such.

The fact that statutory payments of allowances are stated in a fixed amount does not change their character. In each case the true intendment of the statute must be ascertained. If a statutory enactment or its equivalent makes it clear, that a payment authorized by it is not by way of remuneration but only by way of reimbursement of expense, then the amount of such payment is not taxable income in the hands of the recipient unless the Income War Tax Act has clearly made it so, either in express terms or by necessary implication. If there is any reasonable doubt in the matter it should be resolved in favour of the taxpayer, for Parliament by appropriate legislation can easily put the matter beyond dispute.

The same observations will apply to other statutory allowances made for specific purposes, where the statute has made it clear that the payments are not made or received by way of remuneration. Where such allowances, according to the real intendment of the statute, are made for purposes other than those of gain or profit or gratuity to the recipient, they are not taxable income and do not become such because the amount of the allowance is fixed. Where the allowance is authorized for expenses, the fixed amount is to be regarded as the amount of expenses beyond which no reimbursement is authorized.

The same consideration should govern the interpretation and construction of the Order in Council under which the appellant was appointed. The full text of the Order in Council is to be found in Vol. I of Proclamations and Orders in Council, passed under the authority of The War Measures Act, R.S.C. 1927, chap. 206, at page 117—*Vide Canada Gazette,* October 7, 1939. While the Order in Council is not expressed to be made pursuant to the powers conferred by the War Measures Act, nevertheless it derives its authority therefrom. The Order in Council creating the Wartime Prices and Trade Board, under which the appellant acted as one of its administrators, was expressed to be made pursuant to the War Measures Act. It was held recently by the Supreme Court of Canada in *The*

Chemical Regulations Reference (1) that an Order in Council, passed under the authority of the powers conferred by the War Measures Act, has the effect of an Act of Parliament and is a legislative enactment, having the force of law to the same extent as any other statute. The Order in Council now under consideration comes within that statement.

If the Order in Council had provided for payment to the appellant of his actual transportation expenses and his actual living expenses while absent from his place of residence in connection with his duties no issue as to taxability of the allowances could reasonably have arisen for no element of net gain or profit to the appellant could have been present. This would have been so, even if the actual expenses incurred by the appellant, over and above his usual personal and living expenses, had exceeded the amount of the fixed allowances, which was the fact in this case, according to the sworn testimony of the appellant which I accept. Indeed, that fact is not in dispute. I do not think that this fact is material. What difference does it make to the essential character of the allowance that its amount is fixed at $20 per day? All that is meant by such fixation is that the Order in Council has set a top limit to the reimbursement that is authorized for the additional living expenses incurred. In view of the legislative effect of the Order in Council, the per diem allowance authorized by it is a statutory allowance for expense purposes of the same kind as the statutory allowances of $15 per day for travelling and living expenses authorized by subsection 3 of section 43 of the Senate and House of Commons Act. I think that this is abundantly clear from the terms of the Order in Council with its attendant circumstances.

It may well be that an arrangement made between individuals, under which a fixed amount is paid for certain expense purposes, may result in net gain or profit to the recipient of the fixed amount through his actually spending less than the fixed amount on such expenses, and the recipient may be properly assessable for income tax in respect of such net gain or profit in that it becomes remuneration to him, but, in my view, a similar consequence does not follow in the case of a payment authorized by a

(1) (1943) S C R 1

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statute, emanating from the same legislative authority that enacts the taxing statute. If, under a statutory allowance, not intended or contemplated by the statute to be otherwise than for expense purposes, the recipient of it spends less than the amount fixed by the allowance, that is an individual and personal incident which does not alter the statutory effect of the allowance or transform it into taxable income. In such a case my view is that while the individual recipient may have made a saving in respect of the expenses, such saving is not "income" within the meaning of the Income War Tax Act. If it is gain or profit, it is an item that, in my opinion, is not caught, if I may use the term, by any of the provisions of the taxing statute.

As I interpret the Order in Council, I have come to the conclusion, having regard to all the circumstances of the case, that the per diem living allowances authorized by it involved no element of remuneration or net gain or profit or gratuity to the appellant, and did not result in any gain or profit to him. They were paid and received only as reimbursement of living expenses, over and above ordinary personal and living expenses up to the fixed amount per day. They were not in any sense "income" as defined by the Income War Tax Act and the appellant should not have been assessed for income tax purposes in respect of them.

In view of what has already been stated it is, perhaps, not necessary to say that the use of the word "allowance", whether in a statute or otherwise, does not of itself determine whether the amount of it is solely reimbursement of expense or whether it may have implications of remuneration. It is clear that in many cases the provision of an allowance, having regard to all the attendant circumstances, is in reality the payment of remuneration in respect of which the recipient is properly assessable for income tax purposes. The test is not merely that the amount is fixed. No such easy determination is possible, however convenient it may be for administrative purpose. In each case the true nature of the amount, by whatever name it may be described, must be determined.

In view of the foregoing the appeal herein must be allowed with costs.

Judgment accordingly.

THE ONTARIO ADMIRALTY DISTRICT

1943
Jan. 26
Jan. 28

BETWEEN:

WILLIAM ROSS, ET AL.....PLAINTIFFS;

AND

THE SHIP *ARAGON*.....DEFENDANT,

AND

ALLAN F. MORLEY AND NORMAN R. GIBB.....THIRD PARTIES.

Shipping—Maritime lien—Transferability of lien—Seamen's wages—Discharge of lien by payment of wages—Action in rem for reimbursement.

Held: That the maritime lien attaching to a seaman's wages is personal to the seaman and not transferable, and when the master and crew have been paid and their debts satisfied the maritime lien ceases to exist.

ACTION in *rem* by an assignee of a maritime lien for wages alleged to be due the master and crew of the ship *Aragon*.

The action was tried before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

R. J. Dunn for plaintiffs.

G. P. Campbell, K.C. and *F. H. Keefer* for defendant.

F. W. Bartrem for *Norman R. Gibb*.

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

BARLOW, District Judge in Admiralty, now (January 28, 1943) delivered the following judgment:

BARLOW J.: The plaintiff Graham was the master, the plaintiff Ross the second mate, the plaintiff Springthorpe the chief engineer, the plaintiff Lumby the second engineer, the plaintiff Gallaway the second assistant engineer, and the remaining plaintiffs were seamen of the ship *Aragon*. The plaintiffs as such claim in varying amounts, as set out in the statement of claim, a total sum of $2,170.78 for wages for services performed on the *Aragon* during the month of August 1940.

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ROSS, ET AL AND THE SHIP *Aragon* AND ALLAN F. MORLEY AND NORMAN R. GIBB

Barlow J.

Pursuant to a Charter Party made between Sterling Gravel and Supplies Limited, the owners of the *Aragon* and Allan F. Morley and Norman R. Gibb, the third parties to this action, which Charter Party is dated the 31st day of July, 1940, the third parties chartered the *Aragon* and covenanted *inter alia* to pay all accounts for wages in connection with the *Aragon* and indemnify and save harmless the owners of the *Aragon* against all liens or charges for wages.

The evidence shows that Morley, one of the charterers and one of the third parties to this action, hired the crew (the plaintiffs) of the *Aragon* and became responsible for the payment of their wages.

The wages of the crew of the *Aragon* not having been paid for the month of August, 1940, the said Morley approached the Weaver Coal Company and one C. P. Hotchkiss, who is connected in a capacity which is not shown in the evidence with the Weaver Coal Company, with the result that the said Morley drew a draft, on either the Weaver Coal Company or C. P. Hotchkiss, for $1,600, which draft was accepted by C. P. Hotchkiss, and the said sum of $1,600 advanced by the Royal Bank of Canada to the said Morley. Morley then proceeded to Windsor where the *Aragon* was berthed, and proceeded to pay to each of the plaintiffs the overdue wages. The sum of $1,600 not being sufficient Morley discounted his own note with the Royal Bank of Canada for a further sum of $550. It is to be noted that Morley who had hired the plaintiffs and who was responsible for their wages, paid to each of them the wages which they now claim in this action. At the time of making the said payments Morley obtained from each of the plaintiffs a document, which documents are filed in this action as Exhibit 1. Each document is signed by a plaintiff and witnessed by Morley. Each of these documents is in the following form and is identical, except that the amount owing to the particular plaintiff signing the same is inserted:

> I, the undersigned, hereby acknowledge the advance by C. P. Hotchkiss to me by way of loan, of the sum of $126 50 (One hundred and twenty-six dollars and fifty cents) and I hereby nominate and appoint the said C. P. Hotchkiss my attorney and agent, for me and on my behalf to prosecute my claim against the Steamship *Aragon* for seamen's wages owing to me up to and inclusive of the 31st day of August, 1940, and to settle and adjust the same in his sole discretion, and to bring suit in my name if he deems it advisable.

It is understood that repayment of the advance made to me by the said C. P. Hotchkiss shall be made only out of the moneys which may hereafter be recovered on my behalf by virtue of my said claim for wages.

It is further understood that I am not to be responsible for any interest charges on the said loan or for any costs or expenses of any kind incurred by the said C. P. Hotchkiss in prosecuting, settling or adjusting my said claim against the Steamship *Aragon*.

Counsel for the plaintiffs states that his instructions come from C. P. Hotchkiss and that under the agreement Exhibit 1, Hotchkiss becomes entitled to sue in the names of the plaintiffs for the various amounts claimed. The said document, Exhibit 1, is in reality an assignment of the claim of each of the plaintiffs. Although Morley was responsible for the payment of the wages claimed by the plaintiffs in this action, and although the plaintiffs have been paid in full by Morley, and although Morley in the Charter Party, Exhibit 2, agreed to pay all accounts for wages in connection with the said ship and indemnify the owner of the said ship against liens, nevertheless he is attempting by Exhibit 1 to keep alive the maritime lien which arises when a seaman's wages are unpaid. The law is well settled that a maritime lien is a right vested in a particular person (in this case the seamen), and it cannot without an order of the Court, except in the case of a lien arising out of a bottomry bond, be transferred to another person so as to give such transferee the rights of the man who by certain acts had become possessed of a particular right in *rem*. Once the master and the crew have been paid and their debts satisfied the maritime lien ceases to exist.

Does the agreement Exhibit 1 keep alive the maritime lien? Upon the facts set out above I am of the opinion that once Morley, the person liable to make payment of the wages, paid the same and the wages were received by the plaintiffs, the maritime lien of each of the plaintiffs ceased to exist. The obtaining by Morley at the time of the payment of the said wages of the agreement Exhibit 1, was a subterfuge for no other purpose than to enable him to collect from the *Aragon* the very wages which in the Charter Party, Exhibit 2, he covenanted to pay and against which he agreed to indemnify the owners of the *Aragon*. In the true sense of the word the payment made to the

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Barlow J.

plaintiffs was not an advance by Hotchkiss, as set out in the said agreement Exhibit 1. It was a payment made by Morley.

See the following references with reference to maritime liens.

Price, The Law of Maritime Liens, p. 74; *The Petone* (1); *Bonham* v. *Ship Sarnor* (2); *McCullough* v. *Ship Samuel Marshall* (3); and *Rankin* v. *The Ship Eliza Fisher* (4).

For the above reasons the action will be dismissed with costs to the defendant. The third party proceedings will be dismissed, but under all the circumstances without costs.

Judgment accordingly.

1942

Oct. 29 & 30.

Nov. 12.

BETWEEN:

HIS MAJESTY THE KING on Information of the Attorney-General of Canada, and on behalf of the Brokenhead Band of Indians ..... PLAINTIFF;

AND

KLYM WEREMY ..... DEFENDANT.

Crown—Real property—Action for recovery of possession of Indian reserve land—Dominion Lands Surveys Act, R.S.C., 1927, c. 117, s. 62—Boundaries—Ascertainment of boundaries by means of monuments—Validity of the Indian Act, R.S.C., 1927, c. 98, s. 39.

The action is one for the recovery of possession of land forming part of an Indian reserve.

Held: That the boundaries of the land concerned as defined by the monuments placed at the corners thereof shall be deemed to be the true boundaries.

2. That the indication on a plan of a certain acreage in a particular quarter section of land was not a warranty by the Crown to its grantee or his successor in title.

3. That the Indian Act, R.S.C., 1927, c. 98, s. 39, is *intra vires* of the Parliament of Canada.

INFORMATION by the Attorney-General of Canada to recover possession of certain land now in the occupancy of defendant, part of an Indian reserve.

(1) (1917) P.D. 198 at 208.
(2) (1914) 21 Ex. C.R. 183.
(3) (1924) Ex. C.R. 53.
(4) (1895) 4 Ex. C.R. 461 at 466.

The action was tried before the Honourable Mr. Justice Robson, Deputy Judge of the Court, at Winnipeg.

C. V. McArthur, K.C. and *F. R. Evans* for plaintiff.

W. A. Molloy for defendant.

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

ROBSON, Deputy Judge, now (November 12, 1942) delivered the following judgment:

This action was brought in the name of His Majesty the King on the information of the Attorney-General of Canada, and on behalf of the Brokenhead band of Indians. It is alleged that the defendant, a farmer and adjoining proprietor, wrongfully entered upon and occupied and still occupies a portion of the reserve allotted to the band. The land in question is hay land and is of comparatively small acreage, namely, 42·4 acres. The defences raised will appear as I proceed to discuss the case. One issue was to the location of the line between the reserve and defendant's land. There was a trial with witnesses at Winnipeg, on the 29th and 30th of October, 1942, when judgment was reserved.

It is unnecessary to go into such matters as the recognition of the primitive Indian rights, or the duty towards our Indians assumed by the Dominion on the acquisition of Rupert's Land at the time of the surrender by the Hudson's Bay Company. We know that treaties were made and that they are recorded in official publications. Also that the originals of the band which became known as the Brokenhead band were a portion of the larger number of Chippewas and Swampy Crees, whose surrender of the indefinite Indian title, on terms as stated, was set out in Treaty No. 1, (3rd August, 1871). It is natural to suppose that the band immediately in question were those Indians who, in choosing a habitation after the Treaty, eventually settled in the area watered by the Brokenhead river (flowing northwest into Lake Winnipeg, near the south end), and became known as the Brokenhead band. This is all mere introduction for the fact is that in due time the band fixed itself to the locality now in mind.

The original survey of the reserve took place before the township and range and sectional survey preparatory to

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Robson J.A.

settlement. The original survey of the reserve was made in 1873, but owing to uncertainty as to the boundary on the northwest, confirmation of the reserve by Order in Council did not take place till 1916. When the township surveys were undertaken the northerly limit of section 25, township 15, range 6, east of the principal meridian, coincided with the southerly limit of the reserve (subject to a road allowance in between). But because of the proximity of the reserve the north half of section 25 was fractonal, meaning in this case that it did not contain the normal 320 acres; that the northwest quarter was accordingly fractional and did not contain 160 acres. "Fractional," of course, may mean that the normal figure is either reduced or exceeded; here it means reduced. This is all due to surveyor's problems on the ground which need no further elaboration.

The defendant's land, northwest quarter of section 25, was originally part of what were known as swamp lands conveyed by the Dominion to the Province. The Province granted the land described as "all of section 25, south of the Indian reserve" to C. W. Fillmore, and there were other conveyances down to the acquisition of the northwest quarter by defendant to be mentioned.

In 1925 the defendant entered into an agreement for the sale to him by one McLean of the northwest quarter of section 25. This was completed in November, 1926, and defendant then obtained a certificate of title. In the agreement and in the certificate of title the land was merely described as "the fractional quarter section 25" and no acreage was stated.

Defendant admits that at the time of this agreement he had his mind directed to the question of acreage. He said he inquired of a Provincial Government surveyor and was shown a plan of survey (evidently a copy of a Dominion township plan) in which the acreage of the northwest quarter of section 25 was given at 127·28 acres; that he could not afford a survey or other means of verification, and was satisfied with what he saw on the plan. He says that he made certain measurements and thought that his acreage extended to the 42·4 acres which it is now alleged are part of this reserve, and on which it is alleged defendant is a trespasser. Defendant says he bought the

land by the acre, that he worked himself and employed men to work in making a ditch to drain the land, and that he has paid taxes in respect of the disputed area. It is testified by Mr. Donnelly, the Dominion Land Surveyor, that the road allowance was not opened between section 25 and the reserve. Mr. Donnelly said there was no occupation within some miles to the north.

According to one of the departmental township plans, dated 23rd December, 1896, compiled from surveys in 1874, 1884, and 1888, the northwest quarter of section 25 contains 127·28 acres. It is said that the acreage is actually only 65·4 acres, but that was not explained and for the present purpose is immaterial. It will do the defendant no harm if I accept for the present purpose defendant's contention that when he bought from McLean he was to get 127·28 acres. I infer that the 127·28 acre content marked on the plan was calculated by the surveyor as the area of the abbreviated quarter section less the road allowance between the reserve and the northwest quarter of section 25.

Mr. Donnelly, D.L.S., was called as a witness by the Crown. He testified that from actual examination he found that defendant had fenced and occupied the 42·4 acres. There was no relevant impeachment of the surveys from which the plans produced were made, or of the testimony of Mr. Donnelly, and I must find that he located the southern boundary of the reserve as originally laid out and as confirmed by the Order in Council by means of original monuments and his own accurate survey and found that it was south of the 42·4 acres and that therefore defendant had no title to that portion and was in fact a trespasser.

It is unnecessary to go into a discussion of the various plans and field notes that were adduced in evidence. Suffice to say that these all, aided by Mr. Donnelly's testimony as to discovery of the monuments, convince me as above stated. According to section 62 of the Dominion Land Surveys Act it is the monuments that count. See *Cain* v. *Copeland* (1) and *Kristiansson* v. *Silverson* (2). I see no possibility, in view of the evidence, of the application of section 56 of the Surveys Act, (for the correction of errors) referred to by Mr. Molloy.

(1) (1922) 2 W.W.R. 1025. (2) (1929) 3 W.W.R. 322

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I must hold that the indication on the plan of an acreage of 127·28 acres in the northwest quarter of section 25 was not a warranty by the Crown to Fillmore or his successors in title, nor could there possibly be estoppel. It was at defendant's own risk to be satisfied as to the area and as to its exact limits on the ground. (See Section 62 of the Surveys Act.) It is unfortunate that owing to his lack of skill he did not look for the monuments, or at least the monuments indicating the southwest corner of this reserve contiguous to his own land, and which Mr. Donnelly found on his ascertainment of the lines. It can only be said as a matter of law that defendant had no right to enter upon the 42·4 acres which he occupied and which were in fact part of the reserve. While not wishing to find defendant untruthful but rather suppose him to be ignorant, on the evidence it would be hard to find as a fact that defendant was actually misled by the plan he saw into believing that his land extended so far as the north limit of the fence he erected—as it turns out, on the reserve.

Defendant's counsel raised the objection in point of law that section 39 of the Indian Act (Cap. 98, R.S.C., 1927) was *ultra vires* of Parliament. That section authorizes proceedings by the Attorney-General on instructions of the Superintendent General of Indian Affairs for recovery of possession of reserves. The instructions of the Superintendent General of Indian Affairs were given in this case. I gave close attention to the earnest argument of counsel for the defendant on this point, but I must say there is in my mind no room for the slightest doubt that the section was thoroughly well founded; *The King* v. *McMaster* (1). Aside from that, however, the title here was in the Dominion Crown, subject to its treaty obligations to the Indians. In addition there was the right to protect the property of the Crown held for its wards. See paragraph 11 of the Manitoba National Resources agreement (Stat. Can., 1930, Cap. 29) which preserved the title in the Dominion Crown.

I think there must be judgment for the Crown for possession of the 42·4 acres. The Crown does not ask for profits. In *R.* v. *McMaster* (*supra*) the late President

(1) (1926) Ex. C.R. 68

of this Court did not award costs. I think the circumstances here equally justify me in following that course, so there will be no costs. I would recommend that defendant be given a reasonable time to remove his fence and anything else he may have on the disputed land.

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Judgment accordingly.

BETWEEN:

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA..... PLAINTIFF;

1942
Jan. 8
1943
Feb. 12

AND

DOMINION ENGINEERING COMPANY LIMITED..... DEFENDANT.

Revenue—Sales Tax—Special War Revenue Act, R.S.C. 1927, c. 179, secs. 86, 95 and 106—Liability for sales tax on progress payments not collected—"Falls due" and "becomes payable"—No sales tax payable by manufacturer on amounts overpaid by purchaser.

THE ACTION is for the recovery from defendant of the sum of $10,844.46 for sales tax, and penalties alleged due the plaintiff under the Special War Revenue Act, R.S.C. 1927, c. 179.

Defendant company, incorporated under the laws of the Dominion of Canada, entered into a contract for the sale of a machine and accessories to the Lake Sulphite Pulp Company Limited for the price of $488,335 payable in 9 monthly instalments and one further instalment to be paid after the machine was placed in operation, and in no event later than 6 months from the date of final shipment or offer of shipment of the machine. The property in the machine was not to pass to the purchaser until all payments under the contract had been made. Except for two small parts worth about $1,200 only, the machine was never delivered to the purchaser. Six instalments of the purchase price were paid to defendant and the sales tax on these instalments was paid to the plaintiff by defendant. The defendant did not receive the last four instalments due it from the Lake Sulphite Pulp Company Limited. No

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sales tax on these four instalments was paid by defendant and plaintiff now seeks to recover from it the sales tax on three of these payments.

Held: That the machine never having been delivered except for the parts above mentioned there could be no liability on defendant for sales tax under ss. 1 (*a*) of s. 86 of the Special War Revenue Act.

2. That the phrase "falls due" in the proviso to ss. 1 (*a*) of s. 86 of the Special War Revenue Act refers to the terms of payment as set forth in the contract and the phrase "becomes payable" in the same proviso refers to the time when the progress payments will mature and become exigible in accordance with the progress made in the building of the machine.

3. That the progress payments stipulated in the contract fell due and were exigible in the proportion the work progressed and the sales tax thereon was payable *pro tanto* at the time such payments fell due and became payable and if there were no progress in the work there were no payments due and consequently there was no tax leviable.

4. That no sales tax is due plaintiff on the amount defendant was overpaid by the purchaser of the machine.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant sales tax and penalties alleged due the Crown under the provisions of the Special War Revenue Act, R.S.C. 1927, c. 179, and amendments thereto.

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

Roger Ouimet for plaintiff.

L. A. Forsyth, K.C. and *H. H. Hansard* for defendant.

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

ANGERS J., now (February 12, 1943) delivered the following judgment:

This is an information exhibited by the Attorney General of Canada on behalf of His Majesty the King whereby it appears that the latter claims from the defendant the sum of $10,844.46 for sales tax, penalties as provided for by section 106 of the Special War Revenue Act (R.S.C. 1927, chapter 179) to the date of payment and costs.

[The learned Judge here refers to the pleadings and continues]:

The contract, in the form of a proposal by the defendant to Lake Sulphite Pulp Company Limited and an acceptance by the latter, the first dated June 5, 1937, and the second, August 3, 1937, was filed as exhibit P1.

The proposal made by the defendant, addressed to Lake Sulphite Pulp Company Limited, Montreal, contains at the outset the following stipulation:

> Dominion Engineering Company, Limited (hereinafter called the Company), proposes to furnish apparatus as follows, at the price, on the terms and under the conditions specified herein; it being agreed that wherever the word "apparatus" appears herein, it shall be understood (wherever the context so permits) to comprise any and all of the goods; wares and merchandise which may be made the subject matter of the proposed contract:—
>
> Description of apparatus
>
> One (1) Dominion Pulp Drying Machine with Minton Vacuum Dryer, having a wire width of 168 inches, in accordance with the attached specifications, but not including stock, white water or vacuum pumps, condenser equipment, screens, wires, deckles, felts, ropes or other clothing or any electrical equipment, unless specifically stated to be included.

The contract provides that all plans and specification thereto shall form part thereof. There is no plan attached to the contract but there is a specification, which has no bearing on the question at issue.

The contract then stipulates that all apparatus shall be installed at the expense of the purchaser, unless otherwise agreed. It goes on to say that the services of engineers, millwrights or mechanics furnished by the company to superintend the erection or operation of the apparatus shall be reimbursed to the company by the purchaser monthly, independently of the contract account, at the company's regular rates at the time the work is done. It adds that all labour and material required in connection with these services will be furnished by the purchaser.

Skipping over certain articles which, to my mind, have no materiality herein, I deem it apposite to reproduce verbatim the clause dealing with the payments and the right of property in the apparatus in question; it reads thus:

> The property and right of possession in the apparatus and the right to use the same under any and all patents relating to any of the apparatus herein specified shall not pass from the Company until all payments hereunder (including deferred payments and payments of notes and renewals thereof, if any), shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the

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Company, whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in the Company. If default is made in any of the payments in the manner and form and at the times herein specified the Company may retain any and all partial payments, which have been made, as liquidated damages and as rental for the use of such apparatus, and the Company shall be entitled to the immediate possession, of said apparatus and shall be free to enter the premises where such apparatus may be located and remove the same as its property, without prejudice for recovery of any further damages which the Company may suffer from any cause. . . .

The next clause in the contract offering some interest in the present case is the one concerning the price; it is worded as follows:

The price of said apparatus is

Item No. 1:

For the machine complete as specified—*Four hundred and seventy-three thousand nine hundred and twenty dollars* ($473,920).

Item No. 2:

For spare parts as listed in page No. 3-A—*Fourteen thousand four hundred and fifteen dollars* ($14,415).

The above prices are f.o.b. the Company's works with freight allowed to Nipigon, Ontario, and including Dominion Government Sales Tax of 8 per cent.

I do not think that it is necessary, nay even advantageous, to quote the list of spare parts referred to in item No. 2.

The following clause which has some importance is the one fixing the terms of payment, which states:

The terms of payment are as follows:—

Nine (9) monthly progress payments of *forty-eight thousand eight hundred dollars* ($48,800) each, commencing July 5th, 1937, and continuing on the fifth of each month thereafter until a total of *four hundred and thirty-nine thousand two hundred dollars* ($439,200) has been paid.

Final payment to be made after the machine is placed in operation but in no event later than six months from the date of final shipment or offer of shipment of the apparatus from the Company's works.

The contract then provides that all payments shall be made in funds at par Montreal and that, in case partial shipments are made, pro rata payments shall be made therefor and it adds:

If the manufacture or shipment of the apparatus herein specified, or any material part thereof, is delayed from any cause for which the Purchaser is directly or indirectly accountable, the date of completion of the apparatus shall be regarded as the date of shipment in determining when payments for said apparatus are to be made, and the Company shall be

entitled to receive reasonable compensation for storing the completed apparatus, which shall be held at Purchaser's risk. The Purchaser shall reimburse the Company for any extra cost or expense incurred in the manufacture, delivery or installation of apparatus due to such delay.

Regarding the shipment the contract stipulates as follows:

> The apparatus specified above will be shipped as follows —
> Final shipment on or before March 5th, 1938.

[The learned Judge here considers the evidence and continues]:

In brief the evidence discloses the following material facts:

Dominion Engineering Company Limited started to work on the pulp drying machine provided for in the contract on June 15, 1937, and the work ceased on February 11, 1938;

Dominion Engineering Company Limited got behind in its work mostly due to the fact that it had undertaken more than it could perform within the time agreed upon;

Lake Sulphite Pulp Company Limited made the monthly progress payments on the machine purchased from Dominion Engineering Company Limited falling due on the 5th of July, August, September, October, November and December, 1937, on the following dates, viz. the first two on August 27, 1937, and the others on September 30, October 7, November 13, 1937, and January 11, 1938;

In view of the delay in the execution of the contract by Dominion Engineering Company Limited, Lake Sulphite Pulp Company Limited decided not to make any further payments after the one made on January 11, 1938, which, under the contract, fell due on December 5, 1937;

When the work was stopped on the building of the machine by Dominion Engineering Company Limited on February 11, 1938, Lake Sulphite Pulp Company Limited had overpaid a sum of $15,300;

Lake Sulphite Pulp Company Limited was in financial difficulties towards the end of December, 1937, and it went into liquidation at a time which has not been plainly specified, but on or about February 22, 1938, a provisional liquidator was said by counsel to have been appointed on February 5;

Dominion Engineering Company Limited paid the sales tax on the progress payments received from Lake Sulphite

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Pulp Company Limited on or about the last day of the month following the receipt thereof, to wit September 30, October 30, November 30 and December 31, 1937, and January 31, 1938;

Dominion Engineering Company Limited did not pay any sales tax on the sum of $15,300 overpaid by Lake Sulphite Pulp Company Limited.

Notwithstanding the fact that the defendant received only $15,300 on the progress payment falling due on January 5, 1938, and did not receive the progress payments falling due on February 5 and March 5, 1938, the plaintiff contends that he is entitled to the sales tax on the full amount thereof.

The plaintiff bases his claim on section 86 of the Special War Revenue Act (R.S.C., 1927, chap. 179, and amendments), the relevant provision whereof reading thus:

86. 1. There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,—

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

Provided that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall, for the purposes of this section, be regarded as sales and deliveries.

Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

As plaintiff claims in addition to the sales tax the penalties provided for by section 106 of the Act, it seems convenient to reproduce here the relevant part of this section:

106 1. Every person liable for taxes under Parts XI, XII and XIII of this Act and every manufacturer or producer licensed under section ninety-five thereof, . . . shall file each month a true return of his taxable sales for the last preceding month in accordance with regulations made by the Minister. . . .

2 If no taxable sales have been made during the last preceding month, a return verified as hereinbefore provided, shall be filed, stating that no such taxable sales have been made.

3. The penalty for failure to file the return required by subsections one and two of this section, within the time required by subsection four hereof, shall be a sum not less than ten dollars and not exceeding one hundred dollars.

4. The said return shall be filed and the tax paid not later than the last day of the first month succeeding that in which the sales were made.

5. In default of payment of the said tax or any portion thereof within the time prescribed by this Act or by regulations established thereunder, there shall be paid in addition to the amount in default, a penalty of two-thirds of one per centum of the amount in default, in respect of each month or fraction thereof, during which such default continues.

Section 95 to which section 106 refers contains, among others, the following provision:

95. 1. Every manufacturer or producer shall take out an annual licence, for the purpose of this Part, and the Minister may prescribe a fee therefor, not exceeding two dollars.

It is agreed that defendant at all times material held a licence.

The Dominion Pulp Drying Machine which forms the object of the contract is either divisible or indivisible. If it is indivisible, the plaintiff has no claim against the defendant since the machine was not delivered, with the exception of the sole-plates worth about $1,200, an infinitesimal proportion of the whole, when one considers that the price of the machine complete is $488,335. The tax indeed is payable by the producer or manufacturer of the goods at the time of the delivery thereof to the purchaser: sec. 86, 1 (*a*). If, on the contrary, the machine must be considered as divisible, the case is governed by the first proviso of section 86, 1 (*a*). In this case the tax is payable *pro tanto* at the time each of the instalments on the purchase price *falls due* and *becomes payable* in accordance with the terms of the contract. Both conditions must exist in order that the tax be exigible.

The sales tax payments which became due in connection with the instalments on the purchase price which matured on July 5, August 5, September 5, October 5, December 5, 1937, were made on the dates hereinabove mentioned.

The instalments falling due under the contract on January 5, February 5 and March 5 were not effected. On February 11 when the work was discontinued, Dominion Engineering Company Limited had received $15,300 in excess of the value of the work it had done and on this sum it did not pay any sales tax to the plaintiff.

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Counsel for plaintiff referred to, but did not insist on, section 87 in order to show the legislators' intentions as regards contracts which may be doubtful of interpretation. I do not think that section 87 has any application in the present case.

It was urged by counsel for plaintiff that the Special War Revenue Act being a taxing statute must be construed as "giving the broadest authority to the Crown to exact taxation as provided therein". The addition of the last words of the phrase "as provided therein" restricts, undoubtedly intentionally, in a very material way, the scope of the proposition; however I believe it is apposite to note that a taxing statute must be construed strictly: *Maxwell on the Interpretation of Statutes,* 8th ed., 250; *Inland Revenue Commissioners* v. *Duke of Westminster* (1); *Partington* v. *Attorney-General* (2); *Tennant* v. *Smith* (3); *Cox* v. *Rabbits* (4); *Oriental Bank Corporation and Wright* (5); *Harris Co. Ltd.* v. *Rural Muncipality of Bjorkdale* (6).

I may add incidentally that taxation is the rule and that exemption constitutes a privilege which must be strictly construed: *Roenisch* v. *Minister of National Revenue* (7); *Toronto General Trusts Corporation* v. *Corporation of City of Ottawa* (8).

Counsel for plaintiff submitted that the tax claimed herein is proportionate to the amounts payable in instalments "under any form of conditional sales agreement, contract of hire-purchase of any form, etc." and that such instalments, under a fiction of the law, become individual sales and deliveries. Counsel thence contended that, under the provisions of section 86, 1 (*a*), the moment instalments fell due, irrespective of the fact that they had not yet been obtained by the defendant, the tax on each of these fictional sales and deliveries had to be paid to the Crown, because the dates on which these instalments became due and exigible, as stipulated in the contract, constituted the extreme limits agreed upon by the parties thereto. Counsel submitted that the parties to the contract had qualified and determined the so-called progress; and that this was

(1) 1936) A.C. 1, 24
(2) (1869) L.R., 4 H.L. 100, 122.
(3) (1892) A.C. 150, 154.
(4) (1877-78) 3 A.C. 473, 478.
(5) (1879-80) 5 A.C. 842, 856.
(6) (1929) 2 D.L.R. 507, 512.
(7) (1931) Ex. C.R. 1, 4.
(8) (1935) S.C.R. 531, 536.

the way which they had understood between themselves that the progress payments were to be made. Counsel maintained therefore that, as long as instalments became due on the dates mentioned in the contract, they constituted sales and deliveries under the provisions of section 86, 1 (*a*) of the Act and that the defendant had to turn over to the Crown the amount of the sales tax on each of the progress payments of $48,800 specified in the contract, whether these payments were made or not.

I must say that I cannot agree with the learned counsel's interpretation of section 86, 1 (*a*) of the Act and cannot accept his proposition that the words " the said tax shall be payable *pro tanto* at the time each of such instalments *falls due and becomes payable* in accordance with the terms of the contract " are intended to impose the tax on instalments which have not been received. This, to my mind, would be most unfair and unreasonable.

The interpretation given to section 86, 1 (*a*) of the Act by counsel for plaintiff is repugnant to justice and reason and I do not think that it should be countenanced. It would mean, assuming the worst, that, if the purchaser had paid in one progress payment ($48,800) and defaulted on the eight others totalling $390,400, the vendor, having received a payment of $48,800, could be compelled to pay a sales tax of $35,136, i.e. 8 per cent on a sum of $439,200, to wit nine payments of $48,800 each. I am unable to conceive that such was the legislators' intention, notwithstanding the fact that there are innumerable pieces of legislation which, when construed literally, may lead to an absurdity. In this connection the following may be consulted beneficially: *Maxwell on the Interpretation of Statutes,* 8th ed., pp. 169, 177 and 228; *Craies on Statute Law,* 4th ed., pp. 85 et seq.; *Beal, Cardinal Rules of Legal Interpretation,* 3rd ed., pp. 343 et seq.; *Halsbury's Laws of England,* 2nd ed., vol. 31, v° Interpretation, no. 653; *Bonham's Case* (1).

At page 169, Maxwell says:

> In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles, should, in all cases of doubtful significance, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law; and no less, but rather

(1) (1610) 4 Coke's Reports, 367, 375; Part VIII (114a).

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more, force is due to any drawn from an absurdity or injustice. But a Court of Law has nothing to do with the reasonableness or unreasonableness of a statutory provision, except so far as it may help it in interpreting what the Legislature has said (Lord Halsbury, *Cooke* v. *Vogeler*, 1901, A C. 107).

And at page 177, Maxwell makes the following comments:

> A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations (Lord Herschell L.C. *Arrow Shipping Co.* v. *Tyne Commissioners*, 1894, A.C. 516). Whenever the language of the Legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words.

See the authorities cited in note (*a*) at the foot of page 177.

Counsel for plaintiff intimated that the defendant could have sought the annulment of the contract and thereby freed itself from the sales tax; he observed that instead the defendant let the contract run and kept on working on the construction of the machine, although Lake Sulphite Pulp Company Limited had defaulted twice in its payments; he added that as a matter of fact it continued working until the 11th of February, 1938, five days after Lake Sulphite Pulp Company Limited was in the hands of a provisional liquidator.

I must admit that I fail to see what bearing the recourse which the defendant might have had to seek the annulment of the contract can have on the question at issue.

I am inclined to believe that the defendant, which had got behind in the performance of its contract, was anxious to complete the machine and to get the balance of the progress payments. I think it acted wisely in continuing to build the machine until it became certain that the liquidator of Lake Sulphite Pulp Company Limited did not wish to complete the payments and to take delivery of the machine for the benefit of the liquidation.

What became of the portion of the machine which had already been constructed on the 11th of February, 1938, when the work was stopped has not been divulged. There was an asset of some value which it seems likely could have been disposed of either in its present state or else completed.

Be that as it may, I do not think that the question offers any interest in the present case. What the Court is

concerned with is to determine whether the defendant company is liable to pay a sales tax on instalments or progress payments which it did not receive.

Counsel for plaintiff suggested that the parties to the contract could have established a rate of progress, had they wished to do it, and could have inserted in the contract a clause stating what progress would have to be made between such and such a date; he noted that nothing of the kind had been included in the contract or even been discussed by the parties. This seems to me irrelevant. What we have to consider is the contract in its present form.

Counsel further observed that Stadler, Notman and Welsford had all admitted that in the execution of such contracts there always were delays of two, three and even six months. Counsel concluded that in the present instance time is not of the essence of the contract in suit; that on the contrary there is a clause in the contract stipulating that delay will not entitle the purchaser to damages.

Counsel pressed the point that the evidence discloses that it was due to the purchaser's insolvency that the machine had not been finished and that the work would have gone on unhampered and the machine could have been completed within six weeks, had Lake Sulphite Pulp Company Limited been in a position to pay it.

Taking for granted that these facts are exact, I do not think that they have any bearing on the matter in litigation.

Counsel for plaintiff reiterated his statement that, under the provisions of section 86, 1 (*a*), we are not concerned as to whether or not the progress payments were received by the defendant. According to him, this section does not require that the payments shall have been received in order to be taxed; it says that the tax "shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable". In counsel's view it is not material whether the instalment has been paid; the moment it falls due and becomes payable there is a fictional sale and delivery and as such it is taxable.

It was finally submitted by counsel for plaintiff that if the defendant had wanted to be paid it could have sued

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under its contract, because Lake Sulphite Pulp Company Limited was behind in its payments. I may note in passing that this is not exact; the contrary is rather conformable to the truth. Counsel added that in turn Lake Sulphite Pulp Company Limited could not oppose any plea, because of the wording of the contract, on the ground of delay. He emphasized the fact that the payments of January and February could have been exacted on their respective dates of maturity. He admitted however that, as regards the payment of March 5, it is a somewhat different proposition in view of the fact that Lake Sulphite Pulp Company Limited had gone into liquidation and was no longer in operation.

I must say that I cannot share this view; I do not think that it is judicially sound. Yet as the point seems to me to have no relevance to the question at issue, I do not deem it advisable to waste time in discussing it at length; it will suffice to refer to the statement of Mr. Justice Mignault in the case of *Employers Liability Assurance Company* v. *Lefaivre* (1), concerning the exception *non adimpleti contractus*. I may point out that Mr. Justice Mignault was dissenting in this case, but the observation he made with regard to this exception is not, as claimed by counsel for defendant, germane to the dissent. In fact Mr. Justice Rinfret, who delivered the judgment of the majority of the Court, expressed on this point a similar opinion: *see* pages 7 and following.

Counsel for plaintiff added that the defendant could have continued building the machine, had it been so directed by the liquidator of Lake Sulphite Pulp Company Limited authorized to that effect by the Court. This is quite possible, but it seems to me foreign to the matter in dispute. Again may I repeat that the question with which I am confronted is whether the defendant company is liable to pay a sales tax on progress payments which it has not collected.

It seems obvious to me that the plaintiff has no claim under the first paragraph of subsection 1 (*a*) of section 86 which provides that " there shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods—(*a*) produced or manufactured

(1) (1930) S.C.R. 1, 13.

in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof ".

The machine was never delivered, with the exception of the sole-plates valued at approximately $1,200; one of the essential conditions provided for in paragraph (*a*) of subsection 1 is lacking.

Has the plaintiff got a claim under the first proviso of article 86? According to his counsel's submission he has, if we assume that the sales tax is payable on the progress payments at the time they fall due and become payable in accordance with the terms of the contract, independently of the fact that they have not been paid. As previously stated, such an interpretation of the first proviso in article 86, 1 (*a*) seems to me thoroughly unjust and unreasonable. I may add that, in my view, it is not only repugnant to justice and equity but even to simple common sense.

The legislators have used, in this proviso, two expressions which, at first sight, may perhaps appear to be synonymous, viz. " falls due " and " becomes payable ". Counsel for plaintiff has accepted them as such. I may say that I feel loath to believe that the legislators wittingly used two expressions having, in their opinion, exactly the same meaning and scope when one would have been sufficient. Our legislators are sometimes diffuse and redundant, but I dare not think that they would be to that extent. I believe that the phrase " falls due " is intended to cover the terms of payment as set forth in the contract and that the phrase " becomes payable " refers to the time when the progress payments will mature and become exigible in accordance with the progress effectively made in the building of the pulp drying machine. This seems to me to be the only just, equitable and reasonable view to take of the legislators' intention.

Besides one must not overlook the provision contained in the second proviso of the said article, which reads thus:

> Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

There was no physical delivery of the machine by the defendant company, save for a very trifling portion thereof,

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viz. the sole-plates, worth about $1,200, and the property of the machine never passed to the purchaser. In virtue of the contract the property of the machine shall remain in the defendant company until all payments have been fully made. The clause of the contract dealing with the right of ownership is the seventh on page (2), which is hereinabove recited.

There being no physical delivery of the machine and the property therein having remained vested in the vendor, the plaintiff's claim seems to me, for this additional reason, unfounded.

It was argued on behalf of defendant that, in order that the tax be exigible, the progress payments in respect of which it is claimed must have fallen due and become payable; in his view both conditions must exist.

The progress payments, under the terms of the contract, fell due on the 5th of each month commencing on the 5th of July and continuing for nine consecutive months, the last payment falling due and being exigible when the machine was placed in operation but in no event later than six months from the date of final shipment or offer of shipment of the machine from the defendant company's works. The progress payments, as the name implies, only became payable as the work progressed.

Lake Sulphite Pulp Company Limited made the payments fairly regularly each month, with the exception of the payment maturing on December 5, which was delayed considerably. The instalments which were payable on the 5th of July and the 5th of August were paid on the 27th of August; one must not overlook the fact that the work performed on the construction of the machine itself was only begun on or about the 3rd of September and that when the July and August instalments were paid there was no progress made on the machine at all. The payments maturing on September 5, October 5 and November 5 were made on September 30, October 7 and November 13. The progress payment which was longer deferred was the one falling due on December 5; it was only paid on January 11. At the time Lake Sulphite Pulp Company Limited had paid more than the progress of the work justified. On January 11, taking into account the payment of $48,800 made on that day, Lake Sulphite Pulp Company had overpaid $79,300 to the defendant. The

work was continued until February 11, 1938, when it ceased definitively. With the progress made in the work between the 11th of January and the 11th of February the overpayment was reduced to $15,300.

If one eliminates the word "progress" from the clause relative to the terms of payment, the contract does not come within the purview of the first proviso of section 86, 1 (*a*) which deals with contracts for the sale of goods wherein it is provided that the price shall be paid to the manufacturer or producer by instalments as the work progresses. In that case the contract would be subject to the first paragraph of section 86, 1 (*a*) and, as there was no delivery, save for a negligible part of the machine, viz. the sole-plates valued at approximately $1,200, no tax can be levied, imposed and collected.

It was contended by counsel for defendant that, if the manufacturer is unable to keep up to the progress stipulated in the contract, the obligation of the purchaser to pay is suspended until the manufacturer catches up with his work. This contention seems rational and sensible.

After due consideration I have reached the conclusion that the contract in suit is governed by the first proviso of section 86, 1 (*a*), that the progress payments therein stipulated fell due and were exigible in the proportion the work progressed and that the sales tax thereon was payable *pro tanto* at the time such payments fell due and became payable. If there were no progress in the work there were no payments due and if there were no payments there was no tax leviable.

If the interpretation hereinabove given to the expressions "falls due" and "becomes payable" in the first proviso is not accepted, the case fails in virtue of the stipulations of the second proviso, seeing that there was no physical delivery and that the property of the machine did not pass to the purchaser.

After a careful perusal of the contract and other evidence, documentary and oral, of the law and of counsel's argument, I do not think that the plaintiff is entitled to impose and levy a sales tax on progress payments which were not made and which moreover were not exigible.

Regarding the sum of $15,300 which Lake Sulphite Pulp Company Limited overpaid to the defendant, it would normally have formed part of the progress payment falling

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due January 5, 1938, if the work had been continued; as this payment never became payable and might perhaps be recovered by Lake Sulphite Pulp Company Limited in virtue of the provisions of article 1048 C.C.—a question which it is not within my competence to determine—I do not believe that any sales tax can be imposed and levied thereon.

For the aforesaid reasons there will be judgment dismissing the plaintiff's action with costs.

Judgment accordingly.

1941
Oct. 29.
1943
Feb. 5.

BETWEEN:

ERICH RITCHER .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Custodian—Consolidated Orders—Treaty of Peace (Germany) Order 1920.

The suppliant seeks to recover from the Crown a certain sum with interest, which the Custodian of Enemy Property had under his control and which was realized from the sale of certain shares at one time the property of the suppliant.

Suppliant states, in substance, that from 1910 to 1913 he resided in Canada with his family; that he had acquired shares of Spanish River Pulp & Paper Company and three shares of Bell Telephone Company which later increased to five shares.

In 1913 he returned to Germany, his country of origin, to work, and was kept there during the war. In 1927 the Custodian placed under his custody suppliant's shares in the above companies. He sold the shares of Spanish River Pulp & Paper Company and one share of Bell Telephone Company, receiving $1,811 68 therefor. He further realized $39 from shares not sold, by way of dividends, which the suppliant claims the Custodian had no right to receive.

In 1928 suppliant returned to Canada and in 1934 he was naturalized. Four of the Bell Telephone Company shares not sold were returned to Germany and delivered to suppliant. The suppliant adds interest to his claim and asks for judgment in the sum of $3,366 78.

Respondent claims the Petition of Right is unfounded in law and in fact, because:

(*a*) No remedy is asked against His Majesty the King.

(*b*) No fact is alleged giving rise to right of action against His Majesty the King, and

(*c*) That the Petition of Right does not lie, even if some right to recover exists. Without prejudice to his defence in law he alleged *inter alia*

that save for 4 Bell Telephone Company shares returned to Germany pursuant to agreement with the said country and which were by it returned to suppliant, the shares in question were sold by the Custodian and realized $1,128.65. That until 1934 suppliant was a citizen of Germany and therefore an enemy since the opening of hostilities in 1914. That by virtue of the consolidated orders regarding trading with the enemy, The Treaty of Versailles of 1919 and the Treaty of Peace (Germany) Order 1920, suppliant was deprived of all right, title and interest in the said shares, which thereby became vested in the Custodian of Enemy Properties and their sale as aforesaid was legally exercised and suppliant cannot now ask to have them returned to him, or the revenue received therefrom; that the facts alleged do not give rise to any claim against His Majesty the King and no Petition of Right lies in the premises.

Held: That by Order in Council P.C. 755, of 14th April, 1920, all property in Canada belonging to an enemy on the 10th January, 1920, became the property of Canada and was vested in the Custodian, and no action could be instituted by an enemy to recover his property so vested without the written consent of the Custodian.

2. That money received by the Custodian forms no part of the Consolidated Revenue Fund of Canada. It must be held by the Custodian and credited as provided by the Consolidated Orders. After payment by the Custodian of amounts due to British subjects residing in Canada, by German Nationals or by Germany, the balance only becomes the property of Canada.

3. That the Custodian is in possession of the property, rights and interests of enemies as such and not as representative or employee of the Crown, and that the Petition of Right does not lie in the premises.

ARGUMENT on questions of law concerning the claim of the suppliant to recover from the Crown the proceeds of certain securities sold by the Custodian of Enemy Property.

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

T. L. Bergeron K.C. for suppliant.

Aime Geoffrion, K.C. for respondent.

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

Par sa pétition de droit en date du 9 février 1938, dont l'original a été produit au greffe de cette Cour le 21 mai 1940 et dont une copie conforme portant sur l'endos un accusé de réception de la part du Procureur Général a été déposée au dossier le 7 août 1940, le pétitionnaire réclame de Sa Majesté le Roi la somme de $3,366.78, avec intérêt depuis la date de la pétition, et les dépens.

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The learned Judge here refers to the pleadings and continues:—

La présente action a été fixée pour audition sur les questions de droit soulevées dans la défense par ordonnance en date du 15 octobre 1941, conformément aux dispositions de la règle 149 des règles et ordonnances de cette Cour.

La juridiction de cette Cour découle de l'article 18 de la Loi de la Cour de l'Echiquier (S.R.C. 1927, ch. 34), lequel se lit comme suit:

18. La cour de l'Echiquier a juridiction exclusive en première instance dans tous les cas où une demande est faite ou un recours est recherché au sujet de toute matière qui pourrait, en Angleterre, faire le sujet d'une poursuite ou action contre la Couronne; et pour plus de certitude, mais non pas de manière à restreindre la généralité des termes ci-dessus, elle a juridiction exclusive en première instance dans tous les cas où des terrains, effets ou deniers du sujet sont en la possession de la Couronne, ou dans lesquels la réclamation provient d'un contrat passé par la Couronne ou en son nom.

Le procureur de l'intimé a invoqué les trois points suivants, savoir:

le "séquestre" ou "gardien" des propriétés ennemies ("curateur" dans le décret concernant le traité de paix avec l'Allemagne, 1920) n'est pas un employé ou serviteur de la Couronne;

le fût-il, ce qu'il a fait en l'espèce ne donnerait pas de recours contre la Couronne;

au surplus ce qu'il a fait est conforme à la loi.

La prétention de l'intimé que le pétitionaire n'a point de réclamation pour le recouvrement des actions de Spanish River Pulp & Paper Company et de Bell Telephone Company qu'il détenait au moment de son départ pour l'Allemagne en 1913 ou de leur produit est principalement basée sur le Traité de Paix intervenu entre les Puissances alliées et associées, au nombre desquelles était le Canada, et l'Allemagne, fait et signé à Versailles le 28 juin 1919.

La partie du traité qui nous intéresse particulièrement est la section IV intitulée "Biens, droits et intérêts"; cette section contient deux articles (297 et 298) et une annexe de quinze paragraphes. Certaines dispositions de l'article 297 et quelques paragraphes de l'annexe sont pertinents; j'en citerai la partie essentielle.

L'article 297 du traité stipule, entre autres, ce qui suit:

La question des biens, droits et intérêts privés en pays ennemi recevra sa solution conformément aux principes posés dans la présente section et aux dispositions de l'Annexe ci-jointe.

b) Sous réserve des dispositions contraires qui pourraient résulter du présent Traité, les Puissances alliées ou associées se réservent le droit de retenir et de liquider tous les biens, droits et intérêts appartenant, à la date de la mise en vigueur du présent Traité, à des ressortissants allemands ou des sociétés contrôlées par eux sur leur territoire, dans leurs colonies, possessions et pays de protectorat, y compris les territoires qui leur ont été cédés en vertu du présent Traité.

La liquidation aura lieu conformément aux lois de l'Etat allié ou associé intéressé et le propriétaire allemand ne pourra disposer de ces biens, droits et intérêts, ni les grever d'aucune charge, sans le consentement de cet Etat.

Ne seront pas considérés, au sens du présent paragraphe, comme ressortissants allemands, les ressortissants allemands qui acquièrent de plein droit la nationalité d'une Puissance alliée ou associée, par application du présent Traité.

d) Dans les rapports entre les Puissances alliées ou associées ou leurs ressortissants d'une part, et l'Allemagne ou ses ressortissants d'autre part, seront considérées comme définitives et opposables à toute personne, sous les réserves prévues au présent Traité, toutes mesures exceptionnelles de guerre ou de disposition, ou actes accomplis ou à accomplir en vertu de ces mesures, telles qu'elles sont définies dans les paragraphes 1 et 3 de l'Annexe ci-jointe.

La partie pertinente du paragraphe 1 de l'annexe est ainsi conçue:

Aux termes de l'article 297, paragraphe *d*), est confirmée la validité de toutes mesures attributives de propriété, de toutes ordonnances pour la liquidation d'entreprises ou de sociétés ou de toutes autres ordonnances, règlements, décisions ou instructions rendues ou données par tout tribunal ou administration d'une des Hautes Parties Contractantes ou réputées avoir été rendues ou données par application de la législation de guerre concernant les biens, droits ou intérêts ennemis. Les intérêts de toutes personnes devront être considérés comme ayant valablement fait l'objet de tous règlements, ordonnances, décisions ou instructions concernant les biens dans lesquels sont compris les intérêts dont il s'agit, que ces intérêts aient été ou non expressément visés dans lesdits ordonnances, règlements, décisions ou instructions. Il ne sera soulevé aucune contestation relativement à la régularité d'un transfert de biens, droits ou d'intérêts effectué en vertu des règlements, ordonnances, décisions ou instructions susvisés. Est également confirmée la validité de toutes mesures prises à l'égard d'une propriété, d'une entreprise, ou société, qu'il s'agisse d'enquête, de séquestre, d'administration forcée, d'utilisation, de réquisition, de surveillance ou de liquidation, de la vente, ou de l'administration des biens, droits et intérêts, du recouvrement ou du payement des dettes, du payement des frais, charges, dépenses ou de toutes autres mesures quelconques effectuées en exécution d'ordonnances, de règlements, de décisions ou d'instructions rendues, données ou exécutées par tous tribunaux ou administration d'une des Hautes Parties Contractantes ou réputées avoir été rendues, données ou exécutées par application de la législation exceptionnelle de guerre concernant les biens, droits ou intérêts ennemis, ...

Le paragraphe 3 de l'annexe se lit comme suit:

Dans l'article 297 et la présente Annexe, l'expression 'mesures exceptionnelles de guerre' comprend les mesures de toute nature, législatives,

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administratives, judiciaires ou autres prises ou qui seront prises ultérieurement à l'égard de biens ennemis et qui ont eu ou auront pour effet, sans affecter la propriété, d'enlever aux propriétaires la disposition de leurs biens, notamment les mesures de surveillance, d'administration forcée, de séquestre, ou les mesures qui ont eu ou auront pour objet de saisir, d'utiliser ou de bloquer les avoirs ennemis, et cela pour quelque motif, sous quelque forme et en quelque lieu que ce soit...

Les 'mesures de disposition' sont celles qui ont affecté ou affecteront la propriété des biens ennemis en en transférant tout ou partie à une autre personne que le propriétaire ennemi et sans son consentement, notamment les mesures ordonnant la vente, la liquidation, la dévolution de propriété des biens ennemis, l'annulation des titres ou valeurs mobilières.

L'article 297 du traité stipule, en outre, ce qui suit:

h) Sauf le cas où, par application du paragraphe *f*), des restitutions en nature ont été effectuées, le produit net des liquidations de biens, droits et intérêts ennemis où qu'ils aient été situés, faites soit en vertu de la législation exceptionnelle de guerre, soit par application du présent article et généralement tous les avoirs en numéraire des ennemis recevront l'affectation suivante:

1° En ce qui concerne les Puissances adoptant la Section III et l'Annexe jointe, lesdits produits et avoirs seront portés au crédit de la Puissance dont le propriétaire est ressortissant, par l'intermédiaire de l'Office de vérification et de compensation institué par lesdites Section et Annexe; tout solde créditeur en résultant en faveur de l'Allemagne sera traité conformément à l'article 243.

2° En ce qui concerne les Puissances n'adoptant pas la Section III et l'Annexe jointe, le produit des biens, droits et intérêts et les avoirs en numéraire des ressortissants des Puissances alliées ou associées, détenus par l'Allemagne sera immédiatement payé à l'ayant droit ou à son Gouvernement. Chaque Puissance alliée ou associée pourra disposer du produit des biens, droits et intérêts et des avoirs en numéraire des ressortissants allemands qu'elle a saisis conformément à ses lois et règlements et pourra l'affecter au payement des réclamations et créances définies par le présent article ou par le paragraphe 4 de l'Annexe ci-jointe. Tout bien, droit ou intérêt ou produit de la liquidation de ce bien ou tout avoir en numéraire dont il n'aura pas été disposé conformément à ce qui est dit ci-dessus, peut être retenu par ladite Puissance alliée ou associée, et, dans ce cas, sa valeur en numéraire sera traitée conformément à l'article 243...

L'article 243 ci-dessus mentionné décrète, entre autres, ce qui suit:

Seront portés au crédit de l'Allemagne, au titre de ses obligations de réparer, les éléments suivants:

a) Tout solde définitif en faveur de l'Allemagne visé à la Section V (Alsace-Lorraine) de la Partie III (Clauses politiques européennes) et aux Sections III et IV de la Partie X (Clauses économiques) du présent Traité;

La partie importante du paragraphe 4 de l'annexe, lequel ne me semble offrir aucun intérêt en l'espèce, peut être citée pour compléter l'exposé de la loi concernant la disposition des biens, droits et intérêts en Canada appartenant à des ennemis:

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Les biens, droits et intérêts des ressortissants allemands dans les territoires d'une Puissance alliée ou associée ainsi que le produit net de leur vente, liquidation ou autres mesures de disposition, pourront être grevés par cette Puissance alliée ou associée: en premier lieu, du payement des indemnités dues à l'occasion des réclamations des ressortissants de cette Puissance concernant leurs biens, droits et intérêts y compris les sociétés ou associations dans lesquelles ces ressortissants étaient intéressés en territoire allemand ou des créances qu'ils ont sur les ressortissants allemands ainsi que du payement des réclamations introduites pour des actes commis par le Gouvernement allemand ou par toute autorité allemande postérieurement au 31 juillet 1914 et avant que cette Puissance alliée ou associée ne participât à la guerre... Ils pourront être grevés, en second lieu, du payement des indemnités dues à l'occasion des réclamations des ressortissants de la Puissance alliée ou associée concernant leurs biens, droits et intérêts sur le territoire des autres Puissances ennemies, en tant que ces indemnités n'ont pas été acquittées d'une autre manière.

Ce traité de paix a été mis en vigueur au moyen d'une loi sanctionnée le 10 novembre 1919, intitulée "Loi des Traités de paix, 1919" (10 George V, chap. 30) et d'un arrêté appelé "Arrêté du Traité de paix (Allemagne), 1920", passé le 14 avril 1920.

Cette loi contient, entre autres, les dispositions suivantes:

1. (1) Le Gouverneur en conseil peut faire les nominations, établir les bureaux, décréter les arrêtés en conseil, et accomplir les choses qui lui paraissent nécessaires pour la mise en vigueur desdits traités, et pour donner effet à l'une quelconque des dispositions desdits traités.

(2) Tout arrêté en conseil décrété sous le régime de la présente loi peut statuer sur l'imposition par voie sommaire, ou d'autre façon, des peines qui se rattachent aux infractions aux dispositions dudit traité, et doit être déposé devant le Parlement le plus tôt que faire se peut après qu'il est décrété, et avoir effet comme s'il était édicté en la présente loi, mais il peut être changé ou révoqué par un arrêté en conseil subséquent.

Je noterai en passant qu'une loi n'était pas nécessaire pour mettre en vigueur le Traité de paix entre les Puissances alliées et associées et l'Allemagne, dont il s'agit en l'espèce; un traité de paix fait loi par lui-même, indépendamment de toute législation à ce sujet: *Secretary of State of Canada and Custodian* v. *Alien property Custodian for the United States of America* (1).

Conformément à la Loi des Traités de paix, 1919 susdite un arrêté relatif au Traité de paix avec l'Allemagne (C.P. 755) a été adopté le 14 avril 1920. Cet arrêté comprend, outre son préambule dans lequel est contenue la définition de l'expression "le Curateur", cinq parties intitulées respectivement "Dettes et office de vérification et de compensation", "Biens, droits et intérêts", "Contrats, pres-

(1) [1931] S.C.R. 170, 198.

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criptions, jugements", "Propriété industrielle" et "Clauses générales". La partie qui nous intéresse est la deuxième: "Biens, droits et intérêts".

L'article 32, compris dans cette deuxième partie, définit l'expression "ennemi" y contenue; il me semble à propos de citer le passage pertinent de cette définition:

(1) 'Ennemi' signifie

(*a*) Un ressortissant allemand qui pendant la guerre a résidé ou exercé son industrie dans le territoire d'une puissance en guerre avec Sa Majesté;

(*e*) Tout autre ressortissant allemand que le Gouverneur en Conseil déclare être un ennemi.

pourvu qu'un ressortissant allemand qui a acquis *ipso facto*, conformément aux dispositions du Traité, la nationalité d'une Puissance alliée ou associée pendant la guerre avec Sa Majesté ne soit pas considéré ressortissant allemand au sens de la présente partie.

L'article 33 décrète ce qui suit:

"Tous biens, droits et intérêts en Canada appartenant aux ennemis le 10e jour de janvier 1920, ou appartenant jusque-là aux ennemis et en la possession ou sous le contrôle du Curateur à la date du présent arrêté, appartiendront au Canada et seront par les présentes attribués au Curateur.

(2) Nonobstant toute disposition d'un arrêté antérieur attribuant au Curateur des biens, droits ou intérêts quelconques appartenant antérieurement à un ennemi, tels biens, droits ou intérêts appartiendront au Canada, et le Curateur les détiendra aux mêmes conditions et avec les mêmes pouvoirs et devoirs, en ce qui les concerne, que les biens, droits et intérêts à lui attribués par le présent arrêté."

L'article 35 décrète, entre autres:

"Aucune réclamation ou action n'est recevable de l'Allemagne ou de ses ressortissants, en quelque lieu qu'ils aient leur résidence, contre Sa Majesté ou contre une personne quelconque agissant au nom et sous les ordres de toute juridiction ou administration du Gouvernement du Canada, relativement à tout acte ou toute omission concernant les biens, droits ou intérêts des ressortissants allemands Est également irrecevable toute réclamation ou action contre toute personne à l'égard de tout acte ou omission résultant des mesures exceptionnelles de guerre, mesures de transfert ou autres lois ou règlements du Canada.

(2) Dans l'article précédent et le présent article l'expression 'mesures exceptionnelles de guerre' comprend les mesures de toute nature, législatives, administratives, judiciaires ou autres prises ou qui seront prises ultérieurement à l'égard de biens ennemis et qui ont eu ou auront pour effet, sans affecter la propriété, d'enlever au propriétaire la disposition de ses biens, ... Les 'mesures de transfert' sont celles qui ont affecté la propriété de tous biens ennemis en les transférant en totalité ou en partie à une personne autre que tel ennemi, et sans son consentement, comme les mesures ordonnant la vente, la liquidation ou la dévolution de biens ennemis, ou l'annulation de titres ou valeurs...

Un autre article pertinent de l'arrêté est l'article 41; je crois opportun d'en citer les dispositions suivantes:

(2) Au cas de contestation quant à savoir si des biens, droits ou intérêts appartenaient à un ennemi le 10e jour de janvier 1920 ou avant cette date, le Curateur ou, avec le consentement du Curateur, le réclamant peut demander à la Cour de l'Echiquier du Canada une déclaration quant à la propriété de ces biens, droits ou intérêts, nonobstant qu'ils aient été attribués au Curateur par un ordre antérieurement donné, ou que le Curateur en ait disposé ou ait convenu d'en disposer. Le consentement du Curateur à toute poursuite par un réclamant sera par écrit et pourra être donné sous réserve de telles conditions que le Curateur juge à propos.

(3) Si la Cour de l'Echiquier déclare que les biens, droits ou intérêts n'appartenaient pas à un ennemi ainsi que prévu au paragraphe précédent, le Curateur s'en dessaisira, ou, si le Curateur, avant cette déclaration, a disposé ou convenu de disposer des biens, droits ou intérêts, il en cédera le produit.

Il ressort de ces dispositions de l'arrêté du traité de paix avec l'Allemagne (C.P. 755) que les biens appartenant le 10 janvier 1920 à un ennemi, au sens de l'article 32 dudit arrêté, deviennent la propriété du Canada et sont attribués au Curateur. Aucune action ne peut être intentée par un ennemi pour le recouvrement de ces biens sans le consentement écrit de celui-ci (article 41).

L'article 47 de l'arrêté pourvoit à la disposition des biens d'un ennemi; il est ainsi conçu:

Le Curateur peut disposer de tous biens, droits ou intérêts en tels temps et endroits et à telle personne ou telles personnes et à telles conditions et de telle manière, soit publiquement, soit privément, qu'en sa discrétion, il juge à propos.

L'article 49 détermine la façon dont le Curateur doit créditer à l'Allemagne par l'entremise de l'Office de Compensation constitué par la partie I de l'arrêté (article 4); le premier paragraphe de l'article 49 se lit comme suit:

Le Curateur créditera à l'Allemagne, par l'entremise de l'Office de Compensation établi par la Partie I du présent arrêté, toutes sommes jusqu'ici appartenant aux ennemis et en sa possession ou sous son contrôle à la date du présent arrêté, ainsi que le produit net de la vente de tous biens, droits ou intérêts qui lui sont attribués, et il agira conformément au traité relativement à toute balance ou crédit de l'Allemagne résultant de tels crédits ou des opérations de l'Office de Compensation sous le régime de la Partie I du présent arrêté et relativement à toutes sommes payées au Curateur sous le régime des articles 10 ou 11 pour lesquelles aucune réclamation n'est faite par l'entremise de l'Office de Compensation allemand, ou qui ne sont pas créditées à l'Office de Compensation allemand.

L'Office de Compensation dont il est ici fait mention, est créé par l'article 4 de l'arrêté, qui se lit en partie comme suit:

Est par les présentes établi dans et pour le Canada, sous le contrôle et la direction du Curateur, un office local de vérification et de compensation

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(ci-après désigné sous le nom de 'Office de Compensation') qui agira comme office central pour le Canada ainsi que prescrit ci-dessous, et qui conduira toutes les transactions avec l'Office de Compensation allemand par l'entremise d'un office de vérification et de compensation central (ci-après désigné sous le nom de 'Office central de Vérification et de Compensation') établi dans le Royaume-Uni.

L'article 89, compris dans la partie V de l'arrêté, intitulé "Clauses générales", ordonne le dépôt chez le Receveur général du Canada des sommes reçues par le Curateur et leur paiement sur l'ordre du Secrétaire d'Etat; cet article se lit ainsi:

Toutes les sommes jusqu'ici ou dorénavant reçues par le Curateur seront déposées chez le Receveur général du Canada et seront payées sur l'ordre du Secrétaire d'Etat, tel que prescrit par le présent arrêté.

L'argent perçu par le Curateur ne fait pas partie du fonds consolidé du Canada. Il doit être détenu par le Curateur et par lui crédité tel que ci-dessus prévu. Seul ira au Canada le solde qu'il aura entre les mains après paiement de toutes les créances de sujets britanniques résidant en Canada contre des ressortissants allemands ou contre l'Allemagne.

En vertu des dispositions du traité, les biens appartenant à des ressortissants allemands sur le territoire du Canada, à la date de la mise en vigueur du traité, savoir pour le Canada le 14 avril 1920, jour où a été décrété l'Arrêté du Traité de paix (Allemagne), 1920 conformément à la Loi des Traités de paix, 1919 (10 Geo. V, chap. 30), pouvaient être retenus et liquidés par le Canada; c'est ce qui a été fait, sauf pour quatre actions de Bell Telephone Company qui ont été envoyées au gouvernement allemand et par ce dernier retournées au pétitionnaire, tel qu'admis au paragraphe 9 de sa réponse à la défense.

Le procureur du pétitionnaire a prétendu qu'en vertu de la Loi des mesures de guerre, 1914 (5 George V, chap. 2) les pouvoirs du Gouverneur en conseil comprennent, entre autres, la prise de possession, le contrôle, la confiscation et la disposition des biens et de leur usage; ceci découle du sous-paragraphe (*f*) du premier paragraphe de l'article 6 de la loi. La partie pertinente du premier paragraphe et le sous-paragraphe (*f*) se lisent ainsi:

6. Le Gouverneur en Conseil a le pouvoir de faire et autoriser tels actes et choses et de faire de temps à autre tels ordres et règlements qu'il peut, à raison de l'existence réelle ou appréhendée de la guerre, d'une invasion ou insurrection, juger nécessaires ou à propos pour la sécurité, la

défense, la paix, l'ordre et le bien-être du Canada; et pour plus de certitude, mais non pas pour restreindre la généralité des termes qui précèdent, il est par la présente déclaré que les pouvoirs du Gouverneur en Conseil s'étendront à toutes les matières tombant dans la catégorie des sujets ci-après énumérés, savoir:—

f) la prise de possession, le contrôle, la confiscation et la disposition de biens et de leur usage.

Le procureur du pétitionnaire a ajouté que ces pouvoirs ne devaient être en vigueur que pour la durée de la guerre aux termes de l'article 3, qui est ainsi conçu:

3. Les dispositions des articles 6, 10, 11 et 13 de la présente loi ne seront en vigueur que durant la guerre, l'invasion, ou l'insurrection, réelle ou appréhendée.

Je ne crois pas que la Loi des mesures de guerre, 1914 régisse le cas qui nous occupe; c'est le Traité de paix du 28 juin 1919 et l'Arrêté du Traité de paix (Allemagne) 1920 (C.P. 755) qui s'appliquent.

Le procureur du pétitionnaire a soutenu que le Curateur ne pouvait disposer des biens d'un ennemi si ceux-ci n'avaient pas été saisis et confisqués conformément à la loi. Le Curateur n'avait pas de procédure à faire pour saisir et confisquer les biens du pétitionnaire dont il s'agit en cette cause; ces biens lui étaient attribués automatiquement en vertu de l'article 33 du décret.

Le procureur du pétitionnaire a plaidé en outre qu'un accord entre le gouvernement du Canada et le Reich allemand a été signé à La Haye le 14 janvier 1930 et qu'il a été ratifié par le parlement. En fait, cet accord a été approuvé par un arrêté en conseil passé le 5 mars 1930 (C.P. 457), lequel a été suivi d'un instrument de ratification en date du 21 juillet 1930. Vu que cet arrêté en conseil n'a pas été publié dans la *Gazette du Canada,* il me semble à propos de le reproduire ici:

The Committee of the Privy Council have had before them a Report, dated 25th February, 1930, from the Secretary of State, submitting that it was provided by Article 297 of the Treaty between the Allied and Associated Powers and Germany signed at Versailles on the 28th June, 1919, that Canada, being one of the Allied and Associated Powers therein referred to, has the right to attain and liquidate all property, rights and interests in Canada belonging at the date of the coming into force of the said Treaty to nationals of the German Reich; That it is provided by Section 4 of the Annex following Article 298 of the said Treaty that all property, rights and interests in Canada of nationals of the German Reich and the proceeds of their sale or dealings therein may be charged by Canada in the first place with payment of amounts due in respect of claims by Canadian nationals with regard to property, rights and interest,

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including companies and associations in which they are interested in the German Reich or debts owing to them by German nationals; That, in pursuance of the aforesaid provisions in the said Treaty, the Canadian Custodian of Enemy Property, hereinafter called "The Custodian," took into his possession certain property, rights and interests in Canada of German nationals, and charged thereon certain claims of Canadian nationals. as provided for by the said Treaty; That the Allied and Associated Powers and the Government of the German Reich, by a Protocol dated the 31st August, 1929, and signed at the Hague, adopted in principle, subject to certain reservations, the Report of the Committee of Experts generally known as the "Young Plan;" That certain of the property, rights and interests in Canada of German nationals remain unliquidated; That the Government of Canada adheres to the recommendation contained in Article 144 of the Report, dated June 7th, 1929, of the Committee of Experts, and that an Agreement with the Government of the German Reich for putting into force this recommendation in so far as it relates to the return to the German owners of their property, rights and interests not liquid, liquidated or finally disposed of, has been signed on behalf of the Government of Canada by the late the Honourable Peter Larkin, formerly High Commissioner for Canada in London, and on behalf of the German Reich by the Ministerial director de Haas.

The Committee, on the recommendation of the Secretary of State, advise that the Agreement above referred to, a copy of which is attached hereto, for the purpose of carrying into effect the return of unliquidated property, as recommended by the Young Plan in the paragraphs of the Report relating to "The Liquidation of the Past," dated the 7th of June, 1929, and the Protocol dated 31st August, 1929, be approved and confirmed.

Le procureur du pétitionnaire a invoqué particulièrement l'article premier de cet accord, dont je crois opportun de reproduire le texte:

Sous réserve des dispositions et des stipulations des articles ci-après, le Gouvernement canadien libérera et, le cas échéant, retransférera aux propriétaires allemands primitifs ou à leurs ayants-cause, les biens, droits et intérêts qui leur appartenaient originairement et qui sont actuellement grevés du privilège constitué en vertu du Traité de Versailles, pour autant que lesdits biens, droits et intérêts n'étaient pas déjà liquides ou liquidés ou qu'il n'en avait pas été disposé définitivement à la date du 7 juin 1929.

Seuls, les biens, ci-après définis seront considérés comme des biens liquides ou liquidés ou comme des biens dont il avait été disposé définitivement à cette date:—

a) Les valeurs mentionnées dans l'ordonnance du Gouvernement du Canada N° 114 du 19 janvier 1923 et dont l'administrateur a disposé conformément à ladite ordonnance.

b) Les biens au sujet desquels l'administrateur canadien a conclu antérieurement au 7 juin 1929 un contrat de vente ayant force obligatoire et étant entendu toutefois que, dans ce cas, le produit de la vente payable après cette date et remise entre les mains de l'administrateur sera transféré au Gouvernement allemand agissant comme représentant des anciens propriétaires.

c) Les dettes auxquelles s'appliquent les dispositions de l'article 297 du Traité de Versailles pour autant qu'elles ont été recouvrées à cette date par un fonctionnaire ou un mandataire du Gouvernement canadien.

Je dois dire que ce texte est une traduction, faite par le Bureau des Traducteurs d'Ottawa, l'accord en question ayant été fait en allemand et en anglais exclusivement. Je n'ai pas cru devoir en vérifier l'exactitude; je présume qu'elle contient la substance du texte original. Je noterai cependant qu'au lieu de traduire le mot " Custodian " du texte anglais par le mot " Curateur " dont on s'est servi dans l'arrêté en conseil (C.P. 755) on a cru devoir utiliser le mot " Administrateur ". Je ferai remarquer incidemment que ces variétés de traduction devraient être évitées: elles sont susceptibles d'embrouiller nos lois qui n'en ont pas besoin.

Le préambule de cet accord contient, entre autres, les dispositions suivantes:

Considérant, d'autre part, que, en exécution des dispositions précitées dudit traité (article 297 et paragraphe 4 de l'annexe), l'administrateur canadien des biens ennemis, ci-après dénommé 'l'Administrateur', a pris possession de certains biens, droits et intérêts appartenant à des ressortissants allemands au Canada et les a grevés d'un privilège en faveur de certaines réclamations de ressortissants canadiens, comme il est prévu dans ledit traité;

Et que le Gouvernement du Reich allemand et les Puissances alliées et associées ont, par un Protocole daté du 31 août 1929 et signé à La Haye, adopté en principe, mais avec certaines réserves, le rapport du comité d'experts généralement connu sous le nom de 'Plan Young';

Considérant, enfin, que certains biens, droits et intérêts, appartenant à des ressortissants allemands au Canada n'ont pas encore été liquidés;

Que le Gouvernement du Canada accepte la recommandation contenue à l'article 144 du rapport du Comité d'experts en date du 7 juin 1929 et désire conclure immédiatement un accord avec le Gouvernement du Reich allemand en vue de donner suite à cette recommandation, pour autant qu'elle a trait à la restitution aux ayants-droit allemands de leurs biens, droits et intérêts, qui ne sont pas déjà liquides ou liquidés ou dont il n'a encore été disposé définitivement;

Et que le Gouvernement allemand prend l'engagement de répartir ces biens non liquidés entre les divers ayants-droit, ressortissants du Reich allemand.

Je ne crois pas que l'accord susdit ait d'application en l'espèce vu qu'au moment de son exécution les actions du pétitionnaire qui sont l'objet de la présente pétition avaient été liquidées par le Curateur, tel qu'il ressort du paragraphe 3 de la pétition et de la lettre pièce P[1], partie intégrante du paragraphe 9 de la réponse à la défense.

Au surplus, je crois à propos de faire remarquer que le gouvernement du Canada, en vertu de l'accord, doit régler cette question des biens non encore liquidés appartenant à des Allemands avec le Reich allemand et non avec les sujets allemands.

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Le pétitionnaire était le 10 janvier 1920 un ennemi et l'est demeuré jusqu'à la date de sa naturalisation en 1934. Les actions qui appartenaient au pétitionnaire à cette date sont devenues la propriété du Canada et ont été attribuées au Curateur en vertu des dispositions de l'article 297 du traité et des paragraphes 1 et 3 de l'annexe y relatif et de celles de l'article 33 de l'arrêté (C.P. 755). Le Curateur a disposé de ces actions comme il avait le droit de le faire tant en vertu du traité (article 297) que de l'arrêté susdit (article 33), à l'exception de quatre actions de Bell Telephone Company qui ont été envoyées à l'Allemagne et que le pétitionnaire, au paragraphe 11 de sa réponse à la défense, admet avoir reçues du gouvernement de ce pays. De ce chef la pétition de droit du pétitionnaire est mal fondée et doit être rejetée. Voir *Spitz* v. *Secretary of State of Canada* (1).

A part cela l'article 35 de l'arrêté décrète, comme nous l'avons vu, qu'aucune réclamation n'est recevable de l'Allemagne ou de ses ressortissants contre Sa Majesté ou contre une personne quelconque agissant au nom et sous les ordres de toute juridiction ou administration du gouvernement du Canada relativement à tout acte ou toute omission concernant les biens, droits ou intérêts des ressortissants allemands ainsi que contre toute personne à l'égard de tout acte ou omission résultant, entre autres, des mesures de transfert. Celles-ci sont définies dans le deuxième paragraphe de l'article 35 de l'arrêté ci-dessus reproduit. De ce second chef la pétition de droit me paraît également mal fondée.

Le Curateur est en possession des biens, droits et intérêts des ennemis comme tel et non comme un représentant ou employé de la Courone. Si le pétitionnaire avait un recours, celui-ci ne pouvait être exercé par voie de pétition de droit contre Sa Majesté; il devait l'être par action contre le Curateur, avec le consentement écrit de celui-ci, tel que déterminé par le paragraphe (2) de l'article 41 de l'arrêté. Les dispositions de ce paragraphe sont, à mon avis, fatales à la pétition de droit.

Le procureur du pétitionnaire a référé aux pages 222 et 223 du texte français du traité. Il s'agit du texte français publié au Canada par l'Imprimeur du Roi en 1935. Ce texte avait d'abord été publié au Canada en 1919. La

(1) [1939] Ex. C.R. 162, 180.

pagination de l'édition de 1935 diffère de celle de 1919. Les six documents parlementaires contenus dans la nouvelle édition, numérotés de 41 à 41e inclusivement, sont paginés consécutivement, alors que dans l'édition de 1919 chacun de ces documents avait sa propre pagination.

Nous trouvons sur les pages 222 et 223 la réponse des Puissances alliées et associées aux remarques de la Délégation allemande sur les conditions de paix (document parlementaire n° 41d), relativement aux " traitements de droits privés ", adressée au président de la Délégation par monsieur Clémenceau le 16 juin 1919 (document parlementaire n° 41c).

Ces réponses aux objections présentées par la Délégation allemande, tout intéressantes qu'elles soient, ne font point, va sans dire, partie du traité et n'ont point par conséquent force de loi; elles peuvent tout au plus servir à expliquer la teneur du traité.

Pour toutes ces raisons j'en suis venu à la conclusion que la pétition de droit est mal fondée et que le pétitionnaire n'a pas droit au remède qu'il réclame.

La pétition de droit du pétitionnaire est en conséquence rejetée, avec dépens.

Judgment accordingly.

BETWEEN:

MATTHEW McARTHUR.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Exchequer Court Act R.S.C. 1927, c. 34, s. 19 (c)—"Officer or Servant of the Crown"—Legal status of a member of the Active Militia of Canada—Crown not liable for damages for personal injuries resulting from negligence of a member of the Canadian Active Service Force while acting within the scope of his duties.

Suppliant suffered injuries as a result of being struck by a motor vehicle owned by the Department of National Defence and driven by a member of the Canadian Active Service Force serving with the Royal Canadian Army Service Corps, who was engaged at the time in transporting soldiers' mail from Long Branch, where he was stationed, to Toronto, and army mail to the Headquarters of Military District No. 2 at Toronto.

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Suppliant seeks to recover damages from the Crown for such injuries suffered by him.

Held: That the term "officer or servant of the Crown" as used in section 19 (c) of the Exchequer Court Act must not be construed apart from its context or without regard to the origin of the statutory enactment in which it appears and the judicial history of such enactment.

2. That the term "officer or servant of the Crown" as used in section 19 (c) of the Exchequer Court Act should be regarded as meaning servants or employees of the Government whether appointed by it for the performance of certain duties, or hired by it for certain tasks of employment, all with a view to the accomplishment of governmental purposes and all under the control of the Government and this means persons of a civilian status: the term carries with it the connotation of service or employment with the Government in connection with some aspect of governmental administration or activity.

3. That section 19 (c) of the Exchequer Court Act as amended in 1938 made the doctrine of employer's liability fully applicable to the Crown in respect of the tort of negligence, but such doctrine does not extend to persons on active military service.

4. That a person who enlists as a soldier of the Canadian Active Service Force and takes the oath of allegiance and makes the declaration of service required on his attestation becomes a member of the Non-Permanent Active Militia of Canada on active service.

5. That when a person becomes a member of the Active Militia of Canada on active service, whether by process of law or by voluntary enlistment, whereby he offers his services to his country for the duration of a national emergency, such as now exists, he is performing a national function of citizenship that is not in any way related to governmental service or employment and when he assumes that function he does not enter upon service or employment with the Government and does not become a Crown or governmental servant or employee in any sense of the term: his legal status is that of a person under a written personal engagement with the King whereby he renders his services as a soldier in the defence of his country pursuant to his duty of allegiance to the King whose subject he is.

6. That a person who enlists in an active unit of the Canadian Army for the duration of the present emergency and thereby becomes a member of the Non-Permanent Active Militia of Canada on active service is not an "officer or servant of the Crown" within the meaning, intent or purpose of section 19 (c) of the Exchequer Court Act and the Crown is not liable for the negligence of such a person.

Moscovitz v. *The King* (1934) Ex.C.R. 188; (1935) S.C.R. 404 and *Yukon Southern Air Transport Limited* v. *The King* (1942) Ex.C.R. 181 commented upon and distinguished *Larose* v. *The King* (1901) 31 Can. S.C.R. 206 followed. *Goldstein* v. *State of New York* (1939) 281 N.Y. 396; 24 N.E. (2d) 97; 129 A.L.R. 905 applied.

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

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

G. A. Sullivan, K.C. for Suppliant.

R. L. Kellock, K.C. for Respondent.

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

THE PRESIDENT, now (March 24, 1943) delivered the following judgment:

The suppliant brings this Petition of Right claiming damages from the Crown for personal injuries suffered by him. On January 12th, 1942, having left the east entrance of the Union Station in the City of Toronto, he was crossing Front Street in a northerly direction, when he was struck and knocked down by a 1941 Plymouth station wagon, coming from the west and proceeding east on Front Street, owned by the Department of National Defence of the Dominion of Canada and driven by Private William MacDonald, a member of the Canadian Active Service Force, serving with the Royal Canadian Army Service Corps. At the time of the accident Private MacDonald was attached to the Canadian Small Arms Training Centre at Long Branch, near Toronto, and was engaged in transporting soldiers' mail from Long Branch to Toronto and army mail to the headquarters of Military District No. 2 at Toronto.

The suppliant, in addition to body and head bruises, suffered a fractured pelvis, which leaves him still with some limitation of movement of his left hip and a stiff back, with a likelihood of some permanent disability.

The petition alleges negligence on the part of Private MacDonald while acting within the scope of his duties or employment as a servant of the Crown and contends that the respondent is responsible for the injuries sustained by the suppliant as the result of such negligence.

The respondent denies negligence on the part of Private MacDonald, alleges that the suppliant was guilty of contributory negligence and that his injuries were the result of his own negligence, and raises the defence that at the time of the accident Private MacDonald was not an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act.

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Before dealing with the question of fact as to whether the suppliant's injuries resulted from the negligence of the soldier driver of the station wagon, I must deal first with the important question of law raised on behalf of the respondent, namely, whether an enlisted soldier, such as Private MacDonald, is an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended in 1938. If he is not, the petition of the suppliant must be dismissed, for unless the suppliant can bring his claim within the terms of the statute, this Court has no jurisdiction to entertain his petition.

The section of the Exchequer Court Act, under which this petition of right is brought, since the amendment of 1938, now reads as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

In order to succeed in his petition the suppliant must bring his claim within the express terms of this statutory enactment, for apart from it there is no liability on the part of the Crown. This means that the suppliant in this petition of right must prove not only that his injuries resulted from the negligence of Private MacDonald, but also that at the time of the accident Private MacDonald was an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act, as it now stands.

It is now settled law in England that no proceedings can be taken against the Crown for a tort. (1) This rule of law was settled by the cases of *Viscount Canterbury* v. *The Attorney General* (2); *Tobin* v. *The Queen* (3) and *Feather* v. *The Queen* (4), and is still the law in that country, with the result that the only remedy open to a person in England who has suffered from a tortious act of an officer or servant of the Crown is an action against the actual person who was guilty of the tortious act.

(1) Jenks' Digest of English Civil Law 2nd Ed. Vol. 1, para. 743.

(2) (1843) 1 Ph. 30.

(3) (1864) 16 C. B (N.S.) 310.

(4) (1865) 6 B. & S. 257.

It is true that students of the law, such as the eminent English legal historian, Professor W. S. Holdsworth, after exhaustive legal research, have expressed the opinion that their Lordships who settled the doctrine in England "that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort", *Feather* v. *The Queen* (*supra*), did so through lack of proper appreciation of the fundamental reasons for the modern doctrine of employer's liability, namely, that it rests upon grounds of public policy, and not upon any theory of *respondeat superior*, based upon either an implied undertaking by the master to answer for the wrongs of his servant, or some express or implied authority given by the master to the servant, or the fiction that the wrong of the servant is the wrong of the master, and should, therefore, be imputed to him, under the maxim, *que facit per alium facit per se*, or fault on the part of the master in choosing a careless servant.

Professor Holdsworth in his great work, A History of English Law, traces the development of the modern doctrine of employer's liability (1), and the history of remedies against the Crown (2). He recognizes that it is an "undoubted rule that the modern doctrine of the employer's liability for the torts of his servant is not applicable to the Crown" and expresses the opinion that an obvious failure of justice arises from the fact. After making the statement (3):

> The one respect in which the courts have, it seems to me, given inadequate recognition to the principle that the subject should have a remedy against the crown where he has a remedy against a fellow subject, is in their treatment of petitions of right for torts

He proceeds to discuss the meaning and extent of the rule that no petition of right will lie against the Crown for a tort, and then makes the following critical comment on the "undoubted rule" of English law above referred to (4):

> But the most obvious failure of justice arises from the undoubted rule that the modern doctrine of the employer's liability for the torts of his servants is not applicable to the Crown. I think that the cases show that this rule is largely due to the view that the tort of the servant is imputed to the employer, in the same way as it is imputed to a person who has authorized a tort (5).
>
> This view seems to run through the cases, and is characteristic of the period when, as we have seen, (6) the true basis o fthis liability was not

(1) Vol. VIII, pp 472-479.
(2) Vol. IX, pp. 4-45.
(3) Vol. IX, p. 42.
(4) Vol. IX, p. 43.
(5) Vol. IX, p 43, note 2.
(6) Vol. VIII, pp. 477-478.

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properly understood. But if in fact the basis of this liability is, not the fact that the employer has authorized and therefore committed a tort; if it results rather from the imposition by law of a duty "analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others", (1) there seems to be no reason why the Crown should not be subject to the same duties.

No doubt it was difficult to hold that the Crown was liable for the torts of its servants, since this meant that the various reasons that had from time to time been assigned for holding a master liable for the wrongs of his servant would have to be reconciled with the maxim or rule that "the King can do no wrong.", but if the basis for the modern doctrine of employer's liability, namely, that it rests on grounds of public policy, had been adopted, it would have been possible to give the subject a remedy against the Crown, by way of petition of right, for the torts of its servants, without doing any violence to the rule that "the King can do no wrong". This would have carried to its logical conclusion the view that, although the King was not suable in his own courts by a subject, he was, nevertheless, since he was the fountain head of justice, "morally bound to do the same justice to his subjects as they could be compelled to do to one another" (2).

While the criticism expressed by Professor Holdsworth seems difficult, if not impossible, to answer and while it is difficult to see any real fundamental difference, in principle, apart from historical development, for holding that a petition of right does not lie against the Crown in the case of a tort, but that it does lie "in all cases in which the land, goods or money of the subject are in the possession of the Crown", which might involve wrongful dispossession or abstraction of such property by the Crown, and for breaches of contract, and while it is permissible for any critic of the policy of the law to agree with the views expressed by Professor Holdsworth, it is not now open to any court to deny the binding character of the rule itself within its limits as defined by the courts. Any change in the law must come by way of legislative enactment.

Nor is it necessary in this case to discuss the precise limits of the rule in England that no petition of right lies against the Crown for a tort, or whether under the

(1) Pollock, Essays in Jurisprudence and Ethics 128.

(2) Holdsworth—Supra, Vol IX, p. 10.

authorities, a petition of right may lie for damages for such causes of action as conversion or nuisance. It is sufficient for the purposes of this case to say that it is settled law in England that no petition of right lies against the Crown for the negligence of any of its officers or servants.

The English law on this subject was recognized as applicable in Canada by the decisions of the Supreme Court of Canada in *The Queen* v. *McFarlane* (1) and *The Queen* v. *McLeod* (2),

No change was made in the law of England in this respect by The Petition of Right Act of 1860, 23 & 24 Vict. chap. 34, known as Bovill's Act. This statute was passed mainly for the purpose of simplifying the procedure in petitions of right and assimilating the proceedings in such petitions as nearly as possible to the course of practice and procedure then in force in actions and suits as between subject and subject. It did not extend the field in which petitions of right against the Crown might lie. Indeed section 7 of the statute contains a specific proviso to this effect.

> Provided always, that nothing in this Statute shall be construed to give to the Subject any Remedy against the Crown in any Case in which he would not have been entitled to such Remedy before the passing of this Act.

Nor was any change made in the law of Canada on this subject by the Petition of Right Act passed by the Dominion Parliament in 1876, Statutes of Canada, 1876 chap. 27, which by section 19 provided:

> 19. Nothing in this Act contained shall—
>
> 1. Prejudice or limit otherwise than is herein provided, the rights, privileges or prerogatives of Her Majesty or Her Successors; or—
>
> 2. Prevent any suppliant from proceeding as before the passing of this Act; or—
>
> 3. Give to the subject any remedy against the Crown
>
> (*a*) in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws in force there prior to the passing of the Imperial Statute twenty-third and twenty-fourth Victoria, chapter thirty-four, intituled: *"An Act to amend the law relating to Petitions of Right, to simplify the proceedings and to make provisions for the costs thereof,"* or—
>
> (*b*) in any case in which, either before or within two months after the presentation of the petition, the claim is, under the Statutes in that behalf, referred to arbitration by the head of the proper department, who is thereby authorized with the approval of the Governor in Council to make such reference upon any petition of right.

(1) (1882) 7 Can. S.C.R. 216. (2) (1882) 8 Can. S.C.R. 1.

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It may therefore be regarded as settled law, even if the reasons for it are properly subject to critical comment, that in Canada no petition of right lies against the Crown for negligence, unless authority for such a proceeding can be found in the terms of some statutory enactment. In the case of the Crown in the right of the Dominion, the liability of the Crown must be found in the express terms of a statutory enactment of the Dominion Parliament. If it cannot be found in any such statute it does not exist at all.

In England, no petition of right would lie against the Crown in a case such as the one now before the Court. There the aggrieved party would be confined to his right of action, if any, against the soldier driver of the motor vehicle, although it appears that in practice, in a proper case, the suit would be defended by a solicitor for the Treasury and Counsel for the Attorney General and that a judgment for damages awarded against the soldier would be paid *ex gratia* by the Crown. Recently since the commencement of the present war a Claims Commission has been constituted in the United Kingdom to deal with claims based upon alleged negligence of members of the armed forces but the legal liability of the Crown in such cases has never been admitted in England.

In Canada, however, it was recognized at an early date that in certain cases there ought to be a liability on the part of the Crown for the acts of its officers and servants. Statutory recognition of the desirability of some modification of the rule of governmental irresponsibility for tort which obtained in England and had been accepted as the law in Canada was finally accorded in 1887 by "An Act to amend "The Supreme and Exchequer Courts Act", and to make better provisions for the Trial of Claims against the Crown" Statutes of Canada, 1887, chap. 16, which established the Exchequer Court of Canada as a separate court and by section 16, paragraph (*c*) gave it exclusive original jurisdiction to hear and determine:—

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

Provision had already been made in a previous statute for dealing with certain classes of claims against the govern-

ment. In 1870, by "An Act to extend the powers of the Official Arbitrators to certain cases therein mentioned", Statutes of Canada, 1870, chap. 23, it was provided by section 1 that where there was a supposed claim upon the Government of Canada:

> Arising out of any death, or any injury to person or property on any railway, canal, or public work under the control and management of the Government of Canada.

The claim might by the head of the department concerned therewith be referred to official arbitrators who should have power to hear and make an award upon such claim.

In 1879 an appeal, when the claim exceeded five hundred dollars, from the Official Arbitrators to the Exchequer Court of Canada and from it to the Supreme Court was provided by "An Act respecting the Official Arbitrators", Statutes of Canada, 1879, chap. 8.

In 1886 by "An Act respecting the Official Arbitrators", R.S.C. 1886, chap. 40, sec. 6, the above jurisdiction of the Official Arbitrators was slated as being in respect of:

> Any claim . . . . arising out of any death, or any injury to person or property on any public work.

The Exchequer Court Act of 1887, by Section 58, repealed "An Act respecting the Official Arbitrators", R.S.C. 1886, chap. 40, and vested the jurisdiction previously exercised by the Official Arbitrators in the newly established separate Exchequer Court of Canada.

It should be noted, however, that the first statutory admission of legal liability on the part of the Crown for the negligence of its officers or servants, while acting within the scope of their duties or employment, appeared in section 16, paragraph (*c*) of the Exchequer Court Act of 1887, above referred to. This original liability was a very limited one; it was widened by an amendment in 1917 and still further enlarged by an amendment in 1938. These statutory amendments were made after judicial decisions had exposed the limitations of the jurisdiction conferred upon the Exchequer Court, firstly by the statute of 1887 and then by the amendment of 1917.

It may be assumed that a petition of right against the Crown lies in Canada wherever it is permitted by the law of England as it stood immediately prior to the enactment of the English Petition of Right Act of 1860.

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This situation was maintained by section 15 of the Exchequer Court Act of 1887, now section 18 of the present statute.

Conversely, it may also be assumed, notwithstanding arguments to the contrary which have been made from time to time before the courts, but have never been accepted by them, that a petition of right against the Crown does not lie in Canada, where it was not permitted by the law of England as it stood immediately prior to the enactment of the English Petition of Right Act of 1860, above referred to, unless it is permitted by the express terms of some Canadian statutory enactment.

It becomes, therefore, essential to determine whether a petition of right lies against the Crown in a case such as the present, for unless the suppliant can shew that his case comes within the terms of section 19, subsection (*c*) of the Exchequer Court Act, as amended in 1938, the Court has no jurisdiction to hear his petition; the basic law, namely, that the subject cannot bring a petition of right against the Crown for damages for negligence will apply and he will be left without legal redress, however serious his injuries may be, except such right of action as he may have against the actual person whose negligence resulted in his injuries. In such case his action would lie elsewhere than in the Exchequer Court.

In considering whether the term, "officer or servant of the Crown", as it now appears in section 19 (*c*) of the Exchequer Court Act, and within the meaning of such section, includes a person such as Private MacDonald who has enlisted in the Canadian Active Service Force for the duration of the present emergency and is now serving therein, it is important to observe the warning given by Duff C. J. in *The King* v. *Dubois* (1) against following decisions upon other statutes not in *pari materia*. He said:

> Decisions in other jurisdictions upon other statutes not in *pari materia*, interesting as they may be, cannot safely be relied upon as a guide, especially when, in the decisions of this Court, and in the history of the legislation under review, we have a very sufficient lexicon for the purpose in hand

The fact, therefore, that members of the armed forces of Canada have in certain cases been held not subject to certain provincial statutory requirements on the ground that they were servants of His Majesty engaged in their

(1) (1935) S C R. 378 at 400

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military duties, as, for example, in the cases of *Rex* v. *Anderson* (1), and *Rex* v. *Rhodes* (2), must not be taken as an indication that such persons are also " officers or servants of the Crown " within the meaning of section 19 (*c*) of the Exchequer Court Act.

Nor is it permissible to assume at the outset that such a general term as " officer or servant of the Crown " includes or was meant to include every person who could possibly be considered as coming within its scope. It is not to be denied, for example, that an enlisted soldier, such as Private MacDonald, serves His Majesty for the purposes for which he enlisted and in accordance with his engagement, but it by no means follows as a matter of course, as will be seen later, that he is " an officer or servant of the Crown " within the intendment of the section under discussion. The term must not be construed apart from its context or without regard to the origin of the statutory enactment in which it appears, and the judicial history of such enactment.

In order, therefore, to arrive at the precise meaning of the term " officer or servant of the Crown " as it is used in section 19 (*c*) of the Exchequer Court Act, as amended in 1938, it is necessary to consider not only the express terms of the statute itself, but also the history of the legislation and the judicial decisions that have been rendered with regard to its meaning, for as Lindley, M.R. said in *In re Mayfair Property Co.:* (3)

> In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

By the law as it stood prior to 1887 there was no liability at all on the part of the Crown for the negligence of any of its servants. Since the enactment of section 16 (*c*) of the Exchequer Court Act in 1887, there have been a great many judicial decisions as to the meaning of the statute. The course of interpretation and construction followed by the courts is instructive, not only as illustrative of the care taken by the courts in defining the precise limits of the jurisdiction given to the Exchequer Court in this matter and the extent of the liability of the Crown for

(1) (1930) 39 Man R 84 (2) (1934) O.R. 44.
(3) (1898) 2 Ch. 28 at 35.

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negligence, but also as indicative of the respective functions of the Court and of the legislative authority. Changes in the law are not to be effected by judicial attempts either to widen or to narrow the jurisdiction that is conferred by statute. In view of the fact that apart from statute, there is no crown liability at all for negligence, it follows that the Crown is not liable by statute unless the statute so enacts. The Court has no right to endeavour to include as many cases as possible within the liability, nor to exclude from it cases which are meant to be included. The Court should not seek to give either a wide or a narrow construction to the statutory liability in question, but should endeavour rather to ascertain its precise limits. It is no part of the judicial function to change the law; that right or duty is for the appropriate legislature. It is in that light that the Courts have viewed the statute now under consideration.

It is in the same light that the Court must view the question of law raised on behalf of the respondent in this case. Before dealing with such question specifically, I think it desirable to review in a general way the judicial history of the statute now under discussion and the amendments that have been made to it, with their legal effect. Indeed, such a review is essential to the ascertainment of the exact meaning of the term "officer or servant of the Crown" as it is used in the statute.

It was argued at the outset in *City of Quebec* v. *The Queen* (1) and even as late as 1908 in *Armstrong* v. *The King* (2) that section 16 (*c*) of the Exchequer Court Act was not intended to create any liability which did not formerly exist, but that its only purpose was to confer jurisdiction upon the court to give effect to an existing remedy. This contention was negatived by the Supreme Court of Canada in *City of Quebec* v. *The Queen* (*supra*), where Gwynne J. stated that he had no doubt that there had been a change in the law. It is now settled that section 16 (*c*) of the Exchequer Court Act of 1887 not only conferred jurisdiction on the Exchequer Court but also imposed a liability upon the Crown for negligence, which did not exist before. In *Armstrong* v. *The King* (3) Davies J. said:

(1) (1892) 3 Ex. C.R. 164; (1894) 24 Can. S.C.R. 420.
(2) (1907) 11 Ex. C.R. 119; (1908) 40 Can. S.C.R. 229.
(3) (1908) 40 Can. S.C.R. 229 at 248.

I think our previous decisions have settled, as far as we are concerned, the construction of the clause (c) of the 16th section of the "Exchequer Court Act", and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist,

There was never any doubt that the liability of the Crown for negligence created by the 1887 enactment was qualified and limited, but there was controversy as to the extent of such liability. Burbidge J. was strongly of the opinion that if the cause of the injury to the person or to property arose on a public work, the suppliant's claim was within the statute, even if the injury itself did not occur actually on the public work. He gave expression to this view in a number of cases such as, *City of Quebec* v. *The Queen* (1); *City of Quebec* v. *The Queen* (2); *Filion* v. *The Queen* (3); *Letourneux* v. *The Queen* (4); *Paul v. The King* (5); *Price* v. *The King* (6). He thought that any other construction would be a narrow one.

This extended view of the liability of the Crown was rejected by the Supreme Court of Canada in a number of cases, such as *City of Quebec* v. *The Queen* (7) and *Larose* v. *The King* (8). It was definitely settled in *Paul* v. *The King* (9) that a suppliant in order to bring his claim within the statute must shew that the injury of which he complained had occurred actually "on a public work". If it happened "off" the public work itself, he had no claim, even if the negligence which caused the injury had arisen "on" a public work. The decision in *Paul* v. *The King* was followed in a large number of cases such as *The King* v. *Lefrancois* (10); *Chamberlin* v. *The King* (11); *Olmstead* v. *The King* (12); *Piggott* v. *The King* (13); *Theberge* v. *The King* (14); *Desmarais* v. *The King* (15).

These decisions indicate the closeness of the judicial decisions to the express words of the statute and the view

(1) (1891) 2 Ex. C.R. 252 at 269, 270.
(2) (1892) 3 Ex C.R. 164 at 178.
(3) (1894) 4 Ex. C R. 134 at 144.
(4) (1900) 7 Ex. C R. 1 at 7.
(5) (1904) 9 Ex. C R 245 at 270.
(6) (1906) 10 Ex. C.R. 105 at 137.
(7) (1894) 24 Can. S C.R. 420.
(8) (1901) 31 Can. S C.R. 206.
(9) (1906) 38 Can. S C.R. 126.
(10) (1908) 40 Can. S C R. 431.
(11) (1909) 42 Can. S.C.R. 350.
(12) (1916) 53 Can. S C R. 450.
(13) (1916) 53 Can. S C.R. 626.
(14) (1916) 17 Ex. C.R. 381.
(15) (1918) 18 Ex. C.R. 289.

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of the courts that the liability of the Crown is not to be extended beyond the intendment of the statute. In *City of Quebec* v. *The Queen* (1) Gwynne J. expressed the following view as to the limitations placed upon the court in construing a statute such as the one under consideration:

> The claim here is as to "injury to property" alone not occurring *upon* any public work, and we cannot hold that the Exchequer Court has jurisdiction in the present case without eliminating wholly from the sentence the words "on any public work", which it is not competent for us to do.

This rule of close adherence to the express terms of the statute has governed the courts. Where any decision has appeared to run counter to it, the Supreme Court of Canada has not hesitated to reject its authority. Thus *Letourneux* v. *The King,* (2) which appeared to hold that it was not necessary for a suppliant to show that his injury was actually done or suffered upon the public work itself, has been definitely disapproved. In *Olmstead* v. *The King* (3) Anglin J. said:

> The plaintiff's claim, however, is for damages for injuries sustained through the negligence of a Crown servant in carrying on a public work. The injury of which he complains did not happen on the public work. Section 20 (*c*) of the "Exchequer Court Act", therefore, does not confer jurisdiction on the Exchequer Court. *Chamberlin* v. *The King, Paul* v. *The King* Since these cases were decided *Letourneux* v. *The King* cannot be followed in such a case as this In that case the full limitative effect of the words "on any public work" in sub-sec (*c*) of sec 20 would appear not to have been sufficiently considered.

In *Pigott* v. *The King* (4) Anglin J. expressed the same views:

> Since the decisions in *Chamberlin* v *The King* and *Paul* v *The King, Letourneux* v *The King* is not authority for bringing such an action

In *The King* v. *Dubois* (5) Duff C.J., after pointing out that *Letourneux* v. *The King* (*supra*) was "very imperfectly reported", said:

> It is impossible now to ascertain what were the grounds on which the majority of the court proceeded.

No decision of the courts in construing the meaning of the statute as it was enacted in 1887 is more striking than the one rendered in *Pigott* v. *The King* (6). In that case

(1) (1894) 24 Can. S.C.R. 420 at 450.
(2) (1903) 33 Can. S.C.R. 335
(3) (1916) 53 S.C.R. 450 at 456, 457.
(4) (1916) 53 Can S.C.R. 626 at 632
(5) (1935) S.C.R. 378 at 389
(6) (1915) 19 Ex. C.R. 485; (1916) 53 Can. S.C.R. 626.

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the suppliants brought their petition of right for damages done to their dock and piling grounds caused by the explosion of dynamite on adjoining property on which the Crown was constructing a large cement dock. The damage was the result of negligence on the part of servants of the Crown while engaged in blasting operations in the course of construction of the dock. Although the suppliants would have had a clear case against a fellow subject under similar circumstances, it was held that they had no claim against the Crown under the statute because the injury to them did not happen " on a public work ". If the injury had been to persons rather than to property the result would have been the same. If a number of persons had been injured, those who were on the public work would have had a claim against the Crown under the statute but those who were not actually on the public work when they were injured would have had no claim.

The anomaly of such a situation was obvious, but the Courts had no option in the matter other than to decide as they did as long as the statute remained in its original form.

In 1917, by " An Act to amend the Supreme Court Act and the Exchequer Court Act ", Statutes of Canada, 1917, chap. 23, Sec. 2, paragraph (*c*) of section 20 of the Exchequer Court Act, R.S.C. 1906, chap 40 (formerly paragraph (*c*) of Section 16 of the Exchequer Court Act of 1887) was repealed and the following was substituted therefor:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

It may be noted that the words "on any public work" were removed from their place immediately after the words "any death or injury to the person or to property" and were replaced by the words " upon any public work" immediately after the words " duties or employment ". The liability of the Crown, although widened, was still a very limited one. It was quite clear, after the amendment of 1917, that the suppliant no longer had to show that his injury, whether to his person or to his property had occurred actually " on " a public work, so long as he could shew that it had resulted from the negligence of some officer or servant of the Crown, while acting within the

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scope of his duties or employment, if such duties or employment were "upon any public work".

The meaning of the amendment and the extent of the widened liability of the Crown for negligence resulting from the amendment came before the courts for consideration in a number of cases, before the interpretation and construction of the statute as amended was finally settled in *The King* v. *Dubois* (1).

Contentions were advanced before the courts by counsel for suppliants for as wide an application of the amendment as possible. The main questions in controversy were as to the meaning of the term "upon any public work" in the 1917 amendment. Did the word "upon" have any geographical significance? Was the term "public work" broad enough to include "public service"?

The first of these questions came before the courts for determination in the case of *Schrobounst* v. *The King* (2) in which the decision was rendered on questions of law. In that case the facts alleged were that the suppliants were in a vehicle, standing at the curb, on a public street in the City of St. Catherines, when they were run into and injured by a motor truck, the property of the Crown, due to the negligence of the driver thereof, a servant of the Crown, employed in transporting other employees of the Crown to a public work at Thorold. The contention of the Crown was that the words "upon any public work" still had a geographical significance and that the Court could not entertain the petition because the servant of the Crown in question was not actually "upon" any public work. This contention was not approved by the courts. In the Exchequer Court (3) Maclean J. expressed his views as follows:

> I am of the opinion therefore that the words "employment upon any public work" is merely descriptive of the work or employment, and was not intended to mean that the work or employment must be performed on any defined or specific locus whereon a public work is being maintained, constructed, controlled or managed or that the negligence complained of must occur thereon. I cannot therefore uphold the points of law raised on behalf of the respondent.

On appeal to the Supreme Court of Canada the judgment of the court below was affirmed. There the judgment of the Court was delivered by Mignault J. who said: (4)

(1) (1935) S.C.R. 378.
(2) (1925) Ex. C.R. 167; (1925) S.C.R. 458.
(3) (1925) Ex. C.R. 167 at 171.
(4) (1925) S.C.R. 458 at 459.

We are of the opinion that the words "upon any public work" in subsection (c) qualify not necessarily the presence but the employment of the negligent servant or officer of the Crown.

If it had been intended to restrict the application of the subsection to the case in which the person causing the injury was at the time physically present "upon any public work" these latter words would more properly have been inserted immediately after the word "while", where their significance would have been unmistakeable. The construction placed on the words "on any public work" in *Piggott's Case* (1) and other cases decided on the subsection as it stood prior to 1917, proceeded upon and was necessitated by their collocation with the words "person or property".

The decision in *Schrobounst's Case* (supra) is subject to the following remarks of Duff C. J. in *The King* v. *Dubois:* (2)

It is possible that Schrobounst's case has carried the construction of section 19 (c) to the furthest permissible limit.

In *Dubois* v. *The King* (3) a sharp difference of opinion between the Exchequer Court and the Supreme Court of Canada arose. The case was heard on questions of law. The facts alleged in the petition of right were that specially equipped motor cars, owned by the Government of Canada, were employed by the Radio Branch of the Department of Marine, in the detection and elimination of radio inductive interference, and that two employees of the Radio Branch who were returning to Ottawa in such a car from a tour of inspection had stopped the car on one side of the travelled road to wipe the windshield which had become clouded due to weather conditions, with the result that an oncoming car in which the son of the suppliants was a passenger collided with the Government car and was killed. The questions of law were, (1) whether the Goverment owned motor car under the circumstances was a "public work" within the meaning of sec. 19 (c) of the Exchequer Court Act and (2) whether the employees in question were at the time of the collision officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of the same section. In the Exchequer Court (4) Maclean J. answered both these questions in the affirmative. He expressed the view that the term "any public work" meant any work carried on by the Crown to serve the public with some necessity or convenience required by the public and made available by a parliamentary vote of public

(1) (1916) 53 Can. S.C.R. 626.
(2) (1935) S.C.R. 378 at 398.
(3) (1934) Ex C.R. 195; (1935) S.C.R. 378.
(4) (1934) Ex C.R. 195.

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moneys and included public services such as that of detecting and eliminating radio inductive interference. At page 203 he said:

> Now, I think a public service of this nature is a "public work", and I think also that any physical instrumentality (such as the specially equipped motor car in this case) owned, equipped and used by the Crown, in carrying out a public service of such a character, is a "public work" within the meaning of the Exchequer Court Act.

And at p. 204, after discussing certain previous decisions on the statute he said:

> These cases go to show that a "public work" includes public services, properties or buildings, wherein is administered one of the public services of Canada, at the expense of Canada, and excludes the popular idea or notion that a "work" is necessarily something constructive or permanent in the material sense.

And at p. 206 he stated his conclusion in the following terms:

> I cannot avoid the conviction that the work here rendered by the Crown for the public benefit, with property or means owned and controlled by the Crown, through servants employed by the Crown, a work or service made possible by moneys voted by parliament, constitutes a public work within the meaning of the Exchequer Court Act, and falls within the principle laid down in the *Schrobounst* case.

This was the widest construction of the term "public work" ever given in the judicial history of the statute. When the case came before the Supreme Court of Canada by way of appeal from the judgment of the Exchequer Court the judgment of the court below was unanimously reversed; (2) the views expressed by Maclean J. in the Exchequer Court as to the wide import of the term "public work" and that it was broad enough to include "public service" were emphatically negatived and the term was confined to the limits which it had received in previous judicial interpretations of it. The headnote of the Supreme Court report (1) reads, in part, as follows:

> Held The Government car was not a "public work", nor were its occupants acting within the scope of their duties or employment "upon any public work" at the time in question, within the meaning of s. 19 (*c*) of the *Exchequer Court Act* (R S C 1927, c 34).
>
> Having regard to the history of the legislation and the judicial decisions upon it (reviewed at length in the judgment), the phrase "public work" in s 19 (*c*) means a physical thing having a defined area and an ascertained locality, and does not comprehend public service or employment, as such; nor does it include vehicles or vessels This construction is further supported by the language of the French version of the section

(1) (1935) S C R 378 at 379

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Chief Justice Sir Lyman Duff, in a comprehensive judgment, outlined the history of the legislation from its inception and analyzed the course of its judicial interpretation. Speaking of the section in its original form and the judicial decisions upon it he said, at page 383:

> The actual decisions of this court upon the enactment establish three propositions: first, that the phrase "on a public work" served the office of fixing the locality within which the death or injury must occur in order to bring the enactment into operation; second, that the phrase "public work" denoted, not a service or services, but a physical thing; third, that such physical thing must have a fixed situs and a defined area

And after discussing certain statutory definitions of the term " public work ", he said, at page 385:

> So read and construed the term "public work" cannot be given the sense the respondent seeks to ascribe to it· of public service, employment or duty, nor can it fairly be read as comprehending such things as vehicles and vessels This, we shall see, is the effect of the decisions of this court respecting the construction of these paragraphs

Later, speaking of the amendment of 1917 he said, at page 393:

> The amendment with which we have to deal was an amendment introduced into the *Exchequer Court Act,* an amendment effected, as already observed, by a change in the order of the words in one paragraph of section 16 of that Act. The term "public work" was already there in paragraph (*b*). It was already there and remained there in the amended paragraph (*c*). The scope of the phrase in section 16, as ascertained by reference to the legislation in which those provisions took their origin and the definitions in that legislation, and as determined by the decisions of this Court was plainly settled. No expansion of the meaning of the term "public work", so determined, was necessary to give full effect to the amendment. There is nothing in the amendment requiring any alteration in the sense of the term as settled The amendment, so to speak, was an amendment within the framework of the existing statute; which framework is not altered by it. "Public work" still, in paragraph (*c*), as well as in paragraph (*b*), designates a physical thing and not a public service

The decision of the Supreme Court of Canada in *Dubois* v. *The King* (*supra*) is a striking illustration of the necessity for close attention to the express terms of such a statute as the one now under discussion and the duty of the courts to hold general terms in such a statute within the limits necessary for the accomplishment of its purposes, and not allow them to be expanded beyond such limits.

After the *Dubois* case had been decided, and, no doubt, as the result of it, the statute was further amended in 1938 by " An Act to amend the Exchequer Court Act ", Statutes of Canada, 1938, chap 28, sec. 1, which repealed paragraph

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(c) of section 19 and re-enacted it without the words "upon any public work", so that paragraph (c) of section 19 of the Exchequer Court Act, R.S.C. 1927, chap 34 (originally section 16 (c) of the Exchequer Court Act of 1887) now reads as follows:

> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

It is under the statute in this form that the present petition of right is brought. The specific question of law now before the court for determination is whether the term "officer or servant of the Crown" contained in section 19 (c) as it now stands should be construed as including persons,, such as Private MacDonald, who have enlisted in the armed forces of Canada for the duration of the present emergency and are now on active service with the Canadian Army. It may, at first, appear that the foregoing review of the legislation is irrelevant to the specific question of law now under consideration but that it is not so can be demonstrated. Just as the decisions on the statute before the amendment of 1917, carried weight as to the meaning still to be given to the term "public work" in the amendment of 1917, although in many instances they would no longer be applicable to similar facts after the amendment, so the judicial history of the statute is still of great importance as a guide to the approach that should be made in attempting to reach a solution of the present problem. In view of the judicial definitions of the term "public work", as it appeared in the statute both before and after the amendment of 1917 and the close interpretation and construction of the statute, which the courts have given to it with a view to fixing the precise limits of the liability of the Crown for negligence within the terms of the statute, it seems clear that it would not be a correct approach to the problem to assume that every person is included in the term "officer or servant of the Crown" within the meaning of section 19 (c) of the Exchequer Court Act, merely because he is performing some national or public duty or service and is in receipt of an emolument or pay from the Crown.

That such an assumption is unwarranted seems obvious. It was contended, for example, in *McHugh* v. *The Queen*

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(1) that the Minister of Public Works was an "officer or servant of the Crown" within the meaning of section 16 (*c*) of the Exchequer Court Act of 1887, but this view was negatived by Burbidge J. This case was later approved and followed by Audette J. in *Mavor* v. *The King* (2). These two cases can be considered as authorities for the statement that the term "officer or servant of the Crown" in section 19 (*c*) of the Exchequer Court Act does not include a Minister of the Crown, even although he is in recipt of an emolument from the Crown. The Minister although appointed by the Crown is an adviser to the Crown and responsible to Parliament. There are also many other persons, who, although their appointments and emoluments come from the Crown, are clearly not in any sense "officers or servants of the Crown" within the meaning of the statute under discussion, such as, for example, the Lieutenant-Governors of the provinces who, although appointed and paid by the Crown, are His Majesty's representatives, and likewise the Judges of the Dominion or Provincial Courts, who, although appointed and paid by the Crown, are independent of it. These observations are made only for the purpose of shewing that although the term "officer or servant of the Crown" is a general one, it does not follow that there are no limitations to its meaning. Indeed there are limitations to the term, inherent in the origin of the statute in which it appears, its context in the statute and the judicial interpretation of the meaning of the statute. Just as the general term "public work", which is nowhere defined in the Exchequer Court Act, was not permitted to receive an unrestricted meaning but was held to the meaning fixed by judicial decisions, so likewise the meaning of the general term "officers and servants of the Crown" must, since it is nowhere defined by the statute, be fixed according to rules of construction, similar in principle to those that have governed the court in its decisions on this statute in the past.

Moreover, since it is quite clear that the liability of the Crown for negligence in the original statutory enactment was strictly limited, it is not to be assumed that the liability although it now covers a much wider field than it did at the outset, has now become unlimited.

(1) (1900) 6 Ex. C.R. 374. (2) (1919) 19 Ex. C.R. 304.

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The decision of the Supreme Court of Canada in the *Dubois* case (*supra*) while important in itself, for its correction of the erroneous expansion of the term "public work" made in the judgment of the court below, and, perhaps even more so, for having, no doubt, pointed to the need for the amendment of 1938, is even more important for the rules of construction of a statute such as this and for the warnings of the dangers to be avoided in such construction which it contains.

In *The King* v. *Dubois* (*supra*) Duff C. J. said, at page 381:

> It will appear as we proceed that the most effectual way of ascertaining the import of the language we have to construe is to note the course of legislation upon the subject matter of the enactment from 1870 onward, and to examine with some care the course of judicial decision upon that legislation.
>
> One general observation will not, I think, be superfluous The judicial function in considering and applying statutes is one of interpretation and interpretation alone The duty of the court in every case is loyally to endeavour to ascertain the intention of the legislature; and to ascertain that intention by reading and interpreting the language which the legislature itself has selected for the purpose of expressing it.
>
> In this process of interpretation the individual views of the judge as to the subject matter of the legislation are, of course, quite irrelevant.
>
> We have before us an enactment which presents certain peculiarities There is a remedy given against the Crown in a limited class of torts; and the reasons which actuated the legislature in prescribing the limitations cannot be stated with any kind of certainty That is no ground for ignoring the limitations or for ascribing a non-natural meaning to the words in which they are stated in order to minimize the effect of these words.
>
> It is the duty of the courts to give effect to the language employed, having regard to the judicial construction which it has received.

At page 398, he sounded the following warning:

> It is important, in applying legislation of this character, to be on one's guard against a very natural tendency. For the reasons I have given the conclusion is inescapable that the purpose of the statute is not to establish the doctrine *respondeat superior* as affecting the Crown throughout the whole field of negligence. The area of responsibility, even in respect of negligence, is restricted. In *Schrobounst's Case* (1) this Court thought it was not infringing upon this restriction in holding that the facts of that case brought it within the statute. There is a natural tendency to take the latest case as a new starting point and to apply the statute to all cases which seem to fall within any of its apparent logical implications. But one thing is indisputable. If the supposed logical implication carries you beyond the area delimitated by the language of the statute, then you cannot give effect to it without transcending your function as a judge. You are constituting yourself a legislator;

(1) (1925) S C R. 458

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Then he concluded the above observations of a general nature with the following specific one relating to the question in issue before the court, at page 399:

And you cannot, for the purpose of this case, having regard to the history of the legislation and the decisions upon it, which are binding on this court, hold that "public work", in this enactment, includes matters which are not physical things, but public service or public employment as such

In the period prior to the amendment of 1917, there was only one judicial pronouncement as to the meaning of the term "officer or servant of the Crown" directly on the specific question of law that is now before the Court. In *Larose* v. *The King* (1) the facts alleged were that the suppliant who was working in his field more than a mile away from the rifle range at Cote St. Luc in the District of Montreal was wounded by a bullet fired during target practice from the rifle range. Burbidge J. dismissed the petition mainly on the ground that the rifle range was not a public work within the meaning of that term as used in section 16 (*c*) of The Exchequer Court Act of 1887.

On appeal to the Supreme Court of Canada, the judgment of the court below was affirmed and the reasons for judgment of Burbidge J. were approved. Taschereau J., in giving the judgment of the Court (Girouard J. dissenting), in addition to approving the reasons for judgment given in the Exchequer Court said: (2)

Then I do not see that the words "any officer or servant of the Crown" can be held to include the officers or men of the militia. It must not be lost sight of that the suppliant to succeed must come within the strict words of the Statute

No reasons for the above opinion appear in the reported judgment. The contention on which it was based was advanced by counsel for the Crown, Fitzpatrick K.C., Solicitor General of Canada, and Newcombe K.C., Deputy Minister of Justice, both of whom, it is interesting to note, subsequently became members of the Supreme Court of Canada, the former becoming its Chief Justice. The factum on behalf of the Attorney General of Canada filed in the appeal contains the following argument on the point:

The expression, "any officer or servant of the Crown", does not include the officers or men of the militia

Sec. 10 of the Militia Act, R S.C , cap. 41, enacts as follows: "The militia shall consist of all the male inhabitants of Canada of the age of eighteen years and upwards, and under sixty, not exempted or disqualified

(1) (1900) 6 Ex C R. 425

(2) (1901) 31 Can S C R 206 at 209.

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by law, and being British subjects by birth or naturalization; but Her Majesty may require all the male inhabitants of Canada capable of bearing arms to serve in a case of a *"levée en masse"*.

Surely the country is not to be liable for the negligence of all these.

It may fairly be assumed that Taschereau J. deliberately adopted the argument of counsel for the Crown and made the conclusion based on it part of the judgment of the Court. It should be noted that the remarks of Taschereau J. are not *obiter*. The judgment dismissing the petition in the *Larose* case could stand on this ground as easily as on any of the other grounds that were advanced, of which there were a number, namely, that the rifle range was not a public work within the meaning of the statute, that the injury to the suppliant had not happened "on" a public work, and that there was no evidence of negligence. The decision should, therefore, be regarded as a judicial pronouncement of the Supreme Court of Canada on the specific question now under consideration, and binding upon this court, unless there is something in subsequent amendments to the statute which deprives it of its authority. Further reference to the *Larose* case will be made later. It seems to me that the decision is sound in principle having regard to the limited character of the liability of the Crown. It could not possibly have been intended by Parliament that the Crown should, even potentially, become liable for the negligent acts of "all the male inhabitants of Canada capable of bearing arms". The class of persons for whose negligence the Crown was made responsible was a very restricted one.

It cannot be too strongly stressed that the liability of the Crown for negligence under the statute of 1887 was a very limited one. It was confined to negligence resulting in an injury to the person or to property "on" a public work. The injury had to occur actually on a public work and, even then, only a public work that was a physical thing having a defined area and an ascertained locality. If the injury happened "off" the public work or on a vehicle or vessel the injured person had no claim against the Crown. It would also appear that the negligence itself had to arise on a public work before there could be any valid claim. This was certainly the view expressed in many of the judicial decisions on the statute. It was also repeatedly stated that the suppliant had to come within

the express terms of the statute, which meant, of course, the express terms of the statute as they had been judicially defined.

Under the circumstances it is clear that, at the outset, liability was not imposed upon the Crown for the negligence of all its officers or servants. Just as the term "public work", in the statute, was closely defined by the courts and was never given the wide meaning that Maclean J. sought to ascribe to it in the *Dubois'* case, (*supra*) so it is reasonable to assume that the term "officer or servant of the Crown" had also a limited meaning and included only the kind of officers or servants of the Crown that would have duties or employment on a public work, that is, persons with various kinds of duties to perform on the public work of a supervisory or directing nature and workmen engaged on the public work in carrying out the tasks assigned to them by persons in authority over them. It seems clear to me that the Crown did not assume liability for the negligence of officers or men of the militia, who would in their capacity as such have nothing to do with a "public work" as defined by the judicial decisions. The term, in my opinion, included only civilian personnel in the employ of the government.

Support for the view that only such a limited class or kind of persons was meant by the term "office or servant of the Crown" may be found in the reasons suggested by the Judicial Committee of the Privy Council for the departure by new and undeveloped countries owing allegiance to the Crown from the well recognized doctrine of Crown immunity from liability for tort which was the law of England and likewise the law of such countries until they themselves altered it by statute.

In *Farnell* v. *Bowman* (1) there was an appeal to the Judicial Committee from the Supreme Court of New South Wales in which the main question to be determined was whether, under the provisions of a certain statute of the colonial legislature, the Government of the colony was liable to be sued in an action of tort. The Committee held on construction of the statute before it that the Government was so liable. In the course of delivering the judgment of their Lordships, *Sir Barnes Peacock,* at p. 649, said:

(1) (1887) 12 A.C. 643.

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> It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen If, therefore, the maxim that "the king can do no wrong" were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England.

In *The Attorney General of the Straits Settlement* v. *Wemyss* (1), in which the Judicial Committee had before it as one of its problems the effect of the Crown Suits Ordinance of 1876 of the colonial legislature, the Committee gave further approval to the views expressed in *Farnell* v. *Bowman* (*supra*). The judgment of their Lordships was delivered by Lord Hobhouse, who, at p. 197, said:

> In the case of *Farnell* v *Bowman* attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons and to the consequent expediency of providing remedies for injuries committed in the course of these works

These remarks would be much more applicable to the Canadian statute than to the statutes of New South Wales and the Straits Settlement which imposed a much wider liability upon the Crown than was the case under the Canadian Statute where the liability for negligence was limited to injuries occurring "on" a public work.

It should, perhaps, be said by way of qualification of the applicability of these remarks of the Judicial Committee to the specific question now before the court that in so far as they merely seek to justify the policy of the colonies in question in departing from the law of England, they are of little, if any, value, since the courts are not concerned with the policy of legislation but only with its interpretation and application; but, in so far as they are indicative of the intention of the legislature to meet a particular situation and to provide a remedy for it, they are very illuminating and would be particularly applicable to the Canadian legislation which confined the liability of the Crown to the kind of enterprises referred to by the Judicial Committee in the statements that have been quoted.

(1) (1888) 13 A C. 192.

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Indeed, the Supreme Court of Canada gave expression to similar views in determining the intention of the legislature in enacting the legislation of 1887. In *City of Quebec* v. *The Queen* (1) Gwynne J. said:

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals

This judicial pronouncement has been approved by the Supreme Court of Canada in a number of cases. In *The Queen* v. *Filion* (2), Sedgewick J., after referring to the above remarks of Gwynne J. in *City of Quebec* v. *The Queen (supra)*, said:

"I consider myself bound by that judgment." And in *The King* v. *Dubois* (3), Duff C.J. gave further approval of the correctness of this interpretation of "the object, intent and effect" of the legislation when, after referring to the above views of Gwynne J. and their adoption by Sedgewick J., he said:

> These words of Mr Justice Gwynne adopted by Mr Justice Sedgewick, gave no countenance to the suggestion that the term "public work" in the enactments under consideration should be construed in the sense of public employment or service.

Not only do the words in question have the negative effect which Duff C. J. ascribes to them; but they also indicate very clearly that under the original statute, the liability of the Crown is limited to claims against the government "either for the death of any person, or for injury to the person or property of any person committed to their charge" where the injury happens "upon any railway or other public work of the Dominion under the management and control of the Government"; they also shew the limited class of "servants of the Government" for whose negligence "the Government" is made liable. The limited class consists of "servants of the Government, acting within the scope of their duties or employment upon such public work." In other words the term "officer

(1) (1894) 24 Can. S C R 420 at 449
(2) (1894) 24 Can. S.C.R. 482 at 485.
(3) (1935) S C.R. 378 at 385.

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or servant of the Crown" is confined to the kind or class of servants of the Crown whose duties or employment would be upon a public work, that is to say civil servants of the Government with various duties to perform upon public works, or civilian workmen engaged upon them. There is nothing to suggest that the term should include persons who are in "military service" in the permanent forces or as members of the militia, for such persons while in such military service would have no "duties or employment on any public work". It would seem fair to say, borrowing the phraseology of Duff C.J. in the *Dubois* Case *(supra)* that these words of Mr. Justice Gwynne give no countenance to the suggestion that the term "officer or servant of the Crown" in the enactment under consideration should be construed as including persons in military service as such. The words of Mr. Justice Gwynne, on the other hand, may be taken as authority for the view that the term "officer or servant of the Crown" has been defined by the Supreme Court of Canada as meaning "servants of the Government". When "the Crown" is spoken of in a statute, the term is symbolic of the executive power and means the King acting in his executive capacity. This, in effect, means "the Government". The term "officer or servant of the Crown", as used in section 19 (*c*) of the Exchequer Court Act should, therefore, be regarded as meaning "servants", or "employees", "of the Government" whether appointed by it for the performance of certain duties, or hired by it for certain tasks of employment, all with a view to the accomplishment of governmental purposes, and all under the control of the Government. This, I think, clearly means persons of a civilian status.

This interpretation of the term is, in my opinion, more consistent with the French version of the statute, than a wider one would be. In the French text of the statute, as binding, of course, as the English one, the term used is "employé ou serviteur de la couronne".

Further support for the view that the term contemplates only persons having a civilian status is given by Mr. Justice Gwynne's statement that, within the limits expressed by him, it was "the object, intent and effect" of the enactment to confer upon the Exchequer Court in respect of claims against the government "the like juris-

diction as in like cases is exercised over public companies and individuals". It is, of course, obvious that the only kind of "officers or servants" that a public company or an individual could have would be persons in civil life, that is to say, civilian officers or servants.

It is also a sound principle of construction, to give to phrases or collocations of words that are used in a statute, and have not otherwise been judicially construed either in such statute or in a statute in *pari materia,* the ordinary well established legal meaning that such phrases or collocations of words have acquired. The term "officer or servant" in conjunction with the words "while acting within the scope of his duties or employment" makes its appearance in English legal phraseology with the commencement of the formulation of the modern doctrine of employer's liability. This statement is supported by Professor W. S. Holdsworth who, after discussing the various grounds that had been assigned for holding the master responsible for the acts of his servants, said: (1)

> But, at the end of the eighteenth and the beginning of the nineteenth centuries, it began to be more plainly seen that this liability did not depend upon agency at all It followed that these phrases about implied commands were out of place. Therefore the phrases "scope or course of employment or authority" take their place. This development helped the judges at length to see that the rule rested ultimately on grounds of public policy.

The phrase and the collocation of words had acquired and still have a well known legal meaning; they indicate the circumstances under which the employer is responsible for the acts of his "officers or servants", that is to say, only while they are acting within the scope of their duties or employment. The relationship of an employer to his "officer or servant" is a contractual one, at any rate most certainly a civilian one, and the extent of the employer's liability is limited. It would seem to be a correct interpretation, to say of an enactment whereby liability is imposed for the conduct of "an officer or servant", "while acting within the scope of his duties or employment", that the doctrine of employer's liability has been incorporated in such enactment, subject of course, to whatever restrictions upon its application the enactment may contain. In view of the limited application of the doctrine of employer's liability to the Crown by the statute, as it was

(1) A History of English Law, Vol. VIII p. 478.

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enacted in 1887, it is reasonable to assume that the only "officers or servants" contemplated by the statute were persons who would be subject to the doctrine of employer's liability if the employer, instead of being the Crown, were a corporation or a private individual. To say that when there was only a very limited application of the doctrine of employer's liability to the Crown, the liability should be held to include responsibility for the acts of persons, such as military officers or soldiers on active military service, to whom the doctrine, as it is ordinarily understood as between subject and subject, could not possibly apply, involves, in my opinion, an extension of the terms of the statute that is wholly unwarranted and quite unnecessary to give effect to the remedy which in its limited form the statute was intended to give.

In view of the complete absence of liability on the part of the Crown before the statute in question was enacted, the very limited liability that was imposed by it, the close construction of the statute by the courts and the reasons indicated in this discussion, the conclusion appears to me to be inescapable that the term "any officer or servant of the Crown" as it appeared in Section 16 (*c*) of the Exchequer Court Act of 1887 meant only civilian officers or servants of the Crown, such servants or employees of the Government as would have duties or employment upon a public work, the kind of officers or servants that a public corporation or an individual would have, persons who could be subject to the doctrine of employer's liability as it was ordinarily understood having either full contractual capacity or, at any rate, freedom of action in respect of their duties or employment, and did not include officers or men of the militia of Canada or members of the armed forces of the country engaged in active military service.

The amendment of 1917 made no change in the term "officer or servant of the Crown" or in the collocation of words "while acting within the scope of his duties or employment". The amendment consisted only in the deletion of the words "on any public work" immediately after the words "injury to the person or to property" and the addition of the words "upon any public work" immediately after the words "duties or employment". It should also be noted that the word "upon" replaced the word "on".

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The result of the amendment was that after it was made it was no longer necessary for the suppliant to shew that his injury had occurred actually "on" a public work. Nor did he have to shew that the negligence that was the cause of his injury had arisen "on" a public work, nor that the "officer or servant of the Crown" had duties or employment "on" a public work. All that he had to shew was that his injury had resulted from the negligency of an officer or servant of the Crown, while acting within the scope of his duties or employment "upon any public work", the term "upon any public work" being considered as merely descriptive of the duties or employment of the officer or servant of the Crown. This was the decision in the *Schrobounst* case *(supra)*.

The purpose of the amendment of 1917 in deleting the words "on any public work" immediately after the words "injury to the person or to property" was to make it clear that the suppliant no longer had to shew that his injury had occurred actually "on" a public work and to bring within the ambit of the statute cases such as *Piggott* v. *The King* (1), in which the suppliant had been denied relief against the Crown solely because his injury had not happened "on" the public work. That this was a purpose of the amendment of 1917 was indicated by the Supreme Court of Canada in *Wolfe Company* v. *The King* (2), where Mignault J. after referring to the decision in *Piggott* v. *The King* (*supra*) said:

> The amendment having been made in the year following this decision, it is not unreasonable to suppose that the intention was to bring such a claim as the one dismissed in *Piggott* v *The King* within the ambit of the amended clause.

Likewise in *The King* v. *Dubois* (3), Duff C. J. said:

> My own view, as already intimated is that the principal object of the amendment of 1917 was to bring within the scope of the statute those cases such as *Piggott* v. *The King* and *Chamberlain* v. *The King*, in which an injury not occurring on a public work was caused by the negligence of some servant of the Crown upon a public work; injuries, for example, caused by the escape of sparks from a carelessly constructed locomotive engine, by blasting operations carelessly conducted, and cases in which, through the negligent working of a canal, lands at some distance from the canal are flooded.

(1) (1916) 53 Can. S C R 626.
(2) (1921) 63 Can S C.R 141 at 152.
(3) (1935) S.C R. 378 at 396.

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It is also clear that another purpose was intended by using the word "upon" instead of the word "on" in connection with the words "any public work" to make it certain that it would not be necessary for a suppliant to show that the duties or employment of the Crown officer or servant had actually been "on" a public work, so long as the duties or employment were related to or connected with a public work; in other words to make it clear that the words "upon any public work" were not restrictive of the locality of the duties or employment of the Crown officer or servant, but were merely descriptive of the nature of such duties or employment. That such a purpose was intended by the amendment is clearly indicated in *The King* v. *Dubois* (1), where Duff C. J. said:

> The purpose of the legislation having been, as I have said, to correct the "stupid" inequalities, to use the phrase of Mr. Justice Idington, arising in the application of the statute as it stood before 1917, it seemed to me that that purpose would be largely frustrated if you read the word "upon" which had been substituted for the word "on" strictly as a preposition of place. In a very large number of cases the offices of the Crown responsible for the injury would be a person whose duties were not carried out on the public work in the physical sense

But, as is pointed out by the Supreme Court of Canada in the *Dubois* case *(supra)* the amendment of 1917 did not go beyond these purposes. There was nothing in the amendment to indicate any other purpose. There was no change in the term "public work", and no change in the term "officer or servant of the Crown". It was not necessary in order to give effect to the purposes of the amendment that have been mentioned to extend the meaning of the term "public work" to include "public service", and there was nothing in the amendment itself to indicate that the legislature meant any more by it than it had expressly stated. In the *Dubois* case (2), Duff C. J., in speaking of the term "public work", said:

> The scope of the phrase in section 16, as ascertained by reference to the legislation in which those provisions took their origin and the definitions in that legislation, and as determined by the decisions of this court, was plainly settled. No expansion of the meaning of the term "public work", so determined, was necessary to give full effect to the amendment. There is nothing in the amendment requiring any alteration in the sense of the term as settled. The amendment, so to speak, was an amendment within the framework of the existing statute; which framework is not altered by it.

(1) (1935) S.C.R. 378 at 397. (2) (1935) S C R. 378 at 393.

Similarly, it would seem that just as the term "public work" received no enlargement by the amendment of 1917, so the term "officer or servant of the Crown" retained the same meaning after the amendment as it had prior thereto and at the time of the original enactment in 1887. There was no change in the term, and no reason to assume any change in its meaning in order to give full effect to the purposes of the amendment. The reasoning of Chief Justice Duff, to which I have just referred is as applicable in principle to the term "officer or servant of the Crown" as it was to the term "public work". There was certainly nothing in the amendment of 1917 to indicate that the term "officer or servant of the Crown" was thereafter intended to include persons on active military service, if there were no intention prior to the amendment that the term should include such persons.

The only enlargement in respect of the term was a quantitative or numerical one, consequently resulting from the amendment, namely, that it would now cover persons whose duties or employment were "upon any public work" in the sense given to those words, as above indicated, even although they may not have been actually "on" a public work. The kind or class of "officer or servant of the Crown" was in nowise affected by the 1917 amendment. It was still of a civilian character.

The course thus far taken by the courts in interpreting the meaning of the statute is in accordance with the rule of interpretation laid down in Maxwell on The Interpretation of Statutes, 8th Edition, at page 73, where, after mentioning that there are certain objects which the Legislature is presumed not to intend, the author says:

> One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually be

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construed as being limited to the actual objects of the Act The general words of the Act are not to be so construed as to alter the previous policy of the law.

It was in the light of these principles that the Courts construed the term "on any public work" in the 1887 enactment and the term "upon any public work" in the 1917 amendment. The construction of these terms, which, apart from their context, were general ones, was limited to the actual objects of the Act.

It is clear, therefore, that it is not a proper approach to the interpretation of the term "any officer or servant of the Crown", even after the amendment of 1938, whereby the words "upon any public work" were omitted from section 19 (*c*) altogether, to assume at the outset that the term now includes every person performing any kind of public duty or rendering any kind of national service even if the term by itself should be capable of such a meaning. We have already seen, for example, that certain persons, such as Ministers of the Crown and others are not included within the meaning of the term, notwithstanding the fact that they have public duties to perform and receive their appointments and emoluments from the Crown. The term must be interpreted in such a way as to give effect to the actual objects of the Act, but the Court has no right to give it a wider meaning.

This is, perhaps, particularly true of a statute such as the present one, touching as it does the position of the Crown and the basic law that, apart from statute, the Crown is not liable for damages resulting from negligence.

Maxwell, in the text book above referred to, at page 120, makes the following statement as to the construction of a statute in so far as it affects the Crown:

> At all events, the Crown is not reached except by express words or by necessary implication in any case when it would be ousted of an existing prerogative or interest It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect

The statutory rule goes even further for section 16 of the Interpretation Act, R.S.C. 1927, chap. 1 provides:

> 16. No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby

Was there anything in the amendment of 1938 that involved any change in the meaning of the term "officer or servant of the Crown" in the section as amended from that which it had immediately prior to the amendment? It has been seen that there was an expansion of liability on the part of the Crown for negligence as the result of the 1917 amendment. The term "upon any public work" was entitled to a broad interpretation as was indicated by Duff C. J. in *The King* v. *Dubois* (1), when he said:

> My view has always been that where you have a public work, in the sense indicated in the course of the preceding discussion, and an injury is caused through the negligence of some servant of the Crown in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work, you are not deforming the language of the section, as amended in 1917, by holding that such an injury comes within the scope of the statute, that is to say, that it is an injury due to the negligence of an employee of the Crown while acting in the scope of his duties or employment "upon a public work". I have always thought, moreover, that the principle ought not to be applied in a niggardly way and that it ought to extend to the negligent acts of public servants necessarily incidental to the construction, repair, maintenance, care, working of public works.

The number of persons, therefore, whose negligence in the course of their duties or employment might involve the Crown in liability for the results of such negligence was substantially enlarged, but the Crown was still liable only for the negligence of officers or servants whose duties or employment were connected with or related to some aspect of a public work. That meant only civilian servants or employees of the Government where the relationship of the officer or servant to the Crown was one of civilian employment, whether created by appointment or by contract. The amendment of 1917, in order to effect its purposes, as has been seen, did not involve any extension of the term "officer or servant of the Crown" other than one that was purely consequential to the amendment but was still only quantitative or numerical in character.

The amendment of 1938, by deleting the "troublesome" words "upon any public work" from the section, greatly increased the number of persons for whose negligence the Crown might become responsible. It was no longer necessary for the suppliant to show that the duties or employment of the officer or servant of the Crown, whose negligence had resulted in injury to him, had been "upon

(1) (1935) S C R 378 at 397.

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any public work". All that he had to show was that his injury resulted from the negligence of any officer or servant of the Crown while acting "within the scope of his duties or employment". There was no longer any restrictive description of his duties or employment in the statute.

The amendment of 1938 was intended to bring within the ambit of the section such claims as the one that was in question in the *Dubois* case (*supra*), where the officers or servants of the Crown were engaged in the public service of locating and removing radio inductive interference. After the 1938 amendment any person in the employ of the Government engaged in a public service of a similar nature or kind, could be deemed to be an "officer or servant of the Crown" within the meaning of the section. The duties or employment of the officer or servant no longer had to have any connection with or be in any way related to a public work; they could be incidental to any kind of governmental activity, for the accomplishment of which the officer or servant had been appointed or hired.

In the last case which came before the Supreme Court of Canada in which the section, as it stood prior to the 1938 amendment, was before the Court for consideration, *Salmo Investments Limited* v. *The King* (1) Crocket J., at pages 272, 273, said:

> The section remained as thus amended until Parliament in 1938 finally, and, if I may say so, very sensibly, removed the troublesome words "upon any public work", entirely from the section, and thereby established the doctrine of *respondeat superior* as regards the Crown, and rendered it liable for the negligence of its servants in the course of their employment, in the same way as any other master would be liable for the negligence of his or its servants.

While the 1938 amendment and its effect were not before the Court and the above remarks of Crocket J. were, therefore, perhaps *obiter*, I am of the opinion that they correctly express the "object, intent and effect" of the enactment in its amended form. They are in accord with the pronouncement of Gwynne J. in *City of Quebec* v. *The Queen* (2) which I have already quoted, but take the liberty of quoting again, deleting only the limitations expressed by him which are no longer applicable to the enactment as it now stands:

(1) (1940) S.C.R. 263.

(2) (1894) 24 Can. S.C.R. 420 at 449.

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> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person or for injury to the person or property of any person . . . . ., arising from the negligence of the servants of the government, acting within the scope of their duties or employment . . . . ., the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

While the doctrine of employer's liability became thus fully applicable to the Crown in respect of the tort of negligence, by virtue of the 1938 amendment of the statute, and a great extension of the field of the liability of the Crown for the negligence of its officers or servants resulted in consequence thereof, the amendment had no further effect. The officers or servants for whose negligence the Crown was made responsible were still the kind or class of officers or servants to whom the doctrine of employer's liability would apply if the employer were some person other than the Crown, that is to say, employees of the Government in the real sense of the term, coming within the general concept of the relationship of master and servant as it is ordinarily understood, with full freedom of action to each party to the relationship, persons of the same kind or class as public companies or individuals could have as their officers or servants, in other words, civilian servants or employees of the government appointed or hired by it to carry out the regular purposes of government.

Since the amendment would have the wide effect which was intended for it, namely, that of making the doctrine of employer's liability applicable to the Crown so far as the tort of negligence is concerned, without any change in the meaning of the term "officer or servant of the Crown" and since, therefore, no change of meaning is necessary to give effect to such purpose of the amendment, the term should not receive any wider meaning than it had before. There is nothing in the amendment itself to indicate that the term "officer or servant of the Crown" was intended to receive any meaning different from that which it had before. There was no change in the term "officer or servant of the Crown" itself or in the collocation of words "while in the course of his duties or employment". There is nothing to indicate in any way that the legislature intended to go beyond the application of the doctrine of employer's liability to the Crown in the field of negligence,

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or that it meant to include within the scope of the doctrine persons of a class or kind to whom the doctrine as it is ordinarily understood could not apply, such as persons on active military service who, in the emergency of war, offer their services to their country for the duration of the emergency and by so doing enter into a status fundamentally different from that of a government servant or employee. Before the Crown should be held responsible for the negligence of such persons to whom the doctrine of employer's liability, as understood between subject and subject, would not apply, and where the relationship of the parties is so different from that of master and servant, or employer and employee, would require language in the statute of the clearest and most explicit kind. Any such far reaching extension of the liability of the Crown would have to be stated in the statute in express terms. In the absence of such express statutory terms, the Court is not justified in including within the term "officer or servant of the Crown", which by judicial definition has become synonymous with the term "servant or employee of the government", persons whose status is fundamentally different from that of government servants or employees.

That the status of a soldier on active miiltary service who has enlisted for the duration of the present emergency is fundamentally different from that of a civilian servant or employee of the Government seems quite clear. The soldier driver of the motor vehicle in question in this petition of right, Private William James MacDonald, enlisted on October 8th, 1940, at Toronto in the Canadian Active Service Force, with the unit described as No. 2 District Depot, Canadian Active Service Force, Royal Canadian Army Service Corps (Service Wing). It appears from his attestation paper, Form M.F.M. 2, that on the said date he took the oath of allegiance and made the declaration required to be taken and made by a man on his attestation. The oath of allegiance was in the following form,—

I, William James MacDonald do sincerely promise and swear (or solemnly declare) that I will be faithful and bear true allegiance to His Majesty.

W. J. MacDonald.

A specific statutory effect is given to this oath by section 21 of The Militia Act, R.S.C. 1927, Chap. 132, which provides not only for the taking of the oath but also for the effect it shall have, as follows:

21. The following oath shall be taken and subscribed before one of such commissioned officers of the Militia as are authorized for that purpose by any general order or by regulation, or before a justice of the peace, by every person upon engaging to serve in the Active Militia:—

I, A.B., do sincerely promise and swear (or solemnly declare) that I will be faithful and bear true allegiance to His Majesty.

2. Such oath shall have the effect of a written engagement with the King, binding the person subscribing it to serve in the Militia until he is legally discharged, dismissed or removed, or until his resignation is accepted.

In addition to taking this oath of allegiance Private MacDonald, after having given certain particulars with regard to himself, also made the following declaration:

I, William James MacDonald, do solemnly declare that the above particulars are true, and I hereby engage to serve in any Active Formation or Unit of the Canadian Army so long as an emergency, i.e., war, invasion, riot or insurrection, real or apprehended, exists, and for the period of demobilization after said emergency ceases to exist, and in any event for a period of not less than one year, provided His Majesty should so require my services.

W. G. Black.

Dated October 18th, 1940. W. J. MacDonald.

This indicates the nature and extent of Private MacDonald's engagement on his enlistment.

Sections 139 and 140 of the Militia Act provide for the making of regulations for carrying the Act into effect and for giving such regulations the force of law, as follows:

139. The Governor in Council may make regulations for carrying this Act into effect, for the organization, discipline, efficiency and good government generally of the Militia, and for anything requiring to be done in connection with the military defence of Canada.

140. Such regulations shall be published in the *Canada Gazette*; and upon being so published, they shall have the same force in law as if they formed part of this Act.

Under these provisions of the Militia Act the Governor in Council made the regulations known as The King's Regulations and Orders for the Canadian Militia, or more briefly, K.R. (Can.).

In conjunction with section 21, subsection 2, of the Militia Act there should also be read paragraph 302 of the said K.R. (Can.) which provides that upon signing the

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declaration and taking the oath the person concerned shall be deemed to be enlisted as a soldier of the Non-Permanent Active Militia.

By virtue of these provisions Private MacDonald on his enlistment as a soldier of the Canadian Active Service Force became a member of the Non-Permanent Active Militia of Canada. In that category he would come within the ambit of the statement made by Taschereau J. when delivering the judgment of the Supreme Court of Canada in *Larose* v. *The King* (1):

> Then I do not see that the words "any officer or servants of the Crown" can be held to include the officers or men of the militia. It must not be lost sight of that the suppliant to succeed must come within the strict words of the statute.

Section 64 of the Militia Act provides for the placing of the Militia on active service by reason of emergency as follows:

> 64. The Governor in Council may place the Militia, or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency.

and by Section 2, paragraph (*b*) it is provided that;

> "emergency" means war, invasion, riot or insurrection, real or apprehended.

Such an emergency was declared to exist by a Proclamation issued on September 1st, 1939, pursuant to Order in Council P.C. 2477 of the same date; under the provisions of the War Measures Act, R.S.C. 1927, chap. 206, the issue of such a Proclamation is conclusive evidence that the emergency exists.

By orders of the Governor in Council under Sec. 64 of the Militia Act, all active units of the Canadian Army have been placed on active service in Canada, and by a further order all such units which have been or may be comprised in or form part of the Canadian Active Service Force Overseas (now the Canadian Army Overseas) have been placed on active service beyond Canada for the defence thereof.

Furthermore Section 69 of the Militia Act provides for the subjection of officers and men of the Active Militia to military law, as follows:

> 69 The *Army Act* for the time being in force in Great Britain, the King's regulations, and all other laws applicable to His Majesty's troops in

(1) (1901) 31 S.C.R. 206 at 209.

Canada and not inconsistent with this Act or the regulations made hereunder, shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia.

2. Every officer and man of the Militia shall be subject to such acts, regulations and laws

(*a*) from the time of being called out for active service; etc.

and by Section 2, paragraph (*g*) it is provided that:

"On active service", as applied to a person subject to military service, means whenever he is enrolled, enlisted, drafted or warned for service or duty during an emergency, or when he is on duty, or has been warned for duty in aid of the civil power.

Private MacDonald, therefore, on his enlistment in addition to becoming a member of the Non-Permanent Active Militia of Canada, was immediately on active service and became subject to military law.

It remains now to consider his status and the respects in which it is fundamentally different from that of a civilian servant or employee of the government.

In the first place the engagement upon which such a person enters upon his enlistment is a personal engagement with the King, with obligations attached thereto of only a unilateral character. The relationship is very different from the contractual relationship that exists between a master and his servant, with full freedom of action on the part of each. While the enlisted soldier must serve the King for the period for which he has engaged himself and cannot, prior to the legal termination thereof, leave such service unless he is released therefrom by the authority of the King, without subjecting himself to penal consequences, there is on the other hand no obligation on the part of the King to retain the soldier for any period of service. Even although the causes of discharge from the service have been specified by Orders in Council, there is nothing to restrict the Governor in Council from discharging a soldier on any ground. In other words, the obligations as to service are only unilateral in that while the soldier must carry out his engagement of service under penal consequences for failure to do so, the King may dispense with the services of his soldier at pleasure and the soldier has, of course, no remedy for such discharge, even if such discharge be without cause.

Then, too, special provisions are made by statute for compensation to soldiers on active service for disability

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resulting from injury or disease and to their dependents in the case of their death, which are not applicable to ordinary officers or servants of the Crown.

Moreover, the pay and allowances of members of the Active Militia on active service are at such rates as may be prescribed by the Governor in Council. They are in the main fixed according to the rank of the soldier regardless of the nature of his duties. Even in respect of his pay and allowances the soldier has no contractual rights against the Crown. It is clearly established that no petition of right or any other proceeding against the Crown will lie in law for the recovery of military pay by an officer or soldier. *Cooke* v. *The King* (1) and the cases therein referred to.

Indeed it is established that all engagements between those in the military service of the Crown and the Crown are voluntary on the part of the Crown and give no occasion for an action in respect of any alleged contract, and that rule applies as well to private soldiers as it does to officers. *Mitchell* v. *The Queen* (2) and *Leaman* v. *The King* (3).

While these aspects of the personal engagement of the soldier with the King shew that the relationship is very different from that of master and servant in the ordinary sense and substantially different from that of a servant or employee of the Government, there is still another difference in status that is even more striking.

As I have indicated, a soldier such as Private MacDonald on his enlistment subjects himself to military discipline and military law. He owes a duty of implicit obedience to superior authority. He has not only abandoned his civilian status and given up many of his civil rights as an ordinary person but he has also assumed obligations and incurred the risk of penalties of a kind radically different from those to which a civilian can be subject. He may be tried by court-martial for acts committed by him which are not illegal under any law other than the military one and which, if committed by him in civilian life would carry no penal consequences with them, but which, according to military law, may involve him in the loss of his personal liberty. For example, under military law severe penalties such as penal servitude, imprisonment or detention may be awarded

(1) (1929) Ex. C.R. 20. (2) (1896) 1 Q.B. 121 n.
(3) (1920) 3 K.B.D. 663.

to a soldier who deserts, absents himself without leave or disobeys the orders of a superior, whereas the same acts if done by a civilian servant or employee of the Government, while they might result in his dismissal from the service, could not involve him in any deprivation of liberty or in penal consequences of any kind. Indeed, some breaches of duty on the part of a soldier on active service might bring upon him the penalty of death.

It is, therefore, quite clear that the status of a person who has enlisted for active service for the duration of the present emergency is fundamentally different from that of an ordinary "officer or servant of the Crown" with the connotation of that term indicating service or employment with the Government.

Furthermore, the wide scope of the Militia Act indicates that something quite different from service or employment with the Government is contemplated by it. Section 8 of the Militia Act indicates how wide the liability to militia service is. Potentially, it extends to every male inhabitant in Canada who is capable of bearing arms. The section provides as follows:

> 8. All the male inhabitants of Canada, of the age of eighteen years and upwards, and under sixty, not exempt or disqualified by law, and being British subjects, shall be liable to service in the Militia: Provided that the Governor General may require all the male inhabitants of Canada capable of bearing arms, to serve in the case of a *levée en masse*.

From the previous discussion of Section 19 (*c*) of the Exchequer Court Act, both as originally enacted and in its present form, it is clear that Parliament intended to impose the doctrine of employer's liability upon the Crown with respect to the tort of negligence first, within the narrow limits fixed by the original enactment of 1887, then, within the extended range resulting from the amendment of 1917, and finally, by the amendment of 1938, over the whole field of negligence, as suggested by Crockett J in *Salmo Investments Limited* v. *The King* (1) in the statement which I have already cited, but that liability was only in respect of officers or servants of the Crown while acting within the scope of their duties or employment. It seems to me beyond argument that when Parliament first imposed a liability upon the Crown for the negligence of its officers or servants it never contemplated a potential liability for the negligent

(1) (1940) S C R. 263 at 272, 273.

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acts of all the male inhabitants of Canada, capable of bearing arms, in the event of their being engaged in the national duty of active militia service. Nor can I see anything in the amendments of 1917 or 1938 whereby a strictly limited liability for the negligence of certain persons in the service or employment of the Government under specified circumstances has been turned into what is virtually capable of becoming an almost unlimited liability for the negligence of all the male inhabitants of Canada capable of carrying arms, who may become members of the Active Militia on active service. Such an expansion of the liability of the Crown is not possible except by express statutory enactment.

It is clear from the judicial history of section 19 (*c*) of the Exchequer Court Act that the term "officer or servant of the Crown" carries with it the connotation of service or employment with the Government in connection with some aspect of governmental administration or activity. It would, in my view, involve an improper straining of the term "officer or servant of the Crown" as it is used in the section to hold, that it extends to and includes persons who either by voluntary enlistment or by process of law become members of the Active Militia of Canada on active service. In my judgment, when a person becomes a member of the Active Militia of Canada on active service, whether by process of law or by voluntary enlistment, whereby he offers his services, and, if necessary, his life to his country for the duration of a national emergency, such as now exists, he is performing what may be termed a national function of citizenship of the highest order that is not in any way related to governmental service or employment. When he assumes that function he does not enter upon service or employment with the Government and does not become a Crown or governmental servant or employee in any sense of the term. His duties and his status are of an entirely different character. His legal status, in my judgment, may be defined as that of a person under a written personal engagement with the King whereby he renders his services as a soldier in the defence of his country pursuant to his duty of allegiance to the King, whose subject he is. Such a status is quite different from that of an "officer or servant of the Crown" as that term is used in section 19 (*c*) of the Exchequer Court Act, with its connotation of governmental

service or employment in connection with some aspect of governmental administration or activity. Nor does it make any difference to the status of such person, whether he is called to such national duty under the provisions of a statutory enactment or whether he enters upon such a status by his voluntary enlistment. Certainly he does not lose the status he would have, had he been called thereto by process of law, by the fact that his enlistment has been voluntary. Nor does the particular duty or function that he may be performing while he is on active service in any manner affect his status, for he is liable for general active service and subject to such assignments of particular tasks as superior military authority may from time to time determine.

This view as to the status of a member of the Active Militia on active service was expressed by Audette J. in *Cooke* v. *The King* (1). When speaking of section 8 of the Militia Act (then R.S.C. 1906, chap. 41, Section 10), he said:

> The compliance with this law, whereby the subject is so enlisted, cannot be called a contract creating mutual rights and obligations between the parties, as contended by suppliant at trial. The enlistment is more in the nature of a formal transmutation of a citizen into a soldier for the time being and as required by the defence of the realm.

and later:

> The enlistment is more in the nature of a species of compact (which is intelligible and requires only the statement of it to recommend it to the consideration of anyone of common sense) whereby the soldier is placed at the pleasure of the State,

and further:

> The authority and power given to the State under the Act is quite extensive. The King has the right to require the personal service of every man able to bear arms and the allegiance due from the subject renders it incumbent upon him to assist his Sovereign The prerogative of the Crown is founded on immemorial usage, recognized, admitted and sanctioned by Parliament. Chitty's prerogative, 46, 47.

A similar view was also expressed by the New York Court of Appeals in *Goldstein* v. *State of New York* (2). There the Court in dealing with a question similar to the one new under discussion, after referring to the provisions of the State Military Law, said (3):

(1) (1929) Ex C R 20, at 23.
(2) (1939) 281 N Y 396, 24 N E (2d) 97; 129 A L R 905
(3) 129 A L.R 905 at 908

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It seems clear that one who joins the State militia and is engaged in active service therein is in no sense an employee of the State. He is simply performing a duty which he owes to the sovereign State as a resident and citizen. It makes no difference whether he does that voluntarily in time of peace or in response to the call of the Governor in time of trouble.

Before dealing further with the decision in the *Goldstein* case, I should first make reference to certain opinions that have already been expressed in this Court as to whether members of His Majesty's armed forces in peace time, being members of the Permanent Forces and not of the Non-Permanent Active Militia, were officers or servants of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act. There are two cases to which reference should be made.

The first one is *Moscovitz* v. *The King* (1). In that case the suppliants were the widow and stepmother of a man who had been killed while a pasenger in a motor truck. It was alleged that his death was the result of negligence on the part of Private Kelly who had enlisted in the Permanent Forces as a member of the Canadian Army Service Corps and was engaged as a transport driver. He was stationed at Kingston and was driving a motor truck loaded with supplies from Kingston. After he had delivered the supplies to the Royal Canadian Air Force at Trenton and while he was returning to Kingston the truck which he was driving collided with that in which the deceased was a passenger resulting in his death.

The action was tried by Maclean J. who held that Private Kelly was an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act and that he had been employed "upon a public work" at the time of the negligence which resulted in the death of the deceased, and found in favour of the suppliants. At page 192, he said:

> Private Kelly was engaged in the Canadian Army Service Corps, as a transport driver, and such were his duties, and it was while acting within the scope of such duties the accident here occurred. On the occasion in question, Kelly was, I think, a servant of the Crown, performing a public work. The fact that Kelly was an enlisted soldier, or in a soldier's uniform, would not seem to me to affect the question as to whether or not he was a servant of the Crown, on a public work, on the occasion in question.

(1) (1934) Ex. C.R. 188.

and later, on the same page:

> I know of no principle or authority for the proposition that an enlisted member of the Permanent Military Forces of Canada is not a servant of the Crown, for some purposes at least. I think Kelly was a servant of the Crown in the sense intended by the Exchequer Court Act.

Before stating these views he sought to distinguish the case before him from the facts in *Larose* v. *The King* (1) and to explain the opinion of Taschereau J. in that case. At page 191, he said:

> The facts of that case would seem to me to be inapplicable here. On appeal to the Supreme Court of Canada, Taschereau, J., who delivered the judgment of the court, said: "Then I do not see that the words that 'any officer or servant of the Crown' can be held to include the officers or men of the militia". I cannot feel confident just what was meant by this observation. By sec. 76 of the Militia Act, Chap. 41 R S C, 1886, Her Majesty was empowered to sanction the organization of rifle associations, and of associations for purposes of drill, to be composed of Militia officers, or men on the Militia Rolls, and of independent companies of infantry composed of professors, masters or pupils of universities, schools or other public institutions, or of persons engaged in or about the same, under such regulations as were from time to time approved by Her Majesty; but such associations or companies, it was provided, should not be provided with any clothing or allowance therefor. I think that Taschereau J. was of the opinion in that case, that the "officers or men of the militia" were not "officers or servants of the Crown", upon the ground that at the time material there, the "officers or men of the militia" were acting as members of a voluntary rifle association, and were not under any obligation as to service in such rifle association, and were not under the pay of the Crown as such.

With great deference to the late President of this Court, I cannot see any grounds for assuming that Taschereau J., when he stated that he did not see that the words " any officer or servant of the Crown " could be held to include the officers or men of the militia, was thinking of members of a voluntary rifle association. Indeed, such an assumption is not in accord with the facts. It is quite clear from the report of the *Larose* case (*supra*) that when Taschereau J. referred to officers or men of the militia he meant exactly what he said and did not have in mind persons who were merely members of a voluntary rifle association. The report clearly shews that the rifle practice that was taking place on the rifle range in question was governmental rifle practice for members of the militia under the supervision of the Department of Militia and not merely rifle practice of members of a voluntary rifle association. It is true, of course, that there were also

(1) (1901) 31 Can. S C R 206

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some amateurs or volunteers not on duty who were practising on the rifle range at the time in question, but it is obvious from the report of the case that Taschereau J. was not thinking of any such persons. That such is the fact may be seen from the following extracts from the judgment in the *Larose* case (1). At page 208, Taschereau J. said:

> The suppliant brought this action in the Exchequer Court by petition of right against the Crown, claiming $10,000 for personal damages, alleging that the bullet which wounded him had been fired by one of the militiamen of Her Majesty, who was practising shooting at the place, and that
>
> "les autorités dépendant du département de la milice qui ont le contrôle de ce champ de tir, savaient que l'exercice du tir à cet endroit, surtout avec les balles et les fusils employés dans les dernières années, étaient dangereux pour les voisins".
>
> No other act of negligence or ground of action is charged in the petition of right.

and, at page 209:

> Moreover, it is not proved who fired the shot that wounded the suppliant It may have been fired by one of the amateurs or volunteers not on duty, who were there practising on that date with the men having what is called in the case, government practice.

If there had been any evidence that the shot had been fired by "one of the amateurs, or volunteers not on duty", there would have been no reason for Mr. Justice Taschereau making any remarks at all about officers or men of the militia.

Maclean J. after making the comment on the *Larose* case (*supra*) which I have cited, then made reference to the opinion of Burbidge J., who had been the trial judge in that case, that the rifle range was not a public work within the meaning of the term as used in the Exchequer Court Act, and continued with the following statement, at page 191:

> I do not therefore think that Taschereau, J intended to say that "any officer or servant of the Crown", did not include one enlisted in one of the permanent military services of Canada maintained by the Crown, and whose assigned duties were comparable to those of Kelly in this case.

While I am unable to conclude from anything that Taschereau J. said in the *Larose* Case (*supra*) whether he meant to exclude from the ambit of his remarks members of the permanent military services of Canada, the fact remains that in the *Moscovitz* Case (*supra*) Maclean J. was

(1) (1901) 31 Can S C R 206

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of the opinion that the exclusion of officers or men of the Militia from the term " officer or servant of the Crown " as used in the Exchequer Court Act did not extend to members of the permanent military services of Canada such as Private Kelly.

Upon appeal to the Supreme Court of Canada, the judgment of the Exchequer Court was reversed for reasons similar to those that moved the Court to reverse the judgment of the Exchequer Court in *The King* v. *Dubois* (1).

In *The King* v. *Moscovitz* (2) the Supreme Court of Canada dealt directly with the opinion expressed by Maclean J. in the court below that Private Kelly when driving the motor truck in question was employed " upon a public work " and held that his opinion in that respect was erroneous and inadmissible, in view of the meaning of the term " public work " and the fact that it did not include public service.

Duff C.J. who delivered the judgment of the court said, at page 407:

> The phrases "public work" and "chantier public" contemplate, as has been fully explained in *Dubois'* case, not public services, but physical things . . . .
>
> I cannot find here any such connection between the duties or employment in which Kelly was engaged at the time of the collision, and either the garage at Kingston which served as a depot for mechanical transport vehicles, or the Trenton airport, as to bring Kelly's negligence within the scope of the words quoted. Kelly was, in truth, simply the driver of an automobile the property of the Crown under the control of the Army Service Corps; an automobile used generally, it may be assumed, for the purposes of military transport If you interpret "public work", "chantier public", as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute I have given my reasons in the *Dubois* case for the conclusion that the phrase cannot receive such an extended interpretation. Such a public service is not, as explained in that judgment, for the purpose in hand, differentiated by any substantial distinction from any other public service; and to read "public work", "chantier public", as the equivalent of public service, is for the reasons there given plainly inadmissible.

The Supreme Court of Canada did not however deal with the opinion expressed by Maclean J. in the court below that Private Kelly was an " officer or servant of the Crown " within the meaning of the Exchequer Court Act, unless an inference that the Supreme Court had approved of his opinion on that question may be drawn from a certain sentence from the judgment of Chief Justice Duff which I have cited, to which sentence I shall later refer.

(1) (1935) S C R 378 (2) (1935) S.C.R. 404.

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The second case in which an opinion on the question was given is *Yukon Southern Air Transport Limited* v. *The King* (1). In that case the Court had before it a petition of right whereby the suppliant claimed damages from the Crown for the total loss of an aeroplane owned by it due to the alleged negligence of Sergeant Pilot Davis and Squadron Leader Fullerton, both members of the Royal Canadian Air Force. It should perhaps be noted that the accident in question in the proceedings took place on March 2nd, 1939, after the amendment of 1938 had gone into effect, but before the commencement of the present emergency.

One of the questions before the Court was whether Sergeant Pilot Davis and Squadron Leader Fullerton were officers or servants of the Crown within the meaning of Section 19 (*c*) of the Exchequer Court Act. Counsel for the suppliant contended that they were and in support of such contention relied upon the following sentence taken from the judgment of Duff C.J. in *The King* v. *Moscovitz* (2) which I have already cited.

> If you interpret "public work", "chantier public", as the learned President has done, as embracing public service of that kind, then the case, of course, falls within the statute.

It was argued that by this statement the Chief Justice had made it clear that but for the fact that the accident had not occurred "upon a public work" the Crown would have been liable in the *Moscovitz* case (*supra*). The statement was relied upon as authority for the contention that it had been held in the *Moscovitz* case (*supra*) by Maclean J. that Private Kelly, at the time of the accident in that case, had been an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act and that this view had been approved by the Supreme Court of Canada by the above statement but that the petition had been dismissed by the Supreme Court of Canada solely on the ground that Private Kelly's employment had not been "upon a public work". This inference from the sentence that I have quoted and the contention of counsel based upon it appears to have been adopted by the Court. In giving judgment in favour of the suppliant Angers J. said (3):

(1) (1942) Ex. C.R. 181. (2) (1935) S.C.R. 404 at 407.
(3) (1942) Ex. C.R. 181 at 188.

After a careful perusal of the law and precedents, I am satisfied that Fullerton and Davis were, at all times material herein, officers and servants of the Crown within the meaning of paragraph (*c*) of subsection 1 of section 19 and that consequently, if the accident was caused by their negligence or the negligence of either of them the respondent is responsible therefor See *Larose* v. *The King* (1); *Moscovitz* v. *The King* (2). In the latter case Sir Lyman Duff C. J. expressed the following opinion (p. 408):

> "If you interpret 'public work', 'chantier public', as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute."

With great deference to the opinion so expressed by Angers J., I think that the above sentence from the judgment of the Chief Justice in the *Moscovitz* case (*supra*) should be read with the context in which it appears. The Judgment of the Chief Justice, from which this sentence is taken, is devoted to the conclusion that it is inadmissible to read the term "public work", "chantier public", in section 19 (*c*) of the Exchequer Court Act as the equivalent of public service, and that the kind of service that Private Kelly was performing, since his employment was not "upon a public work", made no difference. When the Chief Justice made the statement referred to, he did so in the course of an argument resulting in that conclusion. I venture the opinion that when he made it he did not have in mind any pronouncement at all, either directly or by implication, upon the opinion expressed by Maclean J. in the Court below that Private Kelly was an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act. The whole tenor of the argument shews that it was the other opinion expressed by Maclean J. in the court below namely, that Private Kelly in driving his truck under the circumstances in question was employed "upon a public work", that was under examination. Indeed, it appears to me that the sentence in question is clearly referable to such other opinion. The Supreme Court of Canada having come to the conclusion that Private Kelly's duties or employment were not duties or employment "upon a public work", within the meaning of the term "public work", "chantier public", as explained in the *Dubois* case (*supra*), and that the judgment of the court below should be reversed on that ground, it became quite unnecessary for it to make any pronouncement at all

(1) (1901) 31 Can. S.C.R. 206.

(2) (1934) Ex. C.R. 188; (1935) S.C.R. 404.

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upon the question whether Private Kelly was or was not an "officer or servant of the Crown" within the meaning of the statute. That question had, by reason of the conclusion reached by the Supreme Court, become immaterial to the issue that was before it and any pronouncement upon it could have no effect upon the result of the case. Under the circumstances, I am of the view that no inference should be drawn from this sentence, taken out of its context, that the Supreme Court of Canada has held in the *Moscovitz* case that a member of the permanent military services of Canada is an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act. I cannot believe that the Supreme Court intended a pronouncement of such importance to be left as a matter of such inference, particularly when an inference as to a different matter may quite properly be taken. In my opinion the better view is that the Supreme Court in the *Moscovitz* case (*supra*) made no pronouncement at all upon the question.

In view of the reversal of the judgment of the Exchequer Court in the *Moscovitz* case (*supra*) by the Supreme Court of Canada on the grounds mentioned, it may be that the opinion expressed by Maclean J. in that case that Private Kelly was an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act, since it now stands by itself and is unsupported by a judgment based upon it, has no binding force as a judicial pronouncement but the same cannot be said of the decision of the Court in *Yukon Southern Air Transport Limited* v. *The King* (1). In that case the opinion of Angers J. that Sergeant Pilot Davis and Squadron Leader Fullerton were "officers or servants of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act is clearly not *obiter* since it was essential to the judgment rendered. Indeed, without such a finding the Court would have been without jurisdiction to determine the other issues involved in the petition. It should be pointed out, however, that the decision does not go beyond holding that the officers of the Royal Canadian Air Force in question in that action, both of them members of the Permanent Force, were "officers or servants of the Crown" within the meaning of section 19 (*c*). Since Private Macdonald, at the time of the accident in

(1) (1942) Ex. C.R. 181.

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this case, was a member of the Non-Permanent Active Militia on active service and, in my opinion, clearly within the ambit of the judgment of the Supreme Court of Canada in the *Larose* case (*supra*), I must hold that the decision of this court in *Yukon Southern Air Transport Limited* v. *The King* (*supra*) is not applicable to the circumstances of the case now under consideration.

It may be that a differentiation should be made between members of the Permanent Forces of Canada in peace time and members of the Active Militia on active service in a time of emergency such as the present. While I am not inclined to such a view, I appreciate that an argument in favour of such a differentiation might be supported by reference to the special provisions of the Militia Act relating to the Permanent Force and setting it apart, as it were, from the rest of the Militia. It might also be contended that, with the deletion of the words "upon any public work" from section 19 (*c*) of the Exchequer Court Act, after the amendment of 1938, the section now includes within its ambit liability on the part of the Crown for the negligence of persons permanently engaged in its military service as a profession and that such persons are "officers or servants of the Crown" within the meaning of the section. It might be argued further that the professional service of such persons is not rendered as a matter of national duty or pursuant to any duty of allegiance, since no emergency exists, but solely as a matter of personal choice with no obligatory liability to militia service involved therein and is, therefore, of the nature of governmental service or employment. If such a differentation should be made, then, of course, *Yukon Southern Air Transport Limited* v. *The King* (*supra*) stands clearly distinguishable from *Larose* v. *The King* (*supra*). If, on the other hand, no distinction should be made, then the judgment of the Supreme Court of Canada in *Larose* v. *The King* (*supra*) is the superior and governing authority. In any event this question is not presently before the Court for determination.

I may, perhaps, add that the term "militia" by section 2(*e*) of the Militia Act means all the military forces of Canada and that, so far as I have been able to gather, whatever differences there may possibly be in peace time between the Permanent Force and the Non-Permanent Active Militia, in a time of emergency such as the present,

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members of the Permanent Force and members of the Non-Permanent Active Militia are equally members of the Active Militia of Canada on active service and there is no essential difference in their status.

The only two cases in the Exchequer Court, which I have been able to find, in which there has been any expression of opinion as to whether members of the armed forces of Canada are "officers or servants of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act, are those that I have mentioned, namely, *Moscovitz* v. *The King* (1) and *Yukon Southern Air Transport Limited* v. *The King* (2). For the reasons stated I do not consider the decisions in either of them applicable to the circumstances of the present case.

In another case, *Brebner* v. *The King* (3), Audette J. found for the suppliant in a petition where the negligence alleged and proved was that of a private soldier in the Army Service Corps, but the question now under discussion was not referred to in that case at all. There, also, the private soldier was a peace time member of the Permanent Force. Under the circumstances and in view of the *Larose* case (*supra*) the decision in the *Brebner* case cannot be regarded as an authority here.

This leaves the judgment of the Supreme Court of Canada in *Larose* v. *The King* (4) as the only Canadian judicial pronouncement that is applicable to the circumstances of this case. I have no hesitation in accepting the judgment of Taschereau J. in that case as an authority that should be followed in this one.

It is not surprising that there is no English decision on the question now under discussion, since under the law obtaining in England a petition of right against the Crown for an alleged cause of action such as the present one would not be entertainable at all.

I am greatly strengthened in the opinion which I have formed by the decision of the New York Court of Appeals in *Goldstein* v. *State of New York* (5) to which reference has already been made.

(1) (1934) Ex. C.R. 188.
(2) (1942) Ex. C.R. 181.
(3) (1913) 14 Ex. C.R. 242.
(4) (1901) 31 Can S.C.R. 206.
(5) (1939) 281 N.Y. 396; 24 N.E. (2d) 97; 129 A.L.R. 905.

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While I am mindful of the warning given by Duff C.J. in *Dubois'* case (1) against placing reliance upon "decisions in other jurisdictions upon other statutes, not in *pari materia*", I think that the circumstances of the *Goldstein* case (*supra*) are so similar to those in question in the present proceedings, and the findings so clear and striking, that the decision in that case is worthy of careful examination as being very instructive as to the construction that should be placed upon the term "officer or servant of the Crown" as it is used in section 19 (*c*) of the Exchequer Court Act.

It should be noted that in the United States the same doctrine of governmental irresponsibility for torts that obtains in England applies with equal force in most, if not all, of the states in the Union. The concept contained in the maxim that the King can do no wrong was accepted and applied to the Sovereign State, so that the rule that applies in England that no proceedings can be taken against the Crown for tort is the basis for a similar rule in the United States, namely, that in the absence of express statutory provision, no action lies against the State for the torts of its officers or servants.

The *Goldstein* case (*supra*) came before the New York Court of Appeals by way of an appeal by the defendant State of New York from a judgment of the Supreme Court, Appellate Division, Third Department, which affirmed a judgment of the Court of Claims in favour of the claimants for damages growing out of the death of their son while serving in the State militia, through the negligence of other members of the militia. The New York Court of Appeals reversed the judgments of the courts below and dismissed the claims. The New York Court of Appeals had before it a number of questions, the first being whether the deceased member of the militia was an employee of the State within the meaning of the Workmen's Compensation Law in effect in the State. It was urged before the Court by counsel for the State that the deceased, a private of the State militia, who was engaged in active service at the time of the injury which caused his death, and suffered such injury as a result of the negligence of a fellow-private and of a militia officer, was an employee of the State and that, therefore, the Workmen's Compensation Law (Con-

(1) (1935) S C.R. 378 at 400.

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sol. Laws, ch. 67) afforded the exclusive remedy. It was conceded that if the deceased were an employee of the State covered by that law there could be no recovery in the proceedings that were then before the court.

The New York Court of Appeals refused to accept this contention advanced on behalf of the State. Hubbs J. who delivered the opinion of the court said: (1)

> The deceased, while in active service in the militia, received $1 25 per day pay It is, therefore, urged by the State that as he received pay from the State and was engaged in the service of the State he was an employee of the State within the meaning of group 16 of section 3 of the Workmen's Compensation Law We cannot accept that conclusion

and, later, on the same page:

> In determining whether particular persons or classes are covered it is necessary to consider the statute as a whole and the purpose embodied in its enactment When so considered it seems to us to be apparent that it was never intended to cover militiamen while engaged in active service There are many reasons which lead to that conclusion

Thus far the decision is perhaps not strictly on a statute in *pari materia* with the one now under discussion, since the court was dealing with the State Workmen's Compensation Law.

The learned judge then enumerated the essential differences between working men and women and members of the State militia in active service and then, after referring to the State Military Law under which " the militia of the state shall consist of all able-bodied male citizens . . . between the ages of eighteen and forty-five who are residents of the state " and whereby it is provided that the Governor may, in case of necessity, order into active service of the State any part of the militia that he may deem proper (which provisions are strikingly similar to those of section 8 of the Canadian Militia Act except that they are not quite as extensive in their scope), went on to express the view, which I have already quoted, that a member of the State militia engaged in active service is in no sense an employee of the State but is simply performing a duty which he owes to the Sovereign State as a resident and citizen. This expression of opinion is as applicable to the facts now in issue as it was to those that were before the New York Court.

(1) 129 A L R 905 at 907

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The Court had also before it another question, which is almost identical with the one under consideration in this case, namely, whether the officers and privates in the State militia are " officers and employees " of the State within the meaning, intent and purpose of a statute passed by the State whereby the State waived its immunity from liability for the torts of its officers and employees. The Court answered this question in the negative. The statute in question, namely, Section 12-a of the Court of Claims Act, in effect at the date of the death of the son of the claimants, was in the following terms:

Waiver of immunity from liability for torts of state officers and employees The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee. Such claim must be submitted pursuant to the procedural provisions of the court of claims act. Nothing herein contained shall be construed so as to affect, alter or repeal any provisions of the workmen's compensation law.

It is to be noted that this statute, which is even wider in its scope than section 19 (*c*) of the Exchequer Court Act, is just as general in its terms. The New York Court of Appeals held, notwithstanding the general terms of the statute, that the term "officers or employees of the State" as used in section 12-a of the Court of Claims Act did not include officers and privates of the militia on active service. On this question Bunn J. said: (1)

If private members of the State militia are not employees of the State, then for the same reason the officers referred to were not. The word "officers" as used in section 12-a is included in the term employee Neither was acting in any employment of the State They were citizens performing a public duty under the Military Law By section 12-a "the State . . . waives its immunity from liability for the torts of its officers and employees" The officers and privates in the militia referred to in the findings are not "officers and employees" within the meaning, intent and purpose of the section Therefore, the State has not waived its immunity from liability for their torts Any other construction would be contrary to the history of military organization and control.

This decision of the New York Court of Appeals, which is, of course, not binding upon this court, is, in my opinion, sound in principle. It is directly in line with the views

(1) 125 A L R 905 at 909

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expressed by Taschereau J. when speakng for the Supreme Court of Canada in *Larose* v. *The King* (1), already cited, which are likewise sound in principle and binding upon this court in the circumstances of this case.

I have therefore come to the conclusion that a person who enlists in an active unit of the Canadian Army for the duration of the present emergency and thereby becomes a member of the Non-Permanent Active Militia of Canada on active service is not an "officer or servant of the Crown" within the meaning, intent or purpose of section 19 (*c*) of the Exchequer Court Act, in that such a person on his enlistment enters upon a personal engagement with the King whereby he puts his services at the disposal of his country pursuant to his duty of allegiance to his Sovereign; in so doing he is performing a national duty and does not thereby become a crown or governmental servant or employee in any sense of the term. It follows as a consequence that the Crown is not liable for the negligence of such a person.

There is a further reason for the conclusion that Parliament did not intend the Crown to be made liable for the negligence of the officers and men of the militia, to which reference may be made.

The Militia Act itself specifies the circumstances under which compensation shall be payable in respect of injury suffered as the result of militia activities, and it is reasonable to assume that when Parliament by the Militia Act has provided remedies for specific injuries resulting from militia activities it has fixed the limits of the liability to be assumed in connection with such activities, unless liability for injuries other than those specified by the Militia Act has been expressly imposed by some other statute. For example, Section 7 of the Militia Act gives certain powers to the officer commanding the Militia in a locality or any officer duly authorized by him, subject to certain conditions. The section provides as follows:

> 7. Whenever an emergency exists, the officer commanding the Militia in the locality, or any officer duly authorized by him, may, subject to the regulations, enter upon and occupy with troops, or other persons, any buildings or lands for defence purposes, and may dig trenches and throw up field works on any such lands, and may fortify any buildings and may, for the purposes aforesaid, destroy or desolate and lay waste any such buildings or lands, and destroy food, crops, fodder, stores, or other things, and

(1) (1901) 31 Can. S C R 206 at 209.

slaughter live stock, or may take or cause to be taken, any such food, crops, fodder, stores or other things; and may drive or cause to be driven, any live stock to some place of safety; and may also impress any horses, mules, oxen or other animals required for military purposes.

The statute contemplates that if the powers conferred by this section are acted upon injury will result from the exercise of such powers and by subsection 2 of section 7 it makes provision for compensation for such injury in the following terms:

7. (2) Any person injured by the exercise of any of the provisions of this section shall be compensated from the Consolidated Revenue Fund of Canada.

A further example of the payment of compensation for property loss or injury may be found in the provisions of the Militia Act relating to the taking possession of railways. Section 90 of the Militia Act provides that under certain circumstances the Minister of National Defence may empower any person or persons to take possession in the name or on behalf of His Majesty of any railway in Canada, and of the plant belonging thereto, or of any part thereof, or to take possession of any plant without taking possession of the railway itself, and to use it for His Majesty's service. If such action is taken the owners are entitled to compensation in accordance with the provisions of section 91 of the Militia Act which reads as follows:

91. There shall be paid to any person whose railway or plant is taken possession of in pursuance of this Act, out of moneys to be provided by Parliament, such full compensation, for any loss or injury he sustains by the exercise of the powers of the Minister under the last preceding section, as is agreed upon between the Minister and the said person, or, in case of difference, as is fixed upon reference to the Exchequer Court of Canada.

The sections to which I have referred provide for compensation for loss or injury to property only. The statute also prescribes the circumstances under which compensation shall be paid for personal as well as property injury but it will be seen that the liability for personal injury is a very narrow and restricted one. Sections 52-54 of the Militia Act deal with rifle ranges and drill sheds. Section 52 makes provision for a rifle range at or as near as possible to the headquarters of every regimental division and the inspection and approval of such range before being used; section 53 provides for regulations for conducting rifle practice and for the safety of the public and section 54 provides for the

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payment of compensation for the death of any person or for any injury to the person or to property, arising from the use of any such rifle range, as follows:

54. His Majesty shall be liable to make compensation for the death of any person, or for any injury to the person or to property, arising from the use of any such rifle range or of any rifle range under the control of the Department of National Defence for target practice, carried on in accordance with the regulations of the Governor in Council in that behalf.

2. There shall be no claim to compensation

(*a*) where death or injury to the person is due to negligence on the part of the person killed or injured;

(*b*) where such person at the time death or injury was sustained was present as a spectator at the shooting, or for the purpose of taking part in the shooting, or in some official or other capacity in connection therewith; or

(*c*) in case of injury to property, where such injury is due to negligence on the part of the owner of the property.

It is interesting to note that at the time *Larose* v. *The Queen* (1) was decided in the Exchequer Court, the Militia Act contained no provision for compensation for personal injury arising from the use of a rifle range. At that time the relevant sections of the Militia Act, R.S.C. 1886, chap. 41, dealing with rifle ranges and drill sheds were sections 69-71. Section 69 dealt with the provision of rifle ranges, the appropriation of land therefor, regulations for conducting target practice and for the safety of the public and concluded with the following provisions as to inspection and compensation:

And all such ranges shall be subject to inspection and approval before being used, and the owners of private property shall be compensated for any damage that accrues to their respective properties from the use of any such rifle range

It will be recalled that in *Larose* v. *The Queen* (2) Burbidge J. held against the suppliant on the ground that the rifle range in question was not a public work within the meaning of that term as used in section 16 (*c*) of the Exchequer Court Act, but, after he had referred to section 69 of the Militia Act and pointed out that compensation under it was limited to damages accruing to property and did not extend to personal injuries, he concluded his finding as follows:

Parliament has made provision for compensating persons for damages accruing to their properties from the use of a rifle range; but not for personal injuries, and it is not for the court to add to or extend the remedies that Parliament has provided.

(1) (1900) 6 Ex C R 425. (2) (1900) 6 Ex. C.R. 425 at 428, 429

It is of interest to note from the judgment of Burbidge J. in the *Larose* case (*supra*) that in 1898, after the accident to Larose had happened, Parliament, by the Appropriation Act of that year, voted a sum of one thousand dollars as a gratuity to "Joseph Larose, shot at Côte St. Luc". It was because the suppliant thought this sum insufficient that he brought his petition of right.

Subsequently to the judgment of the Exchequer Court in the *Larose* case (*supra*) and its affirmation by the Supreme Court of Canada, the Militia Act was recast in 1904, Statutes of Canada 1904, chap. 23, and section 59 was then enacted, substantially in the same form as the present section 54, quoted above, whereby, no doubt as the result of the *Larose* case, liability to pay compensation for injury arising from the use of rifle ranges was extended to include compensation for death or injury to the person.

With the exception of section 73 which enacts that when any officer or soldier is killed on active service, or dies from wounds or disease contracted on active service, drill or training, or on duty, provision shall be made for his wife and family out of the public funds, section 54 is the only section of the Militia Act which provides for compensation for personal injury suffered as the result of any militia activity.

Parliament has in this manner specifically set out the circumstances under which compensation shall be payable for injury resulting from militia activities. It has prescribed a very limited area of liability for personal injuries, namely, only those that arise from the use of rifle ranges, as defined by section 54. This was done after the decision of the Supreme Court of Canada in the *Larose* case (1), when, if it had been so intended, the effect of that decision could easily have been nullified. It would, under the circumstances, in my judgment, be unsound to extend the field of liability for militia activities beyond the one specifically fixed by Parliament by the Militia Act or to make it include a general liability for the negligence of all officers and men of the militia. The liability of the Crown for personal injury under the Militia Act is a very restricted one: it is an indication that Parliament did not intend any general assumption of liability by the Crown for the acts of officers or men of the militia. Since Parliament has

(1) (1901) 31 Can. S.C.R. 206.

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thus deliberately delimited the field of liability for militia activities, I see no justification for any extension of such liability and I agree with the views expressed by Burbidge J. in *Larose* v. *The Queen* (*supra*) that "it is not for the Court to add to or extend the remedies that Parliament has provided".

Having reached the conclusion which I have already stated, I find that Private MacDonald, the driver of the Plymouth station wagon in question in this petition of right, was, at the time of the accident to the suppliant, not an "officer or servant of the Crown" within the meaning of that term as it is used in section 19 (*c*) of the Exchequer Court Act.

Since the suppliant, in order to succeed in his claim against the Crown, must prove all the facts that are necessary to bring his claim within the jurisdiction of the Court, and since the Court has no jurisdiction to entertain a claim against the Crown for negligence when the alleged negligence is that of some person other than an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act, and since there is no other statutory enactment under which his claim can be brought in this court, the Court has no alternative other than to hold that the petition of the suppliant in this case must be dismissed, even if the injuries suffered by him resulted from the negligence of Private MacDonald, since it follows from the conclusion I have reached as to his status that the Crown would not be liable for negligence on his part, even if such negligence were fully established.

In view of this conclusion it is not necessary for the Court to deal with a number of interesting questions that arose during the course of the trial, nor need the Court deal with the issue of negligence itself. I might say, however, that if I had come to a different conclusion on the important question of law involved in this case, I would have had no hesitation in dismissing the suppliant's petition on the ground that he had failed, on the facts, to shew that his injuries had resulted from negligence on the part of Private MacDonald.

I have dealt with this question of law at considerable length, in the belief that its importance merited as careful a consideration of its various aspects as possible. With

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the consequences of the decision, namely, that claims against the Crown, based upon alleged negligence on the part of officers and men of the Active Militia of Canada on active service, are not within the jurisdiction of this Court to entertain, and that persons injured as a result of such negligence will be left without any remedy except such as they may have against the individual person guilty of such negligence, the Court as such can have no concern. Nor can the Court take cognizance of the fact that claimants in the United Kingdom and elsewhere, by virtue of Orders in Council, such as P. C. 29/2544, dated April 11, 1941, constituting a Canadian Claims Commission (Overseas) which is charged with the duty of dealing with claims against the Crown in the right of the Dominion of Canada arising in the United Kingdom and on the continent of Europe out of any death or injury to the person or to property resulting from the alleged negligence of any Canadian Military or Air Force personnel or of any civilian personnel employed by the Department of National Defence while acting within the scope of their duties or employment, and is empowered to consider such claims and determine whether the Crown, but for any immunity or privilege, would be legally liable in the circumstances of each claim, stand in a preferred position in respect of their claims against the Crown in the right of the Dominion as compared with claimants in Canada itself. It is the duty of the Court in a case such as the one now under consideration to determine the precise limits of the jurisdiction conferred upon it and to keep within such limits. Whether such jurisdiction should be enlarged or modified is a matter of policy to be determined by the appropriate legislative authority.

In the case now before the Court there will be judgment that the suppliant is not entitled to any of the relief sought by him in his petition of right herein, and that the same be dismissed, but, under the circumstances, and in view of the importance of the question of law involved, which is squarely raised for the first time since the commencement of the present emergency, the dismissal of the petition will be without costs.

Judgment accordingly.

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May 13 & 14.
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Jan. 8.
June 1.

BETWEEN:

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... PLAINTIFF;

AND

W. D. MORRIS REALTY LIMITED... DEFENDANT.

Expropriation—Basis of valuation of expropriated property is its fair market value at date of expropriation—Value of property not to be determined by an offer to buy or sell made for the purpose of avoiding litigation or controversy—Fair market value to be based upon the most advantageous use to which property is adapted or could reasonably be applied—Structural value of buildings or improvements not to be added to fair market value of the land except only to the extent that the construction of the buildings or improvements has enhanced the fair market value of the property as a whole—Onus of proof of value upon defendant—Net revenue resulting from rents received for expropriated property is one of the best tests of fair market value—Admissibility of evidence regarding statements made by owner of expropriated property at time of expropriation.

Plaintiff expropriated certain property in the City of Ottawa, Ontario, on which there was erected a building used for storage purposes, owned by defendant. The action is to determine the value of the expropriated property.

Held: That the owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent value to be estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation. *In Re Lucas and Chesterfield Gas and Water Board* (1909) 1 K.B. 16; *Sidney* v. *North Eastern Railway Company* (1914) 3 K.B. 629; *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1914) A.C. 569; followed.

2. That an offer to buy the property made by the expropriating party for the purpose of avoiding controversy and litigation is not a fair test of its market value, nor is an offer to sell it made by the owner for the same purpose to be regarded as an admission by him as to its value.

3. That evidence as to the structural value of buildings or improvements upon land based upon their reconstruction cost less depreciation at a fixed or general rate is not an independent test of value in expropriation proceedings and the value of expropriated property cannot be ascertained by adding such structural value of the buildings or improvements to the fair market value of the land by itself except only to the extent that the construction of the buildings or improvements has enhanced the fair market value of the property as a whole.

4. That while the owner of expropriated property has no right to receive by way of compensation for its loss more than the fair market value of such property taken as a whole, he is entitled to have the fair market value based upon the most advantageous use to which the property is adapted or could reasonably be applied. *The King* v. *Manuel* (1915) 15 Ex. C.R. 381, followed.

5. That the onus of proof of value in expropriation proceedings is upon the defendant. *The King* v. *Kendall* (1912) 14 Ex. C.R. 71, followed.

6. That where property is rented for a purpose for which it is adapted the net revenue resulting from the rents received for the property is one of the best tests of its fair market value as this is one of the factors that would weigh strongly with an independent purchaser.

7. That where the owner of expropriated property claims that it was of greater value at the time of its expropriation than the amount which the expropriating party is willing to pay, evidence may be given of statements or declarations made by the owner at or about the time of the expropriation that the property was worth an amount less than that claimed by the owner even if such statements or declarations were made for purposes other than those of the expropriation.

INFORMATION by the Crown to have certain property expropriated in the City of Ottawa, Ontario, for public purposes, valued by the Court.

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

L. A. Kelly, K.C. and *E. G. Charleson* for plaintiff.

J. A. Robertson, K.C. for defendant.

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

THE PRESIDENT now (June 1st, 1943) delivered the following judgment:—

This action came on for trial on May 13 and 14, 1942, before the late President of this court whose death occurred before he was able to deliver judgment which he had reserved on the conclusion of the hearing with permission to counsel to file written briefs on the question of taxes involved in this case. On the new trial that consequently became necessary counsel submitted as evidence the transcript of the evidence adduced at the previous hearing together with the exhibits filed thereat and agreed that the action should be disposed of by the Court on the basis of such material without further evidence. Counsel also rested their respective contentions upon the oral arguments

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made at the previous hearing of which a transcript had been made. In addition counsel for the defendant resubmitted his written brief on the question of taxes and counsel for the plaintiff relied upon the written brief on this subject which had been submitted on behalf of the plaintiff in the case of *The King* v. *Harris Tie and Timber Company Limited*. No question of credibility of witnesses arises and since all the issues both of fact and of law were fully dealt with on the previous hearing there is no need for any further evidence or argument. It was clearly understood that the trial before me was in every respect to be regarded as a new trial by the Court rendered necessary by the death of the late President and that the course adopted by the parties, as outlined above, was taken in the interests of convenience and economy.

The Information exhibited by the Attorney-General herein shows that the property of the defendant described in the Information was taken under the provisions and authority of the Expropriation Act, R.S.C. 1927, chap. 64, for the purposes of the public works of Canada and that a plan and description thereof were deposited of record in the office of the Registrar of Deeds for the Registry Division of the City of Ottawa on July 28, 1938. On such deposit the expropriation was completed and the property became vested in His Majesty the King under the provisions of section 9 of the Expropriation Act. It is further provided by section 23 of the same Act that the compensation agreed upon or adjudged for the expropriated property shall stand in the stead of the property. The compensation to be adjudged by the court must, therefore, represent the value of the expropriated property as it stood at the date of the expropriation. It also appears from the Information that His Majesty the King was willing to pay to the defendant or whoever was entitled thereto the sum of $63,224.77 in full satisfaction of all estate, right, title and interest free from all encumbrance and in discharge of all claims in respect of damage or loss occasioned by the expropriation. On the other hand, the defendant by its statement of defence claimed the sum of $99,467.77 by way of compensation plus interest as set out in the said statement of defence.

There is, therefore, a substantial difference between the amount claimed by the defendant and that which the plaintiff tenders by the Information.

The defendant includes in its total claim a special claim for $2,968.70 representing sums which are said to be payable by the defendant to the City of Ottawa by way of taxes in respect of the expropriated property for the period from July 28, 1938, the date of the expropriation, to December 31, 1939, together with interest thereon. This amount is made up as follows: $739.99 for the period from July 28, 1938, to December 31, 1938; $863.89 for the first instalment of 1939 taxes; $863.89 for the second instalment of such taxes; the balance represents interest charged by the City of Ottawa on these amounts to the date of the first trial. These sums have not been paid by the defendant but payment of them has been continuously demanded by the City of Ottawa. The contention advanced by the defendant in support of this portion of its claim is that it became liable for these taxes under the provisions of the Assessment Act, Revised Statutes of Ontario, chap. 272, section 60, subsection 5, that the assessment upon its final revision shall be " the assessment upon which the taxes of the following year shall be levied ", notwithstanding the fact that on the expropriation the property became Crown property and exempt from taxation, and that in consequence of such liability the defendant suffered damage from the expropriation for which it is entitled to compensation in addition to the value of the land. The assessment made by the City of Ottawa in 1937 became the basis for the tax levy made in 1938, while that made in 1938 became the basis for the 1939 tax levy. At the time of the assessment in each case the property stood on the assessment roll in the name of the defendant as owner with the Crown as tenant. In respect of the 1938 taxes, the defendant claims that it should have to pay only the taxes up to July 28, 1938, the date of the expropriation. In respect of the 1939 taxes the contention is more involved. It is urged that the last day for appeal against the 1938 assessment in Victoria Ward of the City of Ottawa in which the expropriated property is situate was June 25, 1938, and that consequently the time for appealing from the assessment had expired before the date of the expropriation with the result that the defendant became liable by law for the 1939 taxes by reason of the assessment of 1938 being the basis of the 1939 tax levy and that there was no way in

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which the defendant could have avoided this liability. It is, therefore, argued that this liability for taxes on the part of the defendant should be regarded as damage suffered by the defendant by reason of the expropriation.

This portion of the defendant's claim cannot be allowed for the reasons indicated in the reasons for judgment given on March 6, 1943, in the case of *The King* v. *Harris Tie and Timber Company Limited* (unreported) in which I had occasion to deal with a similar claim advanced by the defendant in that case. There the defendant had actually paid the taxes for 1938 and 1939 although the property in that case had been expropriated on July 28, 1938. The reasons for disallowing the claim in that case are applicable to the present one and are to be considered as incorporated in these reasons for judgment.

Whether the City of Ottawa can compel the defendant to pay any taxes in respect of this property after its expropriation by the Crown is not a matter for this Court to determine and no opinion is expressed on this question, but it is clear that the Crown is not liable for any taxes in respect of its property, and the Court may not make it indirectly liable for such taxes by adding to the value of the property any amounts in respect of taxes, whether they have been paid by the defendant or not. The defendant's claim for $2,968.70 is, therefore, disallowed.

The defendant also makes a claim for $318 over and above any amount that it may receive by way of interest on the compensation money. The property in question is subject to a mortgage for $25,500 in favour of the London & Scottish Assurance Corporation. This mortgage carries interest at the rate of 6 per cent per annum compounded semi-annually but the mortgagee has made an agreement with the defendant that it will accept interest at the rate of 5 per cent per annum not compounded on condition that in lieu of the additional 1 per cent rate of interest it shall be paid three months' interest as a bonus. The amount of this bonus is claimed as damage suffered as a result of the expropriation on the ground that the defendant will have to pay this bonus to the mortgagee in addition to the amount which it will receive from the Crown by way of interest. I can see no possible ground upon which this claim can be sustained.

The valuation fixed by the Court covers the total value of the property, not merely the net equity which the defendant may have in it after paying off any encumbrance, lien or charge. It, therefore, makes no difference to the value of the property what rate of interest the defendant has to pay to the mortgagee. If the rate of interest on the mortgage were lower than the rate of interest which the defendant will receive on the compensation adjudged by the Court, the value of the property would not be reduced thereby; neither should it be increased even if the defendant has to pay a higher rate of interest or a sum in lieu of such higher rate. The amount of compensation money to which the defendant is entitled, representing as it does the value of the expropriated property, cannot be affected by the contractual obligations which the defendant may owe to the owner of a mortgage on such property. No contractual relationship between the owner of the expropriated property and the owner of a mortgage upon it can have the effect of making the Crown pay by way of compensation more than the value of the property. This portion of the defendant's claim must also be disallowed.

[The learned President describes the expropriated property which has erected on it a building used for storage purposes, and continues:]

Since the defendant, immediately upon the expropriation, which becomes complete when the plan and description of the land have been deposited as required by section 9 of the Expropriation Act, loses all its right, title and interest in respect of the expropriated property and the compensation adjudged by the Court takes the place of the property, it is incumbent upon the Court to determine the value of the property as it stood at the date of its expropriation, for such value is the amount of compensation to which the defendant is entitled apart from any damage that the defendant may have suffered by reason of the expropriation beyond the loss of the property itself.

What, then, is the value of the property that has been described? While there is no yardstick by which the value of any particular expropriated property can be precisely and exactly measured, there are certain general principles which have been so consistently adopted by the courts that they are beyond dispute. They have been

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clearly enunciated in such well-known cases as *In re Lucas and Chesterfield Gas and Water Board* (1); *Sidney* v. *North Eastern Railway Company* (2); *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (3); and *Fraser* v. *City of Fraserville* (4); and in text books such as Cripps on Compensation, 8th edition, p. 172, and Nichols on Eminent Domain, 2nd edition, pp. 630, 658.

The first of these principles is that in expropriation proceedings the question of value of the expropriated property must be regarded from the point of view not of the expropriating party but of the owner. He is to be compensated for the loss of his property according to its value to him. Its value to the expropriating party is not a basis for determining the compensation to which the owner is entitled. This cardinal principle is clearly adopted in the Expropriation Act itself by its provisions in section 23 that the compensation shall stand in the stead of the expropriated property and generally by its description of the compensation money as the amount to which the defendant is entitled. Indeed, the principle is inherent in the term "compensation" itself.

So far as a monetary compensation can effect such a result, the defendant is to be put in the same position with regard to the value of his property as he was in before it was taken from him. The total value of his property is to remain the same although its form has changed, so that in respect of the expropriated property, while he has lost the property itself, he is still entitled to its equivalent money value. Nowhere has this cardinal principle of expropriation law been more precisely stated than by Fletcher Moulton L.J. in the case of *In re Lucas and Chesterfield Gas and Water Board* (*supra*) where he said at p. 29:

> The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser.

While the value of the property to the expropriating party is to be disregarded and the owner compensated for the loss of his property according to its value to him, this

(1) (1909) 1 K.B. 16.
(2) (1914) 3 K.B. 629.
(3) (1914) A.C. 569.
(4) (1917) A.C. 187.

does not mean that the owner has any right to place his own or even an intrinsic valuation on the property. Just as he is not to suffer a financial loss of value of property through the expropriation, he has, on the other hand, no right to make a profit or have the sum total of his property increased in value through the expropriation. This fact calls for the application of a second general principle, namely, that the measure of the compensation to which the owner of expropriated property is entitled is the fair market value of the property as it stood at the date of its expropriation. Furthermore, the first principle must be regarded in the light of the second one, and the two principles must be applied to each case at the same time. The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent to be estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation.

While it is easy to state these general principles, their application to a particular property is not an easy matter, for the fair market value of real property cannot be ascertained with the same exactness as is possible in the case of goods for which there is a continuous and ready market. This is particularly true in the case of land with buildings or improvements on it for which the number of possible purchasers may be very limited. Nevertheless, an effort must be made to ascertain the value of the property, not intrinsically but commercially, and test such valuation if necessary "by the imaginary market which would have ruled had the land been exposed for sale", to borrow the phrase used by Lord Dunedin in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (*supra*). This is based upon the assumption that property has a money value only if someone would be willing to buy it. There are, however, useful directions that have been laid down as to the general factors that should be taken into consideration in determining fair market value.

In *In re Lucas and Chesterfield Gas and Water Board* (*supra*), Fletcher Moulton L.J. used these words (p. 30):

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The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

In *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (*supra*), Lord Dunedin, who delivered the judgment of their Lordships of the Judicial Committee of the Privy Council, after making the following statement, at p. 576:

> The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* (*supra*).

stated the following propositions:

> For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Lord Dunedin makes it clear, however, that this value to the owner cannot be fixed apart from the price that the property could have been sold for to some purchaser, other than the takers under compulsory powers, if it had been exposed for sale, for he says at p. 579:

> The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the appellant company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

While the owner is entitled to have every element of the value of the property to him taken into consideration, the decisions make it clear that it is not the intrinsic value of the property to the owner but its commercial or marketable value that must be ascertained. In other words, the price must be fixed upon the assumption that some purchaser other than the expropriating party would be willing to pay such a price. If the property were exposed for sale the limit to which legitimate competition by purchasers would reasonably force the price is the limit of the entitlement of the owner. In *Sidney* v. *North Eastern Railway Company* (*supra*), Rowlatt J. said, at p. 635:

It is well settled that the compensation must represent the value to the owner, not to the purchaser. But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

And Shearman J. said, at p. 641:

The value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.

The same view as to what is meant by fair market value is expressed in Nichols on Eminent Domain, 2nd edition, p. 658, where the author, after laying down the proposition that "the measure of compensation is the fair market value of the lands", says:

By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.

And at page 664, the same author makes the following statement:

The tribunal which determines the market value of real estate for the purposes of fixing compensation in eminent domain proceedings should take into consideration every element and indication of value which a prudent purchaser would consider.

In my view this is a correct statement of the general rule that should guide the Court in assessing the value of the expropriated property to the owner. In effect it follows that the question the Court must ask itself is—what would a purchaser, other than the expropriating party, after considering all the advantages of the property, be willing to pay for it The needs of the expropriating party are not to be taken into account; the value of the land to the owner and the amount of compensation to which he is entitled through the forcible taking of his property from him cannot be either increased or decreased by the importance or value of the purposes to which the expropriated land will be put after the expropriation is completed.

While it is true that, even when all the relevant information has been brought to the attention of the Court and weighed by it, the value of any particular expropriated property still remains to a large extent a matter of

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opinion, such opinion will rest upon a sounder foundation the more closely it is the result of the application of the guiding principles that have been enunciated.

Evidence as to the value of the expropriated property in this case was given on behalf of the defendant by George Acheson, the president of the defendant company, A. H. Fitzsimmons, a real estate broker, N. B. MacRostie, an engineer, and W. J. Abra, an architect, and on behalf of the plaintiff by W. C. Ross, a real estate broker, who had made a valuation for the Department of Public Works towards the close of 1939, and L. Cassels, a surveyor and engineer, who had been associated with Mr. Ross in his valuation. As frequently happens in cases of this sort there was a wide difference between the opinions of the witnesses for the defendant and those for the plaintiff as to the value of the property. Mr. Acheson placed its value at, say, $100,000; Mr. Fitzsimmons valued the land at $26,785 and the building at $65,400, making a total of $92,185; Mr. MacRostie took the same value for the land but valued the building at $65,969, making his total valuation come to $92,754; Mr. Abra gave evidence only as to the value of the building which he placed at $72,539. For the plaintiff, Mr. Ross put the value of the land at $18,179.50 and that of the building at $45,045.27, making his total valuation come to $63,224.77, the amount tendered by the plaintiff by the Information. Mr. Cassels agreed with the valuation given by Mr. Ross. Counsel for the defendant stressed the fact in argument that the witnesses for the defendant had arrived at their respective valuations independently of one another, whereas those for the plaintiff had worked together. In my view, not much, if any, importance is to be attached to this fact. Other evidence as to value showed that the property was assessed by the City of Ottawa in 1938 at $40,800 for the land and building. It also appeared that the defendant carried this property on its books at a value of $74,439.88 as shown by its balance sheet dated December 31, 1937, the last one prior to the expropriation. Evidence was also given, although exception was taken to it, that Mr. Ross had recommended a settlement to the Department of Public Works, which was acceptable to the defendant, of $80,000 together with $2,968.70 for taxes, $318.75 for three months' bonus on the mortgage together with interest to the date

of payment on the balance owing to the defendant and its taxed costs. This recommended settlement was not approved by the department. It is clear that the recommendation was made by way of compromise and that it was acceptable to the defendant on the same basis. It is well established that an offer to buy the property made by the expropriating party for the purpose of avoiding controversy and litigation is not a fair test of its market value, nor is an offer to sell it made by the owner for the same purpose to be regarded as an admission by him as to its value. The evidence as to the proposed compromise settlement cannot, therefore, be accepted nor can the amount of the proposed settlement be regarded as evidence of the value of the expropriated property in these proceedings at all.

(The learned President reviews the evidence as to value given by the expert witnesses for plaintiff and defendant, and continues:)

Some observations of a general nature may properly be made with regard to the evidence given in this case by the expert witnesses. In the main, they followed a general pattern; opinion evidence was given, first, as to the fair market value of the land by itself; then, a structural valuation was placed upon the building itself, by calculating its replacement or reconstruction cost as at the date of the expropriation, either on the basis of its cubical contents at a price per cube unit or on the basis of the quantities of various materials in the building at prevailing prices for such materials, and deducting therefrom a depreciation at a fixed rate; finally, the fair market value of the land by itself and the structural value of the building by itself, arrived at in the manner indicated, were added together and the total was given as the value of the expropriated property. This method of appraisal of the value of the building has sometimes been called the "quantity survey method". It is the fair market value of the property itself, taken as a whole, the land with the buildings upon it, that must be considered, for it is the whole property and not the land or the buildings separately, that is being expropriated. It is a matter of common and general knowledge that in many cases the separate calculation of the structural value of a building by estimating its replacement cost and deducting there-

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from a depreciation at a fixed rate and the addition of such structural value to the fair market value of the land by itself, if it can be separately ascertained, would result in a total valuation of the property greatly in excess of its fair market or real value.

The cost of buildings or improvements upon the land is to be taken into account only in so far as the construction of them has enhanced the fair market value of the property. It cannot be too strongly stressed that compensation in expropriation proceedings is to be adjudged on the basis of the value of the expropriated property to its owner, and not on that of its cost to him. Cost to the owner and value to the owner, meaning thereby fair market value, are not necessarily the same. Evidence as to the structural value of buildings or improvements upon land based upon their reconstruction cost, less depreciation at a fixed or general rate, is not admissible an an independent test of value in expropriation proceedings and the value of expropriated property cannot be ascertained by adding such structural value of the buildings or improvements to the fair market value of the land by itself, except only to the extent that the construction of the buildings or improvements has enhanced the fair market value of the property as a whole.

Furthermore, the value of the land with buildings or improvements upon it of a kind for which there is only a limited market cannot be ascertained without careful consideration of the uses to which the property is adapted and applied. This leads to the application of another general principle which has frequently been enunciated in this court, and may be stated as follows, namely, that while the owner of expropriated property has no right to receive by way of compensation for its loss more than the fair market value of such property taken as a whole, he is entitled to have the market value based upon the most advantageous use to which the property is adapted or could reasonably be applied. In *The King* v. *Manuel* (1), Audette J. not only dealt with the quantity survey method of appraising the value of buildings upon land but also laid down the general principle that the market value of expropriated property should be based on its best use. As to the quantity survey

(1) (1915) 15 Ex. C.R. 381.

method of appraising value and the essential difference between intrinsic value and market value, he made the following remarks, at p. 384:

> Now this appraisal of the value of buildings made under what is called "the quantity survey method", while it undoubtedly discloses the intrinsic value of the property does not necessarily establish its market value The compensation under the statute is not to be assessed upon the basis of the intrinsic value, but upon the basis of the market value of the property.
>
> The intrinsic value is the value which does not depend upon any exterior or surrounding circumstances. It is the value embodied in the thing itself. It is the value attaching to objects or things independently of any connection with anything else * * * and it would be proceeding upon a wrong principle to take the "quantity survey method" as a basis to ascertain the compensation as it would give the result of the intrinsic value and not of the market value.

and, at page 386, he said:

> It would seem that the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the land—although all of these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation. *The King* v. *Kendall* (1), affirmed on appeal to the Supreme Court of Canada; *The King* v. *N.B. Ry. Co.* (2); and *The King* v. *Loggie* (3).

With regard to the principle of assessing market value on the basis of best use, Audette J. said, at page 383:

> Now this property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, viz.: as a gentleman's residence commanding a good view and located in a fairly desirable portion of the City of Ottawa.

In *The King* v. *Loggie* (*supra*) where it was held that where an old shipyard, not used as such at the time of the expropriation, had been taken for the purposes of a public work, compensation should not be assessed on the basis of separating the various factors or component parts of the shipyard and estimating their several values but the yard must be regarded as a whole and its market value as such assessed as of the time of the expropriation, Audette J. expressed a similar view as to market value based on best use when he said, at page 89:

> The court has come to the conclusion that this property must be assessed on its market value with the best uses to which it can be put by its owners,—that is, an old discarded shipyard, slightly repaired at times, with all of its prospective capabilities at the date of the expropriation.

(1) (1912) 14 Ex. C.R. 71. (2) (1913) 14 Ex. C.R. 491.
(3) (1912) 15 Ex. C.R. 80.

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In my view, this principle of assessment of market value based upon best use of the property is correctly stated in Nichols on Eminent Domain, 2nd edition, para. 219, p. 665, where the author says:

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

In the determination of the most advantageous use to which the property can be put, while the prospective advantages of the property should be considered, it must not be forgotten that any such prospective advantages may be taken into account only in so far as they may help to give the property its present value, *vide The King* v. *Elgin Realty Company Limited* (1), where Taschereau J., who delivered the judgment of the Supreme Court of Canada, said, at page 52:

> The value to the owner consists in all advantages which the land possesses, present, or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (*supra*).

While the structural value of buildings and improvements upon land, based upon their reconstruction cost less depreciation at a fixed rate, is not an independent test of value, it does not follow that evidence of such structural value should be rejected altogether. Indeed, where the character of the buildings or improvements is well adapted to the land and its location, their structural value may afford a test of the extent to which the construction of the buildings or improvements has enhanced the market value of the property as a whole.

Having in mind the care that must be taken in dealing with separate valuations of the land and the building upon it and the need of keeping constantly in mind the value of the property as a whole on the basis of its best use by the owner, and in so far as it may be possible in

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

this case to ascertain separately the fair market value of the land, I should point out that the onus of proof of value in expropriation proceedings is on the defendant, *vide*—*The King* v. *Kendall* (*supra*), affirmed by the Supreme Court of Canada. I see no reason for preferring the valuation for the land of $26,785 given by Mr. Fitzsimmons and Mr. MacRostie on behalf of the defendant to that of $18,179.50 given by Mr. Ross and Mr. Cassels for the plaintiff and if I were to find the fair market value of the land in this case separately I would adopt the latter figures. If I were required to find the reconstruction cost of the building as at the date of the expropriation I would be inclined to accept Mr. Abra's estimate of $95,385,20 on the ground of his qualifications as an architect and his long standing in his profession, but even if this estimate were accepted it would be subject to a reduction of $7,500 in view of the evidence that a saving of that amount of steel could be effected without in any way lessening the strength of the building. I might, however, make the comment that I think it strange that there should be such a wide divergence between the witnesses of the defendant and those of the plaintiff in their estimates of reconstruction cost. I cannot, however, for the purposes of these proceedings, accept the rate of depreciation of 25 per cent that Mr. Abra adopts. The difference in approach on the question of depreciation between Mr. Abra on the one hand and Mr. Ross on the other illustrates the difficulty involved in attempting to assess the real value of expropriated property by ascertaining separately the fair market value of the land and the structural value of the building upon it, apart from the market value of the property as a whole. Mr. Abra considered that his rate of depreciation, namely 25 per cent, which had regard to the type of construction and the physical state of the building, was ample. His view was that the condition of the building was good and that there was little or no damage to it; he considered that it was capable of being used for storage purposes for over 100 years. In his depreciation allowance he took into account only the physical condition of the building. His estimate of this was that of an architect and I would not take exception to it from that point of view; but it does not take into account any questions of market value; indeed, Mr. Abra's evidence did not purport to be based on market

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value. On the other hand, Mr. Ross in arriving at his rate of depreciation of 40 per cent approached the question from the point of view both of physical depreciation and of decrease in market value. He and Mr. Cassels considered not only physical depreciation, but also other factors having to do with the market value of the property rather than merely the physical condition of the building. Mr. Ross pointed out that buildings became obsolete in time and their market value becomes less on account of changes in conditions and method of construction. Mr. Ross and Mr. Cassels also considered that the building should have further depreciation on account of its long and narrow shape. There is an outside wall 476 feet long; if the building were twice the width and only 100 feet long instead of 200 it would have the same floor area with an outer wall of only 356 feet. While this fact may not affect the life of the building or its physical condition or its structural value from the point of view of its physical condition it certainly does affect the market value of the property. Even with respect to the adaptability of the building for storage purposes this fact is of importance. As Mr. Ross points out, goods might have to be moved the full length of the building; in the case of the second and third floors, goods have to be unloaded from the elevator and moved to the northerly end of the building; on these floors the building is not as convenient even for storage purposes as a square building would be; this does not apply to the ground floor where there are entrances both from Sparks Street and Wellington Street. This disadvantage in the use of the building would affect the market value of the property, for an intending purchaser would look upon it as a defect. The same defect would make the building less adaptable to other uses. It was also pointed out by Mr. Cassels that the presence of the driveway all the way through the length of the building involved wastage of space which would not occur if the building were a square one. In addition, Mr. Ross and Mr. Cassels took other factors into account in fixing their rate of depreciation, such as the obsolescence of the building for its original purpose and its limited adaptability for use. Originally it was erected for garage and showroom purposes but it is no longer suitable for such purposes; the building lacks lighting for showroom purposes

and the south side of Wellington Street is no longer desirable for display purposes. It was also agreed that the building is not suitable for apartments or a hotel and cannot be used for office purposes. Generally it is suitable for storage purposes, but as has been indicated, not as suitable even for such purposes as a squarer building would be. All of these factors were taken into account by Mr. Ross and Mr. Cassels in assessing their rate of depreciation. While I do not question Mr. Abra's rate of depreciation based upon the physical condition of the building, and agree that the adoption of a certain rate of depreciation based entirely upon its physical condition may be sound for certain purposes, I must come to the conclusion that the estimate of depreciation made by Mr. Ross and Mr. Cassels, resting as it does upon a wider basis and taking into account factors other than mere physical condition is more acceptable and affords greater assistance to the Court in enabling it to determine the value of the property for the purpose of these proceedings. Indeed, their estimate is really more than an estimate of depreciation in the ordinary sense of the term, meaning, as it does, an allowance for wear and tear. In effect, it is an estimate of the extent to which the reconstruction cost of the building exceeds its real value from the point of view of its enhancement of the market value of the property as a whole; it might also be regarded as an attempt through the application of a depreciation rate to arrive at an appraisal of the value of the building in relation to the property as a whole. I likewise prefer their estimate to those of Mr. Fitzsimmons and Mr. MacRostie, although the estimates of these witnesses also rested upon a wider basis than that of Mr. Abra, for the reason that it is, in my view, a closer estimate of real value. If I were, therefore, to take Mr. Abra's estimate of reconstruction cost, amounting to $95,385.20, and to subject it to a depreciation of 40 per cent, even including in that rate the steel saving of $7,500, this would result in a depreciation of $38,154, and a structural value of the building of $57,231.20, which, added to the land value of $18,179.50, would result in a total valuation of the property of $75,410.70.

While it is permissible to consider the replacement cost of buildings or improvements upon land, subject to the

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conditions already indicated and provided that proper deductions are made for depreciation, it must never be lost sight of that it is the property as a whole, and not the land or the buildings separately, that is being expropriated and that it is the fair market value of the property as a whole based upon its most advantageous use to the owner that must be ascertained. In my view the property in question in these proceedings should be looked at in the light of its history, its present condition and its adaptability, with the building obsolete for its original purposes as a garage and show room, not adapted for use as an apartment, hotel or office building, but suitable for storage purposes; such purposes, in my judgment, constitute the most advantageous use to the owner to which the property could be applied. The property should, therefore, be regarded primarily from this point of view, and its fair market value as a whole should be ascertained, based upon its adaptability for use for storage purposes.

From this point of view the value of the property as a source of revenue to its owner may well be considered. Where property is rented for a purpose for which it is adapted, the net revenue resulting from the rents received for the property is one of the best tests of its fair market value, for this is one of the factors that would weigh strongly with an intending purchaser. In this case the evidence as to net rental revenues from the property is the strongest evidence that was adduced in favour of the defendant. The property was leased by the defendant to the Crown on February 27, 1933, for a period of five years commencing March 15, 1933, at an annual rental of $9,800 and the lease was renewed on February 8, 1938, for the same annual rental for a further period of five years, which, but for the expropriation, would have expired on March 15, 1943. The property was used for storage purposes by the Canadian Army Service Corps of the Department of National Defence. The average annual net rental revenue for the five years preceding the expropriation was said to be $7,698.93, or a return of 7·6 per cent on a capitalization of $100,000, before taking into account any allowance for depreciation.

This strong evidence on behalf of the defendant, while it is of great importance as a test of the value of the property to the defendant for the most advantageous use

that he could make of it, cannot, however, be looked at by itself for it is subject to some discount. The true rental value of the property cannot be ascertained solely by consideration of the rental paid during the period when the property was in the occupancy of the Crown. The evidence shows that prior to the lease of the property to the Crown in 1933 the average net revenue from it for the fourteen-year period, from 1919 to 1932 inclusive, was $3,426.81, although it may be that this latter amount should be increased by the addition of some revenue for space occupied by the defendant itself under the name of Capital Storage Company during 1931 and 1932, but no particulars as to such additional allowance were given. Mr. Fitzsimmons used the net annual rental revenue of $7,698.93 as a base against which he tested his own valuation of the property at $92,185 and says that he took the lease to the government largely into consideration in arriving at his valuation. His statement was that if the net return of $7,698.93 were capitalized, there would be a return of 7 per cent on $109,985 or a return of 8 per cent on $96,237, without depreciation allowance. Mr. Ross, for the plaintiff, expressed the opinion that the lease was very favourable to the owner of the property, considering the rentals formerly paid for it up until 1933. In the fourteen-year period before this date the maximum gross rental obtained in any one year was $6,000 and the average gross rental for the whole period was approximately $5,200, as against $9,800 per year since the commencement of the Crown lease, with the average net rental revenue for the said period being $3,426.81 per year, as compared with $7,698.93 for the Crown lease period. If Mr. Fitzsimmons had used the average net rental revenue from the building during the whole of its rental history as a base against which to test his valuation of the property he would have been driven to a much lower valuation than the one he made. Mr. Ross also expressed the opinion that the rate of rental paid by the Crown could not be continued for very long, although it must be remembered that the lease ran to March 15, 1943. He also stated that he did not think that the building would have brought a rental of that rate from an occupancy other than a government occupancy. I have no doubt that this opinion is well founded. If this net rental revenue is beyond that which might

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normally be expected, it is to that extent subject to discount as a test of market value of the property. Such higher net rental revenue may not be used by itself as a test of value, for a capitalization based upon it would be in excess of real value to the same proportionate extent as the higher net rental revenue exceeds that which might normally be expected. In this connection it must be remembered that the questions of market value and net rental return as a test of such value must be considered not in the light of present wartime conditions, but only in that of conditions as they obtained on July 28, 1938, the date of the expropriation.

Even after giving great weight to the evidence as to net annual rental return from the expropriated property I must come to the conclusion that the valuations as to the property given on behalf of the defendant, are substantially in excess of its real value.

There remain for consideration two other items of evidence. Of these the assessment of the property at $40,800 in 1938 by the City of Ottawa is receivable as evidence for what it is worth. There may be cases where a municipal assessment might afford some check against an exorbitant claim, but, generally speaking, evidence of a municipal assessment is not of itself to be relied upon as evidence of market value for expropriation purposes, and I do not regard the assessment made by the City of Ottawa as proof of value in this case.

There is one other statement as to value that deserves comment. The owner of expropriated property may give his opinion as to its value, even although he is not an expert, since he is presumed to have sufficient knowledge of such matters as the price paid for the property, the rents or other income received from it, its adaptability for use and other factors having a bearing on its value as to warrant the reception of his statement as evidence, although his opinion as to value is to be regarded really as a statement of the maximum amount of his claim and is subject to discount on the ground of bias. On the other hand, where the owner of expropriated property claims that it was of greater value at the time of its expropriation than the amount which the expropriating party is willing to pay, evidence may be given of statements or declarations made by the owner at or about the time of the expropriation that the property was worth an amount less

than that claimed by him, even if such statements or declarations were made for purposes other than those of the expropriation. In this connection, it should be noted that, although Mr. Acheson, the president of the defendant company, expressed the opinion that the expropriated property was worth $100,000, the defendant company itself carried the property on its books at a value of $74,439.88, as shown by its balance sheet, dated December 31st, 1937, just a few months before the expropriation. This evidence is receivable against the defendant's company contention as to the value of the property as an admission against interest. While no particulars were given as to how this valuation on the books of the company was arrived at, it is not to be assumed that the defendant would depress the value of its assets on its balance sheet.

While the evidence as to the amount at which the defendant company carried the expropriated property on its books is not conclusive as to its value, I have reached the conclusion that this amount is not far short of its real value. I have already expressed the opinion that the valuations put forward on behalf of the defendant were too high. I would have been inclined to accept the valuation placed by Mr. Ross and Mr. Cassels on the property except for the fact that, in my opinion, they gave less weight to its rental value than they should have done, but, on the other hand, Mr. Fitzsimmons in confining his figures to the period of time the property was in the occupany of the Crown attached too much weight to this evidence. Having regard to the property as a whole and its most advantageous use to the owner as property adapted for storage purposes and giving as careful consideration as I can to the value of the premises as a source of net rental revenue to the owner, but taking also into account the obsolescence of the building for its original purposes, and its limited adaptability for use, namely, as Mr. Fitzsimmons put it, " it is just suited to the purpose for which it is being used in the locality in which it is situated ", and the long and narrow shape of the building making it less desirable than a square building would be, all of which factors an intending purchaser other than the Crown would be entitled to take into account, and considering also the valuations arrived at after depreciation, together with the defendant's own estimate of the value of its property shortly before the expropriation, I have come to the con-

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clusion that the sum of $75,000 would be the equivalent in money value of the property and adequately represent its fair market value as it stood at the date of its expropriation and that this amount would be just and adequate compensation to the defendant for the loss of value of its property. I, therefore, find that the value of the expropriated property as it stood at July 28, 1938, was $75,000 and adjudge that this is the amount of compensation money to which the defendant is entitled, less the sum of $16,000 paid to the defendant on account on December 30, 1939.

The defendant has legitimate grounds of complaint against the Crown for its delay in bringing these proceedings. Although the lands were taken by expropriation on July 28, 1938, the information herein was not filed until June 12, 1941, almost three years later. In the meantime the Crown has had the use of the premises and the defendant has had no returns from them. While this is regrettable the Court cannot go further in relief of this grievance than the provisions of the Expropriation Act permit. Section 32 of the Act provides for the allowance of interest at the rate of 5 per cent per annum on the compensation money to the date of judgment where the amount awarded is greater than that tendered by the Crown, but the Act provides nothing further for delay in bringing the matter to adjudication. The maximum amount of interest permitted by the statute should, under the circumstances, be allowed.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King, and that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $75,000, as the value of the expropriated property, as it stood at July 28, 1938, less the sum of $16,000 paid on account on December 30, 1939, together with interest at the rate of five per cent per annum on $75,000 from July 28, 1938, to December 30, 1939, and on $59,000 from December 30, 1939, to the date of judgment. The defendant will also be entitled to its costs of these proceedings throughout, including, of course, the costs of the first hearing before the late President.

Judgment accordingly.

NOVA SCOTIA ADMIRALTY DISTRICT

1941
Feb. 26.
March 17.

BETWEEN:

GLADYS IRENE ROGERS..... PLAINTIFF;

AND

THE STEAMSHIP *BARON CARNEGIE*. DEFENDANT.

Shipping—Action in rem not maintainable against ship operated by the Crown—Personal injuries—"Damage done by a ship".

Held: That where a ship is under requisition by the Ministry of Shipping and is operated on behalf of His Majesty the King no action *in rem* can be maintained.

2. That where a pilot is injured through a defect in the equipment of a ship such injury is not damage done by a ship.

MOTION for an order to set aside a writ of summons and warrant and service thereof.

The motion was argued before the Honourable Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District, at Halifax.

F. D. Smith, K.C for the plaintiff.

C. B. Smith, K.C. for the owner of the ship *Baron Carnegie.*

J. E. Rutledge, K.C. for His Majesty the King.

CARROLL D.J.A. now (March 17, 1941) delivered the following judgment:—

On February 20th, 1941, a writ was issued by the plaintiff addressed to The Owners and all others interested in the steamship *Baron Carnegie,* carrying the following endorsement as the Statement of Claim:

The plaintiff, as widow of the late Malcolm Rogers, deceased, a pilot of the Port of St. John, New Brunswick, claims the sum of $20,000 against the steamship *Baron Carnegie* for damages done by the said ship at or near the mouth of Saint John Harbour in the Bay of Fundy resulting in the death of the said Malcolm Rogers and for costs.

As there is no Executor or Administrator of the Estate of the said Malcolm Rogers, this action is brought by and in the name of the said Gladys Irene Rogers, plaintiff, for the benefit of herself and the infant children of the said Malcolm Rogers and the plaintiff, Shirley Rogers and Evelyn Rogers.

On the same day a warrant was issued for the arrest of said ship, and I believe the said ship was served with all necessary documents leading up to her arrest.

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On the 21st of February an appearance under protest was entered by solicitor for Kelvin Shipping Company, Limited, owner of the steamship *Baron Carnegie,* and on February 22nd by solicitor for His Majesty the King, represented by the Honourable the Minister of Shipping of Great Britain and Ireland, the operator of the steamship *Baron Carnegie.*

Motions were then launched by the respective solicitors, who so appeared for an order or orders absolutely setting aside the writ of summons and warrant and the services thereof on the ground that the endorsement on the writ of summons discloses no cause of action over which the Admiralty Court has jurisdiction and on the further ground that the steamship is under requisition by the Honourable the Minister of Shipping of Great Britain and is being operated on behalf of His Majesty the King and therefore cannot be impleaded in this action.

The affidavit of E. Ernest Bryant filed herein satisfies me that the ship *Baron Carnegie* was requisitioned and remains requisitioned by the British Ministry of Shipping and is now, and at all times relevant to this matter was controlled and operated by the said Ministry, which is a Department of His Majesty's Government of Great Britain and Ireland. Control and operation necessitates possession, and I do not think that actual ownership of the property in this ship by the British Ministry of Shipping is necessary to make her a King's ship and so immune from an action *in rem.* She is, to all intents and purposes, the property of the Crown, and so this action cannot be maintained against her. The S.S. *Scotia* (1).

While this is fatal to the plaintiff in this action, I think I should make reference to the other aspects of the case.

This is an action for damages done by a ship. The facts as outlined in the affidavit of Capt. George S. Cumming, Master of the defendant ship, are that Malcolm Rogers boarded the ship *Baron Carnegie* as pilot at St. John, New Brunswick, on the 17th of February, 1941, to pilot the ship outward from the Port of St. John, New Brunswick. When finished with his pilot duties, he prepared to leave the ship and the watch officer gave orders to one of the crew to place a ladder over the side for the purpose of letting the Captain get down to the waiting tender. The pilot stepped on the ladder, it gave way and he was thrown

(1) (1903) A.C. 501.

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in the water. He was rescued by a pilot boat but died the same day, presumably as a result of the accident. This statement of fact is, I think, not disputed in the motion before me.

It is contended, first, that any damage suffered was not done by a ship within the meaning of the Admiralty Act. I think, under and by virtue of the authorities in which the words "damage done by a ship" have been interpreted, that this contention must prevail.

In the case of *The Theta* (1), the ship was arrested and damage claimed for personal injuries sustained. The circumstances resulting in the injuries were that the plaintiff was proceeding to his ship, moored outside another which was docked at a pier. In crossing the last-mentioned ship, he fell through a hatchway covered only with a tarpaulin. Notwithstanding that he had a legal right to cross the ship and that the hatchway so covered was in the nature of a trap, his claim against the ship was dismissed. The Court held that, while damage included personal injury, the damage was not done by the ship, because damage done by a ship is only applicable to those cases where the ship is the active cause of the damage, or in other words, damage done by those in charge of a ship with the ship as the noxious instrument.

The facts in the present action are somewhat different from those in *The Theta* because here the action is brought not by the person injured but by his representative on behalf of his wife and children. The right to bring any such action is given, I presume, by Chapter 81, Revised Statutes of New Brunswick 1927, the Lord Campbell's Act of that province.

The leading case in actions for damage done by a ship where the only right of any action is given under the provisions of Lord Campbell Act is *The Vera Cruz* (2). There the Captain of a ship was fatally injured owing to a collision between his ship and the *Vera Cruz,* for which collision the *Vera Cruz* was at least partly to blame. An action was brought *in rem* by the administratrix of the deceased under Lord Campbell's Act, and it was decided that an action *in rem* under Lord Compbell's Act is not within Section 7 of the Admiralty Act and that therefore

(1) (1894) P.D. 280. (2) (1884) 9 P.D. 96.

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the Admiralty Division has not jurisdiction over such an action. Said 7th section gave jurisdiction to the Court of Admiralty over "any claim for damage done by a ship".

Brett M.R., said at p. 99:

> The section indeed seems to me to intend by the words "jurisdiction over any claim" to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. I do not say that damage need be confined to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case where physical injury is not done by a ship. What, then, is the cause of action given by Lord Campbell's Act? That statute was passed to meet cases of injury caused to a man's person, because by law his right of action died with him. . . . But Lord Campbell's Act gave to a person who had no right before, a right of action as representative of other persons who had also no right before, the executor who may sue being a mere instrument who acts on behalf of such persons. The death of the man caused by the negligence of the defendant is only part of the cause of action. There must be actual injury to the person on whose account the action is brought. The real cause of action is in fact pecuniary loss caused to these persons, it is not a cause of action for anything done by a ship. . . .

Fry L.J., at p. 101 said:

> Secondly, assuming injury to the person to be within the section, is an action under Lord Campbell's Act within it? Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury sustained by relatives resulting from the death of a person, which resulted from the damage done to him by the ship. It cannot be correctly said that it is an action *for* damage done (which are the words of the Act), though it is for damage resulting from or arising out of damage done.

On appeal to the House of Lords, *Seward v. Owner of The Vera Cruz* (1), that decision was affirmed.

In *McColl* v. *Canadian Pacific Ry. Co.* (2), Mr. Justice Duff (now Sir Lyman Duff, Chief Justice of Canada), who delivered the judgment of their Lordships, cited with approval the observations of Fry L.J. above set out and also those of Bowen L.J. in the same case. So the law in this respect is well settled.

However, by Section 6 of Chapter 126 R.S.C. 1927, (The Maritime Conventions Act), it is provided that "Any enactment which confers on any court Admiralty jurisdiction in respect of damages shall have effect as though

(1) (1884) 10 A.C. 59.

(2) (1923) A.C. 126 at 132.

reference to such damages included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *personam*." This Act was passed in 1914. Section 6 is an exact reproduction of Section 5 of the English Act passed in 1911.

This section was considered by Mr. Justice Maclean, President of the Exchequer Court of Canada, in the case of *Dagsland* v. *The Ship Catala* (3), in which it was decided that this section did not so enlarge the jurisdiction of the Admiralty Court as to give it jurisdiction over actions brought *in rem* under Lord Campbell's Act or similar enactments.

Chap. 31 of the Acts of the Parliament of Canada 1934, (The Admiralty Act) by Schedule A, which is made part and parcel of the Act, now confers on the Admiralty Court in Canada, jurisdiction to hear and determine "any claim for damages done by a ship", and Section 646 of Chapter 44, Acts Parliament of Canada 1934, is now what was Section 6 of the Maritime Conventions Act in exact words. I know of no other enactment which confers on any court Admiralty jurisdiction in respect of damages except the one above mentioned, and on the face of it, it certainly looks as if it were conferring jurisdiction on the court which it did not before have. In this connection I refer to 30 Halsbury 866, Note O and 1 Hals. 94, Note P (New Editions).

However, the decision of the President of the Exchequer Court in *The Ship Catala* is I think the law in Canada and is binding on Local Judges in Admiralty.

The application on behalf of the defendant will be granted.

May I, however, suggest that the law, as it now exists in Canada, cramps or limits the scope of Lord Campbell's Act and kindred legislation in the various provinces by rendering it well nigh impossible for dependents of one fatally injured by a ship to recover damages when the owners are foreign to the jurisdiction. The owners may be far beyond the limits of Canada and reaching them by writ *in personam* and obtaining a judgment is almost useless because of the difficulty of realizing on such judgment. In addition, the costs of such litigation is far beyond the financial capacity of people generally involved as plaintiffs.

(3) (1928) Ex. C.R. 83.

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May I, therefore, with the greatest deference, suggest that our law makers consider the advisability of amending the statute law so as to give Admiralty Courts jurisdiction to hear and determine actions *in rem* by dependents against any ship that has caused the death of their bread winner. That, I believe, was the intention in incorporating Section 6 in the Maritime Conventions Act, now Section 646 of the Shipping Act; but, unfortunately, that intention was not expressed in language sufficiently strong to override the existing law.

Judgment accordingly.

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Apr. 12 & 13

Aug. 5.

BETWEEN:

WILLIAM M. O'CONNOR..... APPELLANT,

AND

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

AND

BETWEEN:

CLEMENT P. MOHER..... APPELLANT,

AND

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

AND

BETWEEN:

HELEN G. O'CONNOR..... APPELLANT,

AND

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

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 3 (a) and 3 (g)—"Annuities or other annual payments received under the provisions of any will or trust"—Payment of a legacy by instalments on specified dates—Distribution of the capital of an estate—Appeal from assessment for income tax allowed.

A testator by his will gave, devised and bequeathed the whole of his property to his trustee upon a number of trusts, one of which was to pay certain legacies out of the capital of his estate including legacies

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to the appellants. The legacy to the first named appellant was to be paid until the death of the survivor of said appellant and his widow or until the total sum of $40,000 should have been paid; the sum of $1,000 to be paid on each 24th day of March and 4th day of December, after the death of the testator, to the appellant or if he were dead to his widow if she were living on such date of payment. The legacies to the other two appellants were of a similar nature. The Commissioner of Income Tax assessed each appellant for income tax in respect of payments received by them on the ground that such payments were taxable income as being "annuities or other annual payments received under the provisions of a will" within the meaning of paragraph (*g*) of section 3 of the Income War Tax Act. Each appellant appealed to this Court. The three appeals were heard at the same time.

Held: That the will of the testator gave to each of the appellants several legacies out of the capital of the estate, payable on specific dates twice a year and aggregating a specified sum, subject to the contingency that the person entitled to each legacy payment should be alive when the legacy became payable; or, alternatively, it gave to each of the appellants a legacy of a maximum exclusively out of such capital payable by instalments and subject to the contingency that the person entitled to the instalment should be alive when it became payable; there was no bequest of an "annuity" or "annual payments" either for life or for an ascertained term of years but a distribution of the capital of the estate among the legatees.

2. That the term "annuities or other annual payments received under the provisions of any will or trust" as used in section 3 (*g*) of the Income War Tax Act, does not include or extend to legacies payable exclusively out of the capital of an estate even when such legacies are payable annually by instalments on specified dates, where the maximum amount which the legatee is to receive out of such capital is specified, such legacy being in each case the legatee's share in the distribution or division of such capital and constituting property acquired by him by gift, bequest, devise or descent within the meaning of section 3 (*a*) of the Act and as such not subject to tax.

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

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

C. F. H. Carson, K.C. for appellants.

R. Forsyth, K.C. and *E. S. MacLatchy* for respondent.

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

THE PRESIDENT now (August 5, 1943) delivered the following judgment:—

These three income tax appeals were heard together, the question in each apeal being whether certain amounts received by the appellant pursuant to the provisions of

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the last will and testament of the late Honourable Frank P. O'Connor are subject to income tax under the Income War Tax Act, R.S.C. 1927, Chap. 97, as amended.

By his will, Mr. O'Connor, who died on August 21, 1939, appointed the National Trust Company Limited as the executor and trustee of his will and left all his property to such Trustee upon certain trusts. The only provisions of the will relevant to these appeals are as follows:

3. I give, devise and bequeath the whole of my property of every nature and kind and wheresoever situate, including any property over which I may have any power of appointment, to my Trustee upon the following trusts, namely:

Then a number of trusts are set forth, one of them being,

(*d*) To pay the following legacies out of the capital of my estate:

Included among the many legacies thus directed to be paid out of the capital of his estate are those to the appellants in this case in the following order and terms:

To the appellant, Helen G. O'Connor:

To pay to Miss Helen Grace O'Connor, at present residing at 168 Inglewood Drive, Toronto, the sum of One Thousand Dollars on each 24th day of March and 4th day of December after my death until her death or until she shall have received the total sum of Forty Thousand Dollars, whichever event shall first occur.

To the appellant, Clement P. Moher:

Until the death of the last survivor of C. P. Moher, at present residing at 89 Rivercrest Road, Toronto, his widow and all his issue or until the total sum of Fifty Thousand Dollars shall have been paid, whichever event shall first occur, to pay on each 24th day of March and 4th day of December after my death the sum of Twelve Hundred and Fifty Dollars to the said C. P. Moher, or if he be dead to his widow, or if she also be dead to his issue alive on such date in equal shares per stirpes.

To the appellant, William M. O'Connor:

Until the death of the survivor of William Marcellus O'Connor, at present residing at 44 Heath Street West, Toronto, and his widow or until the total sum of Forty Thousand Dollars shall have been paid, whichever event shall first occur, to pay on each 24th day of March and 4th day of December after my death the sum of One Thousand Dollars to the said William Marcellus O'Connor, or if he be dead, to his widow, if she be living on such date.

Many other legacies, expressed in similar terms, are left to other persons. Only one other paragraph of the will need be referred to, namely:

16. By paragraph 3 (*d*) I have provided for the payment of certain legacies for a varying number of years after my death. It is my intention that the members of the group named in each sub-paragraph shall

in the order therein set out receive the payments provided so long as any of them are living but that only members of the group living when any payment is to be made shall share in such payment.

In due course payments were made to the present appellants pursuant to the provisions of this will exclusively out of the capital of the estate. They were not included in the income tax returns made by the appellants but in each case after notice the appellant was assessed for income tax in respect of them. In the case of the appellant, William M. O'Connor, by notice from the Inspector of Income Tax at Toronto, dated February 23/42, he was notified of the following change in respect of his income tax return for the year ending December 31/39: "Add—Annuity from Est. of Hon. Frank P. O'Connor $1,000." A similar notice of the same date was sent to the appellant, Clement P. Moher, that he was being assessed on $1,250 in addition to the income reported by him for the same year. In the case of the appellant, Helen G. O'Connor, a similar notice, dated March 2, 1942, was sent to her in connection with her income tax return for the year ending December 31/40 advising her, "Annuity from Hon. F. P. O'Connor—Est. is now taxable $2000.00". This appellant was also assessed in respect of the amount of $1,000 which she had received in 1939.

In each case the appellant, on being assessed in respect of the amounts received under the will, gave notice of appeal on the ground that the payments were not income subject to tax. In each case the respondent took the ground that the payment received by the taxpayer from the estate of the late Honourable Frank P. O'Connor was taxable income under the provisions of section 3 (*g*) of the Income War Tax Act and affirmed the assessment. The appeals are now duly brought to this court for determination as to whether the amounts thus received by the appellants constitute taxable income to them.

Taxable income is defined by section 3 of the Income War Tax Act as follows:

For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the

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interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not.

Thus far the definition does not directly affect the question involved in these appeals. The definition proceeds:

And also the annual profit or gain from any other source including;

Then follow paragraphs (*a*) to (*h*) of which paragraphs (*a*) and (*g*) are of particular importance in the appeals under review. Paragraph (*a*) reads:

(*a*) The income from but not the value of property acquired by gift, bequest, devise or descent.

Paragraph (*g*) is in the following terms:

(*g*) Annuities or other annual payments received under the provisions of any will or trust, irrespective of the date on which such will or trust became effective, and notwithstanding that the annuity or annual payments are in whole or in part paid out of capital funds of the estate or trust and whether the same is received in periods longer or shorter than one year.

It was contended on behalf of the respondent that the amounts severally received by the appellants pursuant to the provisions of Mr. O'Connor's will were "annuities or other annual payments received under the provisions of a will" and were, therefore, included in taxable income as defined by section 3 (*g*) of the Income War Tax Act. On the other hand, it was urged for the appellants that they were specifically exempted from taxation by the second part of section 3 (*a*) which carved out of taxable income "the value of property acquired by gift, bequest, devise or descent". It was also contended that the payments made to the appellants were not "annuities or other annual payments" within section 3 (*g*), but, on the contrary, were several legacies to each of the appellants, in each case aggregating the total sum that each was to receive, and payable exclusively out of the capital of the estate, that the essential test of an "annuity or other annual payment" under section 3 (*g*) was that it should constitute a charge upon the whole estate of the testator and that the payments to the appellants did not answer any such test, but were really a distribution or a division of the capital of the estate among the legatees entitled thereto. Finally it was argued that if the payments to the appellants were held to be "annuities or other annual payments" within section 3 (*g*), the appellants were taxable only in respect of the annual profit or gain from such "annuities or annual

payments" and not upon their full amount, since paragraph (*g*) is merely a statement of one of the sources of taxable income, and only the annual profit or gain from such source is taxable.

If it were not for the provisions of paragraph (*g*) of section 3, the case would present little, if any, difficulty. It would seem clear from the terms of paragraph (*a*) of section 3 that while the appellants would be taxable in respect of the income from their legacies they would not be taxable upon their value on the ground that the legacies were property acquired by bequest. It would not then matter whether they were paid in a lump sum or by instalments. In either event they would be expressly excluded from the definition of taxable income by the terms of the second part of paragraph (*a*) of section 3 which provides that taxable income shall not include "the value of property acquired by gift, bequest, devise or descent."

Paragraph (*g*) of section 3 was enacted as an amendment to the Income War Tax Act in 1938 by "An Act to amend the Income War Tax Act", Statutes of Canada, 1938, Chap. 48, sec. 3. The amendment followed the decision of this court in *Toronto General Trusts Corporation* v. *Minister of National Revenue* (1). In that case the testator by his will had provided:

> 12. I give and direct my Trustees to provide and pay to my wife, Sarah Whitney, an annuity of Twenty-five thousand dollars ($25,000) per annum during her life, payable quarterly in advance.

The only question in controversy was whether the so-called annuity of $25,000 given by the testator to his wife was income within the purview of the Income Tax Act. Angers J., allowed the appeal from the decision of the Minister and held that it was not. In support of his judgment he referred to and applied two decisions of the Supreme Court of the United States, namely: *Burnet* v. *Whitehouse* (2) and *Helvering* v. *Pardee* (3). He pointed out that paragraph (*a*) of section 3 of the Income War Tax Act was in substance the same as section 213 (*b*) (3) of the United States Revenue Acts of 1921 and 1924 upon which the judgments of the Supreme Court of the United States were based. He held that the annuity payable to Mrs. Whitney was a charge upon the whole estate, that it

(1) (1936) Ex. C.R. 172. (2) (1931) 283 U.S. 148.
(2) (1933) 290 U.S. 365.

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was not payable out of a settled fund, and, in effect, that it was excluded from liability for income tax by the terms of paragraph (*a*) of section 3, that "income" shall include "the income from" but that it shall not include "the value of property acquired by gift, bequest, devise or descent." If that were so in the case of an annuity charged upon the whole estate bequeathed by will, it would be beyond dispute that a legacy such as that given to the appellants in this case payable exclusively out of the capital of the estate would not be taxable income within section 3 of the Income War Tax Act but would, on the contrary, be expressly and clearly saved from liability for income tax by the latter part of section 3 (*a*). The provision that "income" shall not include "the value of property acquired by gift, bequest, devise or descent" may, perhaps, strictly speaking, not be a necessary provision in the Income War Tax Act but it is in any event declaratory of a fundamental principle that property acquired by gift, bequest, devise or descent does not constitute taxable income.

With the enactment of the amendment of 1938, whereby paragraph (*g*) was added to section 3 of the Income War Tax Act, it might well be considered that the kind of annuity bequeathed by will, which was held not to be taxable income by this court in *Toronto General Trusts Corporation* v. *Minister of National Revenue* (*supra*) would now be included within the definition of taxable income, although that is not entirely free from doubt if the "annuities or other annual payments" referred to in paragraph (*g*) are regarded merely as a source of income from which only the annual gain or profit is to be considered as taxable income. But even if it should be conceded that the whole amount of the annuity were taxable income it does not, by any means, follow that the amounts received by the appellants in this case under Mr. O'Connor's will come within the ambit of section 3 (*g*) of the Income War Tax Act or are caught as taxable income in the hands of the appellants by it.

It is axiomatic that in a taxing statute the intention to tax must be expressed in clear and unambiguous language. If the statute does not clearly and expressly impose the tax, the tax is not to be exacted. It is also well established that the words in a taxing statute are to be construed in their natural and ordinary meaning. Furthermore, it is erroneous to assume any intention to impose

any tax other than such tax as the statute imposes clearly and expressly. The decisions laying down these and other general principles of construction in the case of taxing statutes have been conveniently gathered together in Quigg, Succession Duties in Canada, 2nd edition, Chap. 1.

The ruling English case on this subject is *Partington* v. *Attorney General* (1), where Lord Cairns used these words:

> I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

The same judge also said in *Cox* v. *Rabbits* (2):

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

In *Attorney-General* v. *Earl of Selbourne* (3), Collins M.R. said:

> Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted, that can only be cured by legislation, and not by any attempt to construe it benevolently in favour of the Crown.

And in *Tennant* v. *Smith* (4), Lord Halsbury said:

> In a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act except to take such tax as the statute imposes. Cases, therefore, under the Taxing Acts always resolve themselves into the question whether or not the words of the Act have reached the alleged subject of taxation.

There are numerous Canadian cases in which the same principles are stated but only one need be mentioned. In *Versailles Sweets, Limited* v. *The Attorney-General of Canada* (5), Duff J. (as he then was) said:

> The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington* v. *Attorney General* (*supra*). Lord Cairns, of course, does not mean to say that in ascertaining "the letter of the law", you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language: you are not to assume: "any governing purpose in the Act except to take such tax as the statute imposes" as Lord Halsbury said in *Tennant* v. *Smith* (*supra*).

(1) (1869) L.R. 4 H.L. 100 at 122.
(2) 1878) 3 A.C. 473 at 478.
(3) (1902) 1 K.B. 388 at 396.
(4) (1892) A.C. 150.
(5) (1924) S.C.R. 466 at 468.

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If, therefore, the amounts received by the appellants under the provisions of Mr. O'Connor's will are not clearly and expressly made subject to income tax by the words of section 3 (*g*) of the Income War Tax Act, they are free from such tax. In the language of Lord Halsbury in *Tennant* v. *Smith* (*supra*) the question is, "whether or not the words of the Act have reached the alleged subject of taxation". Do the words, "annuities or other annual payments received under the provisions of any will", of section 3 (*g*) of the Income War Tax Act apply to the several legacies which the testator directed his Trustee to pay out of the capital of his estate to the appellants in this case? If it is not clear that they do, then the legacies are not subject to income tax.

The term "annuity" is not defined in the Income War Tax Act. While it is a word that is often loosely and, therefore, ambiguously used, its meaning has been clarified for income tax purposes by judicial decisions, where the "annuity" is payable under the terms of a contract. But where it is used in respect of a payment under the terms of a will its meaning is not nearly as clearly settled.

Ordinarily an annuity is thought of as a series of annual payments which a person has purchased or arranged for with a sum of money or other asset of a capital nature. As Best J. said in *Winter* v. *Mouseley* (1):

> I have, however, always understood the meaning of an annuitty to be where the principal is gone forever, and it is satisfied by periodical payments.

In Halsbury's Laws of England, Second Edition, Vol. 17, at page 181, this definition of an annuity is given:

> An annuity is an income purchased with a sum of money or an asset, which then ceases to exist, the principal having been converted into an annuity.

This accords with the ordinary acceptance of the term. The capital that went into the purchase of the annuity has been turned into a flow of income, so that the capital has disappeared altogether and only the flow of income continues. This definition by Halsbury owes its origin to Baron Watson in his remarks in the leading case of *Lady Foley* v. *Fletcher* (2). In that case the plaintiff sold her share in certain mines for £45,000, payable £3,385 down and the residue by half-yearly instalments during a period

(1) (1819) 2 B. & Ald. 802 at 806. (2) (1858) 3 H. & N. 769.

of thirty years. It was held that the instalments were not chargeable with income tax under the words "annuities or other annual profits and gains" in schedule (D) of the 16 & 17 Vict., c. 34; or under the words "annual payments, payable as a personal debt or obligation, by virtue of any contract", in the 5 & 6 Vict., c. 35, s. 102, such instalments being the payment of a debt, and not being profits and gains, and therefore not within the purview of the Acts.

Pollock C.B. said, at p. 779:

> If the annual payment is the repayment of principal, the return of a debt, and is not profit, it is not at all within the purview of the Act, the very title and all the provisions of which announce that it is for imposing a tax on profits. If there is the purchase of an annuity, that annuity is made chargeable in express terms. But this is not a contract to pay an annuity, but to pay a principal sum of money, and the court can only carry into effect the language of the act.

And, at page 780:

> If the plaintiff had sold her estate for an annuity, so calling it, the annuity would have been liable to income tax. But she has sold it for a sum which is payable by instalments, which is therefore not chargeable.

Watson B. said, at p. 784:

> But an annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity. Annuities are made chargeable by express words. The words "other annual payments", in the same section, mean payments *ejusdem generis*, viz. as profits.

Then at page 785 he continued with this distinction:

> Take the case of a will giving to a legatee money payable by instalments; as, for instance £10,000, £5,000 payable at the end of the first, and £5,000 at the end of the second year after the testator's death. The sums so bequeathed would not be an annuity, and would be chargeable, not as income, but under the Legacy or Succession Duty Acts.

These remarks seem to be to be very opposite to the facts of the present case. I cannot see any basic difference between the payment of a legacy in two instalments and the payment of it in a greater number. It is not the annuality of a payment by itself that makes it an annuity. Something more than mere annuality of payment is required, as will be seen later.

In my view, *Lady Foley* v. *Fletcher* (*supra*) established that it is of the essence of a contractual annuity for income tax purposes that the capital that went into its purchase has ceased to exist as such, and that where a taxing statute purports to tax "annuities or other annual payments", the term "annual payments" must be read *ejusdem*

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generis with "annuities" and does not include annual payments which are in reality instalment repayments of a capital sum or debt even although the feature of annuality is present in such payments.

Halsbury proceeds with the following statement, Second Edition, Vol. 17, at p. 181:

> In order therefore to constitute an annuity properly so called, the purchaser must have handed over the money or other asset altogether and converted it into a certain or uncertain number of yearly payments. Where on an examination of the facts it is found that he has so parted with the money or asset, such yearly payments as he may receive will be taxable. If, however, it appears from the facts on the true construction of the contract that he has not parted with the money or other asset, but is to receive his capital back in the form of yearly payments, then such payments are not income payments and are not taxable.

The mere fact that a payment is described in the contract itself as "an annuity" does not necessarily make it such. It is necessary to examine each case in order to discover the real nature of the transaction. In *Secretary of State in Council of India* v. *Scoble* (1), the Secretary of State for India had power to purchase a railway, paying for the purchase the full value of all the shares or capital stock of the railway company, with the option of paying instead of a gross sum "an annuity" for a term of years, the rate of interest to be used in calculating the annuity being determined in a specified way. The Secretary of State purchased the railway and exercised the option to pay an annuity instead of a gross sum. The annuity was paid half yearly, each payment representing, as to part, an instalment of the purchase money, and as to the rest, interest on the amount of the purchase money unpaid. The House of Lords unanimously held that the Income Tax Acts do not tax capital as income, and that income tax was not payable upon that part of the annuity which represented capital.

In that case it was argued by the Attorney-General and Solicitor-General that the annual payment came within the words of the Income Tax Act, 1842, s. 102, which imposed the tax upon all "annuities, yearly interest of money, or other annual payments"; and within the words of the Income Tax Act, 1853, s. 2, "all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue" (Sched. C); and "all interest of money, annuities, and other annual profits and

(1) (1903) A.C. 299.

gains, not charged by virtue of any of the other schedules contained in this Act" (Sched. D) but this contention was rejected. Earl of Halsbury, L.C., said, at p. 302:

> Inasmuch as it is the duty of those who assert and not of those who deny to establish the proposition sought to be established, I think the Crown must fail in the contention that this is "an annuity" within the meaning of the Act.

And on the same page:

> The loose use of the word "annuity" undoubtedly renders a great many of the observations that have been made by the Attorney-General and Solicitor-General very relevant to the question under debate. Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), this is not the case of a purchase of an annuity, it is a case in which, under powers reserved by a contract, one of the parties agrees to buy from the other party what is their property, and what is called an "annuity" in the contract and in the statute is a mode of making the payment for that which had become a debt to be paid by the Government.

The ambiguity of the word "annuity" was also stressed by Lord Lindley who said, at p. 305:

> The difficulty which exists is attributable entirely to the ambiguity of the word "annuity". The annuity in this case is to my mind proved to demonstration to be nothing more than the payment by equal instalments of the purchase money for the railway with interest at the rate of £2 17s. per cent The annual instalments are not at all profits or gains, but are in fact partly payments of principal moneys and partly only profits in the shape of interest. I cannot with any satisfaction to myself accept the view that this is in substance the purchase of an annuity; it is nothing of the sort.

In both of these cases the purchase of property was involved and it was comparatively easy to determine that the annual payments were not annuities in the ordinary sense but were instalment payments of the purchase price of the property. The same general principles have also been laid down in cases where the contract did not involve any question as to the repayment of the purchase price of property. In *Perrin* v. *Dickson* (1) the Court considered the tests that should be applied to determine whether annual payments under a contract are subject to income tax. In that case by a policy of assurance affected by a parent with an Assurance Society to provide for his son's education, the Society, in consideration of six premiums of £90 each, paid annually between 1912 and 1917, agreed to pay to the son's guardian an annuity of £100 each year for seven years as from September 29, 1920. If the son

(1) (1929) 2 K B 85; (1930) 1 K B. 107.

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should die before the expiry of the seven years the premiums were to be repaid to the parent or his representative less any annual payments already made, but without interest. The parent also effected a similar policy to provide for his daughter's education by which the Society agreed to pay him £50 a year during a period of five years. There was evidence that the sums payable were calculated so as to return in the event of the son and daughter living the whole period, the amounts paid to the Society with compound interest. The parent duly received the annual payments, and assessments were made upon him for income tax under Sch. D, Case III, of the Income Tax Act, 1918, on these sums as on an annuity for these years. The matter came before Rowlatt J., on a case stated by the special commissioners. He held that, as the principal money remained intact, the annual payments by the Society did not constitute an annuity under the Income Tax Acts, and that income tax was only payable upon such part of them as consisted of interest. An appeal from this judgment to the Court of Appeal was unanimously dismissed.

In the course of his judgment (1) Rowlatt J., said:

> In these cases the argument always goes back to Watson B's statement in *Foley* v. *Fletcher* (*supra*) that an annuity means "where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity". That definition has never been seriously questioned, and is, I think, still accurate.

Later, on the same page, after referring to the remarks of Walton J., in *Chadwick* v. *Pearl Life Insurance Co.* (2) "that it may be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years" he laid down the following test:

> The mere circumstance of a pre-existing debt is not the test, but whether or not the principal sum is liquidated or not. If it is liquidated, the annual payments made in consideration of the debt constitute an annuity. If the principal sum is not liquidated, but continues to exist and is repaid in annual instalments, the repayment does not constitute an annuity.

Then Rowlatt J., went on to say:

> In *Chadwick* v. *Pearl Life Insurance Co.* (*supra*) the annual payments were not a principal sum at all, but were paid and received as income. Here, on the contrary the position is not so much that the

(1) (1929) K.B. 85 at 89. (2) (1905) 2 K.B. 507, 514.

principal was repaid by means of the annuities as that it was never parted with. In the case of a life annuity the principal sum is of necessity parted with and disappears. But here the principal is never lost sight of. It is always there and is repaid, in certain events without interest, in other events with interest.

The Court of Appeal (1) agreed with the reasoning and judgment of Rowlatt J., in the court below and the appeal from his judgment was accordingly dismissed.

Counsel for the respondent relied upon a later decision of the English Court of Appeal in *Sothern-Smith* v. *Clancy* (2) in which some criticism of the decision in *Perrin* v. *Dickson* (*supra*) was made. In that case the facts were that in consideration of the respondent's brother paying to a life assurance society a single premium of $65,243.22, the society undertook to pay him a life annuity of $6,510 with a guarantee that, if at his death the annual sums paid did not equal the capital invested, the society would continue payments of the annuity to the respondent until the amount of the capital investment had been repaid. Thus, the aggregate amount payable by the society might exceed the capital invested, if the respondent's brother lived long enough, but could not in any event be less than the capital invested. The brother died after $26,040 had been paid, and the society continued to pay the respondent annual sums of $6,510. On these the respondent was charged with income tax. It was held by the Court of Appeal reversing the judgment of Lawrence J. (3), that the contract was one to pay an annual sum for an ascertainable period of years or for the life of the respondent's brother, whichever might prove the longer, and the payments received by the respondent were income, and were properly chargeable with income tax.

As I read the judgment in *Sothern-Smith* v. *Clancy* (*supra*), the Court of Appeal while finding it difficult to follow the reasoning of the Court of Appeal in *Perrin* v. *Dickson* (*supra*) in its application of the law to the facts of that case did not take issue with the test laid down by Rowlatt J., in *Perrin* v. *Dickson* (*supra*) to which I have referred or the proposition that it is an essential test of an annuity that the capital that went into its purchase has been extinguished as such. Indeed this proposition is the basis upon which the judgment of the Court of Appeal is founded. Sir Wilfrid Greene, M.R., at page 17, said:

(1) (1930) 1 K B. 107. (2) (1941) 1 All E.R. 111.
(3) (1940) 3 All E R. 416.

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The contract is to pay an annual sum for an ascertainable period of years or for the period of Sothern's life, whichever may prove to be the longer. There is no debt, nor is there anything which can properly be described as analogous to a debt. The sum paid by Sothern has gone once and for all.

Then, at page 118, he said:

Lawrence, J., from whom I am respectfully differing, thought that the capital sum paid by Sothern never ceased to exist and that the contract in express terms guaranteed that the capital invested should be refunded or returned. I do not take this view. It seems to me that the capital sum did cease to exist, once it was paid, and that the so-called guarantee was an undertaking not to refund a capital sum or any part of a capital sum, but to continue annual payments for an ascertainable period.

The essence of a true "annuity or other annual payment received under the provisions of a contract", in order to make it subject to income tax, is that the annuitant has so used his capital, whether it be a sum of money or other property, as to entitle him only to the receipt of annual payments whether for life or a term of years, and so that the annual payments to which he is entitled cannot be considered as instalment payments of the purchase price of his property and that he retains no right to the return of his capital, either in whole or by instalments. The annuitant must have completely parted with his capital to the person or company that has assumed the obligation to pay him the annuity so that the capital has disappeared and ceased to exist as such. This is the ordinary conception of the term "annuity" as applicable to annuities under a contract where the recipient of the annuity is the very person who originally put up the capital that procured the annuity. But this test is not applicable to the case of an "annuity or other annual payment received under the provisions of a will" for one does not ordinarily think of the term "annuity" in connection with a legacy except perhaps in the cases where there is a bequest of an annuity by a will and the bequest has been termed an "annuity" by the testator. It is not, however, the term that matters but rather the true nature of the payment and its receipt.

In the English Income Tax Act, 1918, annuities or other annual payments, whether payable by virtue of a deed or will or a contract are dealt with in the same charging section. Rule 1 applicable to Case III of Schedule D reads:

The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same, by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract.

This rule reproduces s. 102 of the Income Tax Act, 1842.

In the Canadian Income War Tax Act, "annuities" are not made subject to income tax by the charging sections of the Act, as one might normally expect, particularly when it is sought to tax amounts which are not ordinarily thought of as exclusively annual profits or gains but are referred to in section 3, which is the definition section of the Act, and are dealt with in two separate paragraphs. Paragraph (*g*), dealing with annuities or other annual payments received under the provisions of a will, has been already cited. Paragraph (*b*), dealing with contractual annuities, reads:

(*b*) annuities or other annual payments received under the provisions of any contract, except as in this Act otherwise provided;

The ambiguous nature of the term "annuity" even in cases of contractual annuities and the necessity of examining the true nature of each transaction was stressed by the House of Lords in *Scoble's Case* (*supra*) but there are, as we have seen, certain tests that may be applied in order to determine whether annual payments received under contracts are taxable as annuities or not. The term "annuity" is perhaps even more ambiguous when it is sought to apply it to a legacy or bequest by will. In a contractual annuity the person who put up the capital and transferred it to the person or company that is charged with the obligation to pay the annuity is ordinarily himself the recipient of the annuity when it becomes payable. His capital has gone but his right to receive the annual payments takes its place. The annuity under a contract is in a sense the result of an inseparable blending of capital and interest. If it is truly an annuity, it is all taxable within the meaning of section 3 (*b*) notwithstanding the fact that it was made possible by the expenditure of capital and in that sense includes a return of it. If the capital is not clearly distinguishable by reason of the fact that it has disappeared and ceased to exist as such, the whole annuity is dealt with as subject to tax under section 3 (*b*), whatever its original source may have been.

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Indeed, the ordinary conception of a contractual annuity is a series of annual payments in which principal and interest have been blended so that they are not distinguishable; in other words, that the annuitant has caused his capital to disappear in a return flow of income to him. On the other hand, no such state of affairs exists in the case of an annuity received under the provisions of a will and the tests that are applicable to contractual annuities are not applicable to testamentary ones. The recipient of the annuity is not the contributor of the capital that made the annuity possible. As a matter of fact, "annuity" in its ordinary meaning, as we have seen it applied to contractual annuities, is not an apt term to apply to legacies under a will, except, perhaps, in so for as it is loosely used in a will to signify annual payments of a fixed amount, either payable out of income or chargeable upon the whole estate. The term "annuity" cannot, therefore, have precisely the same meaning in section 3 (*g*) of the Income War Tax Act as it has in section 3 (*b*), since the term is not as referable to the payments that come to a beneficiary under a will as it is to those that come to a person under a contract, where such person has himself contributed the capital that went into the purchase of the annuity.

Some meaning must, however, be found for the words "annuities or other annual payments received under the provisions of any will". In the first place, I think it clear, as in the case of *Lady Foley* v. *Fletcher* (*supra*), that the term "other annual payments" in section 3 (*g*) must be read *ejusden generis* with the term "annuities", whatever that term itself may mean. I can think of no better rule to apply in order to ascertain the meaning of that term than the well-known rule in *Heydon's Case* (1), and I repeat what Lindley M.R., said in *In re Mayfair Property Co.* (2) at page 35:

> In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure the mischief.

It has already been observed that paragraph (*g*) of section 3 of the Income War Tax Act was brought into the Act following the judgment of this court in *Toronto General Trusts Corporation* v. *Minister of National Revenue*

(1) (1584) 3 Co. Rep. 7b. (2) (1898) 2 Ch. 28 at 35.

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(*supra*) where Angers J. held that the annuity left to Sarah Whitney by the will of her late husband of $25,000 per annum during her life was a charge upon the whole estate, and not payable out of any fund, and was not taxable income in her hands under the Income War Tax Act. It is therefore reasonable to assume that paragraph (*g*) was introduced to bring into charge for income tax purposes the kind of annuity received under the provisions of a will that had been held by Angers J., to be not subject to income tax. I may, therefore, I think, quite properly hold that the term "annuity" as used in section 3 (*g*) of the Income War Tax Act includes annuities received under the provisions of a will, where such annuities constitute a charge against the whole estate of the testator and it is the intention of the testator that the beneficiary shall receive the fixed annual amount regardless of whether it comes from the income of the estate or its capital or both.

Indeed, counsel for the appellants in this case strongly contended that the test as to whether an annuity received under the provisions of a will came within section 3 (*g*) was whether it was chargeable upon the whole estate of the testator so that the recipient had the assurance of receiving the income annually regardless of whether it came out of the income or the capital of the estate. His argument was that the bequest of the income of a particular fund was not truly an annuity but that an annual payment directed to be made to a beneficiary chargeable upon the whole estate, so that the beneficiary had the assurance of receiving it no matter from what source it came, whether from the income or the corpus of the estate, would be an annuity. This argument was by way of analogy to a contractual annuity, that is chargeable to the person or company that has assumed the obligation to pay the annuity since such person or company is the source of the flow of income. Just as the contractual annuity is not payable out of any particular fund but by the person or company itself so in the case of a testamentary annuity it must be the whole estate of the testator that is chargeable with its payment. It was also his argument that where the payment was pursuant to a bequest of the aliquot parts of a particular fund or a bequest of the income from the estate or from a particular fund the payment would not be a true annuity even although it had the feature of annuality. He urged that the essential feature of an annuity was its

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chargeability to a person or company in the case of a contractual annuity, and to the whole estate of the testator in the case of a testamentary one.

While there is much to be said for this contention, I am inclined to the opinion that it sets too narrow a limitation upon the meaning of the term and, in any event, it is not necessary for me in this case to set the limits as to what might be included within the term "annuity" as used in section 3 (*g*). I think it sufficient to say that, applying the rule in *Heydon's Case* (*supra*) to the interpretation of section 3 (*g*) the term "annuities or other payments received under a will" does include annuities that are chargeable against the whole estate of the testator.

Counsel for the respondent cited a number of cases in which annuities under wills had been held subject to income tax, such as *Brodie* v. *Commissioners of Inland Revenue* (1); *Lindus & Horton* v. *Commissioners of Inland Revenue* (2); *Michelham* v. *Commissioners of Inland Revenue* (3); *In re Cooper* (4); *Drummond* v. *Collins* (5); *Scholefield* v. *Redfern* (6); *In re Janes' Settlement* (7), but in my opinion none of them is applicable to the facts in these appeals. I shall deal only with some of them.

In *Brodie* v. *Commissioners of Inland Revenue* (*supra*) the trustees of a will were directed, on the testator's death, which occurred in 1920, to hold on trust certain shares together with three-fourths of the residue of his estate and to pay the income thereof to his widow for her life, with the proviso that if, in any year, the income from these sources did not amount to £4,000, they were to raise and pay to her out of the capital of the estate such a sum as added to the income would make a total of £4,000, it being the testator's expressed intention that the income payable to her should not be less than £4,000 a year. For a number of years the income of the shares and of the specified part of the residuary estate together fell short of £4,000, and the trustees made payments to the widow of varying amounts out of the capital of the estate to make up that sum each year. These sums were assessed

(1) (1933) 17 Tax. Cases 432.
(2) (1933) 17 Tax. Cases 442.
(3) (1930) 15 Tax. Cases 737.
(4) (1917) W.N. 385.
(5) (1915) 6 Tax Cases 525.
(6) (1863) 62 E.R. 587.
(7) (1918) 2 Ch. 54.

for income tax. It was held that income tax was payable in respect of the whole of the payment of £4,000, to the widow, including the payments made out of capital.

In *Lindus & Horton* v. *Commissioners of Inland Revenue* (*supra*) the facts were only slightly different. The trustees under a will were directed, on the death of the testator's widow, which occurred in 1909, to hold in trust one-half of the residuary estate and to pay the income thereof to his daughter for her life without power of anticipation and, on her death, for her children in equal shares. The income from the daughter's moiety proved insufficient for the maintenance of herself and her home and by a deed of family arrangement executed in 1925, in which the daughter and all her children joined, the trustees were authorized to supplement the income of the daughter arising from the trust funds by payment to her out of the capital of the fund of such sums as the trustees in their absolute discretion thought necessary and proper for the maintenance of herself and her home. During a number of years the trustees paid the daughter sums out of the corpus of the trust fund in addition to the income of the fund. It was held that the payments were not voluntary allowances but were taxable income of the recipient.

In *In re Cooper* (*supra*) the question was a simple one. In that case the trustees of the testator were directed to pay his widow £50 per month for life, and that if there was not enough income out of which to pay it, it should be paid out of the capital. The position was taken that, since the money was payable every month, it was not an annuity or annual payment and therefore not subject to tax. This contention was rejected by the court. The principal of this case was applied in *In re Janes' Settlement* (*supra*), where a fixed weekly payment under a separation agreement made payable on a fixed day every week for a period possibly exceeding a year was an "annual sum" within the Income Tax Acts so that the person liable to make the payment was entitled to deduct income tax.

It may, I think, fairly be assumed that the draughtsman who put into paragraph (*g*) of section 3 of the Income War Tax Act the words "notwithstanding that the annuity or annual payments are in whole or in part paid out of capital funds of the estate or trust" intended to make the paragraph apply to such cases as came before the court in *Brodie* v *Commissioners of Inland Revenue* (*supra*) and

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Lindus & Horton v. *Commissioners of Inland Revenue* (*supra*) and that, when he used the words "whether the same is received in periods longer or shorter than one year", he had in mind such cases as *In re Cooper* (*supra*) and *In re Janes' Settlement* (*supra*). The paragraph seems to have been drafted in the light of such decisions.

I would, therefore, think it reasonable to hold that section 3 (*g*) brought into charge for income tax purposes, not only annuities bequeathed by will that are chargeable upon the whole estate of the testator but also the kind of annual payments received under the provisions of a will or trust that were held to be taxable in the *Brodie Case* (*supra*) and the *Lindus & Horton Case* (*supra*) and such payments under a will or trust as were referred to *In re Cooper* (*supra*) and *In re Janes' Settlement* (*supra*), all of which kind of payments would not have been subject to income tax prior to the introduction of paragraph (*g*) into section 3 of the Income War Tax Act in 1938.

The class of cases thus brought into charge for income tax purposes does not, in my view, include such bequests as the legacies to the appellants in this case. These legacies were not annuities in the ordinary sense of the term. If one were to take the term "annuity" in such ordinary sense it would certainly not be used to describe what each of the appellants received under Mr. O'Connor's will. An "annuity" is not ordinarily thought of as applicable to a legacy payable out of the capital of an estate or in connection with the distribution of such capital among legatees. In reality, the testator's will gave to each of the appellants several legacies out of the capital of the estate, payable on specific dates twice a year and aggregating a specified sum, subject to the contingency that the person entitled to each legacy payment should be alive when it became payable. Alternatively, the will gave to each of the appellants a legacy of a maximum amount exclusively out of such capital payable by instalments and subject to the contingency that the person entitled to the instalment should be alive when it became payable. There was no bequest of an "annuity" or "annual payments" either for life or for an ascertained term of years but rather a distribution of the capital of the estate among the legatees. Since the tests that are available to determine whether annual payments received under contracts are taxable as "annuities" are not applicable to payments received under a will, and although a

special meaning must, therefore, be found for the term "annuities or other annual payments received under a will", as used in section 3 (*g*) of the Income War Tax Act, there is no justification for extending the meaning of the term beyond the purposes which it was intended to achieve. If it be conceded that paragraph (*g*) of section 3 brought into charge for income tax purposes for the first time the kind of annuities or annual payments received under a will that have been referred to, then the purpose of the amendment has been accomplished. As Lord Halsbury said in *Tennant* v. *Smith* (*supra*);

> It is impossible . . . to assume any intention, any governing purpose in the Act except to take such tax as the statute imposes.

By the application of the rule in *Heydon's Case* (*supra*), the term "annuity" which has no ordinary meaning as applicable to a bequest by will except such as has been indicated, has been given a particular meaning in order "to cure the mischief for which the old law did not provide". It should not receive any wider meaning than is necessary for the purpose sought to be accomplished, nor be made to apply to cases that are quite different from those which it was designed to cover. In *Toronto General Trusts Corporation* v. *Minister of National Revenue* (*supra*) there was a bequest of an annuity of $25,000 per annum for life, chargeable upon the whole estate. There the testator called it an annuity. He could easily have called it "income". It was certainly not a distribution of the estate. In *Brodie* v. *Commissioners of Inland Revenue* (*supra*) there was a specific direction that the income from a part of the estate should go to the widow, but that if in any year the income should be less than £4,000, enough should be paid out of the capital of the estate to make up such an amount, the expressed intention of the testator being that the widow should receive not less than £4,000 a year. The clear intention of the testator that his widow should receive such an income was stressed in the reasons for judgment in that case. In that case there was a bequest of income, chargeable in a sense, against the whole estate, if the income from the specific sources fell below £4,000 in any one year. In *Lindus & Horton* v. *Commissioners of Inland Revenue* (*supra*), there was a direction that the daughter should have the income from a specific part of the estate and by a family deed of arrangement the trustees were empowered to pay amounts out of the capital of the

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fund in their discretion and as they thought necessary for the maintenance of the daughter. In this case there was an intention shown by the deed of arrangement that the daughter should have sufficient income for her annual maintenance.

It is bequests of this character that are sought to be charged by section 3 (*g*), and, without any attempt being made necessarily to fix the limits of what the term "annuities or other annual payments", as used in section 3 (*g*), includes, it might well be considered that the term does include bequests of income and annual payments made out of the capital of the estate or out of a fund of the kind dealt with in the *Brodie Case* (*supra*) and the *Lindus & Horton Case* (*supra*), where the payments were made out of the capital in order to supplement, up to a certain requirement, specific bequests of income. In the case now before the Court there is a totally different situation, clearly distinguishable from that of the cases referred to. There is no bequest of an annuity or income chargeable against the whole estate as in *Toronto General Trusts Corporation* v. *Minister of National Revenue* (*supra*), nor any specific bequest of income to be supplemented by annual payments out of the capital of the estate or out of a fund, either to insure a minimum annual income as in the *Brodie Case* (*supra*) or a sufficient amount for annual maintenance as in the *Lindus & Horton Case* (*supra*). In the case now under review, there was a direction to the trustee to pay legacies exclusively out of capital and the evidence shows that the payments received by the appellants, which are sought to be assessed for income tax in this case, all came out of the capital of the estate. A maximum amount was fixed by the will for each legatee. He was not to receive it all in one lump sum but at stated periods twice a year provided that the person entitled was still alive when the payment fell due. There was no bequest of income from the estate or any part of it and no charge against either the whole estate or any particular fund. It was a distribution of the capital. The term "annuity", even when loosely used, is not ordinarily regarded as an apt term to describe a person's share in the distribution of the capital of an estate, even although such share is payable by instalments, and the term "annual payments" must be read *ejusdem generis* with the term "annuity".

There is a further comment that may well be made with regard to *Brodie* v. *Commissioners of Inland Revenue* (*supra*). In that case Finlay J. sought to lay down a test as to whether an annual payment received under a will was taxable or not, the test being "was the sum received as income". He said, at page 439:

> But, I think, the governing consideration is this; the question being, was the sum received as income, one has to consider what was the source from which it was received and what were the circumstances in which it was received. If the capital belonged to the person receiving the sums—if he or she was beneficially entitled not only to the income but to the capital—then I should think that, when the payments were made, they ought to be regarded, and would be regarded, as payments out of capital, but where there is a right to the income, but the capital belongs to some one else, then, if payments out of capital are made and made in such a form that they come into the hands of the beneficiaries as income, it seems to me that they are income and not the less income, because the source from which they come was—in the hands, not of the person receiving them, but in the hands of somebody else—capital.

It must be remembered that the payments out of capital to which Finlay J. is referring are those which the trustees were empowered to make in order to raise the widow's annual income up to at least £4,000. Then later, on the same page, after referring to the remarks of Rowlatt J., *Michelham* v. *Commissioners Inland Revenue* (*supra*), he said:

> It seems to me that there Mr. Justice Rowlatt is laying down a principle which exactly covers the case which is before me. He is there, I think, deciding that, though the payer may pay out of capital which is his capital—he may, of course, hold it for other people, but that is immaterial—but which is not the capital of the beneficiary to whom he is paying it, where he is paying out of capital in that way, but the beneficiary is receiving the sum as income, then it is income and is liable to tax.

I must confess that I find difficulty in understanding exactly what is meant by the test "was the sum received as income" for the recipient of an amount under a will cannot be said to receive it otherwise than as it was intended to be paid by the testator, in which case the test would be "was the sum paid as income to the recipient" a test more easy of application, with an answer more definitely ascertainable from the will itself. In any event the payments received by the appellants in this case do not answer the test thus laid down by Finlay J. in the *Brodie Case* (*supra*). The appellants did not receive their payments as income but as part of the capital of the estate. They are the beneficiaries of the estate with whom we are

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concerned, and are the very persons entitled to the capital of the estate to the extent of their legacies. It is their capital which is in question. It was capital in the hands of the trustees of the estate and paid by them to the appellants as such, they being entitled to receive it as such. The legacies to the appellants, exclusively payable out of the capital, constitute a distribution or division of the capital of the estate among the legatees entitled to share in it, among whom the appellants are included, to the extent of each legatee's entitlement. The payments to the appellants were not out of the income of the estate but out of its capital, nor were they paid by the trustees or received by the appellants as income, but as shares of the distribution or division of the capital, coming to them by instalments. If the legacies in this case are a distribution or division of the capital of the estate, as I think they are, I do not see how payment of them by instalments changes their character, and it would take much clearer language than that used in section 3 (*g*) to bring such instalments of the distribution or division of the capital of an estate into charge for income tax purposes.

In my view, the term "annuities or other annual payments received under the provisions of any will or trust", as used in section 3 (*g*) of the Income War Tax Act, does not include or extend to legacies payable exclusively out of the capital of an estate, even when such legacies are payable by instalments on specified dates annually, where the maximum amount which the legatee is to receive out of such capital is specified, such legacies being in each case the legatee's share in the distribution or division of such capital and constituting property acquired by him by gift, bequest, devise or descent within the meaning of section 3 (*a*) of the Act and as such not subject to income tax.

In my judgment, the respondent has failed to discharge the onus that rests upon him to shew that the words of section 3 (*g*) of the Income War Tax Act "have reached the alleged subject of taxation" and clearly and expressly brought into charge for income tax purposes the amounts received by the appellants under the provisions of the late Honourable F. P. O'Connor's will, and I must, therefore, hold that such payments are not subject to income tax.

In view of the conclusion which I have reached it is not necessary to deal with the contention of counsel for the appellants that, if the payments in question are held to

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come within section 3 (*g*) of the Income War Tax Act, the appellants are taxable only in respect of the annual profit or gain from such payments on the ground that paragraph (*g*) is merely a statement of one of the sources from which only the annual profit or gain is taxable income, nor with the very interesting argument of counsel for the respondent in reply thereto, with his historical exposition of the section and the French version of it, or his contention that the subject matter of the paragraph is all included as taxable income within the meaning of section 3 of the Act.

It follows from what I have said that the three appeals herein must be allowed with costs with the result that the assessments appealed from will be set aside.

Judgment accordingly.

BETWEEN:

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

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May 12
Aug. 10

AND

LLOYD CAMERON WILLIAMS ... DEFENDANT.

Crown—Foreign Exchange Control Order P.C. 7378, of December 13, 1940—Gold Export Act 22-23 Geo. V. c. 33—Generalia specialibus non derogant—Action for forfeiture of gold under Foreign Exchange Control Order dismissed.

Defendant was a salesman employed by the Williams Gold Refining Company of Canada Limited, a company carrying on the business of gold refiners in Canada. He attempted to export a certain quantity of fine gold, the property of the aforementioned company, from Canada without having obtained a licence to do so from the Foreign Exchange Control Board. The gold while in defendant's possession was seized and detained by an inspector of the Foreign Exchange Control Board. The present action is brought under the provisions of Foreign Exchange Control Order, P.C. 7378, of December 13, 1940, for a declaratory order that such gold should be forfeited to His Majesty the King.

Held: That the principle underlying the maxim *generalia specialibus non derogant* should be applied.

2. That the general term "property" as defined in s. 2(1)(t) of the Foreign Exchange Control Order should be construed as "silently excluding" gold of the kind in question herein since the prohibition of the export of such gold is dealt with by the Gold Export Act, Statutes of Canada, 1932, c. 33, and the regulations made thereunder.

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3. That the provisions of the Foreign Exchange Control Order, including those relating to forfeiture, have no application to the facts in this action and in the absence of any provisions for forfeiture contained in the Gold Export Act and regulations made under it the action must be dismissed.

INFORMATION exhibited by the Attorney General of Canada for a declaratory order that a quantity of fine gold be forfeited to His Majesty the King, under the provisions of the Foreign Exchange Control Order of December 13, 1940.

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

Robert Forsyth, K.C., for plaintiff.

R. B. Law, K.C., for defendant.

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

THE PRESIDENT now (August 10, 1943) delivered the following judgment:—

These proceedings were taken under the provisions of the Foreign Exchange Control Order enacted by Order in Council, P.C. 7378, dated December 13, 1940, as amended, for a declaratory order of this Court that certain fine gold, which the defendant had attempted to export from Canada, without a licence from the Foreign Exchange Control Board, should be forfeited to His Majesty the King.

The facts are not in dispute. The defendant is a resident of Fort Erie, Ontario, and at the time of the attempted export he was a salesman in the employment of the Williams Gold Refining Company of Canada Limited, a company carrying on the business of gold refiners at Fort Erie, Ontario. On December 10, 1942, he presented himself at the Customs Port of Fort Erie with the intention of going to the United States by crossing over the Peace Bridge to Buffalo in the State of New York. He had in his possession two envelopes containing fine gold, having an aggregate weight of 46 oz., 19 dwt., 10 gr., of the value of approximately $1,808, which he intended to take with him into the United States, without having obtained an export licence from the Foreign Exchange Control Board

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under the Foreign Exchange Control Order. The gold which he was thus attempting to export from Canada into the United States was the property of the company in whose employment he was and was part of the monthly allowance of 300 oz. of gold allowed by the Royal Mint of Canada to the company for the purpose of its business. While the gold was in the defendant's possession it was seized and detained by an inspector of the Foreign Exchange Control Board. The defendant was subsequently prosecuted on a charge laid under the Foreign Exchange Control Order and was convicted and fined $1,250 and costs which he paid. The claim is now made that the gold is liable to forfeiture to His Majesty the King under the provisions of the Foreign Exchange Control Order. By way of defence to the plaintiff's claim the defendant relies upon the maxim *generalia specialibus non derogant* and contends that the export of gold is excluded from the operation of the Foreign Exchange Control Order altogether by reason of coming within the provisions of the Gold Export Act, Statutes of Canada, 1932, Chap. 33, and the regulations made under it and that under this Act and its regulations there is no provision for the forfeiture of gold even where there has been an illegal attempt to export it.

The Foreign Exchange Control Order was enacted under and by virtue of the provisions of the War Measures Act, R.S.C. 1927, Chap. 206, by Order in Council, P.C. 7378, dated December 13, 1940, and has been amended on a number of occasions by subsequent Orders in Council. The present proceedings are brought under the provisions of subsection (2) of section 42 of the Order, which reads as follows:

> 42 (2). Any currency, securities, foreign exchange, goods or property of any kind which any person exports or attempts to export from Canada or imports or attempts to import into Canada contrary to this Order, or which any person buys or sells or in any way deals with or attempts to buy or sell or in any way deal with contrary to this Order, or which any person fails to declare as required by this Order, may (in addition to any other penalty which may have been imposed on any person, or to which any person may be subject, with relation to such unlawful act or omission, and whether any prosecution in relation thereto has been commenced or not) be seized and detained and shall be liable to forfeiture at the instance of the Minister of Justice upon proceedings in the Exchequer Court of Canada or in any Superior Court subject, however, to a right of compensation on the part of any innocent person interested

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in such property at the time it became liable to forfeiture or who acquired an interest therein subsequent to such time as a bona fide transferee for value without notice, which right may be enforced in the same manner as any other right against His Majesty.

Counsel for the plaintiff relied upon a number of other sections of the Order. Subsection (1) of section 24 provides:

> 24 (1). No person shall, without a licence from the Board export any property from Canada or import any property into Canada.

And subsection (1) (h) of section 40 says:

> 40 (1). Every person shall be guilty of an offence who
> (*h*) Attempts to commit, or does any act preparatory to the commission of, an offence under this order.

"Property" is defined for the purposes of the Order by paragraph (t) of subsection (1) of section 2 as follows:

> 2 (1). In this Order, unless the context otherwise requires,
> (*t*) "Property" means and includes every kind of property, real and personal, movable and immovable, and in the case of any property which, under these regulations, is subject to any restriction as to its use or as to dealing therewith or is subject to forfeiture, the same shall be deemed to include any property into which the property subject to restriction or forfeiture aforesaid has been converted or exchanged and any property acquired by such conversion or exchange whether immediately or otherwise.

Counsel for the plaintiff contended that "gold" was "property" within the meaning of the Order, that the defendant had illegally attempted to export it from Canada contrary to the provisions of the Order, and that it was, therefore, liable to forfeiture to His Majesty. There seemed to be a clear case for the declaratory order of forfeiture that was being claimed.

Counsel for the defendant, on the other hand, contended that the export of fine gold was not covered by the Foreign Exchange Control Order at all and that it had no application to the facts before the Court. He argued that the case was governed exclusively by The Gold Export Act, Statutes of Canada, 1932, Chap. 33, and the regulations made under it which were in effect on December 10, 1942, and that under this Act and its regulations there were no provisions for forfeiture; that the maxim *generalia specialibus non derogant* applied, meaning that a general act does not abrogate a special one unless it specifically so provides; that the Foreign Exchange Control Order was a general act and The Gold Export Act a special one within the

meaning of the maxim; and that under the authorities the term "property" as defined in the Foreign Exchange Control Order must be read as "silently excluding" the subject of "gold" leaving gold and its export exclusively within the ambit of The Gold Export Act, with no provision for forfeiture of the gold even where there has been a breach of the regulations in effect prohibiting its export. If this contention on behalf of the defendant is sound in law the Court has no option other than to dismiss the plaintiff's action.

The Gold Export Act contains only 4 sections reading as follows:

1. This Act may be cited as *The Gold Export Act.*

2. The Governor in Council may prohibit, from time to time and for any period or periods, the export of gold, whether in the form of coin or bullion, from the Dominion of Canada, except in such cases as may be deemed desirable by the Minister of Finance and under licences to be issued by him: Provided that no such licence shall be issued to other than a Canadian chartered bank.

3. (1) The Governor in Council may make such regulations as he deems necessary or expedient to ensure the carrying out of the provisions and the intent of this Act, and to define from time to time as occasion may require what shall be deemed to be included within the expression "bullion" for the purposes of this Act.

(2) Every regulation made by the Governor in Council in virtue of this Act shall have force and effect only after it has been published in the *Canada Gazette.*

4. Whenever a regulation made under the provisions of section three of this Act is in force any person who, without a licence issued by or on behalf of the Minister of Finance, as aforesaid, exports or attempts to export, carries or attempts to carry out of Canada any gold, whether in the form of coin or bullion, shall be liable upon summary conviction to a penalty not exceeding one thousand dollars or to imprisonment for a term not exceeding two years, or to both fine and imprisonment.

The Act was amended in 1935 by striking out the proviso at the end of section 2 and substituting the following:

Provided that no such licence shall be issued to other than a Canadian chartered bank or the Bank of Canada.

The first regulations under the Act prohibiting the export of gold were passed by Order in Council, P.C. 1150, dated 17th May, 1932. The regulations were thereafter continued in force from year to year by Orders in Council passed on the report and recommendation of the Minister of Finance. The last one with which we are concerned is Order in Council, P.C. 9131, dated November 26, 1941, and published in the *Canada Gazette* in the issue of December 6,

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1941, (*Canada Gazette,* Vol. 75, p. 1946). This provided that the regulations first passed by Order in Council, P.C. 1150, dated May 17, 1932, and last continued in force and effect until December 31, 1941, by Order in Council, P.C. 7246, dated December 11, 1940, should be continued in force and effect until December 31, 1942. The prohibition of the export of gold, enacted by these regulations, was therefore in force and effect on December 10, 1942, when the defendant attempted to export the gold in question.

Maxwell on the Interpretation of Statutes, 8th Edition, at page 156, has the following to say with regard to the maxim, *generalia specialibus non derogant*:

> It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general Act is to be construed as not repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later law does not abrogate an earlier special one by mere implication. *Generalia specialibus non derogant,* . . . . . Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special Act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute must be read as silently excluding from its operation the cases which have been provided for by the special one.

These general propositions thus stated by Maxwell are amply supported by the authorities. The principles are well known and have frequently been applied; reference need be made only to the two decisions cited by counsel for the defendant.

In *The City of Vancouver* v. *Bailey* (1) the question before the Supreme Court of Canada was whether a certain general Act, applicable to the City of Vancouver, should be held to nullify a special Act also applicable to the said City. The special Act incorporating the City of Vancouver was the "Vancouver Incorporation Act, 1886." Subsection 8 of section 127 of that Act was amended by the British Columbia Statutes, 1893, Ch. 63, s. 7, so as to read as follows:

(1) (1895) 25 Can S.C.R. 62

Upon receiving the returns for the several wards the city clerk shall add up the names; and if it shall appear from such returns that the total number of votes cast for such by-law be three-fifths of the votes polled, the city clerk shall forthwith declare such by-law carried, otherwise he will declare the by-law lost.

Previously the requirement for carrying a by-law requiring the approval of the ratepayers had been a majority of votes. The general Act was the "Municipal Act, 1892," which applied to cities and other municipalities generally. It gave to municipal councils, by section 104, powers to pass by-laws. Section 119 of this general Act was amended by the British Columbia Statutes, 1893, Ch. 30, s. 33, to read as follows:

No by-law to which the assent of the electors is necessary before the final passing thereof, shall be valid or of any effect unless the vote polled in favor thereof be that of a majority of the persons who shall vote upon such by-law.

Previously the requirement for carrying such a by-law was "at least three-fifths" of the voters. Both amending statutes of 1893, namely, chapters 63 and 30 were passed on the same day. A by-law authorizing a sum of money to be raised by debentures for supplying electric light in the city was voted on by the ratepayers of the City of Vancouver on October 3, 1894, and passed by the council on October 8, 1894. At the polling a majority of the ratepayers voted in favour of the by-law, but the total votes cast for the by-law did not amount to three-fifths of the number of votes polled. The Supreme Court of British Columbia, reversing the judgment of Mr. Justice Drake, quashed the by-law. From this an appeal was taken to the Supreme Court of Canada, the appellants contending that the by-law required only a majority vote and that the "Municipal Act, 1892," as amended in 1893, overruled the provisions of the "Vancouver Incorporation Act, 1886," as amended in 1893. The appeal was unanimously dismissed, notwithstanding the following provision of section 21 of the Municipal Act, 1892, Amendment Act, 1893:

The powers granted by this section 104, and its subsections, are hereby conferred upon the municipal councils of the cities of Vancouver and New Westminster, and the said section and its subsections shall apply to the said cities, notwithstanding anything in the special Acts relating to the said cities which may be inconsistent with or repugnant to, the provisions of the said subsections.

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Sedgewick J., speaking of the Act amending the special Act, and making a three-fifths vote necessary, said, at page 67:

> Is that amending statute to have no effect because, in a general Act passed in the same session, made applicable throughout the province, there was an express provision that by-laws of that character should require the assent of only a majority of the voters. I cannot hold that such an intent can be imputed to the legislature. The principle contained in the maxim *generalia specialibus non derogant,* forcibly applies here. A general later statute (and *a fortiori* a statute passed at the same time), does not abrogate an earlier special one by mere implication; the law does not allow an interpretation that would have the effect of revoking or altering, by the construction of general words, any particular statute where the words may have their proper operation without it.

And then, at page 68, he gave approval to a statement as contained in Maxwell, 2nd edition, p. 213, substantially the same as the one already quoted from the 8th edition, including the words "the general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

In *Barker* v. *Edgar* (1) the Judicial Committee of the Privy Council also approved and applied the general principle of the maxim. This was an appeal from a judgment of the Court of Appeal of New Zealand. In that case certain proceedings were pending in the Native Land Court under a specially enabling Act called the New Zealand Poututu Jurisdiction Act, 1889. In 1893 a new court was established by the Validation Act, in which there was a general provision that the commencement of proceedings in the Validation Court should operate as a stay of proceedings in any other court in respect of the same matters. There were other questions involved in the appeal but on this point Lord Hobhouse, who delivered the judgment of their Lordships, said, at page 754:

> The general maxim is, *"Generalia specialibus non derogant."* When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. This case is a peculiarly strong one for the application of the general maxim.

The Privy Council on this point held that the proceedings in the Native Land Court were not stayed by the commencement of proceedings in the Validation Court, notwithstanding the general provisions in the Act establishing the latter court.

(1) (1898) A C. 748

Counsel for the plaintiff relied upon subsection (1) of Section 1 of the Foreign Exchange Control Order which reads:

> 1. (1) These provisions may be cited as the Foreign Exchange Control Order and shall have effect on and after December 16, 1940. In the event of any conflict between this Order and any law in force in any part of Canada the provisions of this Order shall prevail.

In view of provisos of a similar nature in the cases which have been referred to, I am unable to see how this subsection prevents the application of the maxim. There is nothing in the Foreign Exchange Control Order that can be regarded as shewing a clear or explicit intention that it should supersede the regulations passed under the Gold Export Act prohibiting the export of gold except under certain conditions. Indeed, these regulations were continued in force by Order in Council, P.C. 9131, dated November 26, 1941, after the Foreign Exchange Control Order was enacted by Order in Council, P.C. 7378, dated December 13, 1940. That the purposes of the two enactments may be different is immaterial. Likewise the fact that the Foreign Exchange Control Order provides for forfeiture can have no bearing if "gold" is to be excluded from "property" as defined in that Order. Counsel for the defendant argued that the Governor in Council cannot be presumed to have confided control over the same subject matter to two different authorities. Export permits under the Gold Export Act and its regulations are issued by the Minister of Finance, whereas licences to export under the Foreign Exchange Control Order come from the Foreign Exchange Control Board. It was also argued that if gold were included in "property," as defined in the Foreign Exchange Control Order, there might be conflict in administration and that the Governor in Council must be presumed to have intended both the Gold Export Act with the regulations under it and the Foreign Exchange Control Order as capable of administration without the possibility of any conflict of authority.

There is, in my opinion, no escape from the contentions put forward on behalf of the defendant. The only way in which effect can be given both to the Gold Export Act and the regulations made under it and to the Foreign

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Exchange Control Order is to read the latter as "silently excluding from its operation" the subject matter of gold export, since that has been specially provided for by the Gold Export Act and its regulations. This would be so even if the Foreign Exchange Control Order had been later in date than the date of the last regulations made under the Gold Export Act. The case for the defendant becomes all the stronger by reason of the fact that the last regulations under the Gold Export Act were continued in force after the date of the enactment of the Foreign Exchange Control Order.

The principle underlying the maxim *generalia specialibus non derogant* should be applied to the facts of this case. The general term "property," as defined in section 2(1)(*t*) of the Foreign Exchange Control Order should be construed as "silently excluding" gold of the kind in question in this action, since the prohibition of its export is dealt with by the Gold Export Act and its regulations. Consequently, the provisions of the Foreign Exchange Control Order, including those relating to forfeiture, have no application to the facts now before the Court. In the absence of any provisions for forfeiture of gold contained in the governing special Act, the Gold Export Act, and the regulations made under it, there is in the present case no legal authority for ordering the forfeiture to His Majesty of the gold which the defendant attempted to export and the plaintiff's action must, therefore, be dismissed with costs.

Judgment accordingly.

BETWEEN:

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Jan. 21
Aug. 16

WALTER G. LUMBERS ..... APPELLANT,

AND

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

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 3 & 5(k)—Exemption provisions of a taxing act must be construed strictly—Claim for exemption under s. 5(k) of Income War Tax Act disallowed—Life insurance endowment contract is not an annuity contract within the meaning of s. 5(k) of the Income War Tax Act—Appeal from the decision of the Minister of National Revenue dismissed.

An insurance company issued a policy of insurance to the appellant whereby in consideration of the payment of an annual premium of $1,219.13 for twenty years it assured the life of the appellant and promised to pay him a monthly income of $125 at the end of the endowment period of twenty years, if the assured were then alive, or in the event of the death of the assured during the endowment period to pay the income to the wife of the assured named as beneficiary in the policy. At the end of the endowment period the assured had the right either to take the commuted value of the policy in a lump sum upon its surrender or to receive the monthly income payments as promised in the policy. Payments of monthly income were made in 1940. The appellant in his income tax return for the year 1940 claimed exemption under s. 5(*k*) of the Income War Tax Act on the ground that such payments were income from an annuity contract. The Commissioner of Income Tax disallowed this deduction and assessed the appellant for income tax on the payments received by him. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court.

Held: That the exemption provisions of a taxing act must be construed strictly and a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exemption section of the Income War Tax Act; he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exemping section has been complied with.

2 That the appellant's contract was not an annuity contract when it was entered into within the meaning of s. 5(*k*) of the Income War Tax Act.

3. That the exemption from income tax, granted by s. 5(*k*) of the Income War Tax Act in the case of the income arising from an annuity contract entered into prior to June 25, 1940, does not extend to the monthly income received under a life insurance endowment policy, where the assured, at the end of a specified endowment period and subject to the payment of a specified number of premiums, has the option of receiving the commuted value of the policy in a lump sum upon surrender of the policy or monthly income payments as stipulated in the policy.

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

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

A. L. Fleming, K.C., for appellant.

Robert Forsyth, K.C., and *E. S. MacLatchy* for respondent.

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

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THE PRESIDENT now (August 16, 1943) delivered the following judgment:—

This appeal raises the question as to whether the appellant is entitled to any exemption from income tax under the provisions of paragraph (*k*) of section 5 of the Income War Tax Act, R.S.C. 1927, chap. 97, as amended in 1940, in respect of monthly income payments made by an insurance company under the provisions of a policy whereby it assured the life of the appellant and promised to pay to him a monthly income at the end of an endowment period of 20 years, if he were then living, or, if he should die during the said period, to pay the said monthly income to his wife, the beneficiary named in the policy .

The facts are not in dispute. On December 11, 1918, The Mutual Life Assurance Company of Canada executed and issued a policy on the life of the appellant, whereby the said company, as set out in the policy:

> In consideration of the payment upon the delivery of this policy of the sum of Twelve Hundred and Nineteen and 13/100 Dollars, and the further payment of a like amount on or before the first day of January in every year during the continuance of this contract, until the premiums for twenty years shall have been fully paid, HEREBY ASSURES THE LIFE OF WALTER GLEN LUMBERS of Toronto, Ont., Wholesale Grocer, hereinafter called the Assured, and promises to pay, at its Head Office, TO THE SAID ASSURED, subject to the conditions hereinafter given, A MONTHLY INCOME OF ONE HUNDRED AND TWENTY-FIVE DOLLARS commencing the first day of January 1939, at the end of the endowment period of twenty years, if the assured is then living, and provided this policy is in force; or, in the event of the death of the assured during the said endowment period, the Company will pay the said income to the Assured's wife, Alice Louise Lumbers, hereinafter called the Beneficiary, commencing immediately upon receipt and approval of proofs of the death of the assured provided this policy is in force.

The policy is described as a "Continuous Monthly Income Endowment in 20 Years Annual Dividends" and identified as "Policy No. 143,113 on the life of Walter G. Lumbers, Monthly Income $125—240 Payments Guaranteed—Commuted Value—$21,725—Premium—$1,219.13—Due 1st January."

The appellant at the end of the 20 year endowment period, after payment of the required premiums, had the right either to take the commuted value of the policy, namely, $21,725, in a lump sum upon surrender of the policy or to receive the monthly income payments as promised in the policy

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The following endorsement appears upon the policy:

As the Endowment period of this policy has been completed the Monthly Income stated on the face hereof will now be payable in accordance with the terms of the policy, the first payment being due the first day of January 1939.

Dated at Waterloo, this fourth day of February 1939.

C. B. SPURGEON, Assistant Actuary. R. O. McCULLOCH, President.

On December 2, 1938, the appellant and his wife, Alice Louise Lumbers, the beneficiary named in the policy, gave the following direction *re* optional settlement to the company:

We, Alice Louise Lumbers, beneficiary, and Walter Glen Lumbers, the assured under Policy No. 143,113 issued by The Mutual Life Assurance Company of Canada under its present or former name hereby direct that payment under the said policy or policies shall be made as follows:

When this policy matures as an Endowment on January 1, 1939, the monthly income provided by the terms of the said policy shall be paid to Alice Louise Lumbers during her lifetime, thereafter to Walter Glen Lumbers, and upon the death of both the said Alice Louise Lumbers and Walter Glen Lumbers, the commuted value of any remaining guaranteed installments shall be paid in one sum to the executors or administrators of the estate of the said Alice Louise Lumbers.

The receipt of this direction was duly acknowledged by the company and payments of monthly income pursuant to it were made as from January 1, 1939. In his income tax return for the year 1940 the appellant included the sum of $1,500 as an annuity received from the Mutual Life Insurance Company of Canada and claimed the sum of $1,200 as an exemption on the said annuity. In the assessment of the appellant's income for the year 1940 this deduction claimed by him was disallowed. From such disallowance the present appeal to this Court is brought.

The narrow issue in the appeal is whether the appellant has a right to the exemption claimed by him under the provisions of section 5 (*k*) of the Income War Tax Act, R.S.C. 1927, chap. 97, as amended in 1940, which, so far as relevant to this appeal, reads as follows:

5. "Income" as hereinafter defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*k*) The income arising from any annuity contract entered into prior to the twenty-fifth day of June, 1940, to the extent provided by section three of chapter twenty-four of the statutes of 1930 and section six of chapter forty-three of the statutes of 1932:

In his notice of appeal from the assessment disallowing the exemption claimed, the appellant puts forward two

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alternative contentions. In the first place, he contends that his contract with the Mutual Life Assurance Company of Canada was an annuity contract entered into prior to the 30th day of May, 1930, the date of the amendment of 1930, with a company incorporated or licensed to do business in Canada, which company was effecting annuity contracts like those made by the Dominion Government and that it therefore falls within the provisions of section 5 (*k*) of the Income War Tax Act and section 3 of chapter 24 of the Statutes of 1930. The decision of the Minister does not deal with this specific contention made by the appellant with respect to the 1930 amendment. By the amending legislation of 1930, subsection 1 of section 5 of the Income War Tax Act was amended by adding thereto paragraphs (*i*), (*j*) and (*k*), so that section 5 (*k*), so far as relevant to the matter now under review, reads as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*k*) The income to the extent of five thousand dollars only derived from annuity contracts with the dominion or provincial governments or any company incorporated or licensed to do business in Canada effecting like annuity contracts, provided, however, that any annuity in excess of the said five thousand dollars purchased by a husband for his wife or *vice versa* shall be taxed as income to the purchaser.

On the hearing, counsel for the appellant elaborated the contention made in the notice of appeal. He argued that it was not necessary for the appellant, in order to come within the 1930 exemption, to show that his contract was an annuity contract like a Dominion Government annuity contract, provided he could show that his contract was "an annuity contract" and that it was with a company incorporated or licensed to do business in Canada, which did in fact effect annuity contracts like those effected by the Dominion Government, even although his particular contract might not itself be like a Dominion Government annuity contract.

In support of this contention, evidence was adduced that in 1918, when the appellant's contract was made, the Mutual Life Assurance Company of Canada did in fact issue annuity contracts like the Dominion Government ones.

This contention means that the words "effecting like annuity contracts," as used in the 1930 amendment, are to be read as merely descriptive of the company rather

than of the contracts made by them. Counsel for the respondent took a different view as to the meaning of these words and suggested that they really meant "in so far as they effect like annuity contracts." In my opinion, this is a more reasonable view to take, having regard to the position of income from annuity contracts. It may, I think, reasonably be assumed that when Parliament enacted the amendment of 1930 above referred to, it felt that some exemption from income tax should be given to persons who had bought annuities and that such exemption from what should otherwise be taxable income should not exceed five thousand dollars, but that any annuity income in excess of five thousand dollars should be taxed, regardless of argument as to whether it was really income in the popular sense of the term or return of capital or partly the one and partly the other. The exemption up to the maximum of $5,000 was clearly given to the purchasers of Dominion or Provincial Government annuities. If the amending legislation had stopped at such an exemption, it would no doubt have been regarded as unfair discrimination against companies who were selling annuities in competition with the Dominion or Provincial Government annuity branches. Consequently other companies selling annuities were put in the same position as Dominion and Provincial Governments, so far as income tax exemptions in respect of annuities were concerned. I do not think that the 1930 amendment contemplated any further relief, nor should the Court assume a wider scope for an exemption than is necessary to give effect to the relief intended. The policy of Parliament seems to have been to grant a maximum exemption of five thousand dollars in respect of income, in the sense of incoming moneys, from annuity contracts, which was otherwise assumed to be taxable in its entirety, and to grant such exemption to all purchasers of annuities whether the vendors were Dominion or Provincial Governments on the one hand or companies incorporated or licensed to do business in Canada on the other; I do not think it was intended to extend the field of exemption to contracts, which, while they might have some annuity features connected with them, were different from government annuity contracts. It was not intended, in my opinion, to extend the exemption to life insurance endowment income policies, such as the one the appellant had with the Mutual Life Assurance Company of Canada.

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Even if there were acceptance of the contention of the appellant, namely, that in order to come within the exemption granted by section 5 (*k*), as enacted in 1930, he does not have to show that his contract is an annuity contract like a government annuity contract, provided he can show that the Mutual Life Assurance Company of Canada at the time of his contract was effecting annuity contracts like the Dominion Government ones, he must show that in 1930 he had an "annuity contract." Whatever the term "annuity contract," as used in the 1930 amendment, may possibly include in view of the fact that it is not defined in the Act, it is, I think, quite clear that it does not include a life insurance policy. One of the purposes of a life insurance policy is to make provision for the benefit of the beneficiary against the contingency of the death of the assured. The benefit, whether by a lump sum or by way of stated amounts monthly or otherwise, becomes payable on the death of the assured, whether he has paid one premium or more. The amount necessarily payable by the assured by way of premium is at no time, prior to the maturity of the policy, ascertainable. On the other hand, the element of life insurance is not present at all in what are ordinarily termed annuity contracts, and, furthermore, the amount required to be paid by the annuitant, before he becomes entitled to the benefits of the annuity, is fixed. Counsel for the appellant realized that the appellant's contract of December 11, 1918, was not exclusively an annuity contract and suggested that the proper description of it, at any rate prior to its maturity on January 1, 1939, was an "insurance and annuity contract." I would describe it as a life insurance contract contemplating the payment of benefits, perhaps of an annuity nature, upon the completion of the endowment period of 20 years and the payment of premiums during such period. The exemption granted by section 5 (*k*) of the Income War Tax Act, as enacted in 1930, was only in respect of the income derived from "annuity contracts"; it did not extend to income derived from contracts other than annuity contracts, even if such contracts might ultimately result in payments similar to those payable under annuity contracts. In my judgment, the contention of the appellant that he is entitled to the exemption benefit of the amendment of 1930 cannot be accepted.

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The appellant put forward an alternative contention which was really his main one. In his notice of appeal he alleged that, in the event of it being held that his annuity was not wholly exempt, it was exempt to the extent of twelve hundred dollars, under the provisions of Section 5 (*k*) of the Income War Tax Act and section 6 of chapter 43 of the statutes of 1932. This section amended section 5 (*k*), so that, as far as it is relevant, it read as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions.—
>
> (*k*) Twelve hundred dollars only, being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada:

The contention was made that on January 1, 1939, the contract between the appellant and the Mutual Life Assurance Company of Canada was in fact a like annuity contract to one that might be made with the Dominion Government and that there were no terms of such contract in force as of that date that would distinguish it from a Dominion Government annuity contract. In reply to the notice of appeal on this point the Minister affirmed the assessment disallowing the exemption on the ground that under the provisions of section 3 (*b*) of the Act, income includes "annuities or other annual payments received under the provisions of any contract, except as in this Act otherwise provided"; that the provisions of paragraph (*k*) of section 5 of the Act are not applicable as the said annuity contract was not similar to those issued by the Dominion Government; that the decision of the Minister in this respect is final and conclusive and that under no other provisions of the Act is the said annuity exempt from tax.

It will be noticed that two important changes were made by the 1932 amendment. In the first place, the amount of the exemption was reduced from five thousand dollars to twelve hundred dollars and, secondly, it was made quite clear that where an annuity contract was other than a Dominion Government one it would not qualify the holder of it for the exemption granted unless his annuity contract were like a Dominion Government annuity contract. Whatever doubts there may have been as a result of the 1930 enactment were completely removed by the 1932 amend-

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ment. The appellant, if he seeks to bring his claim for an exemption within the ambit of the 1932 amendment must show that his annuity contract, if it is such, is like the annuity contracts issued by the Dominion Government. Counsel for the appellant contended that on January 1, 1939, after the endorsement had been made on the policy, as set out previously, the appellant had an annuity contract; that after that date his contract had no life insurance features or terms; that it was no longer a life insurance contract but exclusively an annuity contract and like the annuity contracts issued by the Dominion Government; and that the appellant was, therefore, entitled to the exemption granted by section 5 (*k*) as enacted in 1940 to the extent granted by the 1932 amendment, namely, twelve hundred dollars. On the assumption, for the time being, that the appellant had an annuity contract, the first question that presents itself is whether it was like the Dominion Government annuity contracts. A number of samples of such contracts were adduced in evidence at the hearing of the appeal. Mr. E. G. Blackadar, Superintendent of the Dominion Government Annuities Branch, called by the appellant, produced four samples of Dominion Government annuity contracts issued in December of 1918 and since then and four similar samples of contracts that were for sale in January of 1939. There were also several other kinds used. On cross-examination by counsel for the respondent as to the differences between the appellant's contract and those issued by the Dominion Government, he drew attention to the provisions in the appellant's contract which did not appear in the Dominion Government annuity contracts. I need refer only to two of these differences: the life insurance provisions, which I have already referred to, and the provisions whereby the endowment policy became payable at the end of the 20-year endowment period, either in the lump sum of $21,725, which was the cash value of the policy at the time of its maturity, or in continuous monthly income payments of $125 with 240 payments guaranteed. No such provisions appear in the Dominion Government annuity contracts. In my view this difference is enough to take the appellant's contract, if it is an annuity contract at all within the meaning of section 5 (*k*), out of the class of "like annuity contracts," referred to in the section.

It is a well established rule that the exemption provisions of a taxing Act must be construed strictly. In *Wylie* v. *City of Montreal* (1) Sir W. J. Ritchie C. J. said:

> I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed;

The rule may be expressed in a somewhat different way with specific reference to the Income War Tax Act. Just as receipts of money in the hands of a taxpayer are not taxable income unless the Income War Tax Act has clearly made them such, so also, in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with. Consequently, since the contract which the appellant had is not "like" a Dominion Government annuity contract, for the reason already given, it does not fall within the requirement of the term "like annuity contracts" in section 5 (*k*) as amended in 1932, and on that ground alone the appellant is not entitled to the exemption from income tax granted by that section.

There is a further reason for holding that section 5 (*k*) as enacted in 1940 does not apply to the appellant's case. The wording of the section must be carefully analyzed. The section really breaks itself up into two parts: firstly, the income which is exempt and, secondly, the extent to which such income is exempt. I have already discussed the second aspect of the matter: the extent of the exemption is governed by the legislation of 1930 and 1932. Then, with regard to the first part of the section, it should be noted that the exempted income is the income arising from "any annuity contract entered into prior to the twenty-fifth day of June, 1940." Counsel for the appellant contended that as from January 1, 1939, when the monthly income became payable, the contract of the appellant, whatever terms it may have had originally and whether it then had life insurance features, was exclusively an annuity contract and

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

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that it was entered into before June 25, 1940. His own description of it is that prior to January 1, 1939, it was an "insurance and annuity contract," but that after that date it was only an annuity contract, with no life insurance features left in it. He also argued that whatever the contract may have been in any year prior to 1940 was of no importance for the purpose of determining whether the payments made under it in 1940 are or are not exempt from income tax: that the payments made in 1940 flowed from a set of obligations covered by the name of a contract and that it was the obligations of 1940 under the contract that must be looked at in order to get the real nature of the contract and determine whether it were an annuity contract within the meaning of the exempting section. I cannot accept this construction of the section. I think it is clear that it was intended to exempt only income arising from a contract that was an annuity contract at the time it was entered into. The appellant must bring himself within the express terms of the exemption section and must show that his contract, not the obligations resulting from it at any particular time, was an annuity contract when it was entered into. The term used in the exempting section is "contract." While that term is sometimes loosely used to express various ideas, Anson on Contract says that "Contract results from a combination of the two ideas of agreement and obligation" and that "contract is that form of agreement which directly contemplates and creates an obligation; the contractual obligation is that form of obligation which springs from agreement." It is not enough, therefore, for the appellant to show that in 1940 the obligations of the Mutual Life Insurance Company of Canada under his contract with him had become fixed to pay him a monthly income. If the appellant could show that on January 1, 1939, he had entered into a new contract with the Mutual Life Assurance Company of Canada, his counsel's contention might well be accepted, but such was not the case. It is the contract as it was entered into that must be looked at. The appellant did not enter into a contract with the Mutual Life Insurance Company of Canada on January 1, 1939, but on December 11, 1918. At that time it was a life insurance endowment contract imposing an obligation upon the company to make the monthly payments to his beneficiary, if he should die before the end of the endowment period, and to him at the end

of the endowment period if he were then still alive. On either maturity of the policy the person entitled to the benefits could take a lump sum payment instead of the monthly income. Such a contract was, in my view, not an annuity contract when it was "entered into" in 1918. The fact that on January 1, 1939, the monthly income became payable did not result from any new contract, but from the exercise by the appellant of an option, under the provisions of a contract, which he had entered into on December 11, 1918, at which date the contract was one of life insurance and not an annuity contract within the meaning of section 5 (*k*) of the Income War Tax Act.

I cannot see anything in the amendment of 1940 which would extend the scope of exemption from income tax to income from contracts that would have been excluded from the exemptions granted by the legislation of 1930 or 1932.

In these reasons for judgment I have confined myself to a consideration of the narrow question as to whether the appellant is entitled to the exemption claimed by him and must hold, for the reasons given, that he has failed to establish his right to such exemption within the clear terms of the exempting section under discussion. In my opinion, the exemption from income tax, granted by section 5 (*k*) of the Income War Tax Act in the case of the income arising from an annuity contract entered into prior to June 25, 1940, does not extend to the monthly income received under a life insurance endowment policy, where the assured, at the end of a specified endowment period and subject to the payment of a specified number of premiums, has the option of receiving the commuted value of the policy in a lump sum upon surrender of the policy or monthly income payments as stipulated in the policy. The appeal will, therefore, be dismissed with costs.

Judgment accordingly.

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CROWN—*Continued*

cialibus non derogant should be applied. 2. That the general term "property" as defined in s. 2 (1) (t) of the Foreign Exchange Control Order should be construed as "silently excluding" gold of the kind in question herein since the prohibition of the export of such gold is dealt with by the Gold Export Act, Statutes of Canada, 1932, c. 33, and the regulations made thereunder. 3. That the provisions of the Foreign Exchange Control Order, including those relating to forfeiture, have no application to the facts in this action and in the absence of any provisions for forfeiture contained in the Gold Export Act and regulations made under it the action must be dismissed. HIS MAJESTY THE KING *v.* LLOYD CAMERON WILLIAMS **193**

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the declaration of service required on his attestation becomes a member of the Non-Permanent Active Militia of Canada on active service. 5 That when a person becomes a member of the Active Militia of Canada on active service, whether by process of law or by voluntary enlistment, whereby he offers his services to his country for the duration of a national emergency, such as now exists, he is performing a national function of citizenship that is not in any way related to governmental service or employment and when he assumes that function he does not enter upon service or employment with the Government and does not become a Crown or governmental servant or employee in any sense of the term· his legal status is that of a person under a written personal engagement with the King whereby he renders his services as a soldier in the defence of his country pursuant to his duty of allegiance to the King whose subject he is. 6 That a person who enlists in an active unit of the Canadian Army for the duration of the present emergency and thereby becomes a member of the Non-Permanent Active Militia of Canada on active service is not an "officer or servant of the Crown" within the meaning, intent or purpose of section 19 (*c*) of the Exchequer Court Act and the Crown is not liable for the negligence of such a person. *Moscovitz* v. *The King* (1934) Ex C.R 188, (1935) S C R. 404 and *Yukon Southern Air Transport Limited* v. *The King* (1942) Ex. C R. 181 commented upon and distinguished *Larose* v *The King* (1901) 31 Can. S C R. 206 followed *Goldstein* v. *State of New York* (1939) 281 N.Y 396; 24 N E. (2d) 97; 129 A L R 905 applied. MATTHEW MCARTHUR *v.* HIS MAJESTY THE KING **77**

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person entitled to the instalment should be alive when it became payable; there was no bequest of an "annuity" or "annual payments" either for life or for an ascertained term of years but a distribution of the capital of the estate among the legatees. 2. That the term "annuities or other annual payments received under the provisions of any will or trust" as used in section 3 (*g*) of the Income War Tax Act, does not include or extend to legacies payable exclusively out of the capital of an estate even when such legacies are payable annually by instalments on specified dates, where the maximum amount which the legatee is to receive out of such capital is specified, such legacy being in each case the legatee's share in the distribution or division of such capital and constituting property acquired by him by gift, bequest, devise or descent within the meaning of section 3 (*a*) of the Act and as such not subject to tax. WILLIAM M. O'CONNOR *v.* THE MINISTER OF NATIONAL REVENUE **168**

3——*Income Tax—Income War Tax Act, R S C., 1927, c. 97, secs 3, 5 (f), 6 (a) and 6 (f)—"Income"—"Net" profit or gain—"Ascertained" and "Unascertained"—Test of taxability of annual gain or profit or gratuity — Deductions — Statutory allowances—Appeal allowed*]—Appellant was appointed as Hides and Leather Administrator of the Wartime Prices and Trade Board by an Order in Council deriving its authority from the War Measures Act, under the provisions of which he was to receive a salary of one dollar per annum and his actual transportation expenses and a living allowance of twenty dollars per diem while absent from his place of residence in connection with his duties. The appellant was assessed for income tax purposes on the amount of such allowances received by him less a deduction of two dollars per day. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court. *Held*. That the allowances received by appellant were not "income" as defined by the Income War Tax Act. 2. That under the Income War Tax Act income is not necessarily net income and therefore taxable under the Act merely because it is of a fixed amount, nor does the Act preclude the possibility of deductions from fixed incomes in order to determine the taxable amount thereof. 3 That the test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained" but whether it is "net". *In re Salary of Lieutenant-Governors* (1931) Ex C R 232, commented upon. 4. That where a statute or its equivalent, having the same legislative authority as the taxing statute, has made it clear that allowances authorized by it are made for purposes other than those of gain or profit or gratuity to the

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recipient, such allowances are not taxable income and do not become such because the amount thereof is fixed; where the amount of the allowance is authorized for expenses, the fixed amount is to be regarded as the amount of expenses beyond which no reimbursement is authorized. MAURICE SAMSON *v.* MINISTER OF NATIONAL REVENUE **17**

4.——*Sales Tax—Special War Revenue Act, R S C , 1927, c. 179, secs. 86, 95 and 106—Liability for sales tax on progress payments not collected—"Falls due" and "becomes payable"—No sales tax payable by manufacturer on amounts overpaid by purchaser*]—The Action is for the recovery from defendant of the sum of $10,844 46 for sales tax, and penalties alleged due the plaintiff under the Special War Revenue Act, R S C , 1927, c. 179. Defendant company, incorporated under the laws of the Dominion of Canada, entered into a contract for the sale of a machine and accessories to the Lake Sulphite Pulp Company Limited for the price of $488,335 payable in 9 monthly instalments and one further instalment to be paid after the machine was placed in operation, and in no event later than 6 months from the date of final shipment or offer of shipment of the machine. The property in the machine was not to pass to the purchaser until all payments under the contract had been made. Except for two small parts worth about $1,200 only, the machine was never delivered to the purchaser. Six instalments of the purchase price were paid to defendant and the sales tax on these instalments was paid to the plaintiff by defendant. The defendant did not receive the last four instalments due it from the Lake Sulphite Pulp Company Limited. No sales tax on these four instalments was paid by defendant and plaintiff now seeks to recover from it the sales tax on three of these payments. *Held:* That the machine never having been delivered except for the parts above mentioned there could be no liability on defendant for sales tax under ss. 1 (*a*) of s 86 of the Special War Revenue Act 2 That the phrase "falls due" in the proviso to ss. 1 (*a*) of s 86 of the Special War Revenue Act refers to the terms of payment as set forth in the contract and the phrase "becomes payable" in the same proviso refers to the time when the progress payments will mature and become exigible in accordance with the progress made in the building of the machine. 3. That the progress payments stipulated in the contract fell due and were exigible in the proportion the work progressed and the sales tax thereon was payable *pro tanto* at the time such payments fell due and became payable and if there were no progress in the work there were no payments due and consequently there was no tax leviable. 4. That