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Exchequer Court of Canada

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JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISNE JUDGES:

THE HONOURABLE J. C. A. CAMERON
(*Appointed September 4, 1946*)

THE HONOURABLE JOHN DOHERTY KEARNEY
(*Appointed November 1, 1951*)

THE HONOURABLE ALPHONSE FOURNIER
(*Appointed June 12, 1953*)

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

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

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

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

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

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

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

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

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

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

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

SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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DEPUTY JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

ATTORNEY-GENERAL OF CANADA:

The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITOR GENERAL OF CANADA:

The Honourable LÉON BALCER, Q.C.

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CORRIGENDA

At page 84, line 7 for "respondent" read "appellant".

At page 205 in the first line of the marginal note for "March" read "November".

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

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

1957
Apr. 12
Dec. 12

AND

WESTERN CANADA STEAMSHIP COMPANY LIMITED ..... RESPONDENT.

Revenue—Income tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, s. 12(1)(a)—"An outlay or expense . . . made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer"—Expenses incurred for surveys and repairs to ships sold before completion of voyage and made after the sale—Expenses incurred in accordance with good business practice—Deductions allowed—Appeal dismissed.

Respondent operates a fleet of sea-going tramp steamers out of Vancouver, B.C. Two of these ships were chartered for trips to the Orient and were sold during the final voyage and before they were returned to their home port. In accordance with certain sale conditions the respondent expended large sums of money for surveys and repairs to both ships. The survey and repairs of one ship were initiated in Canada and concluded in Japan; the survey and repairs of the other ship were carried out entirely in Japan. Respondent deducted the costs of these surveys and repairs from its taxable income for the taxation year in which they were incurred. The Minister of National Revenue appealed to this Court from a decision of the Income Tax Appeal Board allowing the deductions.

Held: That the expenses of the surveys and consequent repairs to the ships were properly deductible from taxable income as being expenses properly incurred for the purpose of earning the income.

2. That it was in accordance with good business practice and proper navigation that the owner should ensure by all possible means the staunchness of the vessels in all respects.

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APPEAL from a decision of the Income Tax Appeal Board.

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

F. J. Cross for appellant.

William Murphy, Q.C. and *H. W. Thompson* for respondent.

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

DUMOULIN J. now (December 12, 1957) delivered the following judgment:

This appeal was heard at Vancouver, B.C., April 12, 1957.

The instant case is an appeal from a decision of the Income Tax Appeal Board, dated June 14, 1956[1], allowing the respondent's appeal from an assessment to income tax in respect of the taxation year 1953.

Western Canada Steamship Co. Ltd., a body corporate, has its head office in the City of Vancouver, Province of British Columbia, and operates a fleet of sea-going tramp steamers.

In its income tax return for 1953, respondent deducted from its gross income a sum of $45,524.76 as an operation expense.

An amount of $36,283.53 was spent by respondent for a survey of and repairs to one of its several vessels, viz., the S.S. *Lake Sicamous.*

The further sum of $9,241.23 was also alleged to have been expended for the survey of and repairs to a second ship the S.S. *Lake Winnipeg.*

Both these vessels were, at the material time, owned and operated by Western Canada Steamship Co. Ltd.

For the factual reasons, an outline of which will be given shortly, respondent, in para. 14 of its reply to appellant's statement of facts "submits that amounts set forth in paragraph A 8. of this Reply were expended by the Respondent in the normal and ordinary course of its business and for the maintenance and up-keep of the said vessels and for the purpose of earning income for the Respondent."

[1] 15 Tax A.B.C. 228

It might be appropriate to set out at once the appellant's adverse contention expressed in paras. B. 2 and 3 of its Notice of Appeal:

2. The Appellant says that the costs of the survey and repairs to the said vessels together with the cost of returning the said vessels to the City of Vancouver, were not expenses made or incurred for the purpose of producing income.

3. The Appellant says that such expenses were made or incurred for the purpose of or pursuant to the sale of the said vessels.

Both parties rely upon the self-same provision, i.e. s. 12(1)(*a*) of the 1948 *Income Tax Act,* 11-12 Geo. VI, c. 52, reading:

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

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

The undisputed facts are as follows:

In the case under consideration, two units of this fleet, namely S.S. *Lake Winnipeg* and S.S. *Lake Sicamous* were chartered for trips to the Orient with port callings, amongst others, at Pusan, Korea, and Osaka, Japan.

During the final voyage, both vessels were sold, as attested by Exhibits 2 and 5.

The agreement of sale, filed as Exhibit 2, is dated "the 26th day of March, 1953" and deals with the sale of the vessel *Lake Winnipeg*, for the price of $710,000, U.S. currency, with Vancouver as port of delivery, said delivery to be effected "not later than fifteenth (15th) June, 1953", (art. 4).

Exhibit 5 consists in a like agreement, dated "the 31st day of March, 1953", between the same parties implementing the sale of the *Lake Sicamous* for a price of $730,000, U.S. dollars, with obligation to deliver this vessel also at Vancouver, B.C. "not later than 30th June, 1953".

Both agreements of sale contain a similarly worded clause which should be reproduced at length:

5. The vessel shall be delivered safely afloat in a seaworthy condition, tight, staunch and strong, and in Lloyd's 100 A-1 class, without reservation, with Special Survey No. 2 passed, and in every way satisfactory for normal service of a vessel of her type, size and description, and, to ascertain the fulfillment of these requirements, the Seller agrees to have the vessel inspected and examined in a drydock in Vancouver, B.C. for bottom damage, by a surveyor of Lloyd's, and to give notice of such inspection to

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the Purchaser by letter, telegram or cable, at his address at least three (3) days before such inspection takes place, the Seller hereby undertaking to promptly carry out at his expense any repairs ordered to be carried out by Lloyd's surveyor to enable him to issue a classification certificate 100 A-1 without reservation; drydocking and other expenses incidental to the inspection to be paid by the Purchaser if the vessel does not require any repairs or does require repairs the cost of which shall be less than One Thousand Dollars ($1,000), but said expenses to be paid by the Seller if the vessel requires repairs, other than painting, the cost of which will be in excess of the sum of One Thousand Dollars ($1,000); the cost of painting to be borne by the Purchaser except for the painting of those parts which needed repairs.

Again two other stipulations, identical in wording, appear in both covenants of sale, viz., arts. 10 of Exhibits 2 and 5 respectively, extending, until actual delivery, the seller's title in and to the vessels, and saddling him with the owner's legal risks.

Appellant did not call any witnesses, relying upon the exhibits filed and more so upon the interpretation which, at law, they should warrant.

Mr. F. J. Cross, for appellant, declared his complete agreement with Mr. Justice Cameron's decision, in re *Montship Lines Ltd. v. The Minister of National Revenue*[1] which met with the approval of the Supreme Court of Canada in an oral pronouncement, and his intention to refrain from quoting other precedents.

Such concurrence means that, in the actual issue as in the former, appellant would have found no fault with the deductions claimed, if the ships, pending their return to Vancouver, had remained unsold.

It also signifies that this sale and its several obligations provide the litigious factors.

The ensuing details had better be reported from the evidence adduced by respondent's two witnesses, the first of which was Mr. John Sinclair Clarke, President and General Manager of Western Canada Steamship Co. Ltd.

Mr. Clarke testified that a special survey is carried out by duly qualified marine surveyors, at least every four years, as a necessary requisite, amongst other precautionary ends, to classify ships in Lloyd's 100 A-1 class.

Regarding S.S. *Lake Winnipeg,* its initial special survey, given as Survey No. 1 or A, dated back to July 1948, and the next one fell due in July 1952. It was begun only in

[1] [1954] Ex. C.R. 376.

August 1952, at Fort Moody, continued in 1953, at Osaka, Japan, resumed in Vancouver in March 1953, and completed on May 2, again at Osaka.

The cost of this survey and consequent repairs amounts to $7,771.73, according to Exhibits 3 and 4.

As for S.S. *Lake Sicamous,* the preceding survey was performed in May 1949, with the result that it should be renewed in 1953. Since labour costs and other requisites were much cheaper in Japan than in America, the *Sicamous* underwent its survey and necessary repairs entirely at Osaka, from May 6 to May 18, 1953.

Capt. Clarke who, by the way, is the holder of a master mariner's degree, says that, prior to the ships' departure for the Orient, respondent company was approached by agents of Lloyds on the matter of its intention regarding the carrying out or completion of the special surveys which, as already stated, are essential to the retention of the 100 A-1 classification. The Company replied that these requirements would surely be fulfilled in the very near future.

Apparently, permission was obtained by Western Canada Steamship Co. Ltd. to carry out the survey and repairs in some Far Eastern port for economy's sake.

The survey and reconditioning of *Lake Sicamous* cost $32,013.03, although Exhibits 6, 7 and 8 tend to show higher figures.

Capt. Clarke positively declares that each and every one of these surveys and repair jobs would have been accomplished in the same way and to the same extent had the ships remained the Company's property. As instances of respondent company's firm intention in this respect, witness quotes inspection and repairs of two other unsold ships, and also that, between March 11 and 16, 1953, when the *Sicamous* rode at anchor in San Francisco harbour, arrangements were concluded for a painting job to be done some weeks later at Pusan, Korea.

Capt. Clarke, cross-examined, declared that by special permission from Lloyds, pursuant to an inspection in dry dock by the marine insurer's own surveyors, if a ship is found in good condition, a twelve-month delay may be granted.

Clarke goes on to say that the proximity of the quadrennial survey did not, in any way, influence the selling prices.

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A significant part of Mr. Clarke's testimony deals with a trade complication particular to ventures in freight transportation to the Orient. The witness explains that tramp steamers meet with considerable hardship in obtaining worthwhile cargoes for the return trip, known, in marine parlance, as the second leg. Whenever a fortunate result of this nature is achieved, the extra profit derived therefrom bears the savoury epithet of "gravy".

Clarke, whose opinion on these points is shared by the other witness, Mr. Francis C. Garde, testifies that only regular shipping lines, operating pre-ordained schedules between West and East are assured of return cargoes. For this reason, says the witness, *our shipping rates must be computed and spread over the through trips, that is outgoing and incoming voyages or "legs", with the consequence that a profit is nonetheless derived even though one of our steamers returns in ballast.* "It was a constant practice and policy with Western Canada Steamship Co. Ltd." concludes Mr. Clarke, "to keep its fleet in the 100 A-1 class and in good standing with Lloyds."

Each vessel carried a crew of thirty-six men. Under normal conditions, the homeward journey of 4,200 miles would take seventeen days and require a proper state of seaworthiness to affront the risks of the Pacific Ocean.

Mr. Francis C. Garde, president of a Vancouver shipping agency succeeded Capt. Clarke.

According to this witness, in 1953, prior to the departure of respondent's ships and during their trip, he strove to obtain cargoes of any description whatever for the in-bound voyage, but without avail.

Mr. Garde's endeavours in this connection covered a period of three months previously to the return sailings; he unhesitatingly stresses the real difficulty of procuring cargoes on West bound voyages, save for regular liners.

The issue under consideration is a repetition, I would be tempted to say a replica, of the *Montship Lines Ltd.* case, (*supra*), with the sole exception, and this a decisive one, that here surveys and repairs occurred *during the voyage, before the return* trip, instead of, as in *Montship Lines, after completion of the expedition.*

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In the latter case, two vessels were disposed of while on cruise. The agreements of sale also stipulated that both vessels should classify in Lloyd's 100 A-1 class.

Upon their reaching the home port, the ships went into dry docks and certain repairs were made before their delivery. The Court held:

That s. 12(1)(*a*) of the Income Tax Act being a positive enactment and excluding deductions which were not made or incurred by the taxpayer *for the purpose* of gaining or producing income from his property or business, it is not enough to establish that the dilapidations which occasioned the expenditures arose out of or in the course of the business, but that the *purpose* of the taxpayer in making the outlays was that of gaining or producing income from the business. Here that was not the purpose of the taxpayer. The outlays were incurred at the time each vessel entered the drydock, and it was then known that they would no longer be operated by appellant, but, following the inspection by Lloyds' surveyor would be delivered to the purchasers. The sole purpose of appellant in incurring the expenses was to comply with the requirements of the agreements of sale.

However, at p. 380, the learned judge emphasizes that:

It is of particular importance to note that neither of the vessels, following completion of the repairs, was used in the business of the appellant, and that at the time the expenses were incurred the appellant had entered into agreements to dispose of the vessels and knew that *thereafter they would not be used to earn income for the appellant.*

It then becomes apparent that, should any distinguishable difference creep through between the latter and the instant case, it can only proceed from the fact that the *Lake Winnipeg* and *Lake Sicamous*, in the course of their in-bound crossing *would still be operated in the business of respondent upon an income earning venture.* Such a distinction may seem somewhat thin and subtle, which, assuredly, is not a novel contingency in litigations of this nature.

Two witnesses, of unchallenged veracity, Capt. Clarke and Mr. Garde, reported the customary complication for tramp freighters to sail home in ballast from Far Eastern ports, so that cargo rates are tariffed accordingly and overcome this disadvantage. Whenever in-bound ships secure freight consignments, this is looked upon in the light of an additional or super profit nicknamed "gravy".

Had they continued on respondent's register, both these vessels would nonetheless have sailed back to Vancouver, their port of registry, earning, while so engaged, a proportionate share of an income spread over the whole venture.

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The quadrennial surveys evidenced no undue haste nor extraordinary delay regarding their renewals. In the case of S.S. *Lake Winnipeg,* the major portion of the repair jobs, begun in August 1952, continued in January or February 1953 and early March, was over well before the date of sale.

The most recent case in line, viz., *Seagull Steamship Company Limited v. The Minister of National Revenue*[1], a decision rendered by Fournier J. of this Court, on August 30, 1957, dealt with an appellant company which made extensive improvements on two ships that it had agreed to sell. The appellant company deducted the amount spent on repairs for both ships which the Minister then disallowed on the grounds that they were capital.

On pp. 10 and 11 of Mr. Justice Fournier's reasons for judgment, we read:

> I would distinguish this case from that of the *Montship Lines Limited v. The Minister of National Revenue* [*supra*] wherein Cameron J. found that the outlays were not made for the purpose of gaining income but to comply with agreements of sale. . . .
>
> . . . The fact is that the appellant had three of its vessels repaired, one of which was sold while it was in dry-dock, another was sold before going into dry-dock and the third was repaired but not sold. . . .
>
> . . . The Minister refused to deduct the outlay for repairs on the first two vessels but allowed as deduction the outlay for the repairs of the third. Why discriminate? Because they were sold? I do not believe the sales at the time they were agreed upon could change the fact, which was established, that expenses had been incurred for the purpose of gaining income from its business.

The evidence reasonably satisfied the Court that imperative considerations of maintenance and navigation, nowise related with the contractual terms, necessitated the expenditures incurred for surveys and repairs, and also that, owing to conditions inherent to similar undertakings, the ships *persisted during the home crossing,* as related above, *in the income earning business of the respondent.*

Mr. Justice Thorson, in the *Royal Trust Company v. The Minister of National Revenue*[2], pointed out that:

> in considering whether or not an expense was deductible *the first step was to determine whether or not it was in accordance with good business practice.* The second step was to determine whether or not it (the expense) was prohibited by the express terms of section 12(1)(*a*) of the Act.

Before attempting a trans-Pacific voyage of no less than 4,200 miles, was it not then primarily a humane and proper practice of navigation entailing a consequent legal obliga-

[1] [1957] Ex. C.R. 324. [2] (1957) 11 D.T.C. 1055.

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tion for the owners to ensure, by all possible means, the staunchness in all respects of vessels manned by an aggregate crew of seventy-two seamen?

For the preceding reasons the appeal will be dismissed and the record referred to and correspondingly amended by the Minister of National Revenue.

Respondent is entitled to the taxable costs.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1957

Oct. 23, 24, 25

Nov. 12

BETWEEN:

JOHN FOURNIER AND RICHARD CHILDS ..... } PLAINTIFFS;

AND

THE OWNERS OF THE SHIP *POINT ELLICE* AND OF THE CAR BARGE *P.G.E. NO. 2* ..... } DEFENDANTS.

Shipping—Action for damages through loss of yacht after being in collision with tug and tow—Loss caused by negligence of plaintiffs and improper navigation of yacht—Action dismissed.

The action is brought by the plaintiffs as owners of the yacht *Crosswinds II* which foundered and was lost in the First Narrows near Vancouver, B.C. during the night of September 1, 1956, after being in collision with the tug *Point Ellice* inbound on the course of a voyage from Squamish, B.C. to Vancouver, B.C. and having in tow the railway barge *P.G.E. No. 2*. Plaintiffs seek to recover from defendants the value of the yacht.

Held: That the collision and subsequent loss of the yacht were due to the negligence of the plaintiffs in being in the Narrows at all at that time and under those circumstances, not having ascertained the condition of the tide and failing to keep a lookout aft, and in causing the yacht to suddenly veer to starboard across the bow of the barge.

ACTION to recover damage caused by the loss of plaintiffs' yacht.

The action was tried by the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District at Vancouver.

J. G. A. Hutcheson, Q.C. for the plaintiffs.

C. C. I. Merritt for the defendants.

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FOURNIER *et al.* *v.* OWNERS OF THE SHIP *Point Ellice et al.*

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

SIDNEY SMITH D.J.A. now (November 12, 1957) delivered the following judgment:

I was impressed with the closing argument of Mr. Merritt. He said that

> At about 4 a.m. on September 1, 1956, the Tug *Point Ellice* was approaching First Narrows, Port of Vancouver, B.C., in bound, on the course of a voyage from Squamish, B.C. to Vancouver, B.C., and having in tow the railway barge *P.G.E. No. 2.* The night was dark with skies partly cloudy, and visibility 5 miles or better. The wind was a fresh westerly and the tide was ebbing strongly. The course of the *Point Ellice* approaching the Narrows was North 72° East magnetic, and shaped to pass close in to Prospect Point. Her speed was approximately 6 knots . . . a good lookout was being kept aboard both the tug *Point Ellice* and the barge *P.G.E. No. 2.*
>
> In these circumstances, and when approximately one half mile west of the bridge a single white light, which proved to be that of the yacht *Crosswinds II* was observed fine on the port bow. Having ascertained that it was safe to enter the harbour the *Point Ellice* proceeded, with her course shaped to pass close in on the starboard side of the channel. When the *Point Ellice* reached a position where the yacht *Crosswinds II* bore slightly forward of the *Point Ellice's* beam the *Crosswinds II* altered course to starboard, without warning, and closed towards the *Point Ellice* and her tow. The *Point Ellice* altered course hard to starboard, and the barge *P.G.E. No. 2* altered course simultaneously hard to starboard. When the *Crosswinds II* continued to close, the tug *Point Ellice* stopped her engines. Both the tug *Point Ellice* and the barge *P.G.E. No. 2* continued to alter course to starboard until grounding was imminent. The *Crosswinds II* passed astern of the *Point Ellice* and ahead of the *P.G.E. No. 2* striking the starboard towing bridle of the *P.G.E. No. 2* and subsequently the starboard bow of the *P.G.E. No. 2.* The *Crosswinds II* then foundered and was lost, her crew of two hands being rescued by the barge *P.G.E. No. 2.*

I cannot improve upon this narrative which was established in evidence. He pointed out that there were thus in the comparatively narrow and perhaps most travelled portion of the First Narrows, Vancouver Harbour, in a space approximately one half mile long and a quarter of a mile wide four comparatively large ships; and an auxiliary schooner yacht. The ships concerned were the large tug *Point Ellice* (length 96′, breadth 20′, depth 12′, gross tonnage 149 tons), having in tow the railway barge *P.G.E. No. 2* (length 210′, breadth 42′, depth 10′, gross tonnage 812 tons), and the unusually large passenger ferry *Princess of Vancouver* (almost 400′ in length and over 5,000 tons gross tonnage), and there was the plaintiffs' yacht *Cross Winds II,* built a year or so ago. Weather conditions were

about the worst found there. It was dark but clear. A maximum ebb tide of about five knots was running and a southwest gale, estimated by the plaintiffs at 50 m.p.h., was blowing outside in the Strait of Georgia though of course only gustily in the Narrows. The yacht was manned by two not very experienced yachtsmen (the younger say 23 years of age, the older about 62). The other vessels were proceeding upon their lawful occasions earning their livelihood as they had done for many years in all states of weather and tide in these waters. That of course is not to say that the yacht had not as much right to be there as did her greater companions provided she obeyed the rules of the road and became no menace to navigation. But this she did not do.

In view of the valiant submission made by Mr. Hutcheson for the yacht, I did not accept Mr. Merritt's argument at face value. I have taken time, perhaps too much time, for consideration but the conclusion I have reached is definitely for the defendants. I accept the allegations of the tug and the barge and on the whole perhaps it may be just as well not to enlarge upon the matter.

I think it goes without saying that the plaintiffs were negligent. I think they were negligent in being there at all at that time and in those circumstances. The yacht had her jib set, her diesel engine running, and was barely making way against the ebb. Those on board had not even taken the trouble to ascertain the state of the tide in the First Narrows. In fact they were in the middle of the tide rips and in the midst of their difficulties before they realized there was any tide there at all. This is inexcusable; as are her failure to keep a lookout aft—*Bryce v. Canadian Pacific Railway Company*[1], and in the Judicial Committee[2], and her sudden verging to starboard across the bow of the barge. She had been on a run to Nanaimo but had had to turn back as the wind freshened.

The two plaintiffs were rescued by the seamanship of those on board the tug and barge. By the age-old law of the sea the *Princess of Vancouver* stood by to render assistance. That this was found not to be necessary does not detract in the slightest from its gallantry.

[1] (1907) 13 B.C.R. 96.

[2] (1909) 15 B.C.R. 510.

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Sidney Smith D.J.A.

I need not add in conclusion that I reject the evidence given by the plaintiffs and accept the testimony of the defendants. The former was hesitant, inconsistent and unconvincing; the latter was quite the contrary. Nor have I overlooked the *Point Ellice* log entry. But I am satisfied this does not deal with the time of the collision and should not be held against the vessel. It may be permissible for me to add in conclusion that I doubt if evidence has ever been given in this Court more convincingly than that pronounced by Capt. Thos. C. Fairburn, a former Peninsular and Oriental Chief Officer who happened to be signalman in charge of the Lion's Gate Bridge at the relevant times.

The action is dismissed with costs.

Judgment accordingly.

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Apr. 11

Dec. 20

BETWEEN:

WILLIAM G. BRIGGS ..... APPELLANT;

AND

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

Revenue—Income—Income tax—Portion of accounts receivable included in sale of share in partnership—Whether capital payment or income—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 6(c), 14(1), 15.

The appellant on retiring from partnership in a firm of chartered accountants on October 31, 1950 was paid pursuant to the partnership agreement his ratio of the profits, and $3,255.51, his share of the accounts receivable to the end of the last fiscal year. The latter amount was assessed by the Minister as taxable income and the assessment upheld by the Income Tax Appeal Board. The appellant appealed from the Board's decision to this Court on the grounds that the sum in question did not constitute income or profit from a business but a capital payment received in a capital transaction, namely the acquisition by the remaining partners of the appellant's interest in the partnership.

Held: That the accounts receivable and accounts collected were nothing but the returns yielded by the fruitful ventures of the firm, in other words, income or profit and under s. 3 of the *Income Tax Act* the accounts receivable accrued to the appellant as income for the taxation year they were paid to him albeit such profits were made during the preceding fiscal period. The assessment was therefore correctly levied upon monies constituting a proportionate share of the partnership earnings up to October 31, 1950.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Vancouver.

C. C. Locke and *W. M. Carlyle* for appellant.

D. T. Braidwood and *F. J. Cross* for respondent.

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

DUMOULIN J. now (December 20, 1957) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1], dated the 12th day of April, 1956, dismissing William G. Briggs' prior appeal from a ruling of the Minister of National Revenue in respect of appellant's income tax assessment for taxation year 1951.

The material facts are quite simple.

William G. Briggs, the appellant, on October 1, 1947, entered into partnership with other members of a chartered accountants firm known as Gunderson, Stokes, Peers, Walton & Company, whose business operations were carried on in the City of Vancouver.

The requisite agreement evidences the rights and obligations of the parties thereto and those, especially, of the appellant. This indenture was filed as Exhibit 1. Clause 8 of this covenant mentions that the second party, i.e. W. G. Briggs, purchases a one-tenth (1/10) interest in the capital and goodwill of the partnership for a sum of $5,000, also outlining the instalment plan set up for payment.

Of greater importance is clause 10 providing for three contingencies of dissolution, and particularly determining the monies to which a partner, either upon voluntary retirement or consequent to his exclusion from the firm, would be entitled.

Since clause 10 contains the crucial point of disagreement, it should be reproduced at length.

10. In the event that any partner shall die or shall retire from the partnership, or in the event that the partnership is dissolved in order to effect the removal of one of the partners and the remaining partners desire to carry on business in partnership then the partner so retiring or excluded

[1] (1956) 10 D.T.C. 176; 14 Tax A.B.C. 453.

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or his estate, as the case may be, shall be entitled to receive the following monies but shall not otherwise participate in any of the capital or profits of the partnership:

(1) His share of the capital of the partnership as shown at the end of the last fiscal year plus his share of any additional capital invested since that date.

(2) His share of the profits since the last fiscal period consisting of;
(a) The cash net income received since the end of the last fiscal year,
(b) *Accounts receivable,* and
(c) 50% of the accrued time charges.

From his share of the capital and profits as above stated shall be deducted any withdrawals since the last fiscal year.

This association, for reasons undivulged, was dissolved on October 31, 1950.

The relevant memorandum dated October 31, 1950, is noted in the record as Exhibit 2.

The conditions agreed upon do not depart in any manner, shape or form, from the stipulations found, and mutually accepted, in the partnership covenant of October 1, 1947, Exhibit 1.

Clauses 2 and 3 of Exhibit 2 clearly settle the terms to obtain in the event of a dissolution, none of which are at variance with clause 10 of Exhibit 1, the Memorandum of Agreement.

A summary of the firm's (a) profits and losses for the month of October 1950, and (b) its Balance Sheet as at October 31, 1950, also form part of Exhibit 2.

These instruments reveal that the outgoing partner, W. G. Briggs, is being refunded or paid back his proportionate share in the joint capital, his ratio of the profits for October 1950, $523.96, and lastly $3,255.51 for accounts receivable.

Appellant reported as income for October 1950, this amount of $523.96. It then seems rather odd that he thereafter objected to the assessment levied by respondent on the further amount of $3,255.51, in respect of taxation year 1951.

At first glance, both sums: $523.96, appellant's profits for October 1950, and $3,255.51 allotted to him for accounts receivable, appear to flow from a self-same source, namely, the earnings realized by the partnership, with merely the

incidental difference that payment was immediately forthcoming in the first case, and would be collected periodically by the continuing partners in the second instance.

The grounds of appeal appear in para. B 2(b) and (c) of appellant's Statement of Facts hereafter quoted:

2. The Appellant intends to submit the following reasons:

* * *

(*b*) The said sum of $3,255.51 was not received by the Appellant as income or profit from or in the course of carrying on the practice of his profession but rather was received by the Appellant in part satisfaction of the monies payable to the Appellant pursuant to the dissolution agreement and in consideration of the matters set out in paragraph A 3 of this Notice of Appeal.

(*c*) The said sum of $3,255.51 was a capital payment received by the Appellant in a capital transaction, namely, the acquisition by the remaining partners of the said partnership of all of the Appellant's interest in the said partnership, other than certain doubtful accounts receivable.

In para. 6, appellant also mentions the fact that, at all material times, he reported his income on a cash received basis.

As for the relevant law, *The Income Tax Act*, 1948, appellant relies upon ss. 3, 6(*c*), 14(1) and 15(1), whilst respondent rests its case upon ss. 3, 4, 6(*c*) and 15.

Respondent did not assess the capital payment made to W. G. Briggs, but only the sum of $3,255.51 representing appellant's share in the accounts receivable.

The matter to be decided then narrows down to this: should the above amount be considered, as contended, in the light of a capital transaction, namely the purchase price of Mr. Briggs' interest in the partnership, or as instalments of accrued corporate income?

The event, whatever it may be, that brought to an end this association after only three years had nonetheless been provided for in the Memorandum of Agreement. Clause 10 of this document does not even allude to an eventual sale of share or interest by a retiring partner, and all conditions according to which the dissolution will be carried out are plainly stipulated. None of the partners can alter or vary the governing factors therein contained.

The usual basic essentials of a sale, that is, the determination by the vendor of a selling price, his complete freedom of selling to A instead of B or C, are lacking. Conversely, a seller cannot force a sale upon a reluctant

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party while, pursuant to clause 10 of the association covenant, Briggs could enforce its terms upon his former associates. Possibly, it should be said that some very special species of transactions are also devoid of these characteristic traits, such as, for instance, in the civil law that particular sale known as *vente à réméré* (sale with a redemption clause) C.C. 1547 *et seq.*, in derogation to the ordinary principles regulating sales.

Mr. Briggs, in para. B 2(*b*), agrees that he received his share of recoverable accounts "in part satisfaction of the monies payable to the Appellant pursuant to the dissolution agreement and in consideration of the matters set out in paragraph A 3 of this Notice of Appeal". As previously mentioned, there is but slight ground, if any, for construing clause 10 of Exhibit 1, (the October 1, 1947 indenture), as implementing a regular sale of a partnership share.

For argument's sake, let us suppose that the instant firm, after paying out to its several members their *pro rata* dues of joint earnings, had, for one reason or another suspended operations during a year and then decided to wind-up. No receivable accounts would exist at the time, for the evident reason that none would have been earned during that period of inactivity. Accounts receivable and accounts collected, it is trite to say, are nothing but the returns yielded by the fruitful business ventures of a firm, company or association, in other words, income or profit.

If the appellant's opinion were the proper one, it would follow that any partnership, at the expiry of a fiscal year, by resorting to some form of dissolution and allotting its accounts receivable, might thereby become immune to income tax.

Had this association endured, appellant assuredly would have found no fault with the propriety of an assessment upon his share of such earnings when paid to him. The only distinguishing factor then is that the disputed sum was received by appellant upon retirement from, instead of, during the partnership. I am unable to perceive in that alone a sufficiently pertinent reason in law to justify appellant's contention.

Section 6(*c*) of the Act reads as follows:

6. Without restricting the generality of s. 3, there shall be included in computing the income of a taxpayer for a taxation year

* * *

(*c*) the taxpayer's income from a partnership or syndicate for the year *whether or not he has withdrawn it during the year.*

Section 3, according to its extensive scope, comes closer to the disputed question when enacting that:

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

(*a*) businesses
(*b*) property, and
(*c*) offices and employments.

It was argued, if I remember well, that: ". . . income for the year from all (*a*) business . . ." excluded profits distributed outside the fiscal or taxation year they were earned.

I cannot admit of so restrictive an interpretation which, if allowed, would provide an even easier way of thwarting the normal functioning of the Act than was pointed out above in connection with periodical dissolutions of partnership.

As a correct interpretation of s. 3, first paragraph, I would rather hold that accounts receivable accrued to appellant as income for the taxation year they were paid to him albeit such profits were made during the preceding fiscal period.

I therefore reach the conclusion that the assessment, on the sum of $3,255.51 objected to, must be considered as correctly levied upon monies constituting a proportionate share of partnership earnings up to October 31, 1950.

Mention was made by both parties of several precedents amongst which those of *Purchase v. Stainer's Executors*[1], *Bennett v. Ogston*[2] and *Rankine v. Commissioners of Inland Revenue*[3]. These pronouncements of high authority would lend valuable support indeed to appellant's view of the case if only we were dealing with the English Income Tax Act instead of the Canadian Act. The former law

[1] 32 T.C. 367; [1951] 2 All E.R. 1071.
[2] 15 T.C. 378.
[3] 32 T.C. 520-530.

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has many schedules that are not included in our own income tax act. Moreover, the language of our ss. 3, 4 and 6, s-s. (*c*), militates in favour of a different solution.

Two other cases quoted as *No. 333* v. *Minister of National Revenue*[1] and *Wilson v. Minister of National Revenue*[2] are clear instances of partners selling their partnership interest by means of regular and unmistakable sales and therefore should be distinguished from the issue at bar.

A more appropriate precedent is that of *Commissioner of Income-Tax, Madras v. P.R.A.L.M. Muthukaruppan Chettiar*[3]. Upon dissolution of a partnership, the Commissioner of Income Tax purported to assess interest received by the respondent on capital employed in business.

On appeal Lord Atkin held that:

> . . . *Being profits of the respondent up to May 31, 1930, how did they alter their character by dissolution?* The account taken on dissolution ascertains what is due to the partners for profits, and what is due for capital. It can hardly be suggested that the partners share according to their capital proportions in the whole assets of the partnership. The sum due for undrawn profits was and remains a sum due by the partners to each partner, and necessarily ranks first before the sums due for capital can be distributed. In other words, on dissolution of a partnership an outgoing partner has the right to receive not as in the case of a shareholder in winding-up a company only a share of the assets, but to receive payment of his profits, *profits which were his before dissolution and do not cease to be his on dissolution.*

For the reasons preceding, the income tax levied for taxation year 1951, on the sum of $3,255.51 received by appellant, was made conformably to law; the appeal is therefore dismissed and respondent is entitled to taxable costs.

Judgment accordingly.

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[1] (1956) 10 D.T.C. 167. [2] (1956) 10 D.T.C. 194.
[3] Gordon's Digest of Income Tax Cases 757.

BETWEEN:

1957
Feb. 20
Dec. 30

MONTREAL MILK PRODUCERS' CO-OPERATIVE AGRICULTURAL ASSOCIATION ..... APPELLANT,

AND

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

Revenue—Income—Income tax—Association incorporated under the Co-Operative Agriculture Association Act, R.S.Q. 1925, c. 57—Pursuit of gain not excluded from Association's objects—Association not one contemplated by s-ss. (e) and (h) of s. 4 of the Income War Tax Act, R.S.C. 1927, c. 97—Association a "person" receiving fees or emoluments within the meaning of s. 3 of the Income War Tax Act, R.S.C. 1927, c. 97—Liability for income tax—Appeal dismissed.

Appellant was incorporated under the terms of the Co-operative Agriculture Association Act, R.S.Q. 1925, c. 57 (now R.S.Q. 1941, c. 120). Its revenues for the purpose of this appeal are derived from two sources (a) payments to appellant by the Quebec Dairy Industry Commission of money collected by it on milk delivered to distributors in the City of Montreal and paid to appellant in proportion to the number of member-producers and credited by appellant to "association account" (b) deductions from sales returns to member shippers from the operation of a surplus milk plant which the association credits to its "plant account".

In each of the taxation years 1947 and 1948 appellant's "association account" was in receipt of a surplus or net profit which appellant omitted to declare as taxable income for those years. Respondent added such amounts to appellant's taxable income for those years and assessed appellant for income tax accordingly. An appeal to the Income Tax Appeal Board was dismissed and a further appeal to this Court was taken. In the same years appellant's "plant account" returned a profit on which appellant paid income tax.

Held: That appellant was not entitled to exemption from income tax under s. 4, s-ss. (e) and (h) of the Income War Tax Act, R.S.C. 1927, c. 97 as amended since it is not a religious or charitable institution, a board of trade or a chamber of commerce nor is it an agricultural or educational institution, nor was it organized or operated solely for social welfare or other non-profitable purposes: it was not prohibited from declaring dividends or distributing profits nor is the objective of pecuniary gain excluded in its charter provisions; its objects are to some extent of a commercial nature and even if it did not pursue some of its stated objects of a commercial and gainful nature nevertheless because it had declared objects of such nature it cannot qualify as a company organized exclusively for purposes other than profit.

2. That the profits made in appellant's surplus milk plant prove that appellant was not operated exclusively for purposes other than profit.

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3. That the true character of the amounts in dispute discloses that they were received as fees or commissions which belong to the association and the lack of intent to make a profit is not sufficient to enable appellant to escape liability for income tax on them; the largest of these amounts consists of fees or emoluments received by a person for services rendered within the meaning of s. 3 of the Income War Tax Act.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Kearney at Montreal.

J. W. Long, Q.C. for appellant.

Laurent Belanger, Q.C. and *C. Couture* for respondent.

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

KEARNEY J.:—now (December 30, 1957) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1], dated January 5, 1955, dismissing the appellant's appeal against its income tax assessments for 1947 and 1948.

The appellant, sometimes hereinafter referred to as "the Association," was incorporated in 1919 under the authority of the Minister of Agriculture for the Province of Quebec, in virtue of Arts. 1971 and following of the Revised Statutes of Quebec (1909) as amended, concerning co-operative agricultural associations. No amendments which would have any bearing on the present case occurred between 1919 and 1925, and the governing Act, in so far as the powers, purposes, and the corporate status of the appellant at the time of its incorporation, may be conveniently referred to as the *Co-operative Agriculture Association Act*, R.S.Q. (1925), c. 57, (now R.S.Q. 1941, c. 120).

From 1919 until 1935 the appellant's primary efforts were directed to the stabilization of the price of milk to the producers thereof, who became members of the Association, and the promotion of orderly marketing and transportation of milk to the Montreal market. Until 1935, when the price payable by Montreal distributors of bottled milk to member-producers was fixed by the Quebec Dairy Industry

[1] (1954-55) 12 Tax A.B.C. 33.

Commission, hereinafter called "the Commission," the Association, as selling agent for its members, endeavored to obtain the best prices possible. Producers brought in, particularly in the season when milk was most plentiful, more milk than the dairies were ready to purchase and resulting surpluses threatened to unstabilize the producers' market. As a consequence, the appellant established, early in 1935, a surplus milk plant in the City of Montreal where it processed, and manufactured into milk products, such as casein, powdered milk and butter, the surplus milk of its members and of any other milk producers who cared to avail themselves of the Association's facilities.

The appellant kept, in a special "association account," a separate record of its revenue, expenses, and surplus of what may be called its association activities or services. Such services, during 1947 and 1948, consisted *inter alia* in acting as representative of its members in procuring the enactment of provincial legislation favorable to the dairy industry, in maintaining a business office for the purpose of advising and assisting its members in obtaining satisfactory outlets for their products, in investigating their complaints, in supplying information to producers and consumers on market conditions and cost of production in the district.

The operations of the surplus milk plant were also segregated by means of a "plant account".

Leaving aside receipts from relatively minor items such as investments and miscellaneous sources, the appellant's revenues are derived from two sources.

(a) One-half cent per 100 pounds of milk delivered to distributors in the City of Montreal. This revenue was collected monthly by the Quebec Dairy Industry Commission and paid by the latter to the appellant in proportion to the number of member-producers and was credited by the appellant to the "association account".

(b) Deductions from sales returns to member shippers from the operation of the surplus milk plant which the association credits to its "plant account".

According to the appellant's "association account," its surplus or net profit from the revenues described in subpara. (*a*) together with some receipts from investments and miscellaneous sources for the taxation years 1947 and 1948, amounted to $2,989.83 and $4,771.24 respectively. The

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Association considered that these sums were non-taxable and accordingly omitted to declare them as taxable income in its tax return for the said years.

The Association's "plant account" disclosed that its sales exceeded a million dollars per annum, and its net profit from the operation of its surplus milk plant, as well as receipts from investments and other miscellaneous sources for 1947, amounted to $14,897.95. The net profit from the same sources for 1948 was $26,973.60. The appellant showed, in its tax returns, the aforesaid profits as being subject to tax and paid the tax exigible thereon, amounting to $4,183.82 for 1947 and $8,011.45 for 1948.

The respondent added to the declared income of the appellant for the years 1947 and 1948 the amount of the net profit disclosed in the "association account," with the result that the appellant was assessed $923.74 for 1947 and $1,648.34 for 1948, in addition to payments already made.

The appellant objected to the aforesaid assessments which, on reconsideration by the respondent, were confirmed in particular on the ground that the appellant did not qualify for exemption under s. 4 of the *Income War Tax Act*. Later the assessments were affirmed by the Income Tax Appeal Board, as herein first mentioned.

The first issue, which may be called the appellant's main submission, is whether it is exempt from income tax because it is an association organized for non-profitable purposes, within the meaning of s-s. (*e*) or (*h*) of s. 4 of the *Income War Tax Act*, R.S.C. 1927, c. 97, as amended.

Section 4(*e*) and (*h*) reads as follows:

> Sec. 4. *Incomes not liable to tax.*—The following incomes shall not be liable to taxation hereunder:—
>
> (*e*) *Charitable institutions.*—The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein;
>
> (*h*) *Clubs.*—The income of clubs, societies and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes, no part of the income of which inures to the benefit of any stockholder or member.

I fail to see how the Association can justifiably claim exemption under s. 4(*e*). It is certainly not a religious or charitable institution, or a board of trade, or a chamber

of commerce. Although it is an agricultural co-operative association, it is not, in my opinion, an "agricultural and educational institution." Even if it were, it cannot be said that ". . . no part of the income . . . . . is paid or payable to any . . . shareholder . . ." The provisions of the *Co-operative Agricultural Association Act*, R.S.Q. 1925, c. 57, indicate the contrary. According to the said Act, the appellant was incorporated as a joint-stock company, (s. 4), having shares of par value of $10 each, (s. 5). Only the holders of paid-up shares could be members, (s. 9). An annual statement showing the profit and loss of the association is required, (s. 24). Section 25 provides in part as follows:

> The general meeting shall decide, in accordance with such statement, the amount of the profits to be allotted.
>
> The association may have a reserve fund. So long as such fund is not equal to the subscribed capital, the total amount of the dividends distributed shall not exceed six per cent of the paid-up capital.
>
> When the association has a reserve fund equal to or greater than the subscribed capital, it may, after having paid dividends of not more than eight per cent of the paid-up capital, and after having set aside for the reserve fund at least ten per cent of the profits, distribute the remainder of the profits among the shareholders in proportion to their dealings with the association upon the basis established by the association or the board of directors.

The evidence also shows that the Association, although it did not generally pay dividends, at least on one occasion in 1937-38 paid a six per cent dividend to its shareholders.

I likewise do not think that the appellant proved that the Association was *organized* and operated *solely* for social welfare or *other non-profitable purposes,* as provided in s-s. (*h*) (emphasis supplied). It was not prohibited from declaring dividends or distributing profits, as in *St. Catherines Flying Training School Limited v. Minister of National Revenue*[1]. Nowhere in its charter provisions is the objective of pecuniary gain excluded in a manner, for example, as described in Part III, c. 223, s. 198, R.S.Q. 1925, which reads as follows:

> The Lieutenant-Governor may, by letters patent under the Great Seal, grant a charter to any number of persons, not less than three, who apply therefor, for objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, athletic, or sporting character, or the like, but without pecuniary gain.

[1] [1953] Ex. C.R. 259.

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The objects of the Association are, at least to some extent, of a commercial nature. At p. 30 of Ex. 1 is a copy of the notice which appeared in the *Quebec Official Gazette* of the incorporation of the Association, dated September 23, 1919, and signed by the Minister of Agriculture, which reads in part as follows:

> . . . The objects for which the association is formed are the improvement and development of agriculture or of one or any of its branches, the manufacture of butter or cheese, or both, the purchase and sale of cattle, agricultural implements, commercial fertilizers and other things useful to the agricultural class, the purchase, the keeping, transformation and sale of agricultural products.

Even if it be true, as claimed by the appellant, that it did not pursue some of its stated objects of a commercial and gainful nature, such as the purchase and sale of cattle, nevertheless because it had declared objects of such nature, the Association cannot, in my opinion, qualify as a company *organized exclusively* for purposes other than profit. I think that the facts of the case, and particularly the evidence concerning the profits made in the appellant's surplus milk plant prove beyond question that the Association was not *operated exclusively* for purposes other than profit.

For these reasons I find that the appellant is not an association exempt from income tax within the meaning of s. 4(*e*) or (*h*) of the Act.

The appellant made a second submission, namely, that, if it failed to prove that the Association was exempt from taxation by virtue of s. 4(*e*) or (*h*) of the Act, nevertheless not all revenues received by it were subject to tax. According to my notes, counsel for the appellant quite rightly, I think, stated that, if his main argument failed, he acknowledged that the profits of the milk plant operations were properly subject to income tax. In any event, one would have to ignore the undisputed facts to argue the contrary. Although the statement of claim makes no reference to tax payments, the appellant both in 1947 and 1948, without protest, paid tax on the said income to which, as shown by the evidence, producers other than Association members contributed. According to the agreement with the appellant (Ex. 2), which every member-producer was obliged to sign, it was in the discretion of the directors of the Association to determine how much member-producers

would receive for their surplus milk and how much the Association would retain for overhead expenses and reserves. I think it is clear that the amounts retained by the Association became its property and were not held by it for the account of each member-producer, as found by Fournier J., in *Minister of National Revenue v. La Société Co-opérative Agricole de la Vallée d'Yamaska*[1]. Neither were such amounts entered in the books of the Association as loans made by the member-producers, as occurred in the judgment, of the President of this Court in *Manitoba Dairy & Poultry Co-operative Ltd. v. Minister of National Revenue*[2].

According to Mr. W. D. Lowe, secretary of the Association, surplus milk accounts were settled at the end of each month. Once the directors had paid the amount which had been determined by them to the producer-shareholders, the latter ceased to have any further rights in the amounts retained by the Association, except to the extent that they might be distributed as dividends.

I am consequently of the opinion that any further consideration of the revenues derived from the surplus milk plant operations can be eliminated.

The remaining issue is whether, admitting the appellant is precluded from invoking s. 4(*e*) or (*h*), the income from the Quebec Dairy Industry Commission constituted taxable income in the hands of the Association.

The first thing, I think, that should be determined is the true character of the amounts in dispute. See Thorson P. in *The Horse Co-Operative Marketing Association v. Minister of National Revenue*[3]. The assessment of $923.74 for 1947 results directly from monies received by the Association from the Commission, except for two relatively small items from investments and miscellaneous revenue (Ex. 3), which I will consider later. Except for the difference in the corresponding amounts, the same thing can be said of the assessment of $1,648.34 for 1948. Consequently I need only direct my observations to the 1947 assessment. The following appears on the directors' audited report for the year ended December 15, 1946, (Ex. 3), under the title "Association Account."

[1] [1957] Ex. C.R. 65 at 66. [2] November 6, 1957 (unreported).
[3] [1956] Ex. C.R. 393 at 411.

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Association Account

December 15th, 1946—Balance		$ 29,289.57
REVENUE:		
Received from Members	$ 10,657.13	
Revenue from Investments	877.73	
Miscellaneous Revenue	39.63	
		11,574.49
		$ 40,864.06
EXPENDITURE:		
Salaries	$ 3,470.13	
Directors' Expense	1,239.38	
Annual General Meeting Cost (Jan. 28th, 1947)	814.57	
Dairy Farmers of Canada	600.00	
United Milk Producers' Assoc'n. Province of Que.	350.00	
Printing and Stationery	287.16	
Telephones and Telegraphs	255.52	
Advertising, Insurance, etc.	208.69	
Fees: Board of Trade, Trade Marks, etc.	150.00	
Travelling Expense	155.15	
News-Letter Expense	59.62	
Other Expenses	994.44	
		8,584.66
December 15th, 1947—Balance as detailed below		$ 32,279.40
Bonds	$ 29,289.57	
Receivable from Plant Account	2,989.83	
		$ 32,279.40

The revenue of $10,657.13 described above as being received from members is referred to by Mr. Lowe as membership fees and called a commission in clause 6 of the membership contract (Ex. 2),

> (6) In consideration of the services to be rendered by it as herein provided, the Member agrees to pay to the Associtaion a commission, either directly or through others, on all milk shipped by him to any market within the scope of this agreement.

According to the evidence, in the earlier years the revenues of the Association were contributed voluntarily and directly by the member-producers and, as a result, the funds of the Association sometimes showed a deficit. At the request of the Association, the Commission took measures to remedy the situation. From year to year it fixed the price which the dairies, as distributors of bottled

milk, were obliged to pay to the farmers or producers from whom they received their supply. In 1947 the price for each 100 pounds of milk on a 3.5 per cent butter fat basis was $3.90 f.o.b. Montreal (Ex. 5). Instead of remitting the entire fixed price to the producers, the dairies were required by the Commission to deduct therefrom one-half cent per 100 pounds and pay it to the Commission. The Commission in turn undertook to pay the Association one-half cent to the extent that it had been collected from its members. Instead of remitting the balance to non-members of the Association, the Commission agreed to use it for the purpose of promoting in the territory the consumption of milk in its natural state (Ex. 7). The $10,657.13 received by the Association in 1947 represented 75 per cent of these monies collected by the Commission.

The secretary-manager of the appellant described the half cent as a fee contributed by the farmer to the support of his Association. On cross-examination, he gave the following answer to counsel for the respondent Mtre. Bélanger:

> Q. Talking about the one-half cent which you receive from the Dairy Commission, is the Association obliged to remit to its members any excess of such amount?
>
> A. No.

The above outline of the nature of the main item of revenue suffices, I think, to indicate that it consists of a fee or commission which belongs to the Association.

It is claimed for the appellant that it is a service organization and that it acts and has always acted as an association of milk producers seeking, without direct profit motive, stabilized prices, an orderly market, and legislation in the interests of milk producers in general. Even if it can be said that it was by a turn of good fortune, and not by design, that an excess of revenue over expenditure occurred in the appellant's association account for 1947, I do not think that the lack of intent to make a profit is a sufficiently weighty factor to enable the appellant to escape the incidence of income tax.

Section 3 of the *Income War Tax Act*, which is applicable, reads 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

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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 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, and also the annual profit or gain from any other source . . .

"Person," according to s-s. (*h*) of s. 2 of the Act, "includes any body corporate and politic."

The association account for 1947 shows the amount of $10,657.13 which was paid in by the Commission as if it had been directly received from its members. This is immaterial since in any event it was this sum that constituted the consideration for which the Association rendered services to its members, as previously described. In addition, it received in 1947 $877.73 interest from an accumulated surplus fund of $29,289.57, which was invested in bonds. It also was in receipt of miscellaneous revenue amounting to $39.63.

I consider that the three items of revenue above-mentioned, totalling $11,574.49, less expenses of $8,584.66 left the Association with a net annual profit of $2,989.83, which constituted income within the meaning of s. 3 of the Act. In my opinion, the largest item ($10,657.13) consisted of fees or emoluments capable of computation, received by a person, namely, the Association, for services rendered. The $877.73, in the words of s. 3, is interest directly received on a security or investment. In the absence of any explanation of the origin or nature of the amount of $39.63, described as miscellaneous revenue, I think it is caught by the concluding words of s. 3, "annual profit or gain from any other source."

For the foregoing reasons I conclude that the assessments of $923.74 for 1947 and $1,648.34 for 1948 as made by the Minister were justified in the circumstances, and I would dismiss the present appeal with costs.

Judgment accordingly.

BETWEEN:

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Feb. 12, 13
Dec. 13

EDMUND HOWARD SMITH AND MONTREAL TRUST COMPANY, Executors under the Will of HELEN RICHMOND DAY SMITH, CECIL ERNEST FRENCH, ISABEL BEATRICE DAY, GRACE VALENTINE DAY, CHARLOTTE A. SMITH, GARDNER HOWARD SMITH, ROBERT HOWARD SMITH, HELEN LAYTON SMITH, GERALD MEREDITH SMITH, JR., HENRY LEIGHTON SMITH, LOUIE SMITH LAWRENCE, JOSEPHINE SMITH GOODHUGH, ALEXANDER E. SMITH, MARGUERITE SMITH HASKELL AND ELDRED CARTMER, JR. ..... APPELLANTS;

AND

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

Revenue—Succession duty—Dominion Succession Duty Act, 1941, S. of C. 1940-41, c. 14, s. 3, s-s. 4—Residue of estate bequeathed by testator to wife or certain named legatees—Deed of disclaimer of power of disposal executed by wife—Testator's estate not to be included in that of wife for succession duty purposes—No successors of wife—Appeal allowed.

A testator bequeathed the residue of his estate to his wife and to the extent that she had not disposed of it at the time of her death to his collateral relatives and connections named in his will. Immediately following the death of the testator all the income from his estate was paid or credited to his wife and continued to be so paid or credited until her death, no part of the capital of the estate being paid or credited to her. The wife died possessed of a substantial estate in her own right and in assessing her estate for succession duty the residue of the husband's estate was added to her own personal estate. An appeal from such assessment was taken to this Court.

Held: That a deed of disclaimer executed by the wife is valid and does not constitute a gift *inter vivos,* and brought to an end any power or right of disposal of the corpus of the estate which the wife may have had and the delivery over of the property by the wife in conformity with the directions and wishes of the testator should be regarded as the fulfilment of a duty and not as a gift.

2. That the residuary estate of the testator is not included in the estate of the wife for succession duty purposes and since a succession is deemed to have occurred at the time of the death of the party having a general power of disposal within s-s. (4) of s. 3 of the *Succession Duty Act* none of the appellants can be deemed to be the successors of the wife.

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APPEAL under the *Dominion Succession Duty Act.*

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

J. DeM. Marler, Q.C. and *Julian Chipman* for appellants.

Guy Favreau, Q.C. and *M. Paquin, Q.C.* for respondent.

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

KEARNEY J. now (December 13, 1957) delivered the following judgment:

This is an appeal taken from an assessment amounting to $129,374.65 made by the respondent, under the *Dominion Succession Duty Act* (1940-1941), c. 14 and amendments. The appellants were advised thereof by notice dated May 30, 1955, and duly objected thereto, whereupon on review the respondent affirmed the said assessment. It arose in consequence of the death on June 20, 1954, of Helen Richmond Day Smith, hereinafter sometimes called "Mrs. Smith," widow of Edgar Maurice Smith, both in their lifetime of the City of Montreal. Mrs. Smith executed a will in notarial form on December 5, 1947, wherein she appointed the appellants, Edmund Howard Smith and Montreal Trust Company, as executors. Her will, however, is immaterial in this appeal, save for the purpose of explaining the status of the two aforesaid appellants.

The assessment in question stemmed from the will, dated Feb. 23, 1938, (Ex. 3), of Edgar Maurice Smith, hereinafter sometimes called "the testator," who died on September 4, 1938. In his will, after making to others a gift of some particular legacies, the testator bequeathed the residue of his estate to his wife and, to the extent that she had not disposed of it at the time of her death, to his collateral relatives and connections named in his will, who are the other appellants in the present case.

The respondent assessed in the hands of Mrs. Smith the residuary estate of the testator who died before the coming into force of the Act, on the ground that at her death it was deemed to form part of her estate and a succession from her to her husband's heirs was deemed to have occurred, within the meaning, respectively, of s-ss. (1)(*i*) and (4) of s. 3 of the *Dominion Succession Duty Act.* I think the facts may be regarded as uncontested. The parties admit that, immediately following the death of the

testator, all the income from his estate was paid or credited to Mrs. Smith and continued to be so paid or credited until her death; that during the aforesaid period no part of the capital of the said estate was paid or credited to her. The record discloses that Mrs. Smith died possessed of a substantial estate in her own right, and there is no dispute about the succession duty which would be payable thereon if taken by itself. The assessment complained of occurred because of the addition of the residue of her husband's estate to her personal estate. This additional amount also attracted a higher rate of duty since most of the appellants entitled to receive it, though heirs and collateral relatives of her husband, were looked upon by the respondent, for succession duty purposes, as her heirs and they were assessed as strangers.

The more important provisions of the testator's will are as follows:

Ninth.—As to the rest, residue and remainder of my Estate and property, real and personal, moveable and immoveable, including any Life Insurance payable to my Estate, and not specifically distributed or apportioned, I hereby will, devise and bequeath the same to my dear wife, the said DAME HELEN RICHMOND DAY, to have, hold, use, enjoy and dispose of the same as fully and freely as if the next following disposition had not been contained in this my Last Will and Testament.

Tenth.—IN THE EVENT that my said dear wife, DAME HELEN RICHMOND DAY, should predecease me, or to the extent that my said dear wife has not during her lifetime disposed of the residue of my Estate hereinabove bequeathed to her, I will and bequeath to ..... (Here follow the names of the particular legatees.) .....; and the then rest, residue and remainder of my Estate and property to the following persons ..... (Here follow the names of the other appellants herein, being collateral relatives and connections of the testator.)

Counsel agree that clauses ninth and tenth of the will created a substitution under the civil law of the Province of Quebec, wherein Edgar Maurice Smith was the testator or grantor, his wife the institute, and the relatives and connections of the testator entitled to receive his residuary estate were the substitutes.

Counsel for the appellant submitted that the assessment under appeal, to the extent that it imposed a duty on the residuary estate of the testator, was illegal because, even if at one time Mrs. Smith had a general power of disposal, within the meaning of s-s. (4) of s. 3 of the Act, such power had ceased long before her death by reason of her disclaimer thereof and her anticipated delivery of the

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ownership of the substituted property, as set out in the Deed of Declaration and Acceptance (Ex. 1), hereinafter called the deed. This deed was executed before Dakers Cameron, N.P., on August 24, 1951, to which were parties Mrs. Smith, both in her quality of institute and executor under the will of her late husband, the other executors under the said will, and his collateral relatives and connections who were allegedly substitutes thereunder. Leaving out its declaratory clauses, the body of the deed reads as follows:

1. The Party of the First Part hereby disclaims, refuses to accept and repudiates purely and simply, with effect as from the death of the said Testator, any and all right granted to her or which she might have under the provisions of the said Last Will and Testament or by law to dispose of the property comprising the residue of the Estate of the said Testator or any part of the said residue, and the Parties of the First, Second and Third Parts agree that this disclaimer, refusal and repudiation shall be and remain irrevocable.

2. The Party of the First Part hereby delivers over to the Substitutes under the said substitution in anticipation of the term appointed for the opening thereof the naked ownership of the property comprising the residue of the Estate of the said Testator, and the Parties of the Second and Third Parts acknowledge to have received and accept the said delivery.

3. The Parties of the Second Part hereby consent to the foregoing delivery in anticipation and agree to hold the said substituted property for the Substitutes under the said substitution during the lifetime of the Party of the First Part and to pay to her the net revenues to be derived therefrom during her lifetime.

Counsel for the respondent submitted that the deed is illegal, null and void, or alternatively that, if it could be held to be valid, it would constitute a disposition operating or purporting to operate as a gift *inter vivos* made within three years prior to the death of Mrs. Smith and taxable under s. 3(1)(*c*) of the Act. This the appellants denied.

Apart from relying on the validity of the deed, counsel for the appellants submitted among alternative arguments that, even if it were held to be invalid and even if Mrs. Smith at the time of her death were competent to dispose, her power in this connection was not a general power of disposal but only a limited one, since her alleged power of disposal was restricted to alienation by onerous title for the sole purpose of her own maintenance and support (Ex. 3, clause thirteenth); her power was not exclusive as her husband's will gave a power of disposal also to the executors thereof and they, and not she personally, were

given possession of the substituted property (Ex. 3, clause fifteenth); to the extent that Mrs. Smith had a right to alienate, it was attributable to her ownership of or dominion over the property, as distinct from any general power to dispose, within the meaning of the Act.

Counsel for the respondent dealt with these alternative submissions by referring to Art. 944 C.C. and pointed out that an institute only "holds the property *as proprietor*" and is not *the proprietor* or owner in the true sense of the term (Art. 406 C.C.); that the institute had been granted by the will a wide power of disposal during her lifetime, which exceeded that provided in Art. 949 C.C. and constituted a general power to dispose; and that, the substituted property having been made exempt from seizure, it did not follow that the institute could dispose of it only by onerous title for her own maintenance.

The foregoing alternative submissions, which are neither devoid of interest nor free from difficulty, were ably argued by counsel on both sides, but I do not find it necessary to deal with them.

Subsection (4) of s. 3 of the Act, on which the respondent mainly rests his case, states:

> When a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

I think it is of first importance to determine if Mrs. Smith had *any* power of disposal *at the time of her death,* and this depends on the validity of the deed because it unmistakably purported to put an end to any such power. If valid, whether Mrs. Smith prior to the date of the deed had a limited or general power of disposal becomes immaterial.

Because both the testator and his wife were domiciled in the Province of Quebec, I think it is the law of that province which will apply in the present case, except to the extent that the *Dominion Succession Duty Act* is deemed to apply, (*Cossitt v. Minister of National Revenue*[1]).

[1] [1949] Ex. C.R. 339 at 346.

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The deed, being notarial in form, constitutes one of the authentic documents referred to in Arts. 1207 and 1208 C.C. *Prima facie,* I think it must be regarded as valid, and the burden of proving it is defective rests on the respondent, (*Veilleux v. Langlois*[1]). The respondent first made reference to Art. 960 C.C., which reads as follows:

> The institute may, but without prejudice to his creditors, deliver over the property in anticipation of the appointed term, unless the delay is for the benefit of the substitute.

He then submitted that, though the deed in question purports to constitute a delivery over of the substituted property in anticipation of the appointed term, in accordance with the said article, it fails to do so and is illegal, null and void on three counts: because all the substitutes in existence at the time it was signed were not parties to the deed; it was signed at a time when all intended substitutes were not yet definitely identifiable; and because the time appointed for delivery by the testator was established for the benefit of the substitutes.

The last mentioned cause of nullity is the only one contemplated by the said article, and I propose to deal with it first. In so far as the substitutes are concerned, whether considered jointly or severally, I think that any anticipated opening, far from being disadvantageous to them, was for their benefit. Counsel for the respondent urged that a power of disposal in the broadest possible terms was given to Mrs. Smith under her husband's will. The wider such power, the more it was, I think, to the advantage of the substitutes that the institute deliver over the property to them as early as possible. By the anticipated delivery, they became assured that the whole of the residuary estate of the grantor would be divided among them instead of possibly being wholly or in part disposed of by the institute before her death. The delay is usually in favor of the institute, (Langelier *Cours de Droit Civil* Vol. 3, 307) and I can see nothing in the testator's will which would indicate that he wished to favor the substitutes (his collateral relatives), or any one of them, rather than his wife.

[1] (1926) 32 R. de J. 122.

Counsel for the respondent referred to the case of *Gadoua et al v. Pigeon*[1], in which it was held that a delivery by anticipation to some substitutes who had only a part interest in an immoveable property, which was wholly subject to a substitution, was not legal because it was not certain that they would be the substitutes having the right to take the property at the date fixed by the will for the opening of the substitution. In my opinion, the case cited is readily distinguishable from the present one. In the *Gadoua* case, there were three institutes, all children of the testator who stipulated in his will that the substitution in favor of his grandchildren must not open until the death of the last surviving institute. Substitutions may, of course, be appended to dispositions that are universal or by general title and the testator may make such dispositions conditional (Art. 929 C.C.). In the *Gadoua* case, there was such a prohibitory condition applicable to the institutes who refused to respect it. The rights of creditors and of a purchaser in good faith were also in issue. In the present case, no such condition or issue is involved, and there is only one institute. The testator could nevertheless have inserted a stipulation prohibiting his wife from disclaiming her power to dispose of the property or from delivering it over in anticipation of her death. In the absence of such a stipulation or prohibition, I think the institute is entitled under Art. 960 C.C. to effect an anticipated delivery and I cannot accept the respondent's suggestion that Mrs. Smith, in signing the deed, violated the terms or intentions expressed in her husband's will.

It is claimed that the omission to mention at least three parties, namely, Cecil Ernest French, Isabel Beatrice Day and Grace Valentine Day, who were named beneficiaries under the testator's will, vitiated the deed. With immaterial words omitted, the passage in the will concerning them is as follows:

> . . . to the extent that my wife has not during her lifetime disposed of the residue of my Estate . . . I will and bequeath . . . to CECIL ERNEST FRENCH, nephew of my said wife, and to ISABEL BEATRICE DAY and to GRACE VALENTINE DAY, nieces of my said wife, each the sum of Two thousand Dollars ($2,000) . . .

[1] (1887) 16 Revue Légale 498.

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In my opinion, the said beneficiaries were particular legatees but not substitutes, and it was only to the latter that Mrs. Smith was charged to deliver over the capital of what remained of her husband's estate. Similarly, any other parties as were mentioned in the testator's will but omitted from the deed were not substitutes and therefore not essential to the deed, the validity of which was in no way affected by such omission. I might also observe that the respondent is in the position of invoking third party rights by reason of the omission from the deed of three particular legatees who are among those contesting the respondent's assessment and upholding the legality of the deed.

I will now consider whether the deed was a nullity because at the time it was signed it was impossible to know with certainty or identify the substitutes who would be entitled to receive the property in issue at the time of Mrs. Smith's death. The impossibility, it is said, might arise because one or more of the immediately designated substitutes might die between the date of the deed and the date of Mrs. Smith's death, in which case alternative substitutes named in the will would replace them. The difficulty of determining who such alternative substitutes might be is augmented since some of them might not as yet have been born when the deed was executed. There is no suggestion that any of the said possible eventualities took place, but it is true, as stated by respondent's counsel, that in August 1951, when the deed was signed, it was impossible for anyone to know exactly who, among the substitutes, would be living nearly three years later, at Mrs. Smith's death. It should be observed that the testator himself in 1938 had even less idea of who among the substitutes would be alive at his wife's death. Nevertheless, if he had wished to try to favor the youngest or any particular substitute, he could have attached appropriate conditions in respect of the opening of the substitution, but he did not choose to do so.

It is more important, I think, to consider the effect of an anticipated opening upon the rights of the institute, rather than its effect on the rights of the substitutes. Not infrequently, as in the present case, the institute does not have possession of the substituted property, and physical

delivery thereof becomes impossible. The deed mentions both a renunciation of the institute's right of disposal and what amounts to a constructive delivery over of the substituted property. This renunciation, in my opinion, is not to be confused with the renunciation of a succession (Art. 651 C.C.) or the repudiation of a legacy (Art. 866 C.C.). It is a renunciation or disclaimer equivalent to a delivery over as contemplated in Art. 960 C.C. Mignault (*Droit Civil*, vol. 5, p. 129), referring to the extraordinary opening of a substitution, speaks of "l'abandon anticipé" to describe it. Jules Jéraute (*Vocabulaire juridique* 1952 ed.) translates "abandon" in relation to property or rights by surrender, renunciation or relinquishment. The exact translation of the words "abandon anticipé" is only relatively important, but it should be noted that Mignault says that their effect is to put an end definitely to the institute's power of disposal over the substituted property. In so far as the institute is concerned, in the opinion of Mignault, the substitution has opened and the institute's powers over it have come to an end. So much is this so that, even if he should survive the substitution in whose favor the renunciation was made, he could not regain control over the property.

The crux of the issue, I think, is whether the deed in question terminated any power of disposal which the institute previously possessed. I consider that, regardless of what effect an anticipated opening of the substitution might have on the rights of substitutes, such opening is legal and binding on the institute who brought it about.

Contrasting the effect of the opening, with respect to the substitutes, Mignault, at pp. 129 and 130 (*supra*), states in substance that such opening is only provisional as regards substitutes who may be born subsequently to the anticipated surrender and before the normal date fixed for the opening of the substitution, and that the rights of such substitutes are in no way prejudiced by the anticipated opening. After reviewing the controversial question of what occurs when a substitute dies between the anticipated and normal dates of opening of the substitution, he favors the view that the rights of a deceased substitute accrue to the other substitutes and not to his heirs. The contrary view is well stated by the late Professor Philibert Beaudoin in

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his commentary on Art. 960 C.C. (*Revue Légale* N.S. (1899) vol. 5, 1 at 6). This difference of opinion, in relation to the present case, is only of academic interest as the testator made the following provision in his will (Ex. 3, p. 6):

> UNLESS otherwise specified, if any of the foregoing bequests of such residue shall lapse in consequence of any of the said beneficiaries predeceasing me and/or my said wife, or for any other reason, then the amount of such lapsed legacy or legacies shall be divided amongst my surviving residuary legatees in the proportions in which they are to share respectively in such residue.

Furthermore, the deed provides that the residuary estate of the testator will remain in the possession of the executors until the death of Mrs. Smith.

The respondent who is attacking the validity of the deed has not offered any proof that the anticipated opening brought about effects different from those which would have resulted from a normal opening. Ordinarily in fiduciary substitutions *de residuo,* when an institute delivers over the property, the income therefrom is also surrendered (Art. 965 C.C.). Private agreements may contain any provisions which are not contrary to public order or good morals (Art. 13 C.C.). In the present case all essential parties to the deed consented that Mrs. Smith continue to receive the revenue from her husband's estate until her death. The respondent is interested only in the corpus and not the revenue from the estate and, in my opinion, the deed brought to an end any power over or right to dispose of the corpus of the estate, which the institute may have had. For the foregoing reasons I find that the deed should be regarded as valid and effective from the date of its signature.

I do not consider, as contended by counsel for the respondent in his alternative submission, that, if the deed were valid at all, it could only be so because it constituted a gift *inter vivos.* Mignault, in describing the surrender made by an institute under Art. 960 C.C., writes that it is not regarded as a sale or a donation by the institute to one or more of the substitutes. (*Vide Droit Civil,* vol. 5, p. 124.) In my opinion, the delivery over of the substituted property by the institute, in conformity with the directions

and wishes of the grantor of the substitution, should be regarded as the fulfilment of a duty and not as a gift. Moreover, a gift implies that the donor is free to choose the recipient.

As observed by Thévenot d'Essaule, (*Traité des Substitutions* Mathieu Ed. Nos. 50 and 423) the institute in a fiduciary substitution receives the property on trust and must deal with it in good faith. I would add the more implicit the trust, the more is good faith expected. Mrs. Smith, in my opinion, could not, without violating her husband's intention, make a gift of the substituted property to her own relatives or to others instead of delivering it over to the persons designated in her husband's will. One does not speak of making a gift of something to a person who is entitled to receive it. A substitute, although having only a contingent right, is entitled to receive the substituted property on the happening of the contingency. He can dispose of his right under Art. 956 C.C., something which is not permitted to an ordinary heir under Art. 658 C.C. For the reasons mentioned above, I consider that the deed did not constitute a gift.

In concluding his argument, counsel for the respondent suggested that the anticipated delivery mentioned in Art. 960 C.C. could be exercised only in ordinary fiduciary substitutions, as described in the second paragraph of Art. 925 C.C., which reads as follows:

> Fiduciary substitution is that in which the person receiving the thing is charged to deliver it over to another either at his death or at some other time.

Such delivery, he continued, is not susceptible of application to a substitution where the grantor, as provided in Art. 952, may indefinitely allow the alienation of the substituted property, as was done in the present case. Although there is a difference between an ordinary substitution, wherein there is an obligation to conserve the substituted property, and a substitution *de residuo,* wherein no such obligation to conserve exists, I find nothing in the Civil Code to support the respondent's contention and, in my opinion, so long as a substitution *de residuo* is veritably fiduciary in nature, no such distinction is warranted. If, instead of the institute being required by the will to hand over any remaining property, it was left to her discretion

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to do so, the situation would be different. If the testator's will had stated that at her death Mrs. Smith should deliver over what remains of the property, if she wished, there would be no trust imposed and consequently no substitution. (Mignault, *Droit Civil*, vol. 5, quoting Thévenot d'Esseule, note (*a*), p. 92). The present substitution is not open to such objection and, in my opinion, is no different from that described in the case of *Chaussé et al. v. Boucher*[1], as appears particularly from the following notes of Walsh J.:

> The heir, under a fiduciary substitution *de residuo* (*fideicommis de eo quod supererit*) receives his bequest from the testator; but he can only claim it at the death of the legatee. The right is not conditional; its operation is merely suspended, in conformity with the intention of the testator. Though the latter bequeaths something certain, he also curtails it, because he makes such bequest *de eo quod supererit* subordinate to the right of the universal legatee: to alienate, and even to reduce the succession to nothing. Nevertheless, though eventual, the bequest, such as it will be, belongs to the estate of its beneficiary. This bequest *de residuo* does not altogether depend on the will of the universal legatee; because, if any property remains, he must transmit it, whether he likes it or not . . .

In the case of *Deguire et al. v. Despatie and Marsolais et al.*[2], Demers J. held that, while a fiduciary substitution wherein the institute is under no obligation to conserve the residue is not an ordinary substitution, and in France would not be considered a substitution at all, nevertheless in Quebec it is a fiduciary substitution because the obligation to deliver over subsists as in an ordinary substitution. Accordingly, in my opinion there is no justification for saying that Art. 960 C.C. applies only to a simple fiduciary substitution *de residue*, as contemplated in Art. 952 C.C.

Since s-s. (4) of s. 3 of the Act provides that a succession is deemed to have occurred at the time of death of the party having a general power of disposal and does not contain, as it might have done, the words "or at any time within three years prior thereto," in my opinion it must be said that none of the appellants herein can be deemed to be successors of Mrs. Smith. Consequently, for succession duty purposes they inherit "directly from the grantor and not from the institute," as provided in Art. 962 C.C.

For the above-mentioned reasons I find that the residuary estate of the testator should not have been included for succession duty purposes in the estate of the

[1] [1941] R.J.Q. 71 B.R. 67 at 72. [2] [1944] C.S. 1.

late Helen Richmond Day Smith. I therefore allow the appeal and refer the record back to the Minister of National Revenue for re-assessment accordingly. The appellants will be entitled to their costs.

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Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1957

June 26

June 26

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY ..... PLAINTIFF;

AND

BLACK BALL FERRIES LIMITED ..... DEFENDANT.

Shipping—Collision—Both ships proceeding at excessive speed in dense fog—Both ships held to blame in equal degree.

Held: That where two ships collided in dense fog in mid-channel between Prospect Point and Lions Gate Bridge in the First Narrows, Vancouver Harbour, and the Court finds each vessel was proceeding at an excessive rate of speed under the conditions prevailing, both ships should be held to blame in equal degree.

ACTION for damages resulting from a collision in the First Narrows, Vancouver Harbour.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District at Vancouver.

A. G. Harvey and *F. H. Britton* for plaintiff.

C. C. I. Merritt for defendant.

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

SIDNEY SMITH D.J.A. now (June 26, 1957) delivered the following judgment:

This case concerns a collision that occurred in mid-channel between Prospect Point and Lions Gate Bridge in the First Narrows, Vancouver Harbour, on September 14, 1956. The vessels concerned were the passenger ferry *Princess Nanaimo* (length 344 feet; beam 62 feet, 6787 tons gross) and the passenger ferry *Kahloke* (length 300 feet, beam 57 feet, 3910 tons gross).

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Sidney Smith D.J.A.

I mention this particularly because though these ships are commonly referred to as "ferries", they would be more correctly described as passenger motor-vessels. The term "ferry" is no doubt attached to them because they each ply across the Strait of Georgia with passengers and cars several times a day.

On this occasion the *Princess Nanaimo* was outbound from Vancouver to Nanaimo on her scheduled time and more or less her usual course. That was not the case with the *Kahloke*. Her termini were Horseshoe Bay (14 miles north of Vancouver) and Departure Bay (5 miles north of Nanaimo). Ordinarily they would never meet near the First Narrows but bad weather had damaged the landing stage at Horseshoe Bay and the *Kahloke* had no choice but to proceed to Vancouver to unload cars and disembark passengers. Following closely behind her substantially of the same size, belonging to the same company, and also carrying passengers and cars was the motor-vessel *Bainbridge*. The ferry kept out of difficulty and need not again be mentioned, other than by way of narrative.

According to the *Princess Nanaimo's* pleadings she had left her berth on the afternoon, September 14, 1956, and was proceeding through the First Narrows on one of her scheduled runs to Nanaimo. Her log books are expressed in standard time but I translated the entries into daylight saving time. Visibility was not good. According to the evidence and her log there were fog patches in the Narrows and from the Lions Gate Bridge westwards there was dense fog which indeed extended across the Strait to Nanaimo. The vessel had received information by radio telephone from the bridge signalman that the *Kahloke* and the *Bainbridge* were on the other side inbound. The *Kahloke* at the same time from the same source obtained appropriate information about the whereabouts of the *Princess Nanaimo*. So that both vessels knew that in all probability they would meet in the narrowest part of the Narrows—some 1200 feet in width—and of course they also knew that very dense fog prevailed. Nevertheless each vessel proceeded, sounding fog signals it is true, but in my opinion at a speed which was clearly excessive in the circumstances. In each case the average speed was approximately 8 knots. In my opinion nothing will justify such a speed in these

restricted waters in dense fog with traffic about. The fact that the *Princess Nanaimo* had not yet entered the thick fog makes no difference. It may in fact rebound against her contentions for she had the better chance by careful navigation beforehand of keeping clear.

The *Princess Nanaimo* first heard the fog whistle of the *Kahloke* at 3.25¼ p.m. The *Kahloke* was then invisible within the fog somewhere to the west of the bridge. Thereafter the *Princess Nanaimo's* engines were stopped ½ minute, at slow ahead ¼ minute, stopped ¼ minute, and then full astern ¾ minute. At the end of this period the *Kahloke* became visible in the fog on the *Nanaimo's* port bow, 200 feet away. At this time the *Princess Nanaimo* said she had some sternway on her but this I gravely doubt. I think she still had headway. Collision was then inevitable, in either case.

The *Kahloke* gave her speed just before the collision as 8 knots. She saw the *Princess Nanaimo* at Prospect Point 300 feet away and dead ahead of the *Kahloke*. Her logs are significantly meagre in their information. However the Master admitted that approaching the Narrows and upon hearing the first whistle given by the *Princess Nanaimo* he slowed down his engines but did not stop them until three minutes later. She too had some headway upon colliding. No doubt each Master did what he thought best and I do not scan too closely what was done by the two vessels while in the throes of collision. It will be sufficient to say that each with her port bow struck the port bow of the other. The *Kahloke* must also be held at fault.

Neither vessel complied with any one of the requirements of Rule 16 of the Collision Regulations. (The "stop" of the *Princess Nanaimo* at 3.25¼ p.m. was stated by the *Kahloke's* counsel as being merely a "token" stoppage.)

At first I thought the *Princess Nanaimo* the more to blame because she passed from visibility into the fog while the *Kahloke* had been in fog all the way down the Coast. In the end, however, I think justice will be done by holding both to blame in equal degree and I so find. The learned Registrar will assess the damages and costs will follow in like degree.

Judgment accordingly.

1958
Jan. 27
Feb. 3

BETWEEN:

GLEN J. DAY .....APPELLANT;

AND

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

Revenue—Income tax—Land purchased for sale as building lots and later sold en bloc at a profit—Capital gain or taxable income—"Business"—The Income Tax Act 1948, S. of C. 1948, ss. 3, 4, 127(1), 139(1)(e)—Appeal dismissed.

Appellant in 1950 purchased a block of land near Toronto for the purpose of subdividing it and selling it all in building lots. He engaged surveyors who prepared a suitable plan of the subdivision and though some stakes were placed on the property the lots were not actually staked out. Because of unforeseen expenses and other difficulties, in May, 1951, he abandoned his original plan and rented the land for the crop season of that year. In 1951 he was employed for a short time with a company in Toronto and after a period of unemployment he purchased in the fall of 1952 a company which he still operates. In November 1951, he sold the land for an increased price over that at which he purchased it. A certain amount of the purchase price was paid on the closing of the deal and the balance in instalments. He was assessed for income tax for the profits on the sale of the land for each year the instalments were received, and from such assessment appealed to this Court.

Held: That appellant had no intention of retaining the property as an investment but did intend to sell it if and when a suitable price could be obtained and having entered into the business of a subdivider in exactly the same way as one engaged in that business would do and having been frustrated in completing his arrangements for disposing of it in one way, namely in lots, he did sell it another way, namely *en bloc,* and the profits realized on such sale constitute income and consequently are properly assessed for income tax.

APPEAL under the Income Tax Act.

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

J. D. McNish, Q.C. for appellant.

J. D. C. Boland for respondent.

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

CAMERON J. now (February 3, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated March 6, 1957, dismissing the appellant's appeal from re-assessments, all dated February 9,

1956, and made upon him for the taxation years 1952, 1953 and 1954. In each of these years the appellant received certain moneys, the proceeds of a sale of a large block of land, but being of the opinion that these amounts were not to be taken into account in computing his taxable income, omitted them from his tax returns. In the re-assessments, however, the Minister of National Revenue added to the declared income the profits which had been received therefrom during the several years.

The single question for determination, therefore, is whether the profits realized on the sale fall within the provisions of ss. 3 and 4 of *The Income Tax Act*, and more particularly whether they are within the provisions of s. 127, s-s. (1)(*e*) thereof. (The latter section, having been re-numbered appears as s. 139, s-s. (1)(*e*) of the Act in force for the years 1953 and 1954.)

These sections are as follows:

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

(a) businesses,

(b) property, and

(c) offices and employments.

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

127. (1) In this Act,

* * *

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

The facts in the case are not seriously in dispute. It is admitted that if the profits realized constitute taxable income in the hands of the appellant, the amounts added to the declared income are correct and the re-assessments must stand.

The appellant is a young man who graduated from the University of Toronto in 1947 in Commerce and Finance. Immediately upon graduation he joined the Day Sign Company of Toronto, a family concern, fully expecting that he would soon have a financial interest in that business. His hopes, however, were not realized, and due to that fact,

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and for personal and financial reasons, he gave notice at the end of 1950 that he would leave that company on March 31, 1951, which he did.

In the meantime in June, 1950, he had occasion to visit a relative in the Scarboro district east of the city of Toronto, and noting the rapid development of that area, conceived the idea of purchasing a block of land, turning it into a subdivision and then selling it all in building lots. In June, 1950, he purchased a block of 129 acres lying between the Kingston Road and Lake Ontario for $105,000, of which amount $5,000 was paid in cash as a deposit and the balance in cash on closing the purchase early in July of the same year. Exhibit 1 is the agreement of purchase and sale. Exhibit 2 shows the limits of the property in red ink. The evidence does not indicate how much of the purchase price was paid out of his own resources, but it was admitted by his counsel during the argument that a substantial amount was borrowed from a bank. Indeed, in the deductions allowed the appellant, there is an expense item of over $4,000 for bank interest.

Prior to the signing of the agreement to purchase, Mr. Day had had numerous discussions with one Beverley Eppes, an experienced real estate agent in the area and who was agent for the vendor in that sale. Estimates had been made as to the prospect of realizing a profit on the transaction, the number of lots to be made available, and other matters. It was estimated that the total cost of complying with the requirements of the township of Scarboro as to the installation of roads and services would be $50,000, an amount which Day says he could have arranged for. He says frankly that being then dissatisfied with his employment at Day Sign Company he intended to go into the business of buying property, subdividing it and selling it, as he felt confident he would do at a substantial profit.

Following the purchase, he engaged surveyors to prepare a plan of subdivision, and after amendment a suitable plan was approved. While some stakes were placed on the property, the lots themselves were not actually staked out on the land. One item of expense allowed was for $1,500 for surveyors.

Before the subdivision could be proceeded with he had to secure the approval of his plans by both the township of Scarboro and the province of Ontario Planning Board. He immediately ran into difficulties with the township authorities, who insisted on requirements which he had not anticipated or provided for. They required wider roads, some of which had to be paved instead of gravel; larger water mains; provisions for an access road; the reservation of certain acreage for a school; and of 5 per cent of the area for parks. There seemed to be a good deal of uncertainty as to just what they did require, and various meetings were held. Day finally estimated that the total expense of meeting these requirements would be $150,000, an amount greatly in excess of his original estimate. He was completely "fed up", particularly as he estimated that with this outlay his total costs would be so great that he could not sell his lots at competitive prices, and would make no profit. In addition, he had made no arrangements and had no means to provide for the extra outlay. By the end of April, 1951, he had reached the conclusion that the plan could not be proceeded with and must be abandoned.

Nothing further was done at that time as to further development or sale of the property. Under the terms of his original purchase the tenant, Campbell, was entitled to remain on the property for 1950 and remove his crop. In May, 1951, when he had abandoned his original plan, Day arranged to rent the farm for the crop season of 1951 to Campbell for $400.

He then looked for other employment, and from June, 1951, to April, 1952, was with the Silknit Company of Toronto. He was looking for a chance to enter a business on his own account, and after a few months of unemployment and a few months with the Highland Dairy Company he purchased, in the fall of 1952, the Bender Caskets Company of Newmarket, which he still operates.

After abandoning his original plan to subdivide the property, he gave some consideration to what should be done with it, but reached no conclusion. He discussed the matter with the witness J. F. Neil, a graduate of the Ontario Agricultural College, who was of the opinion that the land was suitable for potato growing and that under

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normal conditions of weather and market a return might be expected. It is apparent, however, from this witness, that if such a plan were put into operation, it would need experienced management—and the appellant had had none —and a substantial capital outlay for machinery, equipment and barns. Whether such a plan would have been successful seems very doubtful in view of the large capital cost of the land and equipment. No decision was reached as to what should be done. The property was not advertised for sale and was not listed with any brokers.

In November, 1951, Mr. Day received an offer to purchase the property en bloc for $205,000. This was the first offer he had received for the property as a whole, although other offers had been made for lots or groups of lots before he had abandoned his original plan. He accepted this offer the following day. By its terms he received $2,500 as a deposit, $17,500 on closing in January, 1952, when he was given a mortgage for $185,000, to be paid in instalments of $9,000 quarterly, and the balance at the end of five years. Provisions were made for additional payments to secure the discharge of lots sold. The plans which had been prepared were taken over by the purchaser, and, with modifications, the subdivision was carried out. A commission in excess of $10,000 was paid by Day to the broker who brought the offer to him.

Mr. McNish, counsel for the appellant, frankly concedes —and I think rightly so—that if Day's plan to purchase, subdivide, improve and sell the property in building lots had been carried out as originally planned, the profits realized in that event would have been taxable income in his hands, as falling within the provisions of ss. 3 and 4 of the Act, or at least within the extended meaning of "business" as defined in s-s. (1)(*e*) of s. 127, as being an adventure in the nature of trade, notwithstanding that the appellant neither before nor since this purchase and sale had been engaged in the business of buying and selling real property, except that on one occasion he bought and later sold his own residence.

It is submitted, however, that in May, 1951, his original intention to buy, develop and sell the land was frustrated, and that he then fully abandoned that intention of speculating in real estate. It is said that thereupon the

property became a capital asset, and, as stated in the Notice of Appeal, that at the time of its sale some six months later, the profit secured was merely that realized upon the sale of an investment. The fact that he took other employment, that he proceeded no further with his plan of subdivision, and that he made no attempt in the meantime to sell or list his property for sale is said to be a clear indication of a change of intention.

Now, while he did abandon his original plan of realizing a profit by subdividing the property into building lots and selling them—at least for the time being—I am quite unable to find on the evidence that he at any time abandoned his plan to make a profit by selling the property in some way. It was not suggested that he came to the conclusion that he would operate the property as a farm, and the discussions with Neil were only in regard to what could be done with the property. He was not a farmer, and did nothing to indicate that he ever intended to put Neil's suggestion into effect. The renting of the property to Campbell was for the crop season only, and was entirely in the nature of a stopgap, as indicated by its short duration and the fact that the rental represented less than half of the annual taxes.

There may be cases in which property purchased for trading and speculative purposes might, in certain circumstances, become an investment, the profit from which at a later sale would not be taxable income, but such is not the case here.

In *Gairdner Securities, Ltd. v. M. N. R.*[1], Rand J., in the Supreme Court of Canada, said:

> Investments in the sense urged look primarily to the maintenance of an annual return in dividends or interest.

It is abundantly clear that Day never abandoned his original intention to sell the property, which he had purchased speculatively, at a profit. Mr. McNish said in argument that the only alternative to farming the property was to sell it. Day was anxious to start up in business on his own account, and for that purpose, as well as to pay off his liability to the bank, would have to sell the land. His desire to sell it is clearly evidenced by the immediate acceptance of the first offer made to him.

[1] [1954] C.T.C. 24 at 27.

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Many cases were cited by counsel for both parties, but I find it necessary to refer to one only which I think is closest to the problem here—that of *McIntosh v. M.N.R.*[1]. The facts in that case are, in many respects, similar to those in this case; the same argument was raised and rejected, that there had been a change of intention of such a nature that the property originally purchased for purposes of erecting and selling houses, became in the circumstances, an investment.

In that case McIntosh, a retired merchant, without experience in buying and selling real estate, entered into an agreement with one Laidlaw, an experienced builder, to purchase certain acreage, erect houses thereon, and sell them with a view to profit. McIntosh was to purchase 55 lots and Laidlaw the remaining 110, but they were to be associated in the building scheme. Differences arose between the parties, and following litigation, 55 of the lots were transferred to McIntosh. Having no experience in building houses, he decided to sell the vacant lots. In 1952 he sold 20 lots at a substantial profit.

At p. 129, Hyndman D.J. said:

> The question for decision is, therefore, whether said profit was capital accretion, or, income subject to tax.
>
> It can be said at once that this was an isolated transaction, not in any way related to the respondent's usual or ordinary business.
>
> It is equally true that when he entered into the arrangement with Laidlaw his intention was to make gain or profit. Also, after acquiring the 55 lots from Laidlaw, he had no intention of using them himself or developing them for revenue purposes.
>
> From his notice of appeal to the Income Tax Appeal Board, dated the 27th of September, 1954, I quote the following:
>
> > "The appellant's venture in purchasing the said lots was a speculation."
>
> It was very strongly argued by Mr. Laird, Q.C., counsel for respondent, that the arrangement with Laidlaw having fallen through, an entirely new situation arose affecting or displacing his original intention.
>
> I have given this argument my best consideration, but I cannot escape the conclusion that the original idea, namely, to make gain or profit, continued. It was, as above stated, still a venture or speculation, and not an investment in the ordinary sense.
>
> Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

[1] [1956] Ex. C.R. 127.

He allowed the appeal of the Minister, and restored the assessment which had been set aside by the Income Tax Appeal Board. The taxpayer appealed to the Supreme Court of Canada, in its judgment, delivered a few days ago —but not yet reported—the Chief Justice of Canada, speaking for the Court, said:

> A consideration of the entire record makes it clear that that arrangement was an adventure or concern in the nature of trade within the meaning of the term "business" as defined in the Act, but the argument is that, because of differences which arose between him and his relative, what he did subsequently was merely an endeavour to realize upon an investment. I agree with Mr. Justice Hyndman that that is not the true conclusion from all the circumstances; nor do I think that it is answered by the reasons of the Income Tax Appeal Board that, in order to escape taxation, the appellant should either have refrained from selling the lots for more than they had cost him, or else should have given them away.

Later he said:

> In the present case I agree with Mr. Justice Hyndman's findings with reference to the appellant that:
>
> > "Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained."
>
> The appeal should be dismissed with costs.

In fairness to counsel for the appellant, I should state that the judgment of the Supreme Court of Canada was not delivered until after the hearing of the present appeal.

I am unable to distinguish that case from the one now before me. Here Day had no intention of retaining the property as an investment, but did intend to sell it if and when a suitable price could be obtained. Having entered into the business of a subdivider in exactly the same way as one engaged in that business would do, and having been frustrated in completing his arrangements for disposing of it in one way—namely, in lots—he did sell it in another way—namely, en bloc.

Accordingly, for these reasons, the appeal will be dismissed, and the re-assessments made upon the appellant for each of the years 1952, 1953 and 1954 will be affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.

1957
Feb. 14
1958
Feb. 25

BETWEEN:

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

AND

THE ONTARIO PAPER COMPANY LIMITED ..... RESPONDENT.

Revenue—Income tax—Income Tax Act 1948, S. of C. 1948, c. 52, ss. 11(1)(f) and 127(1)(c)—Interpretation Act, R.S.C. 1927, c. 1, s. 31(j)—Employees' superannuation fund—Amount of contribution deductible from income limited to amount actually paid in respect of a particular participant.

Held: That an employer is entitled to deduct from income as provided in s. 11(1)(f) of the Income Tax Act 1948, S. of C. 1948, c. 52 an amount, provided it does not exceed $900, which he has paid to an approved pension plan in respect of a particular participant and he is limited to making as many such deductions as there are instances in which such a particular payment has been made; the maximum permissible deduction for any year is not to be arrived at by multiplying $900 by the total number of employees participating in each plan.

APPEAL from a decision of the Income Tax Appeal Board.

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

W. R. Jackett, Q.C. and *T. Z. Boles* for appellant.

H. H. Stikeman, Q.C. for respondent.

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

KEARNEY J. now (February 25, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1] allowing two separate appeals by the respondent, from two assessments made and confirmed by the appellant, one in respect of 1949-50-51, and the other for 1952. The appeals were heard together and treated as one, as the issue was identical in both appeals.

There is but one point involved herein, namely, to what extent the respondent's contributions to its employees' superannuation plan or fund are deductible for each of the four years in question. Both parties rely on the same

[1] (1955) 13 Tax A.B.C. 369.

provision of law, and the case turns on the proper interpretation of s. 11(1)(*f*) of *The Income Tax Act*, S. of C. 1948, c. 52, which, omitting an inconsequential amendment in 1951, reads as follows:

> 11. (1) Notwithstanding any other provision in this Division, the following amounts may, subject to sub-sections (2) and (3) of section 12, be deducted in computing the income of a taxpayer for a taxation year:
>
> (*f*) an amount not exceeding $900 paid by the taxpayer to or under an approved superannuation fund or plan in respect of services rendered by each employee, officer or director of the taxpayer in the year plus such amount as may be deducted as a special contribution under section 69.

The facts, although somewhat out of the ordinary, are not controversial. Two partially integrated employees' retirement pension plans were in effect in the respondent's establishment and in those of its subsidiary companies during the taxation years in question: the Basic Plan and the Supplementary Plan described in booklets attached to Exhibits 1 and 2.

These pension plans were required to be, and admittedly were approved by the appellant. The Basic Plan was implemented by a Master Group Contract (Ex. 1) purchased by the respondent from the Annuities Branch of the Department of Labour, as underwriters, and the Supplementary Plan by a similar contract between the respondent and the Great West Life Assurance Co. Employees earning $4,000 or less per annum were eligible to participate in the Basic Plan only, while those earning in excess of $4,000 could and did participate in both plans. The purchase price, or premium, was paid by the respondent partly with monies supplied by each participating employee and the balance by the respondent's own contributions made on behalf of each such employee who, subject to certain conditions, became entitled to certain retirement annuities.

Under the Basic Plan each employee contributed thereto by agreeing to a deduction and periodic remittance by the employer to the underwriter of four per cent of his compensation (maximum $160), as and when it was paid. The respondent similarly paid, for the account of each participant, an amount equal to five per cent of an employee's earnings up to $4,000 (maximum $200).

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Under the Supplementary Plan each employee earning in excess of $4,000 contributed annually in advance four per cent of his compensation, but in no event could his annual contribution be in excess of $740 (apart from $160 contributed to the Basic Plan). The respondent contributed annually in advance, for the account of each participant, the equivalent of twelve per cent of his compensation in excess of $4,000 (apart from the $200 contributed on his behalf to the Basic Plan). I consider that further reference to employees' contributions can be dispensed with, and with respect to employer contributions the parties admit that only future service contributions, as described in the booklets, pages 6 and 7 (Exs. 1 and 2), need be considered.

The appellant interpreted s. 11(1)(*f*) to mean that employers such as the respondent were entitled to deduct not more than $900 in respect of any one of its employees; also that any excess paid over $900 in respect of any one employee was lost for deduction purposes. The appellant caused a booklet (Ex. 4) to be issued concerning pension plans, which contains at page 12, para. (*c*), a statement of principles and rules along the above-mentioned lines.

The respondent thought that it was bound by the principles or practice described in the booklet and followed them. Accordingly it claimed, in its original income tax returns for the four years in question, its total yearly contributions made under both plans less the total amount of such contributions in excess of $900 made on behalf of a relatively few highly paid employees. After a thorough study of the situation, from the legal point of view, had been made, the respondent concluded that it was not bound by the practice described, a fact which the appellant does not dispute, and that there was a possibility of claiming as deductions all the contributions paid by it under the Basic and Supplementary Plans on the ground that its average contribution for each employee did not exceed $900 in any one year. This the appellant denied.

The respondent amended its four income tax returns so as to claim as deductions the full amount of its contributions. The respondent's total contributions to both plans in 1949 amounted to $176,573.94 ($129,134.47 under the Basic Plan and $47,439.47 under the Supplementary Plan), but it had claimed as a deduction $159,158.42, and the

difference of $17,415.52 was later claimed in its amended return. (See Ex. 3.) No itemized statement of the employees' individual earnings or amounts of employer contributions paid for the account of employees individually was filed, but it is admitted that the difference of $17,415.52 is the aggregate of the amounts by which the contributions of the respondent under the plans for certain employees exceeded $900 in 1949.

The amounts of corresponding deductions claimed for 1950, 1951 and 1952 were as follows:

Year	*Deduction now claimed (Total contributions)*	*Deduction previously claimed on T.2 Return*	*Difference*
1950	$179,742.16	$160,689.17	$19,052.99
1951	209,185.04	183,425.39	25,759.65
1952	237,127.39	204,111.75	33,015.64

The appellant assessed the respondent on the basis of its original returns. The respondent gave notice of its objection to the assessments on February 24, 1954, in respect of 1949 to 1951 inclusive, and on September 20, 1954, in respect of 1952. On reconsideration, the appellant confirmed all the assessments on the ground that the respondent had been allowed deductions to the extent provided in s. 11(1)(*f*) of *The Income Tax Act* and duly notified the respondent accordingly. The Board maintained the respondent's objections and allowed the appeals.

In 1949 the total number of employees participating in the Basic Plan was 847, including 85 who were earning more than $4,000 and participating also in the Supplementary Plan. Similar information is contained in Exhibit 3 respecting the other years, but I will only consider the $176,573.94 deduction claimed for 1949, since what can be said for or against it is equally applicable to the deductions claimed for the three succeeding years.

I think the first approach in this case must be to direct one's attention to the wording or language of the statute. In this connection, Lord Herschell, in *Bank of England v. Vagliano*[1], said: "What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute . . ." The following statement is

[1] [1891] A.C. 107, 145.

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found in Halsbury, Vol. 31, Second Edition, at page 477: "It has been said that the meaning of statutes is primarily to be sought in themselves—*Inland Revenue Commissioners v. Herbert*"[1]. The learned President of this Court, in *Mountain Park Coals Ltd. v. Minister of National Revenue*[2], said: "The legislative intent of an Act must be gathered from the words by which it is expressed and it is the meaning of the words as used that is to be ascertained."

I must say that s. 11(1)(*f*) appears plain to me when read in its ordinary and grammatical sense. By applying to it the preceding canons of construction, I think it logically follows that the employer is entitled to deduct an amount, provided it does not exceed $900, which he has paid to an approved pension plan in respect of a particular participant; and that he is limited to making as many such deductions as there are instances in which such a particular payment has been made.

Rand J., in *Commissioner of Patents v. Winthrop Chemical Inc.*[3], speaking of interpretive approach and quoting with approval *Grey v. Pearson*[4], observed: "What has been called the Golden Rule of construction is that the language of a statute should be given its grammatical and ordinary sense unless that would lead to absurdity, repugnancy or inconsistency, in which case that sense may be modified so as to avoid the absurdity or inconsistency, but no farther."

It has been said that "What is plain to one mind may be just the reverse to another." (See Odgers' *The Construction of Deeds and Statutes,* Fourth Edition, page 209.) However, as Halsbury points out in Vol. 31, Second Edition, page 478, even "if the terms employed are ambiguous, then the intention of Parliament must be sought first in the statute itself . . ." See Lord Wrenbury in *Viscountess Rhonddas' Claim*[5].

The respondent interprets the words "an amount not exceeding $900" to mean an average amount for all employees, and it is immaterial whether the employer's contribution based on twelve per cent of the higher salaried employees in some cases exceeded $900 so long as any amount over $900 can be offset, or more than offset, by the

[1] [1913] A.C. 326, 332.
[2] [1952] Ex. C.R. 560, 564.
[3] [1948] S.C.R. 46, 54.
[4] (1857-59) 6 A.C. 61, 106.
[5] [1922] 2 A.C. 339 at 397, 398.

more numerous but lesser contributions based on five per cent of the remuneration paid the lower salaried employees. Thus, in the respondent's view, the maximum permissible deduction for any year is arrived at by first multiplying $900 by the total number of employees participating in each plan. The total of the actual employer contributions to both plans is then ascertained and, provided it is less than or equal to the product of this multiplication, it is deductible *in toto* because in such event the average of the actual contributions may be less but it cannot be more than $900.

The practical application of the respondent's theory to the taxation year 1949 would entail, first, multiplying the number of participating employees during the said year, namely, 847, by $900. The product of $762,300 would, in the respondent's opinion, constitute a maximum global amount which the company is permitted to deduct. According to the respondent, since its total contribution for 1949 was $176,573.94, it could deduct the full amount thereof with $585,726.06 to spare, because the total employer contributions divided by 847 result in an average contribution of $208.47 which allegedly falls within the limit of $900 for each individual by $691.53.

Unless the terms "paid . . . in respect of . . . each employee" which appear in it are ignored, the context does not lend itself, in my opinion, to the interpretation suggested by the respondent which, if accepted, would lead to inconsistencies. In order to justify a deduction under the section, it must be identifiable with the employer's contribution which is actually paid to the underwriters on behalf of each individual participant. The strikingly disproportionate figure of $585,726.06, in my view, has no place in the statute because no part of it was ever paid to the underwriters by the employer.

I do not think that there is any room for doubt as to what is meant by "each employee." Section 127(1)(*c*) of *The Income Tax Act* defines an approved plan as follows:

> (*c*) "Approved superannuation fund or plan" means an employees' superannuation or pension fund or plan approved by the Minister in respect of its constitution and operations for the taxation year under consideration.

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The respondent produced as Exhibits 1 and 2 the approved contracts describing the constitution and operations of the Basic and Supplementary Plans. These contracts clearly contemplate payments being made for the exclusive accounts of particular employees. I do not mean that the contracts contemplate that the employer during a taxation year will remit his contributions, as premium payments, to the underwriters on behalf of individuals in individual amounts, but that he will make one or more global payments accompanied by a statement identifying the employees for whose accounts the contribution is being made and indicating the amount attributable to each one of them. The last paragraph on page 1 of the Basic Contract (Ex. 1) states:

> At the time any payment is made on behalf of Registered Employees hereunder, Purchaser shall stipulate the amount of each kind of payment included therein and, except as expressly provided hereinafter, such payments shall be held for the exclusive accounts of the respective Registered Employees for whom they were deposited. No payment shall be accepted on behalf of a Registered Employee subsequent to his Retirement Date.

Under the Supplementary Plan employer contributions are payable yearly in advance as part of the premium. Section 3 of the Supplementary Contract (Ex. 2) states:

> PREMIUMS.—A premium shall be due and payable annually in advance at the Head Office of the Insurance Company in respect of each employee while covered hereunder . . . .

See also booklet attached to Ex. 2, p. 7, s. 12, which reads in part as follows:

> The Companies will contribute on account of each such participant 12% of such compensation.

I am not disposed to accept the respondent's interpretation for the further reason that to do so would be tantamount to recognizing that s. 11(1)(*f*) is ineffective, if the policy and object of Parliament is to place some reasonable limit on the deductibility of employer contributions made in respect of certain of his more highly paid employees. In the present instance, the limitation of $900 applies to those of the eighty-five participants in the Supplementary Plan whose compensation amounted to or exceeded in round figures $10,000 per annum because in respect of such an employee the respondent would contribute under the Basic Plan five per cent on the first $4,000, or $200, and twelve per cent on the remaining $6,000, or $720. Since a $900

deduction is permitted, all but $20 of the employer's contributions would be deductible. If, as alleged by it, the respondent were entitled to a yearly deduction of nearly $600,000, then I think the limitation in the statute would be so inconsequential as to be almost meaningless. In no case does an employer's contribution exceed twelve per cent of an employee's compensation. Consequently, even on the assumption that a dozen employees were in receipt of a yearly compensation of several hundreds of thousands of dollars each, no limitation could have begun to operate in 1949. I do not think that it could be supposed that such a result was contemplated by the legislature, or that the appellant would give his discretionary approval to the contracts in question, if they were so inconsistent with the object of the legislation.

In this connection, Odgers at page 177 (*supra*) states: "Next, if possible, the construction adopted should be in accordance with the policy and object of the statute in question." Lord Goddard, in *Barnes v. Jarvis*[1] said: "A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered . . ."

Before an interpretation such as suggested by the respondent could be accepted, I think words which are now lacking in the statute would have to be supplied. As a general rule the Court will not introduce into statutes words which are not found there. *Craies on Statute Law*, Fifth Edition, p. 103, treats construction by implication as follows:

> If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions. But the general rule is "not to import into statutes words which are not to be found there" (*King v. Burrell* (1840), 12 A. & E. 460, 468), and there are particular purposes for which express language is absolutely indispensable. "Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context" (*Tinkham v. Perry* [1951] 1 T.L. 91, 92.).

In my view, if the paragraph were meant to convey the meaning which the respondent attributes to it, it would have contained an arithmetical reference, such as averaging or multiplying.

[1] [1953] 1 W.L.R. 649, 652.

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Counsel for the respondent stressed the point that, if the word "amount" meant amounts referrable to each employee, it would have been in the plural. If it were necessary or desirable to do so, I think it would be permissible to insert in s. 11(1)(*f*) "or amounts" after the word "amount," in virtue of the *Interpretation Act*, R.S.C. 1927, c. 1, s. 31(*j*), which states:

> In every Act, unless the contrary intention appears,
> (*j*) words in the singular include the plural, and words in the plural include the singular.

This is particularly true when one considers that the employer in this case is making payments or contributions to two plans which were underwritten by separate underwriters. In like manner, the word "plan" must be read to include more than one plan. For instances in which s. 31(*j*) was applied, see *Minister of National Revenue v. Stovel Press Limited*[1], *The Credit Protectors (Alberta) Limited v. Minister of National Revenue*[2], and *Minister of National Revenue v. 79 Wellington West Ltd.*[3].

A question arose as to how far the legislative history of the instant statute could be used as an aid to its interpretation. I think it is correct to say that in the present case, only its history prior to 1952 could be considered. See Thorson P. in *Mountain Park Coals Limited v. Minister of National Revenue* (*supra*). I do not propose to consider prior amendments because, in the circumstances, I think the intention of Parliament is sufficiently disclosed in the statute itself.

For the foregoing reasons I find that no error in the re-assessments was made by the appellant in respect to the respondent's tax returns for the years 1949-52 inclusive. Accordingly the appeal will be allowed, the decision of the Income Tax Appeal Board set aside, and the re-assessments made upon the respondent for each of the taxation years in question will be affirmed. The appellant is also entitled to his costs after taxation.

Judgment accordingly.

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[1] [1953] Ex. C.R. 169, 172. [2] [1947] Ex. C.R. 44, 46.
[3] [1953] Ex. C.R. 209, 214.

BETWEEN:

RODOLPHE MEUNIER, Executor Testamentary of the ISRAEL MEUNIER Succession ..... APPELLANT;

1957
Sept. 26
1958
Jan. 24

AND

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

Revenue—Succession Duty—Will—When holder of general power deemed competent to dispose of property—When a succession to be deemed in respect of such property—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, ss. 3(1)(i), 3(4), 4(1), 6(1)(a).

A testatrix, common as to property, named her husband one Israel Meunier, her universal legatee and left him her entire estate with a general power of appointment to dispose thereof as he should see fit but with the proviso that should he not dispose of the property *inter vivos* on his death one half thereof was to go to the couple's only son and the other half to an only daughter. So that there might be no doubt as to her intention the testatrix concluded her will with a clause stating that it was her wish and desire that her husband was to dispose of the property as he should see fit without being accountable to any one. A codicil provided that in the event the son predeceased the father the son's wife was to have the usufruct of the son's share for life with the remainder to the children of their marriage. The testatrix died in 1951, her husband in November 1952. He made no disposition of the property in his lifetime. By his will made in May 1952 he named his son and the son's wife his universal legatees and executors of his will.

In assessing the value of the succession arising on the death of Israel Meunier the Minister included the value of the property left him by his wife's will on the ground that as Israel Meunier at the time of his death was competent to dispose thereof by virtue of the power of appointment contained in his wife's will, it was subject to succession duty under s. 3(1)(i) of the Act. On appeal from the assessment:

Held: That since the general power of appointment contained in his wife's will empowered Israel Meunier, her legatee, notwithstanding certain reservations in the will, to dispose of the property as he should see fit without accounting to any one he was, as provided by s. 4(1) of the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89 as amended, deemed competent to dispose of the property and it was immaterial whether such disposition was made by instrument *inter vivos* or by will.

2. That under s. 3(4) of the Act the property as to which Israel Meunier at the time of his death was competent to dispose was to be deemed a succession and the person entitled thereto and the deceased deemed to be the "successor" and "predecessor" respectively in relation to the property. *Montreal Trust Co. v. Minister of National Revenue* [1956] S.C.R. 702 affirming [1955] Ex. C.R. 312, followed. *Royal Trust Co. v. Minister of National Revenue* [1954] Ex. C.R. 354, distinguished.

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APPEAL under the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, as amended.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

Edouard Masson, Q.C. and *Alfred Tourigny, Q.C.* for appellant.

Guy Favreau, Q.C. and *Maurice Paquin, Q.C.* for respondent.

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

FOURNIER J. now (January 24, 1958) delivered the following judgment:

Dans cette cause, il s'agit d'un appel d'une décision du ministère du Revenu national confirmant une cotisation pour fins de droits successoraux exigibles des légataires universels d'Israël Meunier, de la cité de Montréal, province de Québec, décédé le 19 novembre 1952, laissant un testament sous forme authentique fait et passé le 28 mai 1952.

Les faits pertinents au litige sont établis par preuve documentaire et ne sont pas contestés. Je les résume.

Israël Meunier était l'époux commun en biens de feu Amanda St-Pierre. Ils avaient deux enfants, un fils, Rodolphe, et une fille, Yvonne, épouse de Horace Lefrançois. Le 20 juillet 1939, dame Amanda St-Pierre fit son testament, dont les clauses qui suivent ont été soulevées particulièrement au cours du débat.

J'institue Israel Meunier dit Lagacé, mon époux bien-aimé, mon légataire universel, à qui je donne et lègue tous mes biens, meubles et immeubles, y compris le produit des polices d'assurances que je laisserai à mon décès, voulant que tout bénéficiaire d'assurance déjà désigné soit révoqué, par les présentes, de manière à ce que mon époux reçoive le produit de telles assurances.

Mon dit légataire universel aura la propriété entière de tous les biens que je lui lègue par les présentes, avec le pouvoir de les vendre, les échanger, hypothéquer, ou autrement, les aliéner, malgré les réserves qui suivent:

Si mon légataire universel n'a pas disposé entre vifs, soit à titre gratuit, ou à titre onéreux des biens que je lui lègue, ou s'il ne les a pas recueillis, je veux que ce qui lui restera de ce que je lui lègue (car il n'est pas tenu de conserver lesdits biens) appartienne:

1. Pour une moitié indivise à mon fils Rodolphe Meunier dit Lagacé, pour par lui en jouir et disposer en absolue propriété à compter de l'instant du décès de mon dit époux Israel Meunier dit Lagacé, et au cas de prédécès du dit Rodolphe Meunier dit Lagacé, à ses enfants, au premier

degré, par représentation et avec représentation cependant en faveur de leurs enfants. Cependant si mon fils me prédécède laissant des enfants ou petits enfants mineurs, les biens ainsi légués seront confiés pour fins d'administration et de disposition aux exécuteurs ci-après nommés auxquels j'adjoins l'épouse actuelle du dit Rodolphe Meunier. . . .

2. Pour l'autre moitié indivise en usufruit à ma fille Yvonne Meunier dit Lagacé, épouse de Sieur Horace Lefrançois, sa vie durant, pour la nue-propriété des dits biens, c'est-à-dire cette moitié indivise, appartenir aux enfants nés et à naître de ma dite fille Yvonne Meunier dit Lagacé.

* * *

Pour qu'aucun doute n'existe sur mes réelles intentions, je veux et entends que mon dit époux dispose de mes biens, comme il l'entendra, ne devant compte à personne.

Le 13 janvier 1943, la testatrice fit un codicille, dont les clauses suivantes nous intéressent:

L'article un de mon dit testament est annulé et remplacé par le suivant:

Mes biens appartiennent pour une moitié indivise à mon fils Rodolphe Meunier dit Lagacé, pour par lui en jouir et disposé en absolue propriété à compter de l'instant du décès de mon dit époux Israel Meunier dit Lagacé, et au cas de prédécès du dit Rodolphe Meunier dit Lagacé, à son épouse Rose-Alma St-Pierre, en usufruit, sa vie durant, et la nue-propriété à ses enfants nés et à naître de son mariage avec le dit Rodolphe Meunier dit Lagacé, au premier degré. . . .

Je ratifie et confirme toutes et chacune des autres dispositions (dont) il n'est point dérogé par le présent codicille.

La testatrice est décédée le 19 mars 1951 et son mari, Israël Meunier, a recueilli les biens qu'elle lui avait légués. Un rapport a été fait au Département et les droits successoraux ont été acquittés sur sa succession.

Israël Meunier, le 28 mai 1952, fit son testament sous la forme authentique, par lequel testament, qui n'a été ni modifié ni révoqué, il a institué l'appelant et dame Rose-Alma St-Pierre, épouse de ce dernier, ses légataires universels en entière propriété et les a nommés ses exécuteurs testamentaires. Le testateur est décédé à Montréal le 19 novembre 1952. Par la suite, le légataire universel Rodolphe Meunier, conformément à la Loi fédérale sur les droits successoraux, a fait une déclaration indiquant un inventaire des biens compris dans la succession et leur valeur, c'est-à-dire les biens qui appartenaient à son père, soit la moitié de la communauté qui existait entre son père et sa mère telle que constatée au moment du décès de sa mère, plus l'accroissement ajouté aux biens de son père depuis le décès de son épouse. Les droits successoraux furent cotisés par le Département sur sa succession, y com-

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pris les biens à lui légués par son épouse Amanda St-Pierre, et un avis de la cotisation fut expédié à l'appelant. Un avis d'appel de la cotisation, en date du 10 février 1954, fut envoyé au Ministre du Revenu national. Le Ministre confirma la cotisation quant à l'inclusion des biens de feu l'épouse du testateur dans la succession de ce dernier. Le légataire donna un avis de mécontentement, d'où appel dans cette Cour de la cotisation.

Le Ministre a ratifié la cotisation comme ayant été établie en conformité des dispositions de la Loi fédérale sur les droits successoraux, Statuts du Canada, 1940-41 et amendements, c. 14, et plus particulièrement parce que Israël Meunier était au moment de son décès habile à disposer des biens qu'il avait le pouvoir d'attribuer en vertu du testament de feu Amanda Meunier et que les dits biens ont été dûment assujettis aux droits aux termes de l'article 3(1)(i) de la loi, qui se lit comme suit:

> 3. (1) Une succession est censée comprendre les dispositions de biens suivantes, et le bénéficiaire et le défunt sont réputés le "successeur" et le "prédécesseur" respectivement, à l'égard de ces biens.
>
> (i) les biens dont le mourant était habile à disposer au moment de son décès;

L'appelant prétend que cette disposition de la loi n'a pas d'application dans la présente cause parce que l'une des clauses du testament de dame Amanda St-Pierre enlève à son légataire universel le droit de disposer par testament des biens qu'elle lui a légués, s'il n'en a pas disposé entre vifs. Par conséquent ces biens devront, au décès de son époux, Israël Meunier, appartenir aux personnes indiquées par la testatrice. Dans ce cas, les personnes ainsi désignées dans son testament reçoivent leurs legs directement de la testatrice, et non de son époux, et aucuns droits successoraux ne sont exigibles sur la transmission de ces biens, ces droits ayant été acquittés après le décès de la testatrice.

Il s'agit donc de déterminer si oui ou non Israël Meunier était au moment de son décès habile à disposer des biens à lui légués par son épouse. Dans l'affirmative, les droits sont exigibles; dans la négative, les droits successoraux perçus sur la succession de son épouse rencontreraient les exigences de la Loi fédérale sur les droits successoraux.

Pour déterminer si une personne est habile à disposer de biens, il faut référer à l'article 4 (1) de la loi, qui se lit comme suit:

4. (1) Une personne est réputée habile à disposer de biens si elle possède un droit ou un intérêt dans ceux-ci ou tel pouvoir général qui, si elle était *sui juris*, lui permettrait de les aliéner et l'expression "pouvoir général" comprend toute faculté ou autorisation permettant au donataire ou autre détenteur de ces biens de les distribuer ou d'en disposer selon qu'il le juge opportun, qu'elle puisse s'exercer par un acte entre vif ou par testament, ou les deux, mais à l'exclusion de tout pouvoir susceptible d'être exercé à titre fiduciaire en vertu d'une disposition qu'il n'a pas faite lui-même, ou susceptible d'être exercé en qualité de créancier hypothécaire.

En 1952 le paragraphe (4) de l'article 3 a été abrogé et remplacé par le suivant, S.R.C., 1952, article 2 (3), c. 317, savoir:

3. (4) Lorsqu'une personne décédée avait lors du décès un pouvoir général de désignation concernant des biens ou de disposition de biens, il est censé exister une succession à l'égard de ces biens, et la personne y ayant droit et le *de cujus* sont respectivement réputés le "successeur" et le "prédécesseur" à l'égard des biens.

Ces dispositions de la Loi fédérale sur les droits successoraux sont-elles applicables aux biens d'abord légués par Amanda St-Pierre à son époux Israël Meunier et ensuite légués par ce dernier à son fils Rodolphe Meunier et à l'épouse de ce dernier?

Les termes du testament de l'épouse d'Israël Meunier sont clairs et ne prêtent à aucune ambiguïté:

"J'institue Israël Meunier mon légataire universel, à qui je donne et lègue tous mes biens, meubles et immeubles, . . . le produit des polices d'assurances . . . Mon légataire universel aura la propriété entière de tous mes biens . . . Il a le pouvoir de les vendre, les échanger, hypothéquer, ou autrement, les aliéner, malgré les réserves qui suivent: s'il n'en a pas disposé entre vifs ou s'il ne les a pas recueillis . . ." Et enfin: "Pour qu'aucun doute n'existe sur mes réelles intentions, je veux et entends que mon dit époux dispose des mes biens, comme il l'entendra, ne devant compte à personne."

Il me semble que cette dernière clause fait disparaître tout doute, si doute il pouvait y avoir, sur l'intention de la testatrice de donner à son légataire universel un pouvoir général de disposition des biens légués. Ce pouvoir n'était pas limité à la disposition des biens par acte entre vifs: "Je veux et entends que mon époux dispose de mes biens comme il l'entendra, . . ."

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Israël Meunier a accepté la succession de son épouse et suivant les termes du testament il avait la propriété entière des biens. Il a recueilli ces biens, n'en a pas disposé entre vifs, mais le 28 mai 1952 il les a légués, par testament, à son fils et à l'épouse de ce dernier, qu'il a nommés ses légataires universels et exécuteurs testamentaires.

L'appelant a soumis que le codicille de dame Amanda St-Pierre avait pour effet de transmettre éventuellement, mais directement, ses biens à son fils, et, au cas de prédécès de ce dernier, à son épouse en usufruit et aux enfants de ceux-ci en nue propriété. Je ne crois pas que cette interprétation soit conforme aux termes et du testament et du codicille. Le seul changement apporté par le codicille a été (sujet aux autres clauses du testament) d'ajouter l'épouse de son fils, au cas de prédécès, comme légataire des biens en usufruit, sa vie durant, et les enfants comme légataires de la nue propriété. Toutes les autres clauses du testament qui ont rapport au présent litige sont ratifiées.

Maintenant, le testateur Israël Meunier était-il habile à disposer des biens hérités de son épouse, en vertu des dispositions de l'article 4(1) de la loi, lequel stipule quand une personne est censée habile à disposer de biens?

Dans cette cause, il s'agit de déterminer si les faits établis devant la Cour sont conformes aux termes de l'article ci-dessus et permettent de conclure que le testateur était habile à disposer des biens à lui légués par son épouse. Dans l'affirmative, les droits doivent être cotisés, prélevés et payés en conformité des dispositions de l'article 6(1)(*a*) de la loi.

Suivant la loi, une personne est habile à disposer des biens dans lesquels elle possède un droit ou un intérêt. Le testament d'Amanda St-Pierre donne la propriété entière de tous les biens qu'elle lègue à son époux Israël Meunier; il a donc un droit de propriété dans les dits biens. L'article continue: "si cette personne a un pouvoir général qui, si elle était *sui juris*, lui permettrait de les aliéner." Le testament dit que le légataire aura le pouvoir de les vendre, les échanger, les hypothéquer ou autrement les aliéner, malgré *certaines* réserves. Le pouvoir général susmentionné comprend, selon la loi, toute faculté ou autorisation permettant au détenteur de ces biens de les distribuer ou d'en disposer selon qu'il le juge opportun. La testatrice veut que son

époux dispose de ses biens comme il l'entendra, "ne devant compte à personne". La disposition des biens *selon qu'il le juge opportun* peut s'exercer soit par acte entre vifs, soit par testament, ou des deux façons à la fois. Les termes ". . . dispose de mes biens comme il l'entendra" n'imposent pas une disposition spécifiée ou limitée des biens: elle peut se faire soit par acte entre vifs, soit par testament, ou des deux manières à la fois.

Je suis d'opinion qu'un testateur qui lègue tous ses biens en entière propriété, avec pouvoir de les vendre, les échanger, les hypothéquer, ou autrement aliéner, malgré certaines réserves, et qui veut que son légataire puisse disposer de ces biens comme il l'entendra, "ne devant compte à personne", rend son légataire habile à disposer de ses biens suivant les dispositions de l'article 4(1) de la Loi fédérale sur les droits successoraux.

Il s'ensuit qu'une personne qui avait à son décès le pouvoir général de disposer des biens à elle légués constitue une succession à l'égard de ces biens, et la personne y ayant droit et le *de cujus* sont respectivement réputés le "successeur" et le "prédécesseur" à l'égard des biens suivant les dispositions de l'article 3(4) de la loi.

Je crois qu'il est immatériel que la disposition des biens résulte d'un acte entre vifs ou d'un testament. Le seul fait d'avoir le pouvoir de disposer de ces biens est censé constituer une succession, et les biens compris dans cette succession sont sujets aux dispositions de l'article 6(1)(*a*) de la loi (voir *Montreal Trust Company (Emily Rhoda Bathgate Estate) v. The Minister of National Revenue*)[1].

A l'argument les parties m'ont cité des décisions, dont les unes antérieures et les autres postérieures à l'abrogation et au remplacement de l'article 3(4) de la loi par le chapitre 317, S.R.C., 1952. Dans la cause de *Royal Trust Company (Walter Chipman) v. Le Ministre du Revenu National*[2], le cas était régi par l'article 3(4) tel qu'il existait avant le mois de novembre 1952. Le juge Cameron a décidé comme suit (p. 355):

> 2. . . . If mere "competency to dispose" resulted in a "succession" without an actual *disposition* by the deceased, there would have been no necessity for enacting s. 3(4). Here, Dr. Chipman made no disposition whatever of the principal of the residue of Mrs. Chipman's estate. Therefore, there was no "succession" in respect to that residue under s. 3(1)(i) so far as Dr. Chipman's estate is concerned.

[1] [1955] Ex. C.R. 312. [2] [1954] Ex. C.R. 354.

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Les faits dans cette cause diffèrent de ceux établis dans la présente instance et l'article sur lequel l'honorable juge Cameron de cette Cour base sa décision a été abrogé et remplacé. Cet article ne peut être appliqué ici, le testateur étant décédé après la mise en vigueur du nouvel article 3(4).

Les décisions de cette Cour et de la Cour suprême du Canada dans la cause de *Montreal Trust Co. (Emily Rhoda Bathgate Estate) v. The Minister of National Revenue*[1] sont basées sur les dispositions de la loi applicable au présent litige. Les faits sont les suivants:

> By his will one Bathgate left his estate to his trustees to pay to his wife during her lifetime the net income thereof and "to pay to my wife the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". Upon the death of the wife the residuary estate was to be divided equally between his two children. Mrs. Bathgate died in 1953. In assessing the value of the succession arising on her death the Minister included the amount then comprising the residue of Mr. Bathgate's estate on the ground that under his will his widow had at the time of her death a general power to appoint or dispose of property within the meaning of s. 3(4) of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89 as amended.
>
> *Held:* That although the power held by Mrs. Bathgate was exercisable only in favour of herself and not in favour of such person or persons as she pleased the will of her husband conferred on her a general power of appointment in respect of the residue of his estate. *Re Richards, Uglow v. Richards* [1902] L.R., 1 Ch. D. 76; *Re Ryder, Burton v. Kearsley* [1914] L.R., 1 Ch. D. 865; and the opinions of Rinfret C.J. and Locke J. dissenting in *Wanklyn v. Minister of National Revenue* [1953] 2 S.C.R. 58 at page 60 and following, referred to and followed.

La cause a été portée en appel devant la Cour suprême; celle-ci a rejeté l'appel. Le jugé se lit en partie comme suit:

> *Held:* The appeal should be dismissed. *Per* Kerwin C.J. and Taschereau and Fauteux JJ.: The wife was "competent to dispose" of the residue of her husband's estate within s. 3(1)(i) of the Act, because she had a general power to dispose of it, since "general power" includes under s. 4(1) of the Act "every power or authority enabling the donee . . . to appoint or dispose of the property as he thinks fit". By virtue of s. 3(4) there was deemed to be a succession when a deceased held such a power. (*In re Penrose*, [1933] Ch. 793, referred to). *Per* Rand J.: When a donee can require the whole of the residue to be paid to him and thereupon dispose of it as he sees fit, he has power or authority to dispose of the property as he thinks fit within the meaning of s. 4(1) of the Act.

Cete dernière décision, rendue par la Cour de l'Échiquier et la Cour suprême du Canada, est la plus récente que je connaisse traitant de l'interprétation des articles 3(1)(i), 4(1) et 3(4) de la Loi fédérale sur les successions.

[1] [1955] Ex. C.R. 312 et seq.; [1956] S.C.R. 702 et seq.

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Fournier J.

Dans cette cause les exécuteurs testamentaires étaient autorisés à payer à madame Bathgate toutes ou certaines parties des biens de la succession, selon sa demande ou son désir. La Cour suprême a décidé que lorsqu'un légataire pouvait obtenir pour lui-même la propriété entière des biens légués à son décès, qu'il en ait disposé ou non, ses biens étaient transmis à ses héritiers.

Dans la cause actuelle, la testatrice lègue tous ses biens en entière propriété à son époux, avec pouvoir d'en disposer malgré certaines réserves au cas de non disposition entre vifs.

Relativement à la cotisation et au prélèvement de droits successoraux, la Cour suprême a décidé que le fait d'avoir un pouvoir général de distribution et d'attribution créait entre le *de cujus* et ceux qui avaient droit à ces biens la relation de prédécesseur et de successeur et que les droits ainsi légués sont soumis aux dispositions de l'article 6(1)(*a*).

Je crois que la Cour est liée par la décision de la Cour suprême dans la cause de Bathgate.

Pour ces raisons la Cour rejette l'appel avec frais.

Jugement en conséquence.

1958

Feb. 7

Feb. 19

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

GARTLAND STEAMSHIP COMPANY AND ALBERT P. LABLANC } DEFENDANTS.

Practice—Judgment—Motion for leave to present further argument after judgment entered—Jurisdiction of trial judge—Motion dismissed.

Held: That after a judgment has been pronounced and entered the Court is powerless to entertain a motion to hear further argument on a matter of law which was considered in the judgment.

MOTION for leave to present further argument after judgment.

The motion was heard before the Honourable Mr. Justice Cameron in Chambers.

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C. F. H. Carson, Q.C. and *G. B. S. Southey* for the motion.

F. O. Gerity and *P. B. C. Pepper contra.*

CAMERON J. now (February 19, 1958) delivered the following judgment:

Judgment was pronounced in this case on January 25, 1958, and on that date, in compliance with the requirements of s. 81 of the *Exchequer Court Act*, copies of the written Reasons for Judgment were filed in the Court's Registry. On the same date, the following entry was made in the Court's Docket Book:

JUDGMENT FOR PLAINTIFF IN THE SUM OF $367,823.49 AND COSTS BUT BY REASON OF LIMITATION OF LIABILITY TO WHICH THE DEFENDANT, GARTLAND STEAMSHIP COMPANY, IS ENTITLED, ITS LIABILITY FOR DAMAGES IS LIMITED TO $184,383.50.

On February 7 I heard a motion by counsel for the Crown "for leave to present further argument on the issue as to limitation of liability in the light of the decision of the Privy Council in *Nisbett Shipping Co. Ltd. v. Reginam*[1]". In my reasons for judgment I referred to that decision which was pronounced after the conclusion of the trial in the present case.

Mr. Carson, counsel for the Crown, submits that as he had no opportunity at the trial of discussing the applicability of that decision to the question of limitation of liability, he should now be allowed to do so. While the matter now before me is one for leave to present further argument, and consequently nothing was said directly as to the applicability or otherwise of the *Nisbett Shipping* case (*supra*) to the present one, I think I may assume that if leave were granted, a submission would be made that the judgment of the Judicial Committee of the Privy Council is open to an interpretation other than that made by me, or that it has here no application whatever; and that consequently the judgment should be varied or amended.

Mr. Gerity, counsel for the defendants, opposed the application on the ground that the Court is without jurisdiction to grant leave to present further argument. The submission is that when a judgment has been entered, the

[1] [1955] 3 All E.R. 161.

Judge pronouncing the judgment is *functus officio*; the entry in the Court's Docket Book referred to above, it is said, is, in the circumstances, an entry of the judgment.

Mr. Carson, however, submits that the entry in the Court's Docket Book does not constitute an entry of the judgment; that the judgment is not "entered" until the formal order containing the minutes of judgment has been brought in by the parties, settled and then entered. Until the judgment has been so entered, the Court, it is said, has power to vary its own orders. Reference is made to the cases set out at p. 1333 of the *Ontario Judicature Act* (Holmsted and Langton, 5th Ed.,); to the recent decision of the Court of Appeal in England in *Harrison v. Harrison*[1], and to Halsbury, 2nd Ed., Vol. 19, para. 560, where it is stated:

> Until a judgment or order has been entered or drawn up there is inherent in every Court the power to vary its own orders so as to carry out what was intended and to render the language free from doubt, or to withdraw the order so that the decision may be reconsidered.

The more limited powers of correction after the judgment or order has been entered or drawn up are set out in the following paragraph 561. Counsel for the Crown does not suggest that the present application falls within any of such limited powers and it is clear that it does not. There it is stated: "But it (i.e., the power of correction) does not apply where the judgment or order correctly represents what the Court intended and where the Court itself was wrong, nor enable one form of judgment to be substituted for another."

The first question for determination, therefore, is whether the entry in the Court's Docket Book on January 25 was "an entry of the judgment". In my opinion it was. The duty of a Judge to direct that judgment be entered and the authority of that direction are stated in para. 540 of vol. 19, Halsbury, 2nd Ed., as follows:

> It is the duty of the judge at or after a trial to direct judgment to be entered as he thinks right; and his direction that any judgment be entered for any party absolutely is a sufficient authority to the proper officer to enter judgment accordingly.

When I pronounced judgment on January 25 last, the reasons for judgment were followed by the usual concluding paragraph stating in brief form the judgment of the Court

[1] [1955] Ch. D. 260.

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and by the words "Judgment Accordingly". The reported cases of this Court show that for over sixty years, when final judgment has been pronounced in this Court, it has been the invariable practice to conclude the pronouncement of the judgment in that manner. I am informed by the officials in the Registry that it has also been the practice in that office to treat such a final judgment as a direction to enter judgment in accordance with the findings of the trial Judge and then to enter the judgment in the Court's Docket Book as of the day when the judgment was pronounced. That was precisely what was done in the present case.

It is to be noted, also, that when final judgments are pronounced in this Court, the direction to enter judgment in the manner I have described is the only occasion on which there is an opportunity for the trial Judge to direct the entry of the judgment. In such cases, no motion for judgment is required and unless there should be some difficulty in settling the formal minutes of judgment before the Registrar or some matter has been reserved, the proceedings are at an end so far as the trial Judge is concerned, subject always, however, to the inherent power of the Court to correct clerical mistakes in the judgment or errors arising therein from any accidental slip or omission.

The precise point has been before the Court on several occasions and, with one possible exception (to which I shall refer later), all the reported cases support the conclusion at which I have arrived.

In *The General Engineering Co. of Ontario Ltd. v. The Dominion Cotton Mills Co. Ltd., et al.*[1], Burbidge J. considered and rejected a motion by the defendants to be allowed to file certain affidavits in support of their case in respect of the matter upon which evidence had been given at the trial by both sides. The motion was made after the trial had been completed, but before judgment was pronounced. At p. 307 he said:

> I think, however, that the application, made as it is, after the taking of the evidence has been closed and the case argued, is made too late. If I should re-open the case to permit the defendants to give evidence of this kind, I could not well refuse a like indulgence to the plaintiffs. Such a practice would, I think, be found to be very inconvenient and undesirable.

[1] (1899) 6 Can. Ex. C.R. 306.

In the same case, he considered and distinguished two cases to which he had been referred. In *Humphrey v. The Queen*[1] there had been a preliminary judgment and a reference for assessment of damages and accordingly the case would again come before the Court for the pronouncement of the final judgment. In *De Kuyper v. Van Dulken*[2], while the motion to re-open was allowed, it was only for the purpose of taking evidence on a point upon which no evidence had been given and in respect of which "it was left optional to both parties to produce evidence".

In *The King v. The Globe Indemnity Co. of Canada et al.*[3], the headnote is as follows:

Where the Court in pronouncing judgment has dealt with all the questions of law and fact in issue between the parties, including the right of a defendant to bring in third parties to respond any judgment which might be entered against such defendant, the Court will refuse a motion to vary the judgment by finding, contrary to the actual finding of the trial judge, that the Court had jurisdiction in the third party proceeding; or, in the alternative (thereby raising a new point of law after judgment) that the judgment be varied by finding that the Court or such trial judge had no jurisdiction under the Canada Grain Act, and amendments, to grant the relief sought by the Crown in the information.

In refusing the motion, the Court held that in so far as the motion savoured of an appeal it was irregular; and, on the other hand, that if it were to be treated as a new proceeding between the parties the subject-matter of the motion was *res judicata*.

In that case Audette J. said at p. 217:

After hearing counsel for all parties, suffice it to say that by and under my judgment of the 12th May, 1921, all the issues and questions raised by the written pleadings, by the evidence and by the argument of counsel for all parties, inclusive of the contract resulting from the bond given by the Globe Indemnity Company of Canada, have been duly considered and passed upon, and such issues or questions have now become *res judicata*. It is axiomatic that there must be finality in litigation before the courts; and that a trial judge ought not to sit on appeal from his own judgment. In *Charles Bright & Co. v. Sellar*, [1904] 1 K.B. 6 at p. 11 Cozens-Hardy L.J. said: "Since the Judicature Act no judge of the High Court has jurisdiction to re-hear, such jurisdiction being essentially appellate." If the motion here is to be treated as tantamount to a substantive and new proceeding then clearly I cannot in such proceeding vary or add to a judgment already given in another case.

[1] (1891) 2 Can. Ex. C.R. 386. [2] (1892) 3 Can. Ex. C.R. 88.
[3] (1921) 21 Ex. C.R. 215.

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In *Lavissiere v. The King*[1], Maclean J., the late President of this Court, considered and rejected a motion for a new trial and for permission to adduce new evidence. In that case it was

Held that when in any action or proceeding before this Court final judgment has been pronounced, an application for new trial cannot be made to a Judge of the Court but should be made to the Court to which an appeal lies from the judgment of this Court.

2. That a final judgment of this Court becomes effective at and from the day on which such judgment is pronounced.

At p. 232 he said:

There were certain English cases cited by counsel for the Claimant to show that if the old rule enabling the trial judge in this Court to order a new trial was still in force the motion could have been entertained because my judgment, though pronounced, had not been entered by the Registrar. That is an entirely technical point which rests upon a difference in the procedure in the English Courts and this Court with regard to the moment when the judgment becomes operative. I am inclined to think that under the provisions of section 81 of the Exchequer Court Act, R.S., 1927, c. 34 and of Rule 174 of the present practice, a final judgment in this Court becomes effective at and from the day on which such judgment is pronounced.

It is of particular importance to note that in that case the late President held that a final judgment of this Court becomes effective at and from the day on which it is pronounced, even though it had not been entered by the Registrar. I have examined the Court's Docket Book in that case and found that there was an entry there on the same date as the original judgment was pronounced, such entry being of the same nature as in the instant case. That book shows that no formal order embodying the terms of the judgment was ever applied for or entered and I think that the statement of Maclean J.—"because my judgment, though pronounced, had not been entered by the Registrar" (*supra*)—must refer to that fact.

In *Merco Nordstrom Valve Co. et al. v. Comer*[2], Maclean J. considered and rejected a motion by the plaintiff that the judgment pronounced be reconsidered on the ground that the reasons for judgment were based on a misunderstanding of the evidence; he held that the Court is powerless to reconsider a judgment after the date of its pronouncement and its concurrent entry. On the motion now before me, counsel for the defendants filed a certificate of the Registrar which clearly indicates that

[1] [1931] Ex. C.R. 230. [2] [1942] Ex. C.R. 156.

in the *Merco Nordstrom Valve Co.* case, the "concurrent entry" referred to by Maclean J. was that made by the Registrar in the Court's Docket Book on the same date as the pronouncement of the judgment (an entry similar to that made in the instant case) and not that entry made months after the motion was heard and following the settlement of the formal minutes of judgment by the party.

At p. 158, the late President said:

I was referred to several English and Canadian cases which appear to have decided that until a judgment pronounced has been entered, a judge may reconsider his decision and may withdraw or vary the same. Burbidge J., in the case of *Copeland-Chatterson v. Paquette* (1906) 10 Ex. C.R. 425, reconsidered a judgment pronounced by him in a patent case on a motion made on behalf of the plaintiff to vary the same on certain stated grounds—which in the end he refused—but I am not inclined to think that under the practice of this Court he was free to do so, except possibly in the case of clerical mistakes or some such other slight error. In this Court the practice is to enter judgment concurrently with the pronouncement of any judgment by the Court. Rule 174 states that where any judgment is pronounced by the Court or a Judge in Court, "entry of the judgment shall be dated as of the day when such judgment is pronounced." Here, when judgment was pronounced by the Court, judgment was the same day entered in a certain book of record, in the words "judgment dismissing the action with costs", and the time for the entry of appeal runs from the date when the judgment was given. It seems to me, therefore, that when a judgment is pronounced and entered that is the end of the matter so far as this Court is concerned. If I am right in my interpretation of the Rules of this Court and its practice, then it follows, I think, that I am powerless to entertain a motion to reconsider and vary my judgment, in the manner and to the extent here proposed. And if this view is in conflict with that of Burbidge J., in the case mentioned, then it is desirable that the point be settled by a pronouncement of the Supreme Court of Canada thereon. In fact this point has for some time been a debatable one with practitioners before this Court. Perhaps I should mention that Rule 172 provides that the Registrar shall settle the minutes of any judgment or order pronounced by the Court, but that does not, I think, affect the view I have just expressed, namely, that there was an entry of the judgment pronounced in this cause and that I am now powerless to reconsider the same in the manner which the motion suggests.

I have looked at the report of the *Copeland-Chatterson* case referred to above. So far as I am aware, it is the only reported case in which the Court has allowed a motion to reconsider the terms of a final judgment. There is nothing in the judgment as reported to suggest that the question of the Court's jurisdiction to hear such a motion was raised or considered. It seems to have been assumed that the

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Court had such jurisdiction, possibly by reason of the then Rule 174 which (as set out in Audette's *Practice of the Exchequer Court,* 1910, 2nd Ed., at p. 471) was as follows:

> *Former Rule 174.* Upon the trial of an action the Judge may at, or after, such trial, direct that judgment be entered for any or either party, as he is by law entitled to upon the findings, and either with or without leave to any party to move, to set aside, or vary the same, or to enter any other judgment upon such terms, if any, as he shall think fit to impose, or he may direct judgment not to be entered then, and leave any party to move for judgment. No judgment shall be entered after a trial, without the order of the Court or a Judge.

For these reasons, I am of the opinion that the judgment pronounced on January 25, 1958, was validly entered on that date and that consequently I have now no power to entertain a motion such as the present one in which I am invited to hear further argument on a matter of law which was considered in my judgment.

But even if I had a discretion in the matter, I would not have exercised it in this case inasmuch as my opinion as to the applicability of the limitation of liability sections of the *Canada Shipping Act* was arrived at by a consideration of the Act itself, and my decision on this point would have been the same without the support—as I considered it to be—of the judgment of the Privy Council in the *Nisbett Shipping* case (*supra*).

Accordingly, the application will be dismissed. The defendants are entitled to be paid their costs after taxation.

Order accordingly.

BETWEEN:

1958

Jan. 28, 31
Feb. 3

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

Feb. 3

AND

KIRBY MAURICE COMPANY, LIMITED ..... RESPONDENT.

Revenue—Income Tax—The Income Tax Act 1948, S. of C. 1948, c. 52, s. 20, s-s. 4(a), s. 139(5), Regulation 1100 s-s. (1) para. (c) and class 14—Franchise granted for indefinite period not within class 14 of Regulation 1100—Transaction between vendor and purchaser not one at arm's length—Respondent not entitled to any capital cost allowance.

One Maurice in 1951 carried on business as sole proprietor of the Kirby Company of Toronto engaged in the sale of vacuum cleaners and parts thereof. On February 20th, 1951 the Kirby company entered into an agreement with Gelling Industries, Ltd. manufacturers of vacuum cleaners and parts thereof by which the latter company agreed to sell and the Kirby Company agreed to purchase such goods. By clause two of the agreement the Gelling Company granted to the Kirby Company the exclusive right to sell or otherwise market the Kirby Sanitation system in the County of York in the Province of Ontario, without cost to the Kirby Company of Toronto. At the instance of Maurice on September 29, 1952, letters patent under the *Ontario Companies Act* were granted incorporating Kirby Maurice Co. Ltd., the respondent herein. At a meeting of the directors of this company on October 1, 1952, a by-law of the company was passed authorizing it to enter into an agreement with the Kirby Company of Toronto by which that company sold to the respondent company all its assets including "franchise worth $50,000". The consideration of such sale and purchase was the sum of $105,000 a cheque for which amount was paid by the respondent company to the Kirby Company of Toronto. Maurice purchased shares in the respondent company paying $105,000 for them. Respondent deducted $5,000. from its taxable income for 1953 claiming it as ten per cent of the sum of $50,000. said to have been the cost of the "franchise" to the respondent. This was disallowed upon re-assessment and an appeal to the Income Tax Appeal Board was allowed. The Minister appealed to this Court.

Held: That even if the so-called franchise were in fact a franchise it was not such a one as falls within class 14 referred to in para. c. of Regulation 1100 under the Income Tax Act since the right or franchise granted was for an entirely indefinite period *and not for a limited period* as required by the words of class 14.

2. That the respondent is not entitled to any capital cost allowance in respect of the property, the "franchise", since the transaction between the Kirby Company and the respondent was not one deemed to have been at arms length under s.s. 5 of s. 13 of the Act as Maurice indirectly controlled the respondent company, consequently the

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provisions of s-s. 4(a) of s. 20 of the Act apply and the cost to the taxpayer is deemed to be the capital cost of the property to the original owner, the Kirby Company, and that cost was nothing.

APPEAL from a decision of the Income Tax Appeal Board.

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

Gordon Watson, Q.C. and *J. D.C. Boland* for appellant.

W. D. Lyon for respondent.

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

CAMERON J. now (February 3, 1958) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated November 16, 1956, allowing the respondent's appeal from a re-assessment dated December 21, 1955, made upon it for its taxation year ending September 30, 1953. In computing its taxable income, the respondent had deducted $5,000 as a capital cost allowance in respect of a so-called "franchise" said to be for a term of ten years, the deduction being 10 per cent. of $50,000, said to have been the cost of the "franchise" to the respondent. In the re-assesment, the Minister disallowed the deduction in full, but on appeal to the Income Tax Appeal Board the deduction was allowed.

The problem which I have to consider is mainly one of law, but before referring to the relative provisions of *The Income Tax Act* I shall set out the facts which, in the main, are not in dispute.

The only witness heard at the trial was L. A. Maurice, now the president and the controlling shareholder in the respondent company. In 1951 Mr. Maurice carried on business as the sole proprietor of the Kirby Company of Toronto, and was engaged in the sale of vacuum cleaners and parts thereof. On February 20, 1951, the Kirby Company, by Mr. Maurice, entered into an agreement (Exhibit D) with Gelling Industries, Ltd., of Welland, manufacturers of vacuum cleaners and parts thereof, by which the latter

company agreed to sell and the Kirby Company agreed to purchase such goods. The second clause of that agreement reads:

> Upon and subject to the terms and conditions below stated, the Company hereby grants to the Kirby distributor (i.e., the Kirby Company of Toronto) the exclusive right to sell or otherwise market in the following described territory the Kirby Sanitation System, said territory being as follows: The County of York, in the Province of Ontario.

It is common ground that the "right" or "franchise" so acquired was without cost to the Kirby Company of Toronto. It exercised its rights thereunder until the benefit thereof was assigned to the respondent company under the following circumstances: Maurice decided in September, 1952, that he would thereafter operate as a limited company. Accordingly, at his instance and on his instructions, an application was made for the incorporation of Kirby Maurice Co. Ltd. under the *Ontario Companies Act*, as a private company. Such letters patent (Exhibit A) were granted on September 29, 1952. The capital of the company was divided into 20,000 preference shares of a par value of one dollar each, and 20,000 common shares without nominal or par value. By supplementary letters patent dated November 12, 1952 (Exhibit B), the capital stock of the company was increased by the creation of 80,000 additional and similar preferred shares.

Exhibit C contains the minutes of the meetings of the provisional directors, the directors and shareholders. At a meeting of the directors dated October 1, 1952, there was submitted a draft agreement between L. A. Maurice, carrying on business as the Kirby Company of Toronto, as vendor, and the newly formed company as purchaser, providing for the sale of all assets of the company (i.e., the Kirby Company) including "franchise worth $50,000". By-law 3(A) was then passed authorizing the entering into of the said agreement. Schedule 2 to the minutes of that meeting contains an original of the agreement of purchase and sale. It reads in part as follows:

> 1. The Vendor sells and the Company purchases:
> (c) The moneys, bills, notes and other negotiable instruments, book, and other debts of or owing to the Vendor in the said business and all the Vendor's rights, claims and securities in respect of the said debts, and the benefit of all contracts and engagements to which the Vendor is entitled in connection with the said business; provided further that in relation to the agreement made the

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20th day of February, 1951, between Gelling Industries, Limited, and the Kirby Company of Toronto, covering the exclusive right to sell and distribute the Kirby Sanitation System in the County of York, in the Province of Ontario, the Company shall be entitled to all benefits, rights and privileges for a period of ten years under this agreement and as between the parties hereto shall be regarded and construed as a 10 year franchise.

(*d*) All other property and assets, if any, of the Vendor in connection with the said business.

2. As part of the consideration for the said sale, the Company shall undertake, pay, satisfy, discharge, perform and fulfil all debts, liabilities, contracts and engagements of the Vendor, in connection with the said business, and shall indemnify the Vendor, his heirs, executors and administrators against all actions, proceedings, claims and demands in respect thereof, save and except any liability which the Vendor may have by reason of non-payment of personal income tax.

3. As a further part of the consideration for the said sale the company shall forthwith pay to the Vendor the sum of $105,000 of lawful money of Canada.

4. The said sale shall take effect as from the date hereof, and the Vendor shall from the date hereof be deemed to be carrying on the said business on behalf of the company and shall account to the Company and be indemnified accordingly.

It is in evidence that the respondent company paid the Kirby Company of Toronto the expressed consideration of $105,000 by cheque, and that by-law 3(A) of the directors was ratified at a meeting of the shareholders held on October 1, 1952. The minutes also show that at a meeting of the directors dated November 12, 1952 (the same date as the supplementary letters patent were issued), L. A. Maurice had subscribed for 87,000 preference shares at one dollar per share, which he paid for, and which were allotted to him. At the same meeting Maurice subscribed for 17,998 common shares. The Board fixed the aggregate consideration therefor at $17,998 and authorized the issue of such common shares upon payment of that amount. The stock ledger sheets show that they were paid for and issued on the same date. Mr. Maurice also is shown in these ledger sheets to have received two additional common shares on November 13, 1952. It will be seen, therefore, that his total purchase of preferred and common shares was at a cost of $105,000, precisely the same amount as had been paid him by the company for the assets of the Kirby Company of Toronto.

Although the Minister is here the appellant, the onus of proving that the assessment is erroneous, either on the facts or the law, lies on the taxpayer. Reference may be made to *M. N. R. v. Simpsons Ltd.*[1].

By s-s. (1)(*a*) of s. 11, a taxpayer is allowed, in computing income, to deduct "such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation".

For the respondent it is submitted that the deduction here claimed is allowed under para. (*c*) of s-s. (1) of Regulation 1100, which reads as follows:

1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(*c*) such amount as he may claim in respect of property of Class 14 in Schedule B not exceeding the lesser of

(i) the aggregate of the amounts for the year obtained by apportioning the capital cost to him of each property over the life of the property remaining at the time that the cost was incurred; or

(ii) the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) for property of the class.

And then Class 14 reads:

14. Property that is a patent, franchise, concession or license for a limited period in respect of property . . .

It is not suggested that the property in respect of which the deduction is claimed falls within any other regulation. Unless, therefore, it is within Class 14, the appeal must be allowed.

It is said that the agreement with Gelling Industries, as assigned to the respondent company, was a franchise for a limited period, namely ten years, and that as its cost to the respondent was $50,000, a capital cost allowance of 10 per cent. thereof may be written off annually.

For the Minister it is submitted (1) that the property in respect of which the deduction is claimed is neither a franchise, concession or license, and quite clearly it is not a patent; (2) that even if it be a franchise, concession or license, it is not *for a limited period;* (3) that in any event, as the sale or assignment of the exclusive right to sell the

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

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Kirby Sanitation System in the county of York by Maurice to the respondent company was not a transaction at arm's length, the rule provided in clause (*a*) of s-s. (2) of s. 20 is applicable.

In view of the conclusions which I have reached on the other points, I do not find it necessary to reach any concluded opinion as to whether the property in question was or was not a franchise, concession or license. For the purpose of this case, I am prepared to assume—but without deciding—that it was a franchise.

But not all franchises are within Class 14; only those that are "for a limited period" are within the class. The intention of Parliament in using these words "for a limited period" seems to me to be quite clear. Unless the duration of the franchise is definitely ascertained and limited there is no yardstick by which the value of the franchise can be ascertained. Further, it would be impossible to ascertain the life of the property or franchise, a matter which must be known in order to make the computation required in para. (i) of s-s. (*c*) of s. 1 of Regulation 1100, namely:

> By apportioning the capital cost to him of each property over the life of the property remaining at the time the cost was incurred.

The "franchise" came into existence by reason of the agreement of February 20, 1951, between Gelling Industries, Ltd. and the Kirby Company of Toronto. Nothing is stated therein as to the period for which the right of distribution is granted. Not only is it silent on that matter but specific provision is made in s. 20 by which the entire agreement may be terminated by either party by giving thirty days' notice to the other party, and apparently with or without cause assigned. In my view the right or franchise thereby acquired was for an entirely indefinite period, *and not for a limited period* as required by the words of Class 14. It follows, of course, that had the right been retained by the Kirby Company it could not have claimed any capital cost allowance in respect thereof, both on the ground that it was not for a limited period, and also because it had paid nothing for the right or franchise.

It is submitted, however, that by the terms of the agreement dated October 1, 1952, between the Kirby Company and the respondent, the original franchise, which was for

an indefinite and unlimited period, became, in the hands of the respondent, a franchise for a limited period because of the words:

> The Company shall be entitled to all benefits, rights and privileges for a period of ten years under this agreement, and as between the parties hereto shall be regarded and construed as a ten year franchise.

In my view, this submission is untenable. I am quite unable to see how a franchise for an indefinite and unlimited term can by the act of the holder of the franchise only, become one for a period of ten years, or for any stated period of years. It is of significance to note that while the agreement with Gelling Industries provides in s. 19 that the contract is not assignable or transferable without its prior written consent, there is no evidence that such consent was ever given to the agreement of sale and purchase dated October 1, 1952, or to any of its terms. In my opinion, the Kirby Company could not confer on or assign to the respondent something which it did not possess. The rights acquired by the respondent could be no more than those given by Gelling Industries, and that company, under its agreement, could not only cancel the agreement by thirty days' notice, but by Clause 5 could also change the territory allotted to the distributor from time to time and at any time it desired by merely giving notice thereof.

In my opinion, the property, right or franchise was that created by the original agreement of February 20, 1951, and it was both before and after the assignment to the respondent not a right or franchise for a limited period.

I have also reached the conclusion that the Minister's appeal must be allowed for another reason, namely, that the transaction between the Kirby Company and the respondent was not one at arm's length. Subsection (4)(*a*) of s. 20 of the Act is as follows:

> (4) Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arm's length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11;
>
> (*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

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Then by s. 139, s-s. (5), it is provided:

> (5) For the purposes of this Act a corporation and a person or one of several persons by whom it is directly or indirectly controlled, shall, without extending the meaning of the expression "to deal with each other at arm's length" be deemed not to deal with each other at arm's length.

Mr. Watson, counsel for the respondent, submits that on the evidence to which I shall now refer the transaction by which the respondent acquired the franchise was one not at arm's length, either (a) because the respondent company was indirectly controlled by Maurice, who was also the sole proprietor of the Kirby Company, the Vendor, and that therefore they are deemed not to have dealt with each other at arm's length as provided for in s-s. (5) of s. 139; or (b) because, in the transaction, they were not in fact dealing at arm's length, and therefore the provisions of s-s. (4)(*a*) of s. 20 are applicable.

That s-s. (5) of s. 139 does not purport to define all transactions which are not at arm's length is made clear in the case of *M. N. R. v. Sheldon's Engineering, Ltd.* (1) where Locke J., in delivering the judgment for the Court, said at p. 643:

> The words (i.e., to deal with each other at arm's length) do not appear in the *Income War Tax Act,* though the same subject matter is dealt with in s. 6(1)(n) of that Act. In addition to appearing in ss. 20 and 127, the term is employed in ss. 12(3), 17(1), (2) and (3), 36(4) and 125(3) of *The Income Tax Act.* Section 127(5) does not purport to define the meaning of the expression generally; it merely states certain circumstances in which persons are deemed not to deal with each other at arm's length. I think the language of s. 127(5), though in some respects obscure, is intended to indicate that, in dealings between corporations, the meaning to be assigned to the expression elsewhere in the statute is not confined to that expressed in that section.

The evidence of Maurice satisfies me completely that the transaction by which the franchise came into the hands of the respondent was not one at arm's length. The Act does not define the expression, and it would perhaps be unwise for me to attempt to do so. It is sufficient to state that in my opinion, in a vendor and purchaser matter, an arm's length transaction does not take place when the purchaser is merely carrying out the orders of the vendor, and exercising no independent judgment as to the fairness of the terms of the contract, or seeking to get the best possible terms for himself. That was precisely the situation here.

[1] [1955] S.C.R. 637.

In effect, Maurice was both vendor and purchaser, and while he was not actually a shareholder at the time the agreement of October 1, 1952, was signed, he had in fact full control of the entire operation.

As sole proprietor of the Kirby Company he made the decision to incorporate the respondent company and to transfer his assets to it. He chose its name and fixed the sale price. He employed the solicitors who incorporated the company and were its provisional directors, and later its directors until November 13, 1952, the day following his purchase of the vast majority of the shares, at which date he and his wife and one Sayer, an employee (the latter two each holding a relatively minor number of shares) were appointed directors. On the same date Maurice was appointed president, his wife was appointed a director and secretary-treasurer, and Mr. Sayer became a director and vice-president. On January 18, 1953, Maurice was appointed managing-director.

Mr. Maurice said that he made the decision as to placing a value of $50,000 on the franchise; that when the agreement of October 1 was entered into the three directors were acting entirely on his behalf and carrying out his instructions, and not exercising an independent judgment in the matter. At one point he said he was present at all the meetings held on October 1, but later said that as he was not a shareholder he was not present at the shareholders' meeting which affirmed the directors' by-law. It is apparent, too, that in some way he had control of that meeting as well, for he said that if the price had been questioned his decision would have carried. From these bald admissions it is apparent, therefore, that Maurice made all the decisions, both on behalf of the Kirby Company as vendor and the respondent company as purchaser.

Mr. Lyon, on behalf of the respondent, relies on the *Sheldon Engineering Company* case (*supra*), stressing the fact that when the agreement of October 1 was approved, Maurice was not a shareholder of the respondent company, and that is so according to the records. Therefore, it is said, the control of the company was in the hands of the shareholders who were the three solicitors acting on his

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behalf—his wife, and Sayer, his employee. In view of his admission that he did in fact control their actions, the matter of shareholding in this case becomes of little importance.

The *Sheldon Engineering* case is clearly distinguishable on its facts. The transaction there included the sale of the assets of the old company to the new company, and the question there also was whether the transaction was one at arm's length. It was held that at the time the sale of the depreciable property, in respect of which the capital cost was claimed, was made, the old company was completely controlled by the bank which had made advances and taken certain securities. In the circumstances, it was held that s-s. (2) of s. 20, and s-s. (5) of s. 127 had no application, and the parties were at arm's length within the commonly accepted meaning of that expression. In my view, *Sheldon's* case affords no assistance to the respondent.

My conclusion, therefore, for the reasons stated, must be that on the proven facts Maurice did indirectly control the respondent corporation on October 1, 1952, that therefore they are deemed not to have been at arm's length under s-s. (5) of s. 139.

I am also satisfied that the transaction was between persons not dealing at arm's length and that consequently the provisions of s-s. 4(*a*) of s. 20 apply. It follows, therefore, that the capital cost of the property—the franchise—to the taxpayer is deemed to be the capital cost of the property to the original owner, namely, the Kirby Company. As that cost was nothing, the respondent is not entitled to any capital cost allowance in respect of the property, namely, the "franchise".

For these reasons the appeal of the Minister will be allowed, the decision of the Income Tax Appeal Board set aside, and the re-assessment affirmed. The Minister of National Revenue is entitled to costs of this appeal after taxation.

Judgment accordingly.

BETWEEN:

LELAND PUBLISHING COMPANY LIMITED, ... } APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... } RESPONDENT.

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Revenue—Customs Duty—Encyclopedia, liability to tax—Meaning of books "for the promotion of"—Tariff Board, Appeal from on question of law—The Customs Tariff, R.S.C. 1952, c. 60, Schedule "A", Tariff Items 171, 172—Customs Act, R.S.C. 1952, c. 58, s. 45.

The appellant in 1955 imported into Canada the *New Pictorial Encyclopedia* and the *Universal Standard Encyclopedia*. Both sets of books were classified by the respondent as dutiable under Tariff Item 171 of the *Customs Tariff*, R.S.C. 1952, c. 60. The appellant appealed to the Tariff Board contending that the books should have been admitted duty free under Tariff Item 172: "Books . . . for the promotion of religion, medicine and surgery, the fine arts, law, science, technical training and the study of languages, not including dictionaries". The Board dismissed the appeal. It found that the encyclopedias were essentially what they purported to be: general works of reference. They were not, and did not purport to be, more than incidentally related to any one of the specialized fields of learning mentioned in the particular item or to any combination of these fields. In particular they were not designed principally or particularly "for the promotion" of the fields of learning mentioned in the item.

The appellant appealed, pursuant to leave, upon the question—"Did the Tariff Board err as a matter of law in deciding that the *New Pictorial Encyclopedia* and the *Universal Standard Encyclopedia* were not properly classifiable under *Customs Tariff* Item 172?". The appellant's submission was that the words of item 172 were to be construed in their natural and normal sense and that in determining that the books were not designed principally or particularly for the promotion of the fields of learning mentioned in the item the Board had applied a test not warranted by the Statute.

Held: That in determining whether or not a book is to be classified under item 172 as a book for the promotion of one or more of the fields of learning mentioned in the item, the fact that a book may promote or tend to promote in one way or another one or more of the fields is inconclusive, and that where a book is only incidentally concerned with one or more of such fields, it is not a book for the promotion of such fields within the meaning of the item.

2. That although the declaration of the Board did not include an express statement of its interpretation of item 172, it was to be concluded from its finding and judgment that it was not misdirected by an erroneous interpretation of the item.

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3. That if it could be said there was some error in the Board's interpretation, it followed as a matter of law from the finding that the books in question were not more than incidentally related to any one or more of the fields of learning mentioned in the item, that they could not be regarded as books *for the promotion of* such fields within the meaning of the item and therefore could not be properly classified under it.

APPEAL under the *Customs Act* from a decision of the Tariff Board.

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

J. C. Horwitz, Q.C. for appellant.

R. W. McKimm for respondent.

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

THURLOW J. now (February 26, 1958) delivered the following judgment:

This is an appeal under s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, from a declaration of the Tariff Board made on June 14, 1957 in appeal No. 397. The appeal is taken pursuant to leave, granted by the President of this Court, to appeal upon the question, "Did the Tariff Board err as a matter of law in deciding that the *New Pictorial Encyclopedia* and the *Universal Standard Encyclopedia* imported by Leland Publishing Co. Ltd. were not properly classifiable under Customs Tariff item 172?"

At the time of the importations to which the appeal relates, item 172 designated as free of customs duty, *inter alia*:

books, pamphlets and reports, *for the promotion of* religion, medicine and surgery, the fine arts, law, science, technical training, and the study of languages, not including dictionaries.

The two works mentioned in the question on which the appeal is taken are sets of books containing articles on a wide range of subjects. Each work includes articles dealing with subjects related in one way or another to the several fields of learning or knowledge mentioned in item 172, but neither work is restricted to nor principally concerned with the subject matter of any one or more of such fields.

The *New Pictorial Encyclopedia* is a set of 18 volumes containing short articles, with one or more pictures illustrating the subject of each of such articles. The scope and purpose of this work are described as follows in its Foreword:

It is a *complete* encyclopedia—a ready reference work which should be the *first* book we should turn to in order to get the accurate and adequate first-hand knowledge we seek. Other encyclopedias may add a greatly increased amount of detailed information and should be used when such is required. The thorough exploration of a vast area of knowledge has been included in such encyclopedias for the benefit of the scholar who may be writing a Ph.D. Thesis but the NEW PICTORIAL will even be valuable to scholars for it will point the way to the unraveling of the subject, carefully avoiding the non-essential details which often clutter the pages of so-called "ready-reference" works.

* * * *

When a word is used, a person mentioned, a place referred to, a subject discussed, where do you go to find out about it? Yes, to a person who knows, a library, or an adequate book of reference. You would like to be certain that wherever you go is an authoritative source, an unbiased medium of information, an honest help which can, in as few words as possible, give you the answers. This is the need that the NEW PICTORIAL has been planned to meet.

The *Universal Standard Encyclopedia* is a larger work, containing fewer pictures and purporting to be an abridgment in 25 volumes of a 36-volume work known as *The New Funk & Wagnalls Encyclopedia*. The first paragraph of its Foreword is as follows:

An encyclopedia is meant to be exactly what the ancient roots of the word indicate: the entire circle of education, of human learning. Think, then, how fantastically difficult is the task of compiling a modern, streamlined, truly American encyclopedia—of compressing all the knowledge in all the books of the world into a practical, *usable* number of pages, and of making that vast store of learning understandable to Americans of every condition everywhere. Yet this was our task and here is the result, twenty-five handsomely bound and printed volumes, nearly ten thousand double-columned pages, nearly six million words in more than thirty thousand separate articles.

After reviewing the preparation of the work and the way in which the larger work has been abridged, the Foreword refers to the volumes of the set as follows:

They still comprise as authoritative, accurate, and comprehensive a work as you are likely to need for ready reference. To all this must be added the fact that many articles have undergone still further revision, that all articles are as up to date as the time of printing permits, and that, in quest of the same up-to-dateness, many new articles have been

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added. All in all, we believe you will discover this set to be at least as useful—and usable—as any other encyclopedia you can purchase at any price.

Both the *New Pictorial Encyclopedia* and the *Universal Standard Encyclopedia* are inexpensive sets of books, the former being priced at less than $18 and the latter at less than $25. They are marketed systematically through retail grocery chain stores.

On five occasions in 1955 to which the present appeal relates, books of these sets, on being imported into Canada by the appellant, were classified by the Deputy Minister of National Revenue for Customs and Excise as dutiable under Tariff item 171 of Schedule A of the *Customs Tariff Act* R.S.C. 1952, c. 60. This item provided for

> Books, printed, periodicals and pamphlets, or parts thereof, n. o. p., not to include blank account books, copy books, or books to be written or drawn upon.

From the decision of the Deputy Minister, classifying the books under this item, the appellant appealed to the Tariff Board, contending that these encyclopedias are books *for the promotion of* the fields mentioned in Tariff item 172 and should be classified under that item. The Board, after hearing evidence and argument, unanimously dismissed the appeal and, in so doing, found as follows:

> After examining these works and considering the arguments and evidence presented it is our opinion that these encyclopaedias are essentially what they purport to be: general works of reference. They contain short and readily comprehensible articles designed to inform the general reader on almost any subject in which he may have a general and non-specialized interest. They are designed to help the user to become a generally well-informed person. *They are not,* and do not purport to be, *more than incidentally related to any one of the specialized fields of learning mentioned in the item or to any combination of these fields.* In particular they are not designed *principally or particularly* "for the promotion" of the fields of learning mentioned in the item.

Accordingly, the appeal is dismissed.

The question upon which the appeal to this Court is taken is similar in form to that considered in *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[1]. In that case Kellock J.,

in delivering the unanimous judgment of the Supreme Court of Canada, said at p. 498:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.

The appellant's contention on the hearing of the appeal to this Court raises a question of the first kind mentioned by Kellock J. in the passage above quoted. It was submitted that, in their natural and normal sense, the words of item 172 mean that, if a series of volumes or individual volumes will promote any one or more of the subjects mentioned in the item, such volumes are properly classified under it, that there is no justification for reading into the item any limitation upon this meaning, and that, in determining that the books in question are not designed *principally or particularly* for the promotion of the fields of learning mentioned in item 172, the Tariff Board applied a test which was not warranted by the statute. This is in substance a submission that the Board was not properly instructed in law as to the construction of the statutory item in question.

In my opinion, the words *for the promotion of* in item 172 have no special technical meaning in the context in which they appear but are used in their ordinary sense. I regard the word "promotion" as wide enough to include the promotion of the fields mentioned in the item by the dissemination of present knowledge to greater numbers of people, as well as to the promotion of such fields by stimulating research and further development in them. But I cannot agree with the submission that, in their ordinary sense, the words *for the promotion of* pose no question but that of whether or not the book in question promotes or tends to promote or is capable of promoting one or more of the fields mentioned in the item. If it does so apply, practically any book will fall within its classification, for no matter how small the contribution of any book to promotion of such fields may be, and no matter how much its treatment of subjects pertaining to such fields may be mixed with and outnumbered by subjects pertaining to other fields, it will still meet the test. The statement that a book

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will or will not promote any one or more of the fields mentioned in item 172 or is capable or incapable of promoting any of them is inconclusive on the question whether or not it is a book *for the promotion of* such fields, for I think it is clear that a book may promote to some extent one or more of the fields without falling fairly within the meaning and intention of the expression *for the promotion of* such field or fields. In my opinion, the question whether or not a book is one *for the promotion of* any of the fields mentioned in item 172 is to be resolved by considering not only the question whether or not it in fact promotes or tends to promote or is capable of promoting any of them but by the answer to that question and by the answer to the further question, "Is the subject matter with which the book is principally concerned related to one or more of the fields mentioned or does the book deal with subjects related to such fields only incidentally as part of a larger or different principal subject?" If the book is only incidentally concerned with one or more of the fields or subjects related to them, in my opinion it is not a book *for the promotion of* them within the meaning of the item.

The declaration of the Tariff Board does not include an express statement of its interpretation of item 172, but I think it is apparent from the Board's findings and judgment that the interpretation above set out is the interpretation which the Board in fact applied. If this conclusion is correct, it follows that the Board was not misdirected by an erroneous interpretation of the statutory item. But even if, contrary to this view, it can be said that there was some error in the Board's interpretation of the item, in my opinion it follows, as a matter of law, from the finding that the books in question are not more than incidentally related to any one or more of the fields of learning mentioned in the item, that they cannot be regarded as books *for the promotion of* such fields within the meaning of the item and, therefore, cannot properly be classified under it. This finding by the Board is one of fact, it is

amply supported by the evidence, and no ground has been shown for setting it aside. The answer to the question for determination on this appeal is, accordingly, "No."

The appeal will be dismissed with costs.

Judgment accordingly.

BETWEEN:

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

AND

JOHN THOMAS BURNS ..... RESPONDENT.

Revenue—Income Tax—The Income Tax Act 1948, S. of C. 1948, c. 52, s. 24, s. 129 s-s. 1(a) and s. 85B enacted by S. of C. 1952-1953, c. 40, s. 73—Mortgages payable five years after created are not securities received "wholly, or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt that was then payable"—Amounts received from mortgages expressed in terms of money are to be included in income in the amounts of such money and not the value of the mortgages in terms of money—Allowance by the Minister of National Revenue for setting up reserve within s. 85B (1)(d) of the Act held to be reasonable.

The respondent is the owner of eight second mortgages on real estate which came to him as the result of sales of property on which he had built houses, they representing the balance of the purchased price of the houses. In an amended income tax return for 1953 he showed the total sales of the houses at $55,300 but deducted the sum of $11,125 from income by claiming an item stated to be "less reduction at market value of second mortgages". This was one-half of the face value of the eight second mortgages. In the result he showed a loss of $160.35. This deduction was disallowed in full by the Minister of National Revenue except for allowances made for sale of two mortgages at a loss and for the setting up of a reserve. The Income Tax Appeal Board held that appellant was entitled to value the mortgages at their market value in 1953. The respondent appealed to this Court.

Held: That the second mortgages in question do not fall within the provision of s. 24(1) of the *Income Tax Act* since though undoubtedly securities representing an indebtedness they were clearly not securities received wholly or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt that was then payable; prior to the receipt of the mortgages there was no pre-existing right to receive any portion thereof and the mortgages

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themselves created the original right in the respondent to receive payment; providing for small monthly payments and not finally payable until five years later they could not be said to be then payable at the time they were taken even though the mortgagor had the right to accelerate his payments if he desired to do so.

2. That the mortgages in question clearly fall within the provisions of s. 85B, s-s. (1) of the *Income Tax Act* as enacted by S. of C. 1952-1953, c. 40, s. 73, which makes specific provision for including in the computation of income every amount receivable in respect of properties sold in the course of the business in the year, notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of Part I, does not require him to include any amount receivable in computing his income for a taxation year unless it had been received in the year; the respondent having adopted a method of computation in which accounts receivable were included and which had been accepted by the Department of National Revenue falls within the requirements of s-s. (b) of 85B (1) and is not entitled to the benefit of the exception provided; therefore in computing his income he is required to include the amounts receivable from the second mortgages and since these amounts are expressed in terms of money, it is the amount of such monies that is to be included and not the value in terms of money of the right or thing.

3. That the amount allowed as a reserve by the appellant as provided for by para. (d) of s. 85B (1) of the Act is in the light of all the facts reasonable.

APPEAL from a decision of the Income Tax Appeal Board.

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

W. D. Parker, Q.C. and *T. Z. Boles* for appellant.

M. J. Moriarity for respondent.

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

CAMERON J. now (February 7, 1958) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated December 28, 1956, which allowed in part the respondent's appeal from a re-assessment made upon him for the taxation year 1953.

There is practically no dispute as to the facts. The respondent is a builder residing in Hamilton; he buys lots. erects houses thereon and then sells them. In 1953 he built and sold nine houses, all of which were small five-room,

one-storey cottages without basement, furnace, city water or plumbing fixtures. One was sold for cash. The remaining eight were sold under agreements of sale (Exhibits 1 to 8) at prices ranging from $5,900 to $6,900, in most cases the down payment being $1,200. By these agreements, the purchaser was to arrange and complete a first mortgage "for as large an amount as possible", but for an amount not less than $2,000 or, in some cases, $2,500. The proceeds of these first mortgages were, of course, paid to the respondent. The respondent agreed to take back a second mortgage for the balance of the purchase price, the principal being repayable at a rate of $25 or $30 per month, with the balance payable at the end of five years. Interest was payable semi-annually at 6½ per cent. The purchaser had the right of increasing his payments of principal at any time. When the sales were closed out the respondent received eight second mortgages in amounts varying from $2,700 to $3,000. The two mortgages for $3,000 were sold in December, 1953. for $2,000 each with the assistance of Mr. Biggs, the respondent's auditor.

In his original tax return of 1953, the respondent followed the same practice as he had done since he commenced his business in 1949, and in computing his income, took into account the full selling prices of all houses sold, nothing being said as to the second mortgages and no request being made to consider them as being worth less than their face value. On the basis of that return for 1953, which as in the previous years was on an accrual basis, the tax amounted to $1,229.61, and he was assessed accordingly.

However, in March 1955, he filed an amended return (Exhibit 9) for the year 1953. In the statement of tax attached thereto he showed the total sales of houses at $55,300, but in an item stated to be "Less reduction to market value of second mortgages", deducted $11,125, being one-half of the face value of the eight second mortgages received, and in the result showed a loss of $160.35.

In the re-assessment dated June 10, 1955, the deduction of $11,125 was disallowed in full. However, by the Minister's Notification dated March 6, 1956, following the respondent's Notice of Objections, it is stated:

> The Honourable the Minister of National Revenue having reconsidered the assessment and having considered the facts and reasons set forth in the Notice of Objection hereby agrees to amend the said assess-

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ment to reduce the taxpayer's income by an amount of $2,000 in respect of second mortgages on property situated at East 8th Street and to allow an amount of $2,856.69 as a deduction from income under the provisions of paragraph (b) of subsection (1) of section 85B of the Act and hereby confirms the said assessment in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that the profit on sale of houses has been correctly included in computing the taxpayer's income in accordance with the provisions of paragraph (b) of subsection (1) of section 85B of the Act; that subsection (1) of section 24 of the Act is not applicable as the debt was not "then payable".

The deduction of $2,000 so allowed was in respect of a loss sustained by the respondent when he sold the two second mortgages for $3,000 at a discount of $1,000 each. As stated in the respondent's reply to the Notice of Appeal and admitted at trial, the further deduction of $2,856.69 allowed under s-s. (i)(*d*) of s. 85B of the Act was arrived at by using the following formula:

$$\frac{\$16,250}{\$53,300} \times \$9,369.93 = \$2,856.69$$

The item of $16,250 is the face value of the unsold six mortgages; the item of $53,300 is the total selling price of the eight houses sold in the year and $9,369.93 is the respondent's profit for 1953 as revised substantially by the Minister.

It is to be noted, also, that the respondent arranged for the incorporation of a limited company, John T. Burns & Sons Ltd., in which he holds all the issued stock except for two qualifying shares and of which he has absolute control. That company apparently took over the business assets of the respondent. In Exhibit 20, a letter from the company's auditors to the Department of National Revenue dated February 7, 1956, it is stated that the six remaining mortgages were sold by the respondent to his company at prices representing one-half of their original face value. This statement, however, does not seem to accord with the oral evidence that the sale price was equal to one-half of the principal amount then due, after allowing for all payments previously made thereon. In any event, that transaction by itself, in which the respondent presumably made the final decision both for himself as vendor and for the limited company as purchaser and which was not an arm's length transaction, furnishes no evidence as to the real value of

the mortgages. The respondent thought some of the mortgages had been discharged and that perhaps some allowance had been made to the mortgagors for advancing the payment, but was unable to furnish any details. The auditor, Mr. Biggs, who had the mortgage records only to the end of 1956, stated that all payments of principal and interest required by the mortgages had been regularly met and no evidence was given to indicate that up to the present time there had been any default. All are due before the end of the present year.

The submission on behalf of the respondent on whom the onus lies (see *M. N. R. v. Simpsons Ltd.*[1]) is that under s-s. (1) of s. 24 of *The Income Tax Act*, the respondent is entitled to value the mortgages at their market value in 1953. That submission met with the approval of the Income Tax Appeal Board which, however, was of the opinion that a valuation of 50 per cent. of the face value of the mortgages was too low and referred the matter back to the Minister to value them as at the time they were received and in the manner laid down in *Himmen v. M. N. R.*[2].

For the Minister, it is submitted that the mortgages do not fall within s-s. (1) of s. 24, but are within s. 85B enacted by Statutes of Canada, 1952-1953, c. 40, s. 73, and made applicable to the 1953 and subsequent taxation years. Section 24 is as follows:

24. (1) where a person has received a security or other right or a certificate of indebtedness or other evidence of indebtedness wholly or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt that was then payable and the amount of which would be included in computing his income if it had been paid, the value of the security, right or indebtedness or the applicable portion thereof shall, notwithstanding the form or legal effect of the transaction, be included in computing his income for the taxation year in which it was received; and a payment in redemption of the security, satisfaction of the right or discharge of the indebtedness shall not be included in computing the recipient's income.

(2) Where a security or other right or a certificate of indebtedness or other evidence of indebtedness has been received by a person wholly or partially as, or in lieu of payment of or in satisfaction of a debt before the debt was payable, but was not itself payable or redeemable before the day on which the debt was payable, it shall, for the purpose of subsection (1), be deemed to have been received when the debt became payable by the person holding it at that time.

[1] [1953] Ex. C.R. 93. [2] 4 Tax A.B.C. 44.

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(3) This section is enacted for greater certainty and shall not be construed as limiting the generality of the other provisions of this Part by which amounts are required to be included in computing income.

Subsection (1) was derived from s-s. (11) of s. 3 of the *Income War Tax Act,* which subsection was considered in the *Himmen* case (*supra*) where it was held that builders' second mortgages fell within that subsection of the *Income War Tax Act,* and the taxpayer was entitled to have their real value ascertained as at the date they were acquired. But, following the *Himmen* case, there was added to the subsection after the words "or other debt", the words "that was then payable", and s-s. (2) was also added. The addition of the words "that was then payable", in my opinion is of great importance in determining what securities or rights received by a taxpayer fall within the provisions of the subsection. I have read the subsection with great care and have reached the conclusion that it relates only to cases in which the taxpayer who received the security or other right, or a certificate or other evidence of indebtedness, was, by reason of some pre-existing transaction, entitled to receive an interest, dividend or other debt *that was then payable* and the amount of which would have been included in computing his income if it had been paid. The section envisages a situation in which the interest, dividend or other debt then payable is not in fact paid, but, in lieu thereof, the one entitled receives a security or other right, or a certificate or other evidence of indebtedness. Then the subsection provides in such cases the value of what is received shall be taken into account in computing income for the year of its receipt, and when payment is later actually received it is not then to be included in computing income.

It seems to me that the effect of s-s. (1) of s. 24 is to require a taxpayer to be taxed when he receives a security or other right or certificate or other evidence of indebtedness which is wholly or partially in lieu of or in payment of an interest, dividend or other debt which was itself then payable, and which was of an income nature. That would seem to follow if the words "an interest, dividend or other debt" are read *ejusdem generis.* One instance of the application

of the subsection would be that in which a shareholder entitled to dividends which had fallen into arrears, receives in lieu thereof further shares representing the arrears of dividends.

In the instant case the second mortgages in question were doubtless securities representing an indebtedness, but quite clearly they were not securities received wholly or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt *that was then payable*. Prior to the receipt of the mortgages there was no pre-existing right to receive any portion thereof and the mortgages themselves created the original right in the respondent to receive payment. I am quite unable to find that mortgages such as these, which provided for small monthly payments and were not finally payable until five years later, could, on any reasonable interpretation, be said to have been "then payable", namely, at the time they were taken, even though the mortgagor had the right to accelerate his payments if he so desired. He could not be compelled to pay any more than the amounts specified.

For these reasons, I am of the opinion that the mortgages in question do not, in the circumstances, fall within the general provisions of s. 24(1). They do come, however, within the specific provisions of s. 85B, s-s. (1), the relevant parts of which are as follows:

> 85B(1) In computing the income of a taxpayer for a taxation year,
>
> (*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for the taxation year unless it has been received in the year;
>
> (*d*) where an amount has been included in computing the taxpayer's income from the business for the year or a previous year in respect of property sold in the course of the business and that amount is not receivable until a day
>
> (i) more than two years after the day on which the property was sold, and
>
> (ii) after the end of the taxation year, there may be deducted a reasonable amount as a reserve in respect of that part of the amount so included in computing the income that can reasonably be regarded as a portion of the profit from the sale; and

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(2) Paragraphs (*a*) and (*b*) of subsection (1) are enacted for greater certainty and shall not be construed as implying that any amount not referred to therein is not to be included in computing the income from a business for a taxation year whether it is received or receivable in the year or not.

Paragraph (*b*) of s-s. (1) makes specific provisions for including in the computation of income every amount receivable in respect of properties sold in the course of the business in the year, notwithstanding that the amount is not receivable until a subsequent year *unless* the method adopted by the taxpayer for computing income from the business, and accepted for the purpose of Part 1, does not require him to include any amount receivable in computing his income for a taxation year unless it had been received in the year. The evidence is clear and undenied that since the respondent commenced his business in 1949 he had adopted a method of computation in which amounts receivable were included—sometimes referred to as the accrual method—and that that method had been accepted by the Department of National Revenue which had assessed him accordingly. The respondent therefore is within the requirements of the first part of the paragraph and is not entitled to the benefit of the exception provided. It follows, therefore, that in computing his income he is required to include the amounts receivable from the second mortgages. As these amounts are expressed in terms of money, it is the amount of such monies that is to be included and not the value in terms of money of the right or thing. (See s. 139, s-s. (1)(*a*), which defines "amount".)

But s. 85B(1), while requiring the full amount of the receivables to be included in circumstances such as are found here, makes provision by which the taxpayer may deduct a reasonable amount as a reserve in respect of that part of the amount so included in computing the income that can reasonably be regarded as a portion of the *profit* from the sale. It was under the provisions of para. (*d*) that the Minister allowed the deduction of a reserve of $2,856.69. The respondent does not contend that he is entitled to establish a reserve under any other provision of the Act and the only submission made in respect of the reserve is that it is inadequate.

I have above set out the formula used to fix the amount of the reserve which is that proportion which the face value of the six mortgages when related to the total sales bears to the respondent's profit for 1953, as revised by the Minister. By the terms of para. (*d*), the reserve permitted is that which can reasonably be regarded as a portion of the *profit* from the sale, and does not relate in any way to a proportion or percentage of the gross amount of the sale or to the value of the receivables.

It will be recalled that the respondent's own witnesses did not establish that any loss had been incurred in respect of any of the eight mortgages except for the two sold in 1953 and that that loss was allowed in full. The amount allowed as a reserve by the Minister is slightly more than 30 per cent. of the net profit of the business as computed by him, and in my opinion, in the light of all the facts, it may well be considered as reasonable in every way. I am fully satisfied that the re-assessment as varied by the Minister's Notification is in accordance with the provisions of the Act.

In view of my conclusions, I find it unnecessary to consider the evidence led on behalf of the respondent as to the market value of the second mortgages in 1953.

For the reasons which I have stated, the appeal of the Minister will be allowed, the decision of the Income Tax Appeal Board set aside, and the re-assessment made upon the respondent, as amended by the Minister's Notification, will be affirmed. The appellant is also entitled to his costs after taxation.

Judgment accordingly.

1958
Feb. 4
Feb. 7

BETWEEN:

GEORGE H. BETHUNE .....APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act 1948, S. of C. 1948, c. 52, s. 21(1) and 22(3)—Proceeds of sale of property transferred by husband to wife as a gift rightly assessed as income of husband.

Appellant bought real estate paying for it in full and transferred it to his wife as a gift. The property was later sold and the proceeds of the sale price were used by the wife to purchase dividend and interest paying investments taken in her own name.

Held: That the appellant is rightly assessed for tax on the income received by his wife from investments purchased with the proceeds of the sale of the real estate.

APPEAL from a decision of the Income Tax Appeal Board.

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

A. L. Fleming, Q.C. for appellant.

T. Z. Boles for respondent.

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

CAMERON J. now (February 7, 1958) delivered the following judgment:

This is an appeal in which the taxpayer appeals from a decision of the Income Tax Appeal Board dated December 12, 1956, dismissing his appeal from a re-assessment dated March 22, 1955, in respect of the taxation year 1953. In re-assessing the appellant, the Minister had added to his declared income the sum of $979 said to be income arising from an original gift to his wife, said income being made up as follows:

(a) Interest Kern mortgage	$ 300.00
(b) Dividends from 100 shares New York, New Haven and Hartford Railway	679.00
Total	$ 979.00

In so assessing the appellant, the Minister relied as he now does on s-s. (1) of s. 21 and s-s. (3) of s. 22 of *The Income Tax Act,* which were as follows:

21.(1) Where a person has, on or after the 1st day of August, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall be deemed to be income of the transferor and not of the transferee.

22.(3) For the purpose of this section and section 21, where a person who did own or hold property has disposed of it and acquired other property in substitution therefor and subsequently, by one or more further transactions, has effected one or more further substitutions, the property acquired by any such transaction shall be deemed to have been substituted for the property originally owned or held.

The main facts are not in dispute. On May 1, 1944, the appellant entered personally into an agreement (Exhibit 1) to purchase the property known as 143 Main Street East, Hamilton, for $3,800, of which amount $1,800 was to be in cash on closing and the remaining $2,000 was to be paid to the vendor from the proceeds of a mortgage for that amount to be secured by the appellant. Before or at the time of closing the purchase, the appellant instructed his solicitor to take the deed of the property in the name of his wife, Annie N. Bethune. This was done and the mortgage to the National Trust Company was signed by his wife alone. The mortgage was paid off in 1949.

By an agreement dated December 24, 1951 (Exhibit 4), Mrs. Bethune agreed to sell the property to one Ford for $11,000, $200 of which was paid as a deposit. The sale was closed on January 15, 1952, and after adjustments for taxes, insurance and like matters, she received $2,743.51, less her solicitor's charges, as well as a mortgage for $8,000. The mortgage was paid off in two instalments, $3,000 principal being received on July 17, 1952, and the remaining $5,000 on October 16 of the same year.

Before considering what investments were made with the monies received from the sale of the Main Street property, I must determine the extent to which the appellant contributed in the acquisition by Mrs. Bethune of that property.

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In the Notice of Appeal to this Court, para. (*g*) reads as follows:

> The appellant further alleges that the income derived by his wife arose in fact from the monies derived by her from the several estates herein mentioned, and by her borrowing from the bank, to enable her to make investments, which in turn yielded income exclusive of any income she might have derived from the monies given to her in the said sum of $3,800, to assist in the purchase of a residence known as 143 Main Street East in the city of Hamilton.

That paragraph might perhaps be construed as an admission that she did receive $3,800 to assist in the purchase of the property and it is not suggested that anyone other than her husband assisted her in the purchase. I prefer, however, to reach my conclusion on the whole of the evidence and the inferences to be drawn therefrom.

It is not disputed that the original down payment of $1,800 was made by the appellant and that it was a gift to his wife.

In Exhibit A, a letter dated October 27, 1955, from Mr. Johnston (who was solicitor for Mr. and Mrs. Bethune at the time of the purchase and sale of the Main Street property and still is their solicitor) and addressed to the Dominion Income Tax Department, the following statement is made:

> At this time, therefore, I should like to respectfully submit that the objection herein is made because the revenue derived from the difference between $3,800 and $11,000, being the original $3,800 advance by Mr. Bethune for the purchase of 143 Main Street E. and the sale price of $11,000 is being charged to Mr. Bethune. In reality it would appear that the ultimate situation herein will develop into Mr. Bethune being assessed for the revenue from $11,000 rather than from the $3,800, and I submit it would appear to be the only fair and equitable answer that if Mr. Bethune is to be charged it should be only on the income from the said $3,800 and not otherwise.

From that letter it would appear that Mr. Johnston considered that Mr. Bethune had advanced the full purchase price of the property.

Exhibit B is a letter from the Department of National Revenue to Mrs. Bethune dated December 20, 1954, in which she was asked to state the sources of certain parts of her capital. Paragraph (c) is headed "Gift", and the answer recorded is "Main Street house Gift from my husband Sold 1952 for $11,000". That letter bears the signature of the

appellant and while both husband and wife thought the answer was in the handwriting of the other, Mrs. Bethune agreed that the answer was true.

Then Exhibit C, dated January 4, 1955, is a letter from the Department of National Revenue to Mrs. Bethune. Mr. Croft, the individual assessor in the Hamilton branch of the department and who had written the letter, says that Mr. and Mrs. Bethune called at his office with the letter. He says he interviewed them and asked them for the answers to the questions in the letter and wrote down the answers given by them. This is not denied. Question (a) is "The date and year in which you received the Main Street property as a gift from your husband", and the answer noted is "May 1944". Question (b) is "The location or identity of this particular property?" and the answer noted is "143 Main Street East—Sold for $11,000-1952". Mrs. Bethune admits calling on Mr. Croft and that she answered as best she could.

This question is further complicated by the fact that the appellant, after the property was purchased, collected the rents and paid all disbursements in connection with the property for a period of about five or six years, all receipts going into his own personal bank account and all disbursements being made from the same account. For the first six years the rent appears to have been $45 per month. This was increased to $60 per month for the two years prior to sale, but during that period Mr. Bethune says that the rents were all paid to his wife, but presumably he continued to pay all disbursements. No proper record of receipts and disbursements was kept. However, Mr. Bethune, with the assistance of his solicitor and auditor, prepared the statement Exhibit 6 shortly before the trial. Admittedly, it is an estimate only and was prepared without full or accurate accounts. The rent receipts for the full period of ownership total $4,450 and the disbursements for taxes and water rates and for principal and interest on the mortgage total $4,144.11. The mortgage payment shown therein includes full payment of $2,000 principal as well as interest.

I am quite unable, however, to treat this document as showing the true state of affairs. It does not include any disbursements for insurance or maintenance of the

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property. Morever, when the house was purchased, Mr. Bethune says it was in a very bad state of repair. A new furnace was installed or the old one completely remodelled; new eavestroughs and a veranda were added and the exterior painted. The statement includes nothing for these very substantial outlays. Morever, Mr. Bethune admits that he paid the final instalment of $1,100 and interest on the mortgage out of his own account and it is clear that on the statement itself he then had insufficient rental receipts on hand to make the payments from such rents. Further, the statement is incorrect in that it includes receipts of rent for the last two years totalling $1,440, all of which was received by Mrs. Bethune and was not applied in any way to the maintenance of the house or in repayment of the mortgage. The statement, therefore, is so incomplete and inaccurate that I cannot accept it as evidence that the receipts from the rental of the property were used to pay off the balance of the purchase price represented by the mortgage of $2,000. On the contrary, it tends to support the allegation in the appellant's own pleadings and the statements in Exhibits A, B and D that the property on Main Street was a gift to his wife and that he paid the full purchase price thereof out of his own assets. At the very least, the appellant has failed to satisfy me that such was not the case.

I find, therefore, that the appellant bought the Main Street property and transferred the ownership to his wife and paid for the cost thereof in full. It follows from that conclusion that s-s. (1) of s. 21 and s-s. (3) of s. 22 of the Act (*supra*) apply to the appellant and that the income from the property so transferred or from property substituted or re-substituted therefor is deemed to be the income of the appellant and not that of the transferee—his wife. In this connection, reference may be made to *McLaughlin v. M. N. R.*[1]

There remains the question as to what other property was acquired by Mrs. Bethune in substitution for the Main Street property after it was sold. It is now admitted that the Kern mortgage of $5,000, taken by Mrs. Bethune in November 1952, was an investment made by her out of the proceeds of a final payment of a like amount received by

[1] [1952] Ex. C.R. 225 at 230.

her in October 1952 from the Ford mortgage which formed part of the sale price of the Main Street property. The interest of $300 received on that mortgage in 1953 was therefore properly added to the appellant's income.

The question as to the addition of $679 received in 1953 by Mrs. Bethune from 100 preferred shares of New York, New Haven and Hartford Railway stock, and added to the appellant's declared income, is somewhat more complicated. Mrs. Bethune had other assets of her own, having received a legacy of some $1,100 from her uncle in 1935; she also became the owner of 39 Inverness Ave. West, Hamilton, in 1936, upon the death of her father. By the agreement marked Exhibit 10, she agreed on February 9, 1952, to sell the property for $10,300. The deposit of $500 was apparently paid to the real estate agent. On closing the sale about March 1, 1952, the balance due her was $2,430 and in addition she received a mortgage of $7,500. On March 12, 1952, she deposited $2,400—the proceeds of the sale—in her bank account (Exhibit S). On the same day she borrowed $2,300 from her bank and it was deposited to her credit.

The next relative entry is a deduction of $4,897.95 on March 13, 1952, representing the purchase of 100 preferred shares of New York, New Haven and Hartford Railway stock. The amount to her credit before and after this transaction was negligible and it is clear that she bought those shares partly out of the proceeds of the sale of the Inverness Street property and partly by a bank loan of $2,300. This bank loan was repaid on July 17, 1952, Mrs. Bethune on the same date having received $3,220 for interest and principal on the Main Street mortgage; prior to that receipt the balance in the bank account was negligible and it is clear, therefore, that $2,300 which came from the Main Street mortgage was used to pay off the bank loan which had been incurred for the purpose of purchasing the first 100 preferred shares of New York, New Haven and Hartford stock.

There was a further purchase of an additional 100 such shares in January, 1953. This was financed by a bank loan of $4,650 on January 12, and a cheque for $4,933.68 in payment for the shares was cashed the following day. I cannot find that this purchase was in any way connected

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with the proceeds of the sale of the Main Street property, the full amount of which had been paid in the previous year. After the Kern mortgage was taken in November 1952, the balance in the bank account was quite negligible.

Mr. Sloan, an Appeals Officer in the Hamilton branch of the Department of National Revenue, stated that he had an interview with the appellant and Mr. Johnston, his solicitor, when it was agreed that $5,000 of the $10,500 net received from the Main Street mortgage was invested in the Kern mortgage; and that due to the difficulty in ascertaining what investment represented the remaining $5,500, it was decided to treat it as having been invested in the first purchase of 100 shares of railway stock. Such an interview no doubt took place. On the facts in evidence before me, however, I must find none of the proceeds of the sale of the Main Street property were actually used in the direct purchase of railway shares, but that $2,300 of such proceeds was used in payment of the bank loan made for the purpose of buying the first 100 shares.

Moreover, the evidence satisfies me that when Mrs. Bethune received the down payment of $2,500 from the sale of the Main Street property which was deposited on January 19, 1952, she immediately used it in payment of the purchase price of 200 shares in Brazilian stock, the cheque for $2,550 in payment thereof being debited in her account on March 25. Again, the bank balance both before and after this transaction was negligible. Mrs. Bethune was of the opinion that the Brazilian shares were purchased with monies arising from the sale of the Main Street property.

The proceeds of approximately $10,500 received from the sale of the Main Street property can therefore be accounted for to the following extent:

(*a*) $2,500 used in the purchase of 200 shares of Brazilian stock in January 1952;

(*b*) $2,300 used in payment of the bank loan of a like amount on July 17, 1952;

(*c*) $5,000 advanced by way of mortgage loan to Kern on November 10, 1952.

The remaining $700 is not shown to have been put into any investment or purchase which produced income. It may possibly have been spent for personal needs or the like. It corresponds precisely with the difference between $3,000 principal received from the Main Street mortgage in July 1952, and the payment of the bank loan of $2,300.

In my view, therefore, any income received by Mrs. Bethune in 1953 from the Brazilian shares so purchased is also to be taxed as income received by the appellant in that year.

The manner in which the $2,300 used in paying off the bank loan should be considered has caused me some concern. Certainly, it cannot be disregarded or treated as if it had simply disappeared. Considering that it was Mrs. Bethune's practice to keep her monies invested on the advice of her husband, and that this sum, while used directly in the purchase of the first lot of 100 shares in New York, New Haven and Hartford Railway stock, was used for the purpose of paying off the bank loan incurred for the purpose of completing that purchase, I have reached the conclusion that it may reasonably be considered as having been used indirectly for the purchase of those shares. Certainly, it had no connection with any other investment. The total cost of the purchase of 100 shares having been approximately $4,900, I find that the $2,300 may be considered as having been used in the purchase of 46 shares thereof.

Accordingly, the appeal will be allowed, but only for the purpose of referring the matter back to the Minister for further re-assesment, namely:

1. By deleting from the re-assessment the sum of $679 said to have been received by Mrs. Bethune in 1953 from 100 preferred shares in New York, New Haven and Hartford Railway stock;

2. By adding thereto:

(a) the amount of the dividends received by Mrs. Bethune in 1953 from the purchase of 46 shares forming part of the first 100 shares of that stock purchased by her in March 1952;

(b) the amount of the dividends received by Mrs. Bethune in 1953 from the 200 shares of Brazilian stock purchased by her in January 1952.

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The re-assessment having been upheld with only minor adjustments which may or may not benefit the appellant, I see no reason for depriving the respondent of his costs. Such costs will therefore be paid by the appellant to the respondent after taxation.

Judgment accordingly.

1958

Feb. 24

Feb. 27

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

ALICE AGNES HALL formerly ALICE AGNES NICHOLS ..... } DEFENDANT.

Practice—Pleadings—Amendment—Withdrawal of admission in expropriation proceedings refused when made with intention should be acted upon by Crown—Rules 115 and 119, General Rules and Orders of Exchequer Court—Expropriation Act, R.S.C. 1952, c. 106, s. 9—"Lands taken for the use of Her Majesty shall be laid off by metes and bounds".

Expropriation proceedings to acquire certain lands of the defendant were initiated on January 25, 1954 by the deposit in the Registry Office of the County in which the lands were situate of a plan and description of such land and such description was by metes and bounds. On November 24, 1954 the defendant gave up possession to the Crown. On March 8, 1955 she executed under seal an "Acknowledgement" which set out that she was formerly owner of the lands thereinafter described which lands had been duly expropriated by Her Majesty the Queen in right of Canada and she (the defendant) acknowledged having received $34,000 on account of the compensation due her with respect to the said expropriation. On November 27, 1956 the Crown filed the usual Information in expropriation proceedings. In the first paragraph thereof it was alleged that the lands described in paragraph 2 were taken under the *Expropriation Act,* R.S.C. 1952, c. 106, by Her Majesty the Queen for the purpose of a public work of Canada, by the deposit of a plan and description in the relevant Registry Office and that such land by such deposit thereby became vested in Her Majesty the Queen. In the Statement of Defence filed the defendant admitted the statements in paragraphs 1 and 2 of the Information. At the opening of the trial however the defendant moved for leave to amend the defence by withdrawing the admission relative to paragraph 1 of the Information and by adding a new paragraph to the Statement of Defence stating that the lands described in paragraph 2 of the Information were not validly taken under the *Expropriation Act* because they were not

"laid off by metes and bounds" as required by s. 9 in the deposit of the plan and description referred to in paragraph 1 of the Information.

Held: That the acknowledgement signed under seal by the defendant that her property had been *duly* expropriated by the Crown, was a representation or admission by her with the intention that it would be acted upon, in order that she should receive a substantial part of the compensation moneys. That representation was acted upon and she was paid the sum of $34,000 upon the execution of the acknowledgement. The clear inference was that if she had not made the representation and admission, she would not have been paid any portion of the compensation moneys. In such circumstances, the admission made by the defendant is conclusive against her in all cases between her and the Crown and she should not now be allowed an opportunity of repudiating her own representation. *Canada Permanent Mortgage Corpn. v. Toronto* [1951] O.R. 726 approving *Steward v. North Metropolitan Tramways Co.* (1886) 16 Q.B.D. 556 referred to.

MOTION for leave to amend the Statement of Defence.

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

J. Mirsky, Q.C. and *K. E. Eaton* for the motion.

F. P. Varcoe, Q.C. and *G. W. Ainslie contra.*

CAMERON J. now (February 27, 1958) delivered the following judgment:

This case was set down for hearing on Monday last, February 24. At the opening of the trial, counsel for the defendant moved for leave to amend the Statement of Defence in two particulars. The case itself is an expropriation matter, the Crown having filed the usual Information on November 27, 1956. Paragraph 1 of the Information was as follows:

1. The lands described in paragraph 2 herein were taken, together with other lands under the *Expropriation Act*, c. 106, Revised Statutes of Canada 1952, by Her Majesty the Queen, for the purpose of a public work of Canada, by the deposit of a plan and description in the Registry Office for the Registry Division of the County of Carleton, in the Province of Ontario, on the 25th day of January, 1954, as No. 10948, and such land by such deposit, thereby became vested in Her Majesty the Queen.

Paragraph 1 of the Statement of Defence, filed on December 6, 1956, reads as follows:

1. The defendant admits the statement in paragraphs 1, 2, 3 and 4 of the Information filed herein.

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Until this motion was launched, the sole issue in the case was the determination of the compensation money to be paid for the lands taken. The motion asks for leave to amend the defence by withdrawing the admission relative to para. 1 of the Information and by adding a new para. 5 to the Statement of Defence as follows:

> The defendant says that the lands described in paragraph 2 of the Information were not validly taken under the *Expropriation Act* because they were not laid off by metes and bounds as required by section 9 of the said Act in the deposit of the plan and description referred to in paragraph 1 of the Information.

During the course of the argument, counsel for the Crown pointed out—and I think rightly so—that the proposed para. 5 in this form would be entirely inconsistent with the other paragraphs of the defence. Accordingly, counsel for the defendant intimated that he would ask that the paragraph be preceded by the word "alternatively" and that the word "in" before the words "the deposit" be changed to "before or by".

The motion is supported by the affidavit of Mr. Mirsky of counsel for the defendant, and a member of the firm of Messrs. Mirsky, Soloway, Assaly & Houston, solicitors for the defendant, and includes the following paragraphs:

> 3. That on Wednesday, the 19th day of February, 1958, it first came to my attention, through Mr. Eaton, that compliance with Section 9 of the *Expropriation Act* had been raised before Mr. Justice Thorson in an action in this Court, wherein one, Florence Crawford appears as suppliant and Her Majesty the Queen, respondent. An extract of the discussion before Mr. Justice Thorson, between Mr. Justice Thorson and Counsel, is hereto attached and marked Exhibit "A" to this my affidavit.
>
> 4. In drafting the Defence herein, on the last mentioned date it became apparent that I was obviously in error in admitting Paragraph 1 of the information, by reason of the fact that the information filed by the Plaintiff, the plan and description filed by the Plaintiff do not comply with the requirements of Section 9 of the *Expropriation Act*. I was honestly mistaken in so making the admission. I now desire to withdraw the admission on behalf of the Defendant because the facts so admitted, as a matter of law, are incorrect, and this affidavit is made in support of an application for permission to so withdraw the admission.

I have looked at Exhibit A to that affidavit and it appears therefrom that in the *Crawford* case—which is a Petition of Right in which the suppliant sought to set aside certain expropriation proceedings on the ground of their invalidity—that the learned President indicated that he would consider an application by the suppliant therein

to amend his petition by alleging that the lands were not laid off by metes and bounds, as required by the opening words of s. 9 of the *Expropriation Act*, and that therefore the expropriation was invalid.

In the present case, it would seem that the motion is made so as to enable the defendant to raise a similar question. I take it that the submission would be that the opening words of s. 9, "Lands taken for the use of Her Majesty shall be laid off by metes and bounds" mean that the expropriated property must be staked out on the ground by the Crown and that such a step is a condition precedent to a valid expropriation. The hoped-for result would be, I take it, that the expropriation made in 1954 would be set aside, and that in later expropriation proceedings the value would be ascertained as of such later date.

The power of the Court to grant amendments upon application under the terms of Rules 115 and 119 of the General Rules and Orders of the Court, is very wide. These Rules are similar to the corresponding English Rules and on this point reference may be made to the decision of the Ontario Court of Appeal in *Canada Permanent Mortgage Corporation v. Toronto*[1], in which Hope J. A. referred with approval to *Steward v. North Metropolitan Tramways Co.*[2] in which the Master of the Rolls said:

> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

In the present case, however, I am of the opinion that the motion should not be granted. I have reached that conclusion because of certain other facts which in my view are of such a nature as to estop the defendant from now denying that the expropriation was valid, or that the lands in question had not thereby become vested in the Crown.

As has been stated, the expropriation proceedings were initiated by the deposit of a plan and description in the Registry Office on January 25, 1954, and such description of the property was by metes and bounds. Then, on

[1] [1951] O.R. 726.
[2] (1886) 16 Q.B.D. 556.

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November 24, 1954, the defendant gave up possession to the Crown. As shown by the exhibit attached to the affidavit of William Cherry, filed, the defendant on March 8, 1955, executed under seal an "Acknowledgment", the essential parts of which are as follows:

ACKNOWLEDGMENT

I, Agnes Alice Nichols (Hall), of the city of Ottawa, in the county of Carleton, married woman, formerly the owner of the following lands: (here follows a description of the expropriated property.)
which said lands have been duly expropriated by Her Majesty the Queen in right of Canada, hereby acknowledge having received from Her Majesty the Queen in Right of Canada the sum of THIRTY-FOUR THOUSAND ($34,000.00) dollars on account of compensation moneys due us with respect to the said expropriation.

I further declare that there are no tenancies from which I am receiving rents affecting the lands and premises expropriated.

IN WITNESS HEREOF I have hereunder set my hand and seal this 8th day of March A.D. 1955.

Pursuant to the said agreement and on the same date the defendant was paid thirty-four thousand dollars on account of compensation moneys for the said property. Further, at some date after taking possession—the precise date is not shown—the Crown levelled all buildings on the property, comprising a house, garage and possibly some others. Then, as has been pointed out, the Statement of Defence, with the admission that the property became vested in the Crown as of January 25, 1954, has remained of record for well over a year.

In my view, the Acknowledgment signed under seal by the defendant that her property had been *duly* expropriated by the Crown, was a representation or admission by her with the intention that it could be acted upon, in order that she should receive a substantial part of the compensation moneys. That representation was acted upon and she was paid the sum of $34,000 upon the execution of the Acknowledgment. The clear inference is that if she had not made the representation and admission, she would not have been paid any portion of the compensation moneys. In such circumstances, the admission made by the defendant is conclusive against her in all cases between her and the Crown and she should not now be

allowed an opportunity of repudiating her own representation (see *Taylor on Evidence,* 2nd Ed., Vol. 1, para. 839). If, as is possibly the case, the buildings were levelled after the date of the acknowledgment, the grounds for finding an estoppel are even stronger.

The point is discussed in *Odgers on Pleadings and Practice,* 16th Ed., at p. 203, where it is stated:

> In some cases the law will not allow a litigant to attempt to prove allegations which are directly contrary to that which has already been decided against him, or to that which he has himself deliberately represented to be the fact. He is said to be "estopped" from proving such matters. An estoppel debars a party from raising a particular contention in an action, when to raise it would be inequitable or contrary to the policy of the law. It binds not only the original parties but also all who claim under them. It is not a cause of action but a rule of evidence.

And at p. 204:

> If under his hand and seal a man asserts a thing to be, he cannot set up the contrary in any litigation between him and the other party to that deed. Both parties are bound by the language of the deed; and so are all claiming under them. But there will be no estoppel if the deed was obtained by fraud or duress, or is tainted with illegality.

For these reasons the motion for leave to amend will be dismissed. I have refrained from giving any consideration to certain sections of the *Expropriation Act* (such as ss. 7(5), 9, 12 and 23) which would have had to be considered if there had been no admission or representation in the formal Acknowledgment.

The costs of the motion will be to the plaintiff in any event.

Judgment accordingly.

1956
June 11-15
June 18-21
1958
Mar. 10

BETWEEN:

VISIRECORD OF CANADA LIMITED ..PLAINTIFF;

AND

ROSS SOWERBY MALTON AND BERNARD T. TAYLOR CARRYING ON BUSINESS AS VERTICAL RECORDS COMPANY AND THE SAID VERTICAL RECORDS COMPANY .....DEFENDANTS.

Patents—Action for infringement—Anticipation—Prior user—Subject matter—Patent held valid and to have been infringed—The Patent Act, R.S.C. 1952, c. 203, ss. 28(1)(a)(b)(c), 29(1)(2).

The plaintiff sued for infringement of its patent relating to vertical visible card indexes or card registers of the type in which the cards are arranged in groups separated from each other by main dividers and in sub-groups separated from each other by intermediate dividers. The defendants alleged that the patent was invalid by reason of anticipation, prior user, and lack of subject matter.

Held: That the plaintiff's device, a basic combination which involved a notion of "improvement" more than one of invention, evinced a sufficient degree of inventive acumen to uphold the patent. *Patent Exploitation Ld. v. Siemens Brothers & Co. Ld.*, 21 R.P.C. 541 at 549; *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills Ld.*, [1929] A.C. 269 at 280; 46 R.P.C. 23 at 25; *Rheostatic Co. Ltd. v. Robert McLaren & Co. Ltd.*, 53 R.P.C. 109.

2. That the patent was valid and had been infringed.

ACTION for infringement of patent.

The action was tried before the Honourable Mr. Justice Dumoulin at Ottawa.

G. F. Henderson, Q.C. for plaintiff.

Harold G. Fox, Q.C. for respondents.

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

DUMOULIN J. now (March 10, 1958) delivered the following judgment:

This is an action for infringement of a plaintiff's alleged rights under Letters Patent No. 500,084, dated February 16, 1954, which it owns, by virtue of an assignment from Herbert Weston to Visible Index Corporation and a further assignment from the latter to plaintiff, these assignments being of record in the Canadian Patent Office.

The invention falls in the field of office specialties offering a perfected type of card register.

Before entering upon the gist of the matter, certain explanatory remarks might be appropriate. The device, to which Patent No. 500,084 applies, is of the vertical visible card register type and appears in the form of either a portable unit, or of an office equipment, encased in a metal container mounted on casters for mobility. These card registries consist of cardboard sheets respectively called main and intermediate dividers. Groups or banks of filing cards placed in echelon laterally across the receptacle or tub and notched at their bottom fringe, rest on steel rods or grids, positioned transversely from rear to front of the container. Along the upper edges of the main dividers runs a strip or band usually made of a plastic translucent fabric with, on its anterior face, a grooved channel, facilitating the insertion of slidable index members, corresponding with similar tabs affixed to the slightly lower top of the intermediate dividers. The plastic strip aforesaid has a backward slant extending to the rearmost tab on intermediate dividers, the idea being to reach by one single motion any desired group of cards rearward of the main divider. These components are laterally held in place by metal end rails that also serve as spacing means between sheets for the insertion of cards, and as substantially solid side walls. The intermediate dividers are also cardboard sheets, with upper edges slightly below those of the main dividers, and having index tabs positioned in line with the index members on the main divider. Each bank of cards leans against an intermediate divider separating it from a subsequent breakdown of the same alphabetical subgroup. Figures 1, 2 and 3 of drawings, annexed to the patent, outline this. The result sought and the distinctive advantage claimed consist in the rapidity of operation permitting a user to get at any particular subgroup of cards with one single stretch of the arm, i.e., by a slight pull forward of the main divider index member, opposite a correlated tab on the intermediate divider, thereby eliminating subsequent exertions required on other types of card registers.

This operation was very concisely explained by plaintiff's Sales Manager, Mr. John Stewart, in these few words:

> . . . The index member of the main divider is the finding utensil. The tab on the intermediate is the handle to help you get to that row of cards after you have found it on the main divider.

(Transcript, p. 89)

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A speed superiority of 50% is supposedly assured to this newer style of vertical visible filing, exemplified by exhibit 7, over the old type equipment shown in exhibit 12, wherein two or three movements were required to reach a wanted card instead of one.

Celerity, however, is not the only object intended by the art. Mr. Stewart mentions three other useful attainments: protection for the records, accuracy of filing and flexibility (Transcript, p. 69), dispatch and quickness of manipulation which he classified as the most valuable.

This departure is known, in business parlance, as visible vertical record indexing in contradistinction to the so-called blind card indexes and wheel types.

After insisting on the need for and the nature of such requirements, the witness concludes that each of them appears in the units, exhibits 5 and 7, manufactured and sold by plaintiff. In Mr. Stewart's own terms:

> . . . With Visirecord or vertical visible we achieve the speed factor through (a) the one motion index, through (b) being able to see each card without touching another card and being able to see a generous amount of that card, not just an eighth of an inch or a quarter of an inch. We achieve a protective factor because the cards are not handled unless they are wanted; the cards are protected by the dividers themselves. We have a flexibility factor in vertical visible where the cards can be shifted around. We have a high degree of accuracy because each card is filed in its own place. Thus vertical record or Visirecord gives the answer to a much greater degree to those four factors which each of the other record systems covers in one phase or another but none in all four phases. That makes vertical visible the best answer to those four basic problems facing industry.
>
> (Transcript, pp. 87, 88)

The preceding lines lay no pretention to strict technical accuracy, but since the device under consideration seems a simple one they may serve as a substantial summary.

On the opening day of the hearing, counsel for plaintiff declared he was pursuing the action only in respect of Patent No. 500,084 issued on February 16, 1954, relying upon claims 9 to 14 inclusive, hereafter reproduced:

> 9. In a card registry, a plurality of main dividers provided with channels adjacent and substantially parallel to their upper edges, the channels thus extending laterally of the main dividers, index members mounted in the channels and slidable therein, groups of intermediate dividers arranged between the main dividers, and tabs carried by the intermediate dividers, the tabs of each group of intermediate dividers being spaced laterally from one another, the index members being positioned in the channels in alignment with corresponding tabs on the intermediate dividers.

10. In a card registry, a plurality of main dividers each having a flat body portion and a portion adjacent its upper edge extending upwardly and rearwardly at an angle to the body portion, said upwardly and rearwardly extending portion having a horizontal channel, index members mounted in the channels and slidable therein, groups of intermediate dividers arranged between the main dividers, and tabs carried by the intermediate dividers, the tabs of each group of intermediate dividers being spaced horizontally from one another, the index members being positioned in the channels in alignment with corresponding tabs of intermediate dividers.

11. In a card registry, a plurality of main dividers, intermediate dividers arranged between the main dividers, the main dividers extending upwardly beyond the upper edges of the intermediate dividers, the main dividers being provided with channels adjacent and substantially parallel to their upper edges for the reception of index members, index members mounted in said channels and adjustable in said channels transversely of the main dividers, and tabs carried by the intermediate dividers, the tabs projecting above the upper edges of the intermediate dividers but being below the upper edges of the main dividers, the tabs of each group of intermediate dividers being spaced from one another transversely of the dividers, and the index members being positioned in the channels of the main dividers in alignment with the corresponding tabs of the intermediate dividers.

12. In a card registry, a plurality of main dividers comprising flat sheets, means for spacing the flat sheets predetermined distances apart, thereby forming spaces between the sheets, index members adjacent the upper edges of each main divider, groups of intermediate dividers in the spaces between the main dividers, tabs carried by the intermediate dividers and extending upwardly from their upper edges, the tabs of each group of intermediate dividers directly behind each main divider corresponding to the index members of such main divider and being in alignment therewith, the upper portion of each main divider extending rearwardly a distance sufficient to bring the upper edge thereof adjacent the tab of the rearmost intermediate divider of the group of intermediate dividers directly behind the main divider, whereby a person may, with one finger, simultaneously and in a single operation, pull forward any main divider and any intermediate divider of the group of intermediate dividers directly behind it.

13. In a card registry, a plurality of main dividers, the main dividers comprising end rails of appreciable thickness and sheets connecting the end rails, the end rails when assembled forming substantially solid side walls and forming spaces between the sheets for the reception of cards, the main dividers being provided with laterally-extending channels adjacent their upper edges into which individual index members may readily be inserted, individual index members mounted in the channels, groups of intermediate dividers arranged between the main dividers, tabs carried by the intermediate dividers and extending upwardly from their upper edges, the tabs of each group of intermediate dividers directly behind each main divider corresponding to the index members of such main divider and being in alignment therewith, the upper portion of each main divider extending rearwardly a distance sufficient to bring the upper edge thereof adjacent the tab of the rearmost intermediate divider of the group of intermediate dividers directly behind the main divider, whereby a person may, with one finger, simultaneously and in a single operation, pull forward

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any main divider and any intermediate divider of the group of intermediate dividers directly behind it.

14. A card registry as claimed in claim 9, 12 or 13, in which the upper portion of each main divider extends upwardly as well as rearwardly and the tabs of each group of intermediate dividers directly behind each main divider lie vertically below the upwardly and rearwardly-extending upper edge portion of such main divider.

Plaintiff's Patent No. 500,084 is under attack on the defendants' part because supposedly: (See Particulars of Objections)

1. The subject matter of the said claims of the said patents was not the proper subject matter of a patent and was not patentable in law. Nothing was in fact invented by the alleged inventor of the device described in the said claims. . . . but [they] . . . are merely the results and products of mechanical skill.

2. The alleged inventions . . . were obvious and did not involve any inventive steps having regard to the common knowledge of the art and what was known and used prior to the dates of the applications for the patents containing the said claims or of the grant of the said patents.

3. The alleged inventions claimed in the claims in issue lack novelty. They were known and used by others before the dates thereof, as appears from (a) the common knowledge of the art at the said dates; (b) the prior knowledge shown by the following patents and their applications therefor and the following publications: . . .

We then have to deal with the three usual kinds of reproaches, that is, lack of novelty or anticipation, prior user and lack of subject matter or want of invention. Sections 28(1)(*a*)(*b*)(*c*) and 29(1)(2) were particularly relied upon by defendants (R.S.C. 1952, c. 203).

The first witness heard for plaintiff was Mr. John Stewart of Toronto. In 1952, Stewart, then in the employ of Remington Rand, was introduced to Mr. Ross Sowerby Malton, one of defendants, at the time General Sales Manager of plaintiff. In that same year, Stewart joined Visirecord of Canada as salesman, becoming, in May, 1952, its Toronto Sales Manager. In June of 1953, R. S. Malton, parted with the plaintiff company leaving John Stewart as his successor in the general sales managership.

The witness describes at length the coming technique of the card registers specified in Patent No. 500,084, lending particular emphasis to speed, since such a time and labour saving device naturally tends to cut down overhead costs. It is contended furthermore that other advantages, namely: protection of cards, accuracy in filing and flexibility, increase the usefulness of exhibits 5 and 7 although no special claim of novelty is made on this account.

Regarding commercial success of the invention, Mr. Stewart says that it supplanted the Kardex or flat tray system with a number of large companies amongst which were Canadian Radio Manufacturing Corporation, Rootes Motors, Canadian General Electric, Northern Electric and Canadian Westinghouse Company.

In support thereof, the witness produced a statement of accepted orders for the years 1950 to 1955 inclusive. Prior to the manufacturing of exhibits 5 and 7 by plaintiff company or 6 by defendants, Visirecord had produced a vertical visible record type, exhibit 12, which, for the purposes of this litigation, is labelled "old type equipment", lacking the one motion feature from a main divider to a desired bank of cards on an intermediate divider.

According to Mr. Stewart, March 9, 1951, would be the date of the first commercial delivery of the new type model whose set-up bears a complete identity to that of exhibits 5 and 7, the only difference being the external cabinet or container.

The ascending scale of sales from the starting point, 1950, when the old type still obtained, up to and including 1955, reads as follows:

1950	$121,655.52
1951	$234,793.82
1952	$274,882.86
1953	$277,046.04
1954	$324,570.83
1955	$342,575.22

The above figures were qualified, and *pro tanto* reduced, when Mr. Stewart admitted that they included the over-all sales of his company, 75 to 70% of which represented the new equipment types, and 25 to 30% the sale price of index cards.

John Stewart nonetheless maintained and successfully brought out that the essential difference between the old and new systems, i.e., exhibit 12 and exhibits 5 and 7, were the angled-over portion, the rearwardly inclined plastic strip surmounting the main dividers that enabled the index tabs on intermediates to match with the leading index members. Stewart is positive, and replies accordingly at pages 155 and 159, that before joining with the plaintiff firm, he never had seen on card registries similar bent back tops or

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rearward curvature. He goes on to say that units, such as exhibit 12, with straight or vertical divider ends failed to assure the speedy selection of a row of cards and the correlated, albeit secondary result, of providing a comparable degree of protection to that achieved by the present sets. The witness conceded that exhibit 12 and exhibit A, the October, 1934, Bosse Patent, being vertical visible types could allow an operator to read a balance sheet without drawing out the index card. But this bears no relation to the gist of the problem at issue, which I take to be the rearward bend of the transparent plastic strip on main dividers and its consequent effect on ease and speed of operations.

Mr. Stewart saw on the market filing units of the exhibit 6 type, (T. p. 96) in porta-tray forms. This filing register contains main and intermediate separators, the upper portion of the main dividers rearwardly inclined, with transverse channels receiving index members adjacent to the upper edge of the slanted band.

Mr. Stewart asserts that exhibit 6 achieves the same results (T. p. 97) as plaintiff's exhibits 5 and 7. The indexing material used in defendants' filing register, exhibit 6, is of Visirecord vertical visible design, fabricated by plaintiff company, defendants' exhibit 6 is meant to accommodate these cards (T. p. 98).

Cross-examined by Mr. Fox, Q.C., this witness admits that the filing cards in echelon style were known to him in the Kardex flat tray registers as far back as 1940 (T. pp. 108, 109), but these cards didn't then have the diagonal cut off shown in figure 3 of exhibit 13, a photostat of models 5 and 7 components.

On pages 139, 142, 143 and 145 sternly prodded concerning the differences between old type, exhibit 12, of 1946, and the newer models, exhibits 5 and 7, of 1951, Stewart repeats his previous assertion that, at least, two motions were necessary to reach the desired information in exhibit 12, compared to only one on the later models, 5 and 7.

The explanation is that in exhibit 12, three sets of indexing members were crowded over one another with half an inch between each insert, while in exhibit 7, index members on the main dividers substantially spread across its whole width (15 inches), distanced from each other by two inches or so, plainly revealing the related index tabs on the intermediates.

The next witness called, one Mr. Runnals, is in the employ of British American Oil Company Limited, at Clarkson, Ontario, in the capacity of manufacturing accountant, responsible for all clerical functions. In 1952 or 1953, British American shifted from the blind slot Kardex system to the visible vertical type, similar to exhibits 5 and 7, a porta-tray contained in a metal tub. Such a change, according to witness, greatly improved filing in speed, accuracy and flexibility. Runnals singles out the one motion feature as entailing a reduction of one clerk in his firm's record keeping personnel of three (pp. 176, 177). The added ease of the new registry, says Runnals, "immeasurably boosted the morale of the employees concerned" (except, possibly, that of the discharged one).

Mr. Stanley Ashworth, of Montreal, Assistant General Purchasing Agent of Canada Iron Foundries Limited, a concern employing about 6,000 employees, was next heard.

In March, 1954, Canada Iron Foundries started modernizing its filing systems from Kardex to Visirecord vertical visible with most encouraging results. Before the end of the current year, 1956, vouchsafes Mr. Ashworth, the company's seven plants will be equipped with Visirecord up-to-date sets.

During the past two years, 1954-1956, Mr. Mark Rudiger served as consultant to Visirecord Incorporated, but from 1945 to 1954, he acted as plaintiff's distributor for the entire Buffalo area.

Rudiger, for years, kept a close interest in filing systems and related the obstacles which confronted the trade from 1945 on. Comparing exhibit 12 with the actual products, exhibits 5 and 7, he points out some drawbacks of exhibit 12: the breakage of the plastic strip on dividers through use and pressure; another one being poor visibility, which an attempt to elevate tabs one-sixth of an inch above dividers had not obviated. Rudiger and Mr. Weston, Visirecord's President, spent their week-ends and many evenings in the 1947-1949 period working at those problems but without avail. The witness produces exhibit 16, a letter dated December 23, 1949, from Mr. Weston to all United States distributors, including a plastic band which then marked an initial advance; it was called the Magnivider. Experiments went on, since many difficulties persisted, especially that of better visibility.

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On May 15, 1950, an office circular captioned "Visirecord News", exhibit 17, revealed other progressive steps, among which was the attainment of a one pull motion.

Two months after, on July 14, 1950, a document entitled "Methods", exhibit 18, was circularized amongst distributors, particularizing the latest development of the new Magnivider, closely akin to those appearing in the modern equipment: complete protection, normal visibility, slanted transparent top band, immediate location of the desired information.

Mr. Rudiger afforded the Court a practical appreciation of the time saving feature accruing from the so-called one pull motion and I quote from page 205 of the Transcript:

> A. . . . in any system that is designed to offer efficiency in posting a reference the least amount of motion that is required to perform that function will naturally give the least amount of time and if that is performed many hundreds of times a day the sum total of two operations is certainly going to be more than a single operation.

Mr. Rudiger quite naturally comments upon the results brought about by the recent Visirecord vertical visible apparatus, saying that after 1950, it displaced 90% of all registry installations in the Buffalo area, either flat trays, blind filing or model 12 units.

Under cross-examination, witness agrees that, even in 1947, material identical to that exemplified on figures 1, 2, 3, 4 and 5 of exhibit 13, was not new to the trade.

In 1946 and 1947, Rudiger heard Weston refer to the Bosse Patent, exhibit A, in a more or less casual manner and the latter was certainly not well known at the time by production control managers, cost accountants or the general American public. According to witness, the Diebold unit, exhibit B, came out around the latter part of 1947, displaying the first approach to the principle of Visirecord filing. Since Diebold is a vertical visible system having certain factors inherent to any vertical visible system, Mr. Rudiger insists that neither the Diebold nor Acme Veri-Visible types, exhibit C, eliminated, as eventually did exhibit 7, "the difficulties experienced with the product shown in exhibit 12 by the addition of an angular strip or formation which facilitated single motion exposure of a desired bank of cards. This attained speed . . ."

Another exhibit referred to by defence, Vue-Fax, exhibit D, a model probably prior to 1950, was challenged by

Rudiger as having "no visible strips or any inclination of the strip in any way".

A double experiment was then successfully performed on exhibit 12 (old style model), by Mr. Fox, Q.C., who in a one motion pull reached a wanted intermediate divider, indexed DAR, and repeated this result in both a standing and a sitting posture.

Mr. Rudiger, commenting on this, cautions that in exhibit 12 "since the tops were breaking there was no plastic strip on the divider at all and then the intermediate tabs broke off".

It will be remembered that the new models, exhibits 5 and 7, are provided with those curved transparent plastic bands.

Before proceeding further, I will enumerate the several patents and four publications listed as instances of prior art: U.S. Patent No. 1,228,744 dated June 5, 1917 to E. F. Bredhoft; U.S. Patent No. 1,294,948 dated December 18, 1919 to J. H. Rand; U.S. Patent No. 1,419,394 dated June 13, 1922 to S. W. McKee; U.S. Patent No. 1,975,566 dated October 2, 1934 to R. Bosse; U.S. Patent No. 2,055,364 dated September 22, 1936 to E. S. Roscoe; U.S. Patent No. 2,192,178 dated March 5, 1940 to R. Bosse; U.S. Patent No. 2,383,944 dated September 4, 1945 to F. H. Saltz; U.S. Patent No. 2,435,077 dated January 27, 1948 to M. B. Hall *et al.*; U.S. Patent No. 2,526,950 dated October 24, 1950 to C. E. Jones; U.S. Patent No. 2,584,174 dated February 5, 1952 to H. Weston; Canadian Patent No. 431,601 dated December 4, 1945 to F. H. Saltz; Canadian Patent No. 433,886 dated April 2, 1946 to M. B. Hall *et al.*; French Patent No. 929,695 dated January 5, 1948 to André Chapuis; German Patent No. 692,774 dated March 8, 1938 to Bernard Finke.

Since the subject matter presents no technical intricacies, a few comparisons will suffice, I believe, to draw a distinguishing line between older patents and that of plaintiff.

Exhibit A, the Bosse Patent, dated October 2, 1934, is primarily concerned with the quick perception of the posting V. The specifications, from which I quote the two opening paragraphs, bring out this objective:

> This invention relates to a card register in which the cards or sheets are arranged visibly in echelons in a horizontal direction.

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According to the invention the cards are marked in such a manner that the absence of one card in a pile or the erroneous placing of two cards one exactly behind the other is at once noticed by the observer.

No mention is made of any attempt to simplify the handling of a card register in view of obtaining a one motion reach at the required information.

The Rand Patent, exhibit H, has the bent back top and upper edge channel with index members slidable therein; yet no claim is laid to greater visibility and none also concerning the rearward inclination of the lateral plastic band towards the rearmost intermediate dividers of any particular alphabetical breakdown in order to achieve the single pull feature.

Exhibit AA, the Chapuis Patent, published January 5, 1948, in its figure 5, at numerals 6 and 7, displays a slidable channel (gouttière) with a slight curvature or rearward inclination (légèrement inclinée vers l'arrière). According to the words of the inventor himself, he strove to obtain greater rigidity of the dividers, mains and intermediates, be completely encasing them in a grooved strip of sheet iron (tôle) without seeking for a more rapid operational result. Apparently, Chapuis looked for greater resistance and durability of the dividers and not for quicker movement. To put this in proper light, one paragraph of the patent should be cited:

> La caractéristique essentielle de l'invention réside donc dans la combinaison du carton et d'armatures profilées et découpées dans une bande de tôle, ces armatures entourant l'intercalaire de façon à lui donner la rigidité requise en l'occurrence.

Exhibit J, an advertisement of Sell Corporation Chicago, prompts similar remarks in despite of a 45° angle of the face plate. The novelty here appears to be the easy removal of the index strip at the rear of the spacing plate.

The Jones Patent, exhibit I, claims "transparent substantially flat elongated face plate . . . extending upwardly and rearwardly with respect to said cards. . . ." Still the essence of the invention consists in the ease with which the index strip, in flat facial abutment, may be removed from the rear of the metal plate, a factor distinguishable from the Weston Patent. The date of issue reads October 24, 1950, a doubtful reference, if plaintiff's submission of May 6, 1950, should prevail.

Exhibit T, a Remington Rand booklet entitled "Library Bureau", at p. 41, specifies that "the tab is permanently attached to the body of the holder by eyelets that are stainless and rustless". The tab itself, filed as exhibit U, is a heavy cumbersome metal plaque, punctured with four eyelet holes. The design of the Weston Patent is clearly missing here.

The McKee Patent of June 13, 1922, exhibit C, specifies that: "all the operators need do is to pull forwardly the main guide having the given date thereon thus exposing in the space 10 the letterheads of the letters and other papers which are to be extracted from the file". The emphasis here bears upon a follow-up method, an "aide-mémoire", for correspondence requiring day to day attention rather than on the improvements sought by Visirecord.

Prior to 1950, several constituent parts were of course known to the trade, i.e.: vertical cards in echelon, the top right hand corner diagonally cut off, with notches at the bottom adapted to lugs in a cabinet, as also dividers, and supporting end rails, but the litigation, if I understand it properly, is not headed in that direction.

I now reach the none too easy stage of differentiating novelty from obviousness.

Novelty being assumed, does the alleged improvement possess inventive merit or, on the other hand, is it something obvious?

The patent at Bar results from the combined interplay of elements none of which was new, and one must look elsewhere in order to find, if possible, an admissible inventive achievement.

Before delving deeper into the case, it is apposite to quote a few guiding principles selected from a host of judicial decisions.

In combination patents, the accepted doctrine holds that the novelty of the combination itself is the crucial factor, and not that of its individual elements.

The late President of this Court, Mr. Justice Maclean in re *Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd. et al.*[1] wrote:

> Every trifling improvement is not invention and the industrial public should not be embarrassed by patents for every small improvement. A

[1] [1932] Ex. C.R. 101 at 106.

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slightly more efficient way of doing a thing, small changes in size, shape, degree, or quality in a manufacture or machine, even assuming novelty, is not invention. Something further is necessary to justify a monopoly . . . There must be sufficient ingenuity to make a useful novelty into an invention. A small amount of ingenuity may be sufficient, but there must be some, . . .

The late Mr. Justice Audette had spoken to the same effect in *Lowe-Martin Company Ltd., et al. v. Office Specialty Manufacturing Company Ltd.*[1]:

The facts, before the court, show that the patentee has produced features and functions perfectly familiar to the prior art, without giving it any new functions and without accompanying it with new results, bring the patent within the principle so often stated that:

> The mere carrying forward of the original thought, a change only in form, proportion or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.

Mr. Justice Audette also referred to an American decision in re *The Railroad Supply Co. v. The Elyria Iron and Steel Co.*[2]:

A patent for the mere new use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties is bad and cannot be supported. If the new use involves no ingenuity, but is in manner and purposes analogous to the old use, although not quite the same, there is no invention.

Mr. Justice Masten of the Ontario Appeal Court spoke to like effect in *Helson v. Dominion Dustless Sweepers Co. Limited*[3]:

All the elements being old, and the functions to be performed being identical, the plaintiffs' combination could be patentable only if it performed the old function in some better or cheaper way than did the earlier machines—there must be a new mode of operation resulting from the combination for which the plaintiff claimed novelty; it is not invention to combine old devices in a new machine or manufacture without producing some new mode of operation. . . .

Another decision quite in line with the preceding is again one of Mr. Justice Maclean in *Canadian Gypsum Co., Ltd. v. Gypsum, Lime & Alabastine, Canada, Ltd.*[4]:

To support a valid patent there must be something more than a new and useful manufacture, it must have involved somehow the application of the inventive mind; the invention must have required for its evolution some amount of ingenuity to constitute subject matter, or in other words invention.

Were it advisable to distinguish between two shades of judicial opinion, I would then qualify the above decisions

[1] [1930] Ex. C.R. 181 at 187.
[2] [1917] Patent Office Gaz. (U.S.) vol. 239, 656.
[3] (1923) 23 O.W.N., 597.
[4] [1931] Ex. C.R. 180 at 187.

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as adopting a sterner outlook in opposition with a broader attitude pervading those hereafter quoted. In a controversy of this kind it might well happen that a plausible shade of thought could tip the scales *pro* or *con*.

In *Hickton's Patent Syndicate v. Patents and Machine Improvements Company Ld.*[1] Fletcher Moulton L.J. reversing the Judgment of the Court below held on appeal that:

> The learned Judge says: "An idea may be new and original and very meritorious, but unless there is some invention necessary for putting the idea into practice it is not patentable." With the greatest respect for the learned Judge, that, in my opinion, is quite contrary to the principles of patent law, and would deprive of their reward a very large number of meritorious inventions that have been made. I may say that this dictum is to the best of my knowledge supported by no case, and no case has been quoted to us which would justify it. But let me give an example. Probably the most celebrated Patent in the history of our law is that of *Bolton* and *Watt*, which had the unique distinction of being renewed for the whole fourteen years. The particular invention there was the condensation of the steam, not in the cylinder itself, but in a separate vessel. That conception occurred to *Watt* and it was for that that his Patent was granted, and out of that grew the steam engine. Now can it be suggested that it required any invention whatever to carry out that idea when once you had got it? It could be done in a thousand ways and by any competent enginer, but the invention was in the idea, and when he had once got that idea, the carrying out of it was perfectly easy. To say that the conception may be meritorious and may involve invention and may be new and original, and simply because when you have once got the idea it is easy to carry it out, that that deprives it of the title of being a new invention according to our patent law, is, I think, an extremely dangerous principle and justified neither by reason, nor authority.

Tomlin J. in *Samuel Parkes & Co. Ld. v. Cocker Brothers Ld.*[2] said that:

> *Nobody,* however, *has told me, and I do not suppose anybody ever will tell me, what is the precise characteristic or quality the presence of which distinguished invention from a workshop improvement* . . .The truth is that, when once it has been found, as I find here, that the problem had waited solution for many years, and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to alternative devices, it is, I think, practically impossible to say that there is not present *that scintilla of invention necessary to support the Patent.*

These, and possibly other considerations, induced the learned President of this Court to say in re *The King v. Uhlemann Optical Co.*[3] that:

> Invention may, therefore, be present notwithstanding the fact that there was no difficulty in putting the idea into effect once it had been conceived.

[1] [1909] 26 R.P.C. 339 at 347. [2] (1929) 46 R.P.C. 241 at 248.
[3] [1950] Ex. C.R. 142 at 163.

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Finally, Viscount Dunedin delivering the judgment of the Judicial Committee of the Privy Council in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ld.*[1] puts the test in these words:

> Would a man who was grappling with the problem solved by the Patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hand have said, "That gives me what I wish?"

and later, at page 56:

> Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations.

These references to some of the leading cases indicate that the question for determination is one of fact; whether or not inventive process exists, even though limited to the restrictive conception conveyed by the expression *"scintilla of invention"*.

In 1951, did a trade problem exist in the card registry line, a perceptible demand for something better, stronger, speedier, of more facile manipulation? Obviously yes, if one bears in mind the fourteen patents ranging from 1917 to 1954, each of these striving for some improvement, each and every patentee impelled to ceaseless exertions in a quest for accuracy, celerity and increased operational ease. Yes, repeated over again, by all the leading witnesses heard in support of or against the patent, such as, for instance, defendant Ross Sowerby Malton who, when asked if "in the industry today there is a demand for more speed, speed of location of cards?" replies "yes". On this score, no uncertainty beclouds the issue.

The questions involved find an answer in Mr. R. S. Malton's more than exhaustive, I incline to say exhausting, testimony covering the entire matter . . . and 152 pages.

It may not be amiss, before tackling defendant's version, to refresh one's memory on the peculiar coincidence that R. S. Malton became Visirecord's of Canada Sales Manager for Toronto and vicinity in 1950, Vice-President in 1952, severing his connections with the latter firm on or about June 22, 1953, to then join the defendant company's staff (T. p. 309).

Consequently, his knowledge of plaintiff's successive types of vertical filing registers, of the constant march ahead

[1] (1929) 46 R.P.C. 23 at 52.

towards the goal culminating in the actual patent, is both intimate and second to none.

Transcript pages 324 and 325, confirm this close acquaintance:

Q. [By Mr. Sim for defendants] Are you familiar with the unit of the precise type of construction illustrated in Exhibit 7?

A. Yes, most familiar. I designed it.

Let us now sort out the oral evidence's contribution on the score of:

1. Anticipation by disclosure or publications.
2. Prior user through public sales antedating May 6, 1950.
3. Substantive differences between successive units, exhibits 12, 16, K and 7.

The truest approach to this is to quote from the witnesses' own statements reported in the Transcript.

1. *Anticipation by Disclosure or Publications.*

At page 389, the witness, cross-examined, is asked:

Q. Now, Mr. Malton, would I be correct in saying that that was not what was normally called one motion in the plaintiff company during that period?

A. I don't think it was ever described that way, not as a publication or a promotion or advertising. I think it was more understood.

On the next page, the witness restricts this statement, interjecting that the "one finger" expression had been used "in the time preceding that." Asked by Mr. Henderson, Q.C., if before 1951, Mr. Deekes (President of the plaintiff company) used the expression "one finger selection"; he answered (T. p. 390):

A. I don't recall him doing it.

Q. Did anybody there use that terminology prior to 1951?

A. Other salesmen. It was just generally done.

Q. Give me some names—tell me.

A. I don't have any names, Mr. Henderson. There were many people involved in the company.

Mr. Malton believes that he first saw "about January 1950" a letter headed "Visirecord Inc.", dated December 23, 1949, filed as exhibit 16, a promotional publication vaunting in glowing terms "Our New VISIrecord MAGNIvider Visible Strip", a sample of which was annexed to the document. However, Malton later on tells us that this selfsame exhibit 16, the Magnivider, was never used in Canada

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in the manner or form revealed by exhibit 16, therefore hardly substantiating a reproach of anticipation.

On July 24, 1950, R. S. Malton sent out a written reply to Marshall-Stevens Ltd., in St. John, N.B., distributors for the plaintiff company (exhibit 24) in which one reads: "This MAGNIvider *is really quite a radical advance in vertical visible equipment.*" On page 422, the witness notes that:

A. . . . *To my knowledge, that is the first time a rearwardly inclined main divider had been brought into the market or was intended to have been brought into the market on vertical visible equipment.*

A moment ago, I noted this particular contrivance never entered the local market, and could have done so only after July 24, 1950, close to three months beyond the critical date of May 6, 1950.

Promotional literature introduced by defendants for anticipatory purposes: exhibit N, four direction sheets entitled "Visible Record Tri-Poster Methods", dated September 1, 1949, met with indifferent success as may be gathered from the following excerpts at p. 453:

Q. [By Mr. Henderson, Q.C.] Mr. Malton, may I direct your attention to Exhibit N and draw to your attention that there is nothing on Exhibit N in the passage that you read that suggests that you located an account by going to an intermediate divider?

A. That is correct.

Q. So there is nothing then in Exhibit N that says you go directly to the tab on the intermediate dividers?

A. That is right.

This also applies to exhibits O and P, instructional circulars respectively labelled "A comparison of Visirecord with the Flat-Tray Visible Cabinet" and Sheet No. 3 pertaining to the same promotional matter, as may be seen by a further reference to pages 453 and 454:

Q. [By Mr. Henderson] I now draw to your attention exhibit O and say to you again there is nothing on Exhibit O that says you go directly to an intermediate divider?

A. There is nothing that says that although intermediate dividers were in common usage at that time.

Q. In fact the answer to my question is there is nothing there?

A. That is right.

Q. And I refer you to Exhibit P and there is nothing there that says you go directly to an intermediate divider?

A. That is correct.

Proof of anticipation by publication or disclosure, prior to May 6, 1950, is quite shadowy.

2. *Prior User Through Public Sales*

The evidence on this point could suffer more clarity and for this a certain measure of responsibility may be laid at Mr. Malton's door. It is hard to reconcile that section of his testimony with several precisions otherwise obtained from him. Affirming, as he does, that "right from 1946 I have always accepted and believed and instructed people that they could find a row of cards in which the desired card was located by a one finger motion in indexing as set up in this Exhibit 12. . . .", (T. pp. 382, 383), he cannot recall a physical location where a unit such as exhibit L was in use, but for the sole exception of Anglo-Canadian Drug Co. in Oshawa, Ont., and he agrees that prior to 1950, to the best of his knowledge, exhibit L was the only installation of this type he made (T. pp. 383, 384).

Mr. Malton finally complies with the suggestion that the actual commercial sales of exhibit 7 ranged from March 22, 1951, on (T. p. 362).

I will now dispose of the exhibit L angle and, possibly, a brief sketch of its story may help. Anglo-Canadian Drug Co. of Oshawa, through Mr. Malton's intermediary, purchased this model L filing registry in 1947. In 1951, Mr. Malton, on a visit to the Drug company's bookkeeper, Mr. Davidson, observed this card register still in use. When preparing his defence, in October, 1955, he finally remembered the 1947 deal with his Oshawa clients and returning to their office he found, as will be seen later on, a totally renovated exhibit L. Had this commodity lent itself to a substantial comparison with exhibit 7, of course, prior user would be a proven fact. The question then is: were exhibits L or 12 closely akin to their eventual successor exhibit 7?

These two specimens of vertical visible card indexes, manufactured by the plaintiff, were strenuously pointed at by defendants as evidencing anticipation by prior user. It was argued that every advantage, each step forward claimed by the instant patent appeared on both of these former models. I devoted considerable care in comparing these successive registers, namely, exhibits 12 and L, on the one hand, exhibits 5 and 7, on the other. To begin with, I must signal out that models 12 and L are identical, the difference in notation being merely one of filing convenience.

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June 11-15
June 18-21
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Mar. 10
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Exhibit 12 is a standard model foredating Nos. 5 and 7; exhibit L is also of model 12 manufacture, but sold by R. S. Malton to Anglo-Canadian Drug Co. in Oshawa, about the last day of August or the first day of September, 1947. As for exhibit 12, it remained one of plaintiff's regular "sellers" from 1946 to 1951.

Mr. R. S. Malton, former distributor and sales manager of the plaintiff company, supervised the setting up of this card register bought by Anglo-Canadian Drug Co. He insists that it offered practically all the characteristic traits now attaching to the newer models. This statement is refuted by the evidence of Mr. Carson Herrick and Miss Margaret Hart, and more so by the mute but revealing testimony of exhibits 5 and 7.

Mr. Herrick, in October, 1946, sold vertical visible record keeping registers made by Visirecord of Canada Limited, as agent for Modern Business Methods Limited. In such capacity, for a period of a month or so, he had with him Mr. R. S. Malton himself as sub-distributor. Mr. Herrick, although prudently hinting "at a possible vagueness of memory", nonetheless spoke of having "a distinct recollection of Visirecord at that time and how it was sold". He unhesitatingly points out important discrepancies between the two oft-mentioned types. On model L, the plastic strip running between the end rails above the main dividers was straight instead of rearwardly inclined. Usually, only one tab appeared on the main divider in line with one also on the intermediate divider. This witness, whose veracity was attested by Mr. Fox, Q.C., in the argument, remembers that he prevailed upon the sub-distributors *not to emphasize a possibility of one pull motion because "the visistrip . . . got brittle through use . . . and I instructed the men . . . to take care not to break this visistrip as you pulled it forward"*. It is interesting to remark that one of these agents who received such cautioning directives was none other than Mr. R. S. Malton. True, Herrick concedes the possibility of that one pull motion with exhibit 12 but we have seen why he discouraged it.

Miss Hart, a filing clerk employed by Anglo-Canadian Drug Co. in Oshawa from April, 1948, to July, 1952, had, as such, the daily use of exhibit L, the card register, particularly during the twelve-month period 1949-1950. Miss Hart, whose observations must surely carry some weight,

positively asserts that the plastic band, topping the main dividers, was straight across and not curved backward; that each divider held only one tab and, a noteworthy difference, that the intermediate or, as she says, the "flimsy divider" had no tabbing whatever which, of course, *precluded all possibility of an effective one finger pull.* Probed on these important points, she reiterates her declarations, adding she would disagree with contrary statements and that she recalls quite clearly the system's set-up.

Mr. Mark Rudiger also avers that model 7 increased the degree of visibility of the older models and was especially designed with the advantageous feature of the regular one pull motion which formerly, as on exhibit 16, the Magnivider unit, and exhibit 12, could be achieved *"but inefficiently"*. "We found", continued Rudiger, "that the angle of the magnivider was incorrect and many, many variations were made to determine the correct angle both mathematically and by actual experimentation".

Defendants' counsel quoted several cases, Canadian and English, to establish the legal portent of disclosure of an invention, its publication, public sale or manufacture. I readily agree with those decisions but am at a loss to detect in them any applicability to the instant case. Exhibit L or 12, owned by the Anglo-Canadian Co., and currently publicized prior to March 9, 1951, was superseded by appreciably altered units so frequently referred to above. The card registry on hand before 1951 and its improved successor, issued after this date, are not identical but different.

On page 348, Mr. Sim, one of defendants' counsel, examining Mr. Malton, regarding exhibit L, as recovered in October, *1955*, puts these questions, eliciting the ensuing answers:

Q. Coming to the cabinet now, was the unit you saw at that time identical with the unit you see here today?

A. All the components?

Q. Yes.

A. No.

Q. What was the difference? [in October of 1955]

A. It had a different type of main divider. This was a divider with a curved back and rearwardly inclined top with a channel on the rear under surface with slidable inserts in it.

Q. Do you know of your own knowledge when those dividers were substituted for the dividers that appear in Exhibit L?

A. Yes, in April of 1953.

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I, at once, note that by October, 1955, exhibit L had undergone a radical change which had transformed it into a sample of the new No. 7 class. It is also permissible to repeat that samples L and 12 are identical, L being the Court letter given to an exhibit 12 model purchased by Anglo-Canadian Drugs in 1947. Mr. Malton does not minimize this fact nor the correlative one of exhibit L labouring under the same disabilities that affected exhibit 12, i.e. opacity of the index in the forward position of the main dividers, difficulty of reading the tabbing on the main or intermediates and, lastly, the plastic strip on the straight or vertical dividers had not the required strength or durability to withstand normal wear and tear (T. pp. 376, 377). The article located at Oshawa, in 1955, had to be reconstituted out of mere surmise and recollection back to what it was in 1951, when last observed by Mr. Malton. In a more or less casual way, this retroactive remodelling was attempted through the co-operation of Messrs. Malton and Davidson. Unfortunately, for reasons unexplained, the sample produced in Court admittedly differs from the haphazard rebuilding these two operators strove to attain in October, 1955. The upshot is that in 1947 a card index of model 12 vintage, essentially dissimilar from exhibit 7, was delivered to Anglo-Canadian who reshaped it into an exhibit 7 model in 1953. And to end all, exhibit L produced at trial does not even correspond in every respect to the 1947 replica wishfully built up in the fall of 1955.

Mr. J. Davidson, for many years bookkeeper at Anglo-Canadian Drug Co. in Oshawa, corroborates the transitory conditions of exhibit L, which merged into the newer model on or about April 23, 1953, when "the new main divider had a curved top on it. The celluloid, instead of being flat, had a curve and you put your indexes, strung them out along in behind" (T. p. 474).

Mr. Davidson's evidence assumes a particular degree of significance at page 473 of the Transcript when he states that on the initial exhibit L, from 1947, to April, 1953, the one motion selection could be obtained merely in the first part of the cabinet. Beyond, it became unescapable to utilize the metal dividers on account of the weight of cards pressing against main dividers of too weak a fabric.

I therefore believe that an undeniable step ahead resulted from the equipment appearing as exhibits 5 and 7, the main traits of which are the rearwardly inclined configuration of the tabbing band and the visibility thereby obtained.

Defendants concede (T. p. 657) that the card index owned by Anglo-Canadian Drug Company before 1953, did not possess the bent back top with a grooved channel on its main dividers nor an alignment of indexing tabs, in other words, lacked the developments conducive to, amongst other merits, the single motion performance. This seems a likely occasion to repeat and apply the test suggested by Viscount Dunedin in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ld.*[1]:

> Would a man who was grappling with the problem solved by the Patent attacked, *and having no knowledge of that patent,* if he had had the alleged anticipation in his hand have said, "That gives me what I wish"?

and later, at page 56:

> Does the man attacking the problem find what he wants as solution in the prior so-called anticipation.

Could it be convincingly held that Mr. R. S. Malton, until June, 1953, plaintiff's General Sales Manager, to whom the paternity of exhibit 7 attaches, had, in 1954, the crucial period, "no knowledge of that patent"?

The set-up of exhibit L, in my estimation at least, successfully stands this test and would not necessarily afford, to a mechanic having the common knowledge of the art, the solution provided by the improved models, exhibits 5 and 7.

I cannot detect any prior user in exhibit L.

3. *Substantive Differences between Exhibits 12, 16, K and 7.*

Before entering upon the last factual phase, it seems apposite to outline shortly the chain or sequence of the various types, as reported by R. S. Malton.

1. Exhibit 12, manufactured by plaintiff, from 1945 to or about March 22, 1951, (T. p. 330).
2. Exhibit 16, the Magnivider plastic strip of December 23, 1949, never used in Canada, (T. pp. 322, 324, 448, 449, 450).
3. Exhibit K, intermediate type between exhibits 12 and 7, from 1950, until the spring of 1953, (T. p. 387).

[1] (1929) 46 R.P.C. 23 at 52.

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4. The present plaintiff's exhibit 7, the regular sale of which began on or about March 22, 1951.

Exhibit 12

Since this model has already been described, it will suffice to say that the main dividers were straight or vertical and devoid of the peculiarity of this invention: the rearwardly inclined plastic translucent strip; it was criticized by Mr. Malton (T. p. 376) on the score of its "little or no visibility of the index in the forward position of the main dividers"; also because it was "difficult to see the tabbing on the main or intermediates" and on account of the strip not being "strong enough or durable enough to withstand normal wear and tear".

Exhibit 16

The Magnivider strip affixed to the company's circular of December 23, 1949, and never used in Canada. In Mr. Malton's own words, this device shows three discrepancies when compared with exhibit 7: it "has a single plane below the angled back top portion here and, secondly, it has no channel in the angled back rearwardly inclined portion . . . it is inclined rearwardly a greater distance than on the strip in Exhibit 7. Exhibit 7 in itself has a different attachment means in that it has a slotting arrangement consisting of two planes" (T. p. 323).

Exhibit K

Requested to describe the variations between exhibits K and 7, witness (T. top of p. 327) again ascribed three: exhibit K is not inclined rearwardly; when attached to the body or sheet of the main dividers the rearward edge of the inclined back top of the strip came back so far that it almost touched the face of the next one on the following main divider (T. p. 327). Its transverse plastic band fringing the main dividers was affixed by eyelets or brackets along the upper area of the main dividers. The heavy metal pocket brought about breakage of the plastic strip and repeated fracturing (T. p. 329) "at the time because of the tightening or loosening of eyelets . . . It was a tremendous problem to management and sales so we actually got into this type of thing", this type of thing meaning the substituted features of exhibit 7.

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Exhibit 7

The conclusion flowing from a scrutiny of the former models is that exhibit 7, so often commented upon, is something different. I am satisfied that, owing to their specific characteristics, exhibits 12, 16, K, and 7, since March 22, 1951, should not avail to instance prior user.

In exhibit 21 entitled "A Brief History of Vertical Visible Recordkeeping", prepared by Mr. Malton himself, we read this significant assertion:

> *By the end of 1953* it was apparent that Vertical Visible had finally gained public acceptance *and it was indicated that it would eventually supplant all other types of recordkeeping systems* such as wheels, flat tray, etc.
>
> (Transcript, p. 369)

Questioned as to the accuracy of this, the witness replies: "I believe in that statement" (T. p. 369).

This admission, coupled with the evidence adduced by Messrs. Stewart and Rudiger, reasonably prove the commercial success of vertical visible filing as initiated by plaintiff's Patent No. 500,084. Surely, the rise in the bulk of sales lends itself to no comparisons with articles of universal use, as, for example, eye-glasses or fountain pens; still, in its own proper field, it attested a significant increase from the year of its appearance on the market, 1951, and 1955, the last for which returns are obtainable.

The Statement of Defence, stressing the invalidity of plaintiff's patent on the grounds of anticipation, prior user and absence of inventive matter, lays no claim to actual constructional singularities between defendants' merchandise, exhibits 6 and 19, and that of plaintiff.

Mr. Malton commenting on defendants' models 6 and 19, to this query:

> Q. . . . so that when one puts one's finger over the top of the main divider one's finger contacts the tab on the rearmost intermediate divider?

replied:

> A. That is correct.
>
> (Transcript, p. 355)

In point of fact, the card index promoted by defendants exhibits the same distinctive improvements: slidable index members, inserted in a channel with a rearward curvature at the back, such indices corresponding to tabs mounted on the intermediates and the ensuing advantage of the one motion selection.

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I rather fear that Mr. Malton, designer of plaintiff's newest models (exhibits 5 and 7) could not oust from his "business" memory, to an innocuous extent, all lingering recollections of his latest innovations launched, so to speak, in the other fellow's shop across the street.

At page 707, of the Proceedings at trial, defendants' counsel is reported as saying:

> Now, here is a system that is sold loose. Surely a monopoly is not to be granted on material that if it is set up in a certain manner there may be or may not be infringement because this can be set up in any manner the user desires. You can take the index members off Exhibit 6 and there is no infringement of Claims 9, 10 and 11 at least. You can put any number of index tabs on the main divider. If you put one index tab, then there is no infringement. Now, that, my lord, is not a patentable combination. That is a system that falls into the *terra media* that is not touchable under any of our industrial or property laws at all.

This surely is a clever attack against the patent. But it also is an *a priori* one. Separately considered, each component: dividers, index members or tabs, end rails, are not patentable material. And their arrangement, or rather, as suggested, their disarrangement in the unit itself, at a user's whim, negatives the invention's substantive meaning. This amounts to distorting instead of correctly construing the author's directions. Any invention taken apart, disassembled, sundered from its unitary harmonious functioning, pertains more to cast-off heap than to the Patent Office. In a combination particularly, the aggregates, of little moment by themselves, may concur in some worthwhile unified results. The hoped for unity, then, should not be ascertained nor judicially assayed by the touchstone of fragmentation. Nor can I willingly conceive of anyone interested in speed and accuracy of filing, or as trade parlance goes, anybody sold to the idea of the new device's superiority, purposely failing to fit and operate it according to specifications.

As a concluding, although belated reference to the experiment successfully carried out by defendants' counsel on exhibit 12 regarding the one pull motion, witness Davidson (T. p. 473) explained that a like result could be had only in the first or anterior portion of the card register and was impossible if dealing with the rear section on account of the weight and pressure of the cards and the fragile nature of the upper plastic strip. The exhibit 12 model, adduced in Court, comprises sixteen main dividers, split in two equal

portions by a metal separator. The front section has only one sparse bank of cards, the rear one contains a few incomplete rows of filing material which do not even tally with the situation described by Davidson. Did this facilitate the favourable result of Mr. Fox's experiment? I will not venture to guess. Furthermore, time and time again, the defects of the old type main dividers and the improvements of the newer model were pointed out in all their pertinent aspects.

In the course of his exhaustive argument, Mr. Fox, moved to amend para. 3 of the Particulars of Objections, as amended in the further Particulars of Objections, by setting up in the list of prior publications exhibit 18 and the marketing of exhibit 7 model begun in March, 1951, pursuant to Mr. Stewart's evidence.

Exhibit 18 is an instructional bulletin dated 7/14/50, July 14, 1950; as for exhibit 7, witness Stewart told us that its commercial sale started on or about March 22, 1951. Counsel argued that neither exhibit 18 nor Mr. Stewart's (then unheard) comments had been pleaded as anticipation when the Particulars of Objections were prepared. According to Mr. Fox, these facts would tend to assign May 26, 1951, instead of May 6, 1950, as the initial date for anticipation.

In reply to Mr. Henderson's request for a re-opening of the trial, should this motion be granted, Mr. Fox countered:

> In my submission, if your lordship allows the amendment the case is over so far as the adducing of evidence is concerned and cannot be re-opened at this stage and I put myself on record as saying that if your lordship accepts my [the] suggestion that the granting of this motion should carry with it any co-relative right that the evidence should be opened then I respectfully request your lordship to deny the motion.

I would have allowed some rebuttal, had I granted the motion, and were I to take the learned counsel at his words, I could for this reason alone dispose of his request.

There are, however, more judicial motives to reach a negative decision . The company's circular, exhibit 18, even if mailed to Mr. Stewart on the day appearing on the document itself, July 14, 1950, is subsequent by quite a few weeks to May 6, 1950, (the date of the Canadian application for patent reading: May 6, 1952) and also within the twelve-month period required by s. 29(1) of the Act.

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Dumoulin J.

Regarding Mr. Stewart's testimony, it was freely given without anyone objecting, and I consider it as properly of record. I therefore hold that this motion is both unwarranted as to exhibit 18 and unnecessary as to Stewart's evidence.

The present issue brings to the fore one of those perplexing occurrences properly called border line cases. Noticeably missing from this workaday improvement is the striking element. Yet, continuous waves of comparable commonplace contrivances flood the mercantile arenas, meeting the exigencies of the patent regulations and the relatively extensible test of the law.

The judicial practice favours a realistic interpretation and liberally construes the practical meaning of inventive achievement. Section 48 of c. 203 invests a patent with a presumption of validity, enacting that: ". . . The patent . . . shall thereafter be *prima facie valid and avail the grantee and his legal representatives for the term mentioned therein . . .*"

Mr. Justice Thorson urged this view in re: *O'Cedar of Canada Ltd. v. Mallory Hardware Products Ltd.*[1], writing that:

> Thus it seems to me that when there has been a substantial and useful advance over the prior art the Court should not give effect to an attack on the validity of the patent covering it on the ground that the advance was an obvious workshop improvement unless it is clearly so. In view of the statutory presumption in favour of the validity of the patent the Court should not make the onus of showing its invalidity an easy one to discharge.

Notwithstanding the marginal notation: "Definitions", opposite s. 2 of the Act, I remain unconvinced that para. (*d*) effectively purports to cage in a few words the elusive and subjective analysis of inventive process. So then, I guardedly cite it, emphasizing the word "improvement":

> (*d*) *"invention"* means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful *improvement* in any art, process, machine, manufacture or composition of matter;

The actual litigation involves a notion of "improvement" more than one of invention; and improvement with the twofold merit of novelty and utility is proper patentable matter.

> It may be that the invention is a small one, but slight differences in these cases sometimes produce large results.

[1] [1956] Ex. C.R. 299 at 318.

wrote Lord Davey in *Patent Exploitation, Ld. v. Siemens Brothers & Co., Ld.*[1]

In a similar vein, Viscount Dunedin, in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ld.*[2] spoke thus:

> It must also be considered that there may be invention in what, after all, is only simplification.

The Lord Justice Clerk (Aitchison), deciding the *Rheostatic Co. Ltd. v. Robert McLaren & Co. Ltd.*[3], at page 117, put the difficulty positively:

> Again the simplicity of the device does not exclude invention; on the contrary inventive ingenuity may, and often does, consist in finding a simple and, when discovered, the apparently obvious solution of the problem.

Though unglamorous this fruitful enhancement of the art brought daily relief to hundreds engaged in filing or indexing tasks, easing off some tedious and tiresome motions, while intrinsically improving this specialty's accuracy and durability. The combination at issue evinces, in my mind, a sufficient degree of inventive acumen to uphold the patent. A simultaneous upsurge of sales enhances this opinion.

For the reasons above, I find that the essential or basic combination imparting inventive novelty to plaintiff's card registry, described in claims 9 and 12 of Patent No. 500,084, are present in defendants' card registers, sampled in exhibits 6 and 19, consequently entailing an infringement of those aforementioned claims 9 and 12.

There will, therefore, be judgment in favour of the plaintiff, granting the relief sought by it except as to damages. Should the litigants disagree on the amount of damages or the amount of profits, if plaintiff elects the latter, there will be a reference to the Registrar or a Deputy Registrar, and judgment for such sum of damages or profits as found in the reference. Plaintiff is entitled to costs taxed in the usual way.

Judgment accordingly.

[1] (1904) 21 R.P.C. 541 at 549.
[2] [1929] A.C. 269 at 280; 46 R.P.C. 23 at 55.
[3] (1936) 53 R.P.C. 109.

1958
Mar. 6
Mar. 11

BETWEEN:

WONDER BAKERIES LIMITED .....PLAINTIFF;

AND

MAX FURMAN, WILLIAM FURMAN AND AARON FURMAN, CARRYING ON BUSINESS AS PARTNERS UNDER THE FIRM NAME AND STYLE OF TIP TOP BAKING COMPANY .....DEFENDANTS.

Practice—Pleadings—General Denials—Application to strike out defence—Exchequer Court General Rules and Orders, rr. 88, 95—Particulars—R. 42 and Rules of the Supreme Court of England, O. XIX, r. 7B—Trade Marks Act, S. of C. 1952-53, c. 49, s. 7.

The plaintiff company by its statement of claim alleged that it was the owner of three registered trade marks which by use in connection with the plaintiff's goods had become well known in identifying them; that the defendants had infringed the plaintiff's exclusive rights in these trade marks by using them in association with their goods; and that the defendant's had adopted and used the word "Tip Top" in association with their goods for the purpose of directing public attention to them in such a way as to cause confusion with the plaintiff's goods, contrary to s. 7 of the *Trade Marks Act*. Para. 1 of the defence stated: "The defendants deny each and every allegation made by the plaintiff in its Statement of Claim as if the same were herein set forth and denied seriatim and put the plaintiff to the strict proof thereof". Para. 2: "The defendants deny that the plaintiff is the owner of specific trade mark "Tip-Top" referred to in para. 4 of the plaintiff's Statement of Claim". The plaintiff applied to have para. 1 of the defence struck out on the ground that it was contrary to rr. 88 and 95 of the General Rules and Orders of the Exchequer Court in that the paragraph was merely a general denial of the facts alleged in the statement of claim, raised no defence to the action, and did not deal specifically with each allegation of fact of which the defendants did not admit the truth. The second branch of plaintiff's application was for an order requiring the defendants to deliver particulars of para. 2 of the defence, setting forth the names of the persons alleged to be the owners of the trade mark referred to therein. Finally the plaintiff asked for an order requiring the defendants to deliver particulars of the grounds on which they relied in support of their allegation in their counter-claim that one of the plaintiff's trade marks was invalid.

Held: That the mere fact that the defence did not contain affirmative allegations was not a contravention of r. 88.

2. That the defendants were within their rights under r. 95 in pleading only denials, and the decision as to whether or not to plead any further facts was entirely for them. *Woon v. Minister of National Revenue* [1950] Ex. C.R. 327; *John Lancaster Radiators Ltd. v. General Motor Radiator Co. Ltd.* 176 L.T. 178.

3. That the general rule is that the Court never orders a defendant to give particulars of facts and matter which the plaintiff has to prove in order to succeed. *Weinberger v. Inglis* [1918] 1 Ch. 133 at 137. Here the onus of establishing title to the trade marks was clearly upon the plaintiff. There was no onus on the defendants to allege or prove title in themselves or in any other party and the Court would not require them to give such particulars.

4. That r. 42 provides that where, as here, there is no specific provision in the rules of this Court relating to the ordering of particulars in cases of this kind (trade mark) the English rules and practice shall apply, and by O. XIX, r. 7B of such rules, particulars of a claim shall not be ordered under r. 7 to be delivered before defence unless the Court or Judge be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other reason to be so delivered.

5. That as the Court was of the view that no injustice would result to the plaintiff by a refusal to order particulars at this stage, and as no sufficient reason had been shown for regarding the matter as falling within the exception to r. 7B, the application was refused but without prejudice to a further application at a later stage of the proceedings. *La Radiotechnique v. Weibaum* [1928] 1 Ch. 1 at 9, and *The Queen v. The Ship M/V Island Challenger et al.* [1956] Ex. C.R. 334, referred to.

MOTION for an order to strike out para. 1 of the defence; for further particulars of para. 2 of the defence, and for further particulars of defendants' counterclaim.

W. B. Rest for the motion.

M. M. Kertzer contra.

THURLOW J. now (March 11, 1958) delivered the following judgment:

This is an application on behalf of the plaintiff for an order

(1) striking out paragraph 1 of the defence;

(2) requiring the defendants to deliver particulars of paragraph 2 of the defence; and

(3) requiring the defendants to deliver particulars of their counter-claim.

In the statement of claim, it is alleged that the plaintiff is the owner of three registered trade marks which, by use in connection with the plaintiff's goods, have become well known in identifying them, that the defendants have infringed the plaintiff's exclusive rights in these trade marks by using them in association with their goods, and that the defendants have adopted and used the word "Tip Top" in association with their goods for the purpose of directing

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public attention to them in such a way as to cause confusion with the plaintiff's goods, contrary to s. 7 of *The Trade Marks Act*.

Paragraphs 1 and 2 of the defence are as follows:

1. The defendants deny each and every allegation made by the plaintiff in its Statement of Claim as if the same were herein set forth and denied seriatim and put the plaintiff to the strict proof thereof.

2. The defendants deny that the plaintiff is the owner of specific trade mark "Tip-Top" referred to in paragraph 4 of the plaintiff's Statement of Claim.

In paragraphs 3 and 4, the defendants deny that they have used the trade marks referred to in the statement of claim or sold their goods in such a manner as to be confusing with the plaintiff's goods, and in paragraph 5 they deny that the plaintiff has suffered damages.

The application to strike out paragraph 1 is made on the ground that it is contrary to Rules 88 and 95 of the General Rules and Orders of the Exchequer Court in that the paragraph is merely a general denial of the facts alleged in the statement of claim, raising no defence to the action, and does not deal specifically with each allegation of fact of which the defendants do not admit the truth. The rules referred to are as follows:

RULE 88

Pleadings, how to be drawn—Signature of Counsel

Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence; such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums and numbers shall be expressed in figures and not in words. Signature of Counsel shall not be necessary, except as regards informations, petitions of right and statements of claim. Pleadings may be drawn in conformity with Forms 19, 20, 21 and 22 in the Appendix to these Rules.

RULE 95

Allegations of fact must not be denied generally

It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the information, petition of right or statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth.

The plaintiff submitted that paragraph 1 of the defence is contrary to Rule 88, because it does not contain any statement of the facts on which the defendants rely, and that it is contrary to Rule 95 in that it is a general denial and does not deal specifically with each allegation of the statement

of claim of which the defendants do not admit the truth, and in that it unnecessarily requires the plaintiff to prove facts which it is said the defendants could admit.

In my opinion, the defendants are well within their rights in pleading only denials, and the decision as to whether or not they will plead any further facts is entirely for them. What they may be entitled to prove at the trial under bare denials is, of course, another matter, but I see no contravention of Rule 88 in the mere fact that the defence does not contain affirmative allegations.

The objections under Rule 95 are, in my view, answered by two cases, one of which is a judgment of this Court and the other a judgment of the Court of Appeal in England. In *Woon v. Minister of National Revenue*[1] a similar application was made to strike out two paragraphs of a defence, each of which contained a denial of several paragraphs of the previous pleading. The denials were no less general than the paragraph attacked in the present application and possibly less general, for, while here the whole defence is denied rather than specific paragraphs, the denial is of "each and every allegation made by the plaintiff . . . as if the same were set forth and denied seriatim." In the *Woon* case, Cameron J. said at p. 330:

> Paragraphs 5 and 8 of the statement of defence, in my view, cannot be deemed "general denials" of the facts alleged in the statement of claim. They are specific in denying each and every one of the allegations referred to in the specifically named paragraphs of the statement of claim. The appellant is not left in any doubt as to what is meant by these clauses in the defence. They mean that he will be required to prove each statement of fact which is so denied.

And at p. 331:

> The issue of estoppel is raised by the appellant and clearly met by the respondent in his denial that the respondent is estopped. No doubt objection will be taken to any evidence as to what was said or done by either of the two gentlemen referred to and the question of estoppel as against the Crown will be argued. But those matters are clearly raised in the proceedings and can cause no surprise to appellant's counsel.
>
> If, for example, the respondent desired to rely at the trial on the fact that the officials named had given rulings or offers other than those put forward by the appellant, that would be a fact or circumstance that the respondent would have to refer to in his statement of defence. But he has not chosen to do so, and as admitted by Mr. Mason, could not introduce evidence on that point in the present state of the pleadings.
>
> * * *
>
> On the facts of this particular case I find that the statement of defence is in conformity with the rulings of this Court.

[1] [1950] Ex. C.R. 327.

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In *John Lancaster Radiators, Ltd. v. General Motor Radiator Co., Ltd.*[1], Morton L.J. said of a defence similar to that here in question, at p. 179:

> Apart from authority, my impression of this defence would have been as follows. I strongly suspect that of the numerous allegations of fact set out in the statement of claim there may be some as to which there is no real controversy. I strongly suspect that to that extent the defendants might have limited the issues or admitted some of the allegations of fact, but this court, at the present moment, has no knowledge as to that. The defendants have chosen to plead in a manner which alleges, in effect, that the statement of claim and every allegation of fact in it is incorrect from beginning to end; in other words, that it is a tissue of lies. We do not know whether that is so or not. No doubt, when the matter comes to a hearing, if the court thinks that the statement of defence has involved the plaintiffs in unnecessary expense, the court will know how to deal with the matter by way of costs; but I am unable, on the material before us, which consists simply of the statement of claim and the defence, to say that this defence tends to prejudice, embarrass or delay the fair trail of the action. The plaintiffs are left, as I see the matter, in no doubt as to what the attitude of the defendants is in regard to every single allegation in the statement of claim. They deny every one of them, and, for all we know, every one of them may be false.
>
> I do not propose to express any view, unless and until the matter arises, on a defence consisting simply of one paragraph: "The defendants and each of them deny each and every allegation in the statment of claim contained as fully as if the same were herein set forth and denied *seriatim*." In this case the defendants have at least gone further than that; they have started by answering in unambiguous terms what seems to be the point of substance in the statement of claim, that is, the alleged conspiracy. They go on to deny, in par. 2, all the acts which they are alleged to have done in pursuance of the alleged conspiracy, and they go on, in par. 3, to deny every item of damage and to raise a further defence that the alleged damage, if it has been suffered, is not the result of any act or default of the defendants. Thus, the plaintiffs know that it is for them ot prove every allegation in the statement of claim. It is, of course, open to them, if they think fit, to serve a notice to admit facts on the defendants, or any of them, or to make use of interrogatories, but that is entirely a matter for them.
>
> Although I strongly suspect that the defendants could well admit certain facts in the statement of claim, the court has no knowledge of that at this stage, and I cannot see that any useful purpose would be served at all if the defendants, instead of this form of defence, denied one by one each allegation in the statement of claim, setting out that allegation sufficiently fully to deny it specifically. It seems to me that such a defence would be extremely long in the present case, and would give rise to a good deal of expense in printing. Nor has the court hitherto interpreted rule 17 as making such a form of defence obligatory.

Tucker L.J. also said at p. 180:

> The plaintiffs' real complaint, I think, is that it unnecessarily denies a number of allegations in the plaintiffs' statement of claim which it is thought are not really in dispute. This is not the stage at which to pass

[1] (1946) 176 L.T. 178.

judgment upon that, and it may well be (I do not know) that when this case comes to trial the learned judge may think that the attitude taken up by the defendants has been, in substance, an abuse of the process of the court, or he may consider them to have been guilty of the kind of conduct which tends to bring litigation into disrepute, the kind of thing that the rules are designed to prevent. If the learned judge should come to that conclusion, he will know how to deal with the matter with regard to costs.

See also *Annual Practice,* 1958, p. 472.

In view of these authorities, paragraph 1 of the defence will be allowed to stand.

The second branch of the plaintiff's application is for an order requiring the defendants to deliver particulars of paragraph 2 of the defence, setting forth the names of the persons alleged to be the owners of the trade mark referred to therein. The rule applicable to this situation is stated thus by Astbury J. in *Weinberger v. Inglis*[1] at p. 137:

As a general rule the Court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him.

The title of the plaintiff to the trade marks is the very foundation of its claim, and the onus of establishing that title is clearly upon the plaintiff. There is no onus on the defendants to allege or prove title in themselves or in any other party, and in my opinion they are not required to give such particulars. The application for them will, therefore, be refused.

The third branch of the plaintiff's application is for an order requiring the defendants to deliver particulars of their counter-claim. In the counter-claim, the defendants allege that one of the trade marks referred to in the statement of claim is invalid in that it is not distinctive, and they ask that it be expunged. The particulars sought are of "all grounds upon which the defendants will rely in support of their allegation" that the trade mark is invalid in that it is not distinctive. This is a matter on which, in my opinion, particulars may be ordered at the proper time. See *La Radiotechnique v. Weinbaum*[1] where Clauson J. says at p. 9:

If this were a case in which the plaintiff was seeking to restrain infringement of his trade mark, the position would, as it seems to me, be quite different. Where a plaintiff is seeking an injunction to restrain the defendant from infringing a registered trade mark, there is no onus on the

[1] [1918] 1 Ch. 133.

[1] [1928] Ch. 1.

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plaintiff to prove anything, except that the trade mark is registered. It may often happen that in such a case the defendant is minded to dispute the validity of the registration and may do so on various grounds, one being that the mark ought never to have been registered as being common to the trade and not distinctive. In such a case the defendant must, of course, give particulars of the allegations which he is bound to prove, and there are a number of cases in which he has been directed to deliver them.

But is this the proper time for making such an order? Rule 42 of the rules of this Court provides as follows:

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in Her Majesty's Supreme Court of Judicature in England.

As there is no specific provision in the rules of this Court or in the *Trade Marks Act* relating to the ordering of particulars in cases of this kind, and as I am not aware of any other Act of the Parliament of Canada dealing with the question, in my opinion the English rules and practice are applicable. Rule 7B of Order XIX of the English rules is as follows:

7B. Particulars of a claim shall not be ordered under Rule 7 to be delivered before defence unless the Court or Judge shall be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other special reason to be so delivered.

In *The Queen v. The Ship M/V Island Challenger et al.*[1], Thorson P. said at p. 338:

In general, the cases indicate that the object in ordering particulars is twofold: (1) for purposes of pleading, i.e., to enable the opposite party to plead intelligently; (2) for purposes of trial, i.e., to define the issues to be tried, so as to save the expense of calling unnecessary witnesses and to prevent the opposite party from being taken by surprise: *vide* Holmested & Langton's Ontario Judicature Act, Fifth Edition, page 675. In some cases the first purpose is paramount, in others the second.

Here the learned District Judge expressed the opinion that the particulars ordered by him were desirable to enable the defendants to plead.

I am unable to agree. The defendants do not require the particulars demanded by them in order to enable them to plead. They are just as able to admit or deny the allegations in the statement of claim without having the further particulars demanded as they would be if they were furnished.

Where particulars are not required to enable the defendants to plead they should not be ordered when their effect would be to hamper the plaintiff in the prosecution of his claim and prevent him from obtaining full discovery from the defendants: *vide Dixon* v. *Trusts and Guarantee*

[1] [1956] Ex. C.R. 334.

Co., (1914) 5 O.W.N. 645; *Mexican Northern Power Co.* v. *Pearson Ltd.*, (1914) 5 O.W.N. 648; *Somers* v. *Kingsbury*, (1923) 54 O.L.R. 166 at 169. This is particularly true where the facts alleged lie within the knowledge of the defendants rather than within that of the plaintiff: *vide Millar* v. *Harper*, (1888) 38 Ch. D. 110, where Bowen L.J. said, at page 112:

"It is good practice and good sense that where the Defendant knows the facts and the plaintiffs do not, the Defendant should give discovery before the Plaintiffs deliver particulars."

What I have said applies in the present case. It would be unfair to the plaintiff to require particulars at this stage for it would unjustly restrict the scope of what should be permissible examination for discovery and the refusal of particulars at this stage does not work any injustice against the defendants.

In the present case, the situation is that the defendants have asserted a counter-claim, the basis of which is the allegation that the plaintiff's trade mark is not distinctive. To this claim the plaintiff has not yet filed a defence. Lack of distinctiveness may consist in matters apparent on the face of the mark or on matters not ascertainable from the mark itself, such as facts pertaining to its use. If such facts exist, some of them may and some of them may not be within the knowledge of the defendants. But one would expect that some, if not all, of them are within the knowledge of the plaintiff. And, even if they are not all known to the plaintiff, the plaintiff in my opinion is not likely to be hampered in pleading a defence to this counter-claim by the lack of knowledge of such facts as are unknown to it and on which the defendants may intend to rely. At a later stage before trial the defendants may be required to state such facts, if there are any.

On the other hand, the defendants are entitled to rely on facts not within their present knowledge and to ascertain such facts by discovery before trial. To require them to give particulars of such facts at this stage would be to require them to do the impossible and, in the words of Thorson P., "would unduly restrict the scope of what should be permissible examination for discovery." In my view, no injustice to the plaintiff is involved in refusing to order such particulars at this stage, and no sufficient reason has been shown for regarding the matter as being within the exception of Rule 7B. The application for these particulars will, accordingly, be refused, but without prejudice to any further application which the plaintiff may see fit to make at a later stage of the proceedings.

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The plaintiff's application having failed on all three branches, it will be dismissed with costs to the defendants in any event of the cause.

Order accordingly.

BETWEEN:

1957

Sept. 18

1958

Feb. 27

W. T. HAWKINS LIMITED .....APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... RESPONDENT.

Revenue—Excise—Sales tax—Claim to exemption for foodstuff composed of three tax exempt ingredients—"Seeds or grains in their natural state"—"Salt"—"Shortening"—The Excise Tax Act, R.S.C. 1952, c. 100, ss. 30(1)(a), 32(1), Schedule III.

The *Excise Tax Act* R.S.C. 1952, c. 100, s. 30 provides that a sales tax shall be imposed on the sale price of all goods produced or manufactured in Canada. Section 32(1) exempts from the tax the articles mentioned in Schedule III to the Act. The Appellant which packages and sells a product called "Magic-Pop" and which consists of popping corn and a small quantity of salt placed in a solidified block of shortening, claimed its product was entitled to exemption as it fell within Schedule III under the heading "Grains or seeds in their natural state". The Assistant Deputy Minister of Excise having ruled against the contention, the appellant appealed to the Tariff Board. The Board dismissed the appeal and the appellant pursuant to leave granted appealed to this Court on the question of law: "Did the Tariff Board err as a matter of law in deciding that a product called 'Magic-Pop' . . . is not exempt from sales tax imposed by the *Excise Tax Act*?"

It was admitted that the three components entering into this product were each individually within Schedule III, salt and shortening being mentioned *eo nomine* under the heading "Foodstuffs" and popping corn within the classification "Grains or seeds in their natural state" under the heading "Farm and Forest". The evidence established that in the course of the appellant's process no chemical interaction resulted and that each component retained its identity or fundamental nature and that the popping corn remained in the same natural state it was in prior to its inclusion and would therefore classify as a grain or seed in its natural state.

The appellant's submission was: (a) that as Parliament in Schedule III had used as one of its headings the word "Foodstuffs" it was to be inferred that Parliament's intention was to include all foodstuffs; (b) that the appellant did not manufacture a new product but merely packaged three tax exempt articles in a form ready for convenient use by the purchaser; (c) that as "Magic-Pop" was composed of three ingredients all of which were exempt from tax, the new article was

therefore exempt; (d) that the article sold by the appellant was popping corn, a grain or seed in its natural state.

Held: That it was not to be inferred that as Parliament had used the word "Foodstuffs" as one of the headings in Schedule III, its intention was to include all foodstuffs. Had such been its intention it would have been unnecessary for it to use anything but that word itself. Under that heading were included a large number of specified articles used for food, but clearly the list did not include all foodstuffs but only the specified articles which, to use the language of s. 32(1), are "the articles mentioned in Schedule III".

2. That the headings were merely for use as a guide to the reader and did not themselves constitute "the articles mentioned in Schedule III".

3. That the question of whether an article was exempt from tax was to be determined as of the date of sale. The question to be answered: "Is the article on the date of sale included in the articles specified in Schedule III?" The basic question was what is being sold? Here it could not be said what was being sold was salt, or shortening or popping corn but an entirely new product differing in appearance, form and function from those of the three original ingredients, which new product was not mentioned or included in any of the articles specified in Schedule III.

4. That s. 32(1), the exemption section, refers to the *articles* mentioned in Schedule III and does not contain any such words as "or any combination of the articles mentioned in Schedule III". It was to be noted from the provisions of the schedule that when Parliament intended to extend the exemption to articles beyond those specifically listed, it used such phrases as "or other similar articles", "and similar goods" or "materials for use exclusively in its manufacture". Had it intended to extend the exemption to articles or products consisting of a number of tax exempt articles, it would have been a simple matter to have so provided.

5. That the article sold by the appellant was not popping corn—a grain or seed in its natural state—but a slab of shortening filled with popping corn and with salt added.

6. That there was no general authority in the taxing section or in the Schedule to the Act for classifying an article according to its main ingredient. If Parliament had intended that articles generally should be so classified, it would have made provision accordingly.

APPEAL under the *Excise Tax Act* from a decision of the Tariff Board.

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

J. W. G. Hunter, Q.C. for appellant.

R. W. McKimm for respondent.

CAMERON J. now (February 27, 1958) delivered the following judgment:

This is an appeal from a decision of the Tariff Board dated February 27, 1957 (Appeal 395). On May 15, 1957,

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the appellant was granted leave to appeal on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that a product called "Magic-Pop", sold by W. T. Hawkins Ltd. of Tweed, Ontario, is not exempt from sales tax imposed by the *Excise Tax Act*?

The sales tax is imposed by s. 30 of the *Excise Tax Act*, R.S.C. 1952, c. 100, which in part reads as follows:

> 30. (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.

Counsel for the appellant admits quite properly that that section is of general application and that the appellant is liable to payment of such sales tax in respect of the production or manufacture of its product called "Magic-Pop" unless, on a proper interpretation of the Act, such product is exempted therefrom by reason of the provisions of s. 32(1), which is as follows:

> 32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.

There is but little dispute as to the facts. The appellant packages and sells a product called "Magic-Pop" which consists of popping corn placed in a block of solidified shortening, wrapped and packaged for the retail trade. Exhibit A-1 is a sample thereof wrapped in a cellophane container and weighing about three ounces. As sold it is a "ready-mix" preparation and to produce popcorn therefrom it is necessary only to squeeze the contents into a pot and apply heat as directed.

Apart from colouring matter, the ingredients consist of (*a*) popping corn which is about 68 per cent. of the total weight; (*b*) shortening (usually palm kernel oil), which is about 27 per cent.; and (*c*) a small quantity of salt. The corn represents about 40 per cent. of the cost of the materials and shortening and salt about 60 per cent. The three components individually are within Schedule III, salt and shortening being mentioned *eo nomine* under the heading "Foodstuffs", and popping corn being admittedly within the classification "Grains or seeds in their natural state" under the heading "Farm and Forest". If sold or imported separately, therefore, each would be exempt from sales tax.

The appellant's process was described by the president, Mr. Hawkins, as follows: The ingredients are purchased separately and until the packaging process begins they remain in the same state as when purchased, except that

the shortening is maintained at a temperature which renders it flowable. As a result of extensive tests carried out by the appellant, the precise proportion of each ingredient has been established. The appellant also developed a machine for pouring the ingredients into the container or bag and then sealing it. Three spouts lead into a funnel and through each is conveyed the proper proportion of one ingredient (electronically controlled). From the funnel the mixed ingredients drop into the bag or wrapper which is then sealed. In about five minutes the shortening hardens and the article is then in the form of Exhibit A-1 and ready for sale. No mixing is done by the machine itself and such mixing of the ingredients as does take place is brought about by the mere fact that the ingredients are placed in one container.

The evidence establishes that in the process I have described, no chemical interaction results, the whole remaining as a mixture only; the salt does not dissolve in the shortening. The evidence of an analyst also shows that when the components of "Magic-Pop" (except colour) were segregated by mechanical means, and each isolated component then compared with the individual submitted components, all isolated components were substantially identical to the original constituents prior to packaging. Each component, it was stated, had retained its identity or fundamental nature, although in intimate association with the other ingredients. Further, the analyst stated specifically that the popping corn is in the same natural state in "Magic-Pop" as it was prior to its inclusion therein and that he would therefore classify it as "Grain or seed in its natural state".

The Assistant Deputy Minister for Excise ruled that the appellant's contention that the product "Magic-Pop" was entitled to exemption as "Grains or seeds in their natural state" could not be maintained. An appeal was taken from that ruling to the Tariff Board, the latter's decision being as follows:

> The Appellant, in the words of his counsel, "packages a *product* called 'Magic Pop' which consists of popping corn placed in a block of solidified shortening wrapped and packaged for the retail trade". (Our italic.)
>
> The question at issue is whether this product falls within Schedule III to the Excise Tax Act.
>
> The case for the Appellant amounted to a denial that "Magic Pop" is a product in the ordinary sense at all. It was contended that "Magic Pop"

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ought to be regarded simply as salt, shortening, and grains or seeds in their natural state. Since each of these products (or constituents) is exempt, it was argued that "Magic Pop" therefore is exempt.

However, is the mixture of these ingredients, as sold by the producer, three products or one product? Is the vendor selling shortening, salt, and corn, or is he selling a new product, in effect, a carefully prepared recipe? We think the answer to these questions is clear.

The exemption for shortening, salt, and grains or seeds in their natural state applies to these materials when sold as such, but does not apply to them when they are simply components or ingredients of another product, even though this product is capable of being separated into its original constituents.

Accordingly, the Appeal is dismissed.

Two submissions made by counsel for the appellant may be disposed of at once. The first is that as Parliament in Schedule III used as one of the headings the word "Foodstuffs", it may be inferred that there was an intention to include all foodstuffs, or at least that the schedule should be interpreted liberally. I cannot agree that that is so. If it had been the intention to include all foodstuffs, it would have been unnecessary to use anything but that word itself. Under that heading there are included a large number of specified articles which are used for food, but clearly the list does not include all foodstuffs. It is the specified articles only which—to use the language of s. 32(1)—are "the articles mentioned in Schedule III". The headings such as "Foodstuffs", "Farm and Forest", "Marine and Fisheries", "Religious, Charitable, Health, etc.", are merely for use as a guide in assisting the reader to ascertain whether the article with which he is concerned is or is not listed thereunder. The headings themselves do not constitute "the articles mentioned in Schedule III".

Counsel for the appellant also referred to certain other "mixtures" of individual articles specified in Schedule III (but which "mixtures" themselves are not specified therein) and which were said to have been declared exempt from sales tax by departmental rulings. It would therefore be inconsistent, he says, if these "mixtures" were exempt from sales tax and the mixture "Magic-Pop" was declared to be taxable. The single question now before me is whether the Tariff Board erred as a matter of law in deciding that "Magic-Pop" is not exempt from sales tax. I do not propose, therefore, to explore the validity or otherwise of departmental rulings made in other matters, or whether the decision of the Tariff Board in this case might be inconsistent with such rulings.

Three main contentions are advanced on behalf of the appellant. I shall consider first the submission that the appellant does not manufacture a new product, but merely packages three tax exempt articles in a form convenient for ready use by the purchaser.

It seems to me that the question as to whether an article is exempt from tax is to be determined as of the date of sale. The question to be answered is this: "Is the article on the date of sale included in the articles specified in Schedule III?" If it is, the article is exempt from sales tax. The basic question is therefore—what is being sold? If it is salt that is being sold, the article is exempt from tax as salt is named in the schedule. The same result, of course, follows if shortening is sold or if grains and seeds in their natural state are sold.

In this case, it cannot be said that the appellant was selling salt or that it was selling shortening, or that it was selling popping corn. What it sold was a single article composed of three ingredients in carefully selected proportions and to which it had given the name "Magic-Pop". It was an entirely new product differing in appearance, form and function from those of the three original ingredients. The evidence clearly indicates that both skill and experience were used in the making of the product. It is stated on the wrapper of Exhibit A-1, under the heading "Moisture Control", that "Magic-Pop exclusive scientific process combining corn and shortening in one package prevents moisture loss in the corn and guarantees perfect popping results and eating pleasure. Stays 'fresh' without refrigeration." At the hearing of the appeal, an attempt was made to show that this statement to a substantial extent was mere "puffing" in order to attract consumers. Nevertheless, it was a matter which the appellant considered of some importance and took into consideration in planning its manufacturing process.

In my opinion, the appellant was producing an entirely new article—an article which contained within itself all the ingredients necessary for a householder to use in the preparation of popcorn—in effect a "ready-mix" article. The mere fact that it was named "Magic-Pop" did not by itself result in the making of the new product for any such fancy name could be given to any article without changing

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its nature. Whether it be named "Magic-Pop" or something else, the new product is not mentioned or included in any of the articles specified in Schedule III.

The second submission is that, as "Magic-Pop" is composed of three ingredients, all of which are exempt from tax, the new article is therefore also exempt. The exempting section (s. 32(1)) refers to the *articles* mentioned in Schedule III and does not contain any such words as "or any combination of the articles mentioned in Schedule III". It is to be noted from the provisions of the schedule that when Parliament intended to extend the exemption to articles beyond those specifically listed, it used such phrases as "or other similar articles", "and similar goods", or "materials for use exclusively in its manufacture". If Parliament had intended to extend the exemption to articles or products consisting of a number of tax exempt articles, it would have been a simple matter to have so provided. I am unable to agree with this submission.

Finally, it is submitted that the article sold by the appellant is popping corn—a grain or seed in its natural state. I cannot think that such is the case. If I attended at a store to purchase popping corn, I would expect to receive popping corn alone and not such an article as Exhibit 1-A—a slab of shortening filled with popping corn and with salt added. It is submitted, also, that as popping corn is the main ingredient of "Magic-Pop", the article produced by the appellant should be classified as popping corn. There is no general authority in the taxing section or in the schedule for classifying an article according to its main ingredient. I find in the schedule one instance only in which the exemption from tax is based on the main content of the article, namely, "fruit juices which consist of at least 95 per cent. of pure juice of the fruit". If Parliament had intended that articles generally should be classified according to their main ingredient, it would have made provision accordingly.

For these reasons, my answer to the question submitted is "No".

Accordingly, the appeal will be dismissed with costs.

Judgment accordingly.

BETWEEN:

DAME LIA LALANDE-DAGENAIS *et al.* SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1956

May 14-17, 22, Sept. 17-19, 21, Oct. 1-5, 9-12, 15-19, 22-24

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Crown — Petition of Right — Expropriation — Compensation — Precarious Tenure—Value to owners—Allowance for compulsory taking—Exchequer Court Act, R.S.C. 1952, c. 98, s. 46.

The suppliants, proprietors of large piggeries, claimed $477,730 for damages occasioned by the expropriation by the Crown of a part of their land and the buildings thereon. The land was situate within the limits of the City of St-Laurent and evidence was led at the trial to establish the particular value of the site because of its proximity to the City of Montreal and the difficulty of re-establishing it as advantageously elsewhere due to the restrictive regulations of the suburban municipalities. It having been adduced that the business was being operated in violation of a municipal by-law, the Crown by an amendment to its defence, reduced its original offer of $77,000 as compensation to $8,840, on the grounds that if the suppliants were forced to discontinue their business, it was not due to the expropriation but because they were operating it contrary to the by-law in question.

Held: That the Court in considering the amount of compensation allowable must weigh the precarious future of a business operated contrary to law against the preponderant fact that the piggeries had been enlarged from time to time and the business carried on for some 25 years without complaint by the municipality and that such tolerance in the past and present appeared to assure its continuance for a long and undisturbed future.

2. That under the existing conditions the Crown was estopped from pleading the doctrine of precarious tenure to justify reduction of the compensation originally offered.

3. That the compensation to be paid for an expropriated property is the value to the owner as it existed at the date of the taking and such value consists in all the advantages it possesses, present or future, but it is the present value alone of such advantages that may be taken into account. *Cedar Rapids Manufacturing and Power Co. v. Lacoste* [1914] A.C. 569; *Lake Erie and Northern Ry. Co. v. Schooley* 53 Can. S.C.R. 416; *Pastoral Finance Association Ltd. v. The Minister* [1914] A.C. 1083; *Diggon-Hibben Ltd. v. The King* [1949] S.C.R. 712 at 715, applied.

4. That to determine the value to the former owners a fair method was to estimate the value of the business by capitalizing its earning at any appropriate rate, in this case, 15 per cent. *The Queen v. Potvin* [1952] Ex. C.R. 436 at 444, 445, referred to.

5. That in the circumstances of the case an allowance of ten per cent for compulsory taking should be made. *Diggon-Hibben Ltd. v. The King* (*supra*) and *Irving Oil Co. Ltd. v. The King* [1946] S.C.R. 551, followed.

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PETITION OF RIGHT to recover damages from the Crown for loss sustained by suppliants, owners of a property expropriated for the purpose of a public work.

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

Jacques Décary and *Rhéal Brunet* for suppliants.

Rodolphe Paré for respondent.

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

DUMOULIN J. now (April 1, 1958) delivered the following judgment:

Par leur pétition de droit amendée, les requérants réclament de Sa Majesté la Reine une indemnité de $477,730 pour les dommages divers que leur aurait occasionnés l'expropriation de partie de leur terrain et des bâtiments industriels qui s'y trouvent.

Le, ou vers le 7 janvier, 1954, le ministère des Transports, pour Sa Majesté la Reine aux droits du Canada, déposait selon la loi un plan d'expropriation sous le n° 1050353, s'emparant ainsi du lot n° 174 de la Paroisse St-Laurent, dans l'Ile de Montréal, moins une parcelle de 900 pieds, à partir de la ligne du chemin, avec toutes dépendances attenantes.

La partie expropriée est délimitée *in extenso* par la description intégrale annexée au plan enregistré et reproduite à l'art. 8 de la pétition amendée.

Les quatre pétitionnaires possèdent ces biens selon des attributions individuelles ci-dessous indiquées:

Madame Lia Lalande (veuve d'Emmanuel Dagenais)	$\frac{1}{6}$
Robert Dagenais	$\frac{1}{3}$
Roland Dagenais	$\frac{1}{3}$
Réal Dagenais	$\frac{1}{6}$

Ces trois derniers sont les fils de la requérante.

Le lot 174, du cadastre officiel de la Paroisse de St-Laurent, depuis 1955 Cité de St-Laurent, a une profondeur de 4,230 pieds et une largeur de 99.5 pieds. Il se situe tout auprès de l'extrémité nord-est de l'aéroport de Dorval. C'est en prévision de l'agrandissement de cette utilité publique que l'expropriation fut pratiquée. Ce lot débouche, à son extrémité nord, sur un chemin de terre,

large de 30 pieds, appelé Chemin St-François, et son extrémité opposée décrit un trait carré avec les aboutissants des lots 521 et 519. Une distance de sept milles environ sépare cette terre du rond-point de Dorval. En direction opposée, elle se trouve à 4 milles du rond-point de Ville St-Laurent et à 9 milles de l'intersection des rues Peel et Ste-Catherine.

La ligne d'expropriation sectionne ce terrain parallèlement au Chemin de la Côte St-François, avec retrait de 900 pieds. La superficie enlevée est de 8.96 arpents carrés. Les requérants sont donc privés de leur terre sur une profondeur de 3,330 pieds, mais retiennent la section avant selon le prolongement précité de 900 pieds. La partie arrière de l'immeuble est marécageuse et d'aucune utilité agricole ou autre dans son état actuel. En 1953, un chemin de piètre qualité fut tracé, au coût de $500, afin de faciliter l'exploitation des requérants, dont il sera longuement question plus bas. Enfin, un fossé mitoyen, sur au moins 390 pieds de course, borde l'extrémité est et fait rencontre avec un cours d'eau: le ruisseau St-Maurice, d'un très faible débit, sauf un printemps ou en période de pluies abondantes.

Madame Dagenais et ses trois fils exercent ensemble, et en parfaite entente, une entreprise de porcherie, avec moyenne semestrielle d'élevage de 1,300 à 1,400 animaux et des ventes annuelles se totalisant à 2,500 unités. Cette industrie fut commencée dès 1926 par M. Dagenais, père, décédé au mois de mai 1954, et continuée, nous l'avons vu, par sa veuve et ses fils. Les bâtiments comprennent trois porcheries, appartenant respectivement à Robert, Roland et Réal avec, en outre, un hangar pour la cuisson des déchets alimentaires et un second d'utilité générale, le "hangar à ripes". Ces bâtisses, et leurs additions successives, furent érigées pendant les années 1926, 1930, 1932, puis en 1940, 1943 ou 1944, 1946 et 1952. La longueur de la porcherie annexe de Robert et de Roland atteint environ 410 pieds; celle de Réal, comprenant aussi l'immeuble de cuisson, est de 270 pieds, donnant un cubage total de 268,995 pieds. Les fondations sont en béton; les matériaux de construction comprennent du bois recouvert de tôle, du papier-brique et des tuiles d'asbeste. A l'arrière des porcheries, une plateforme de ciment, que les deux parties évaluent à $800, sert à la manutention des reliefs nourriciers.

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Une nécessité impérative de l'industrie porcine consiste à recueillir quotidiennement des déchets alimentaires, provenant d'établissements publics tels les hôtels, restaurants et hôpitaux. En argot de métier, c'est "la ronde des vidanges". Ces rebuts de table entrent, pour une forte proportion, dans l'alimentation des porcs et coûtent beaucoup moins que les moulées chimiques. Les cueillettes se font à trois reprises chaque jour; deux, à Montréal, une troisième à Ste-Anne de Bellevue. Ces vidanges ne sont pas cédés gratuitement; des contrats réguliers, dressés un an à l'avance, en déterminent les conditions d'enlèvement et le prix. Les acheteurs, d'après l'expression convenue, doivent en prendre livraison, chaque jour ouvrable. Robert Dagenais a spécifié, qu'en 1955, selon les ententes conclues à la fin de 1954, pas moins de $7,200 furent payés aux fournisseurs. Trois camions sont affectés à cette industrie qui, outre les frères Dagenais, requiert les services de trois journaliers. Les porcelets sont achetés au pesage de 50 à 60 livres, engraissés six mois durant, puis livrés à l'abattoir de Modern Packers dès qu'ils atteignent 200 livres.

Robert Dagenais évalue le profit réel à $10 par animal mais, un témoin des requérants, porcher lui-même, Wilfrid Boudrias, de St-Isidore de Laprairie, réduit ce chiffre à $5 et, je note cette dernière indication comme la plus raisonnable.

Le commerce, nous l'avons dit, est conduit de concert par la famille Dagenais, la mère et les trois fils, qui répartissent les dépenses en proportion des achats respectifs des co-associés, chacun ayant mandat tacite de transiger pour ses partenaires. Nous tenons de Robert Dagenais que les taxes foncières anuelles, affectant les porcheries, ne dépassaient pas $38 jusqu'en 1954; toutefois, le taux actuel et l'évaluation du lot 174 et des bâtiments ne furent pas mentionnés.

En 1955, les porcheries étaient assurées à concurrence de $65,000, avec primes annuelles de $960; trois ans auparavant, en 1952, ces primes n'étaient que de $90 par année. Ce fut alors que les assureurs classèrent l'entreprise comme exploitation commerciale au lieu de négoce privé, ce qui explique le formidable accroissement des taux annuels.

Le tracé d'expropriation, à 900 pieds du Chemin de la Côte St-François, ne permettrait pas aux Dagenais de

reconstruire leur porcherie sur la superficie reliquataire, car les règlements municipaux de la Paroisse St-Laurent, respectivement numérotés 33 et 39A, le premier du 22 mai 1930, le second du 3 juillet 1934, produits comme pièces 38 et 39, édictent que:

(33) 1° Personne ne pourra établir, maintenir ou exploiter une porcherie, et personne ne pourra faire bouillir des déchets de table ou toutes autres sortes de déchets pour les fins de la dite porcherie, dans les limites de la paroisse de St-Laurent, à moins que la dite porcherie soit à quinze cent (1,500) pieds de tout chemin public, et au moins à mille (1,000) pieds de toute maison d'habitation.

2° Quant aux porcheries qui existent actuellement elles seront tolérées à l'endroit où elles sont actuellement pourvu que le ou les propriétaires de ces dites porcheries n'y ajoutent aucune nouvelle construction et qu'au cas où ces porcheries seraient démolies par le feu ou autrement, le ou les propriétaires de ces porcheries ne pourront rebâtir au même endroit à moins de se trouver à 1,500 pieds de tout chemin public et à 1,000 pieds de toute maison d'habitation.

3° Toute personne qui contreviendra aux dispositions du présent règlement sera passible d'une amende de dix (10) piastres plus les frais et si l'infraction se continue, le contrevenant sera passible de l'amende ci-dessus édictée pour chaque jour durant lequel l'infraction se continuera.

* * *

(39A) Que le règlement numéro trente-trois (33) des règlements de cette municipalité soit et il est par le présent règlement amendé en remplaçant l'article deuxième du dit règlement N° 33 par le suivant:

"2 Quant aux porcheries qui existent actuellement elles seront tolérées à l'endroit où elles sont actuellement pourvu que le ou les propriétaires de ces dites porcheries n'y ajoutent aucune nouvelle construction et que les porcs, lorsqu'ils sont en quantité de quinze (15) et plus, soient gardés dans la porcherie seulement et non pas errants.

Au cas où ces porcheries seraient démolies par le feu ou autrement, le ou les propriétaires de ces porcheries ne pourront rebâtir au même endroit à moins de se trouver à mille cinq cent (1,500) pieds de tout chemin public et à mille (1,000) pieds de toute maison d'habitation."

A l'audition, la pièce 162 fut déposée, un extrait du procès-verbal d'une assemblée spéciale du Conseil municipal de la Cité de St-Laurent, aux droits de la Paroisse du même nom, tenue le vendredi, 28 septembre 1956, confirmant le rapport de l'inspecteur des bâtiments, M. Charles Robitaille, qui refusait de régulariser le site des porcheries Dagenais "attendu que la demande de permis de construction pour une porcherie n'est pas conforme aux exigences des règlements précités", nos 33 et 39A.

Ceci fait surgir un aspect important de la cause: la réinstallation éventuelle de l'industrie. Aucun des requérants n'a catégoriquement révélé l'intention de reprendre ailleurs ce commerce assez profitable auquel tous s'adonnent

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depuis près de 20 ans. Toutefois, il a paru indubitable que ces trois jeunes gens, qui n'ont jamais exercé d'autre métier, le continueront dans une autre localité, sitôt que l'expropriante les obligera de déguerpir.

Près de 50 des 101 témoins entendus étaient des greffiers ou secrétaires-trésoriers de municipalités montréalaises ou des alentours, tant au nord qu'au sud de l'île, qui déposèrent les règlements appropriés de construction industrielle, édictant l'obtention de permis préalables dans les cas d'entreprises spécifiées, pour démontrer qu'une porcherie serait accueillie moins volontiers qu'un commerce de fleuriste. Toutefois, les pièces 52, 63, 64, 65, 66, révèlent que les municipalités de Montréal-Est, de Laval-Ouest, de Ste-Rose Est, de Ste-Rose Ouest, de Ville de Roxboro, ne prohibent point, sur leur territoire, l'élevage porcin. Il en va de même pour les villages de St-Janvier de Terrebonne, et deux ou trois autres, à 30 ou 40 milles des abattoires de le Compagnie Modern Packers. Advenant une velléité de réinstallations dans la périphérie même de Montréal, j'estime justifiée l'opinion de M. Victorien Pelchat, agronome, le 37e témoin, à l'effet qu'il ne connaît aucun endroit sur l'Île de Montréal, ni sur l'Île Jésus, où il serait sage d'établir une porcherie, avec la menace d'un autre déménagement à brève échéance. Ce témoin cite le cas de la Ferme St-François Inc., la seconde porcherie en importance dans la Province de Québec (celle des Dagenais viendrait au troisième rang), qui dut se transporter, il y a un ou deux ans, à Ste-Anne des Plaines. Il est aisé de concevoir que le développement domiciliaire commercial et industriel intense sur l'Île de Montréal, promet peu de durée à des exploitations du genre, à l'exception possible du lot 174, dont la localisation et l'exiguïté font un cas particulier.

Au mois d'octobre 1956, à l'audition, les requérants n'avaient pas encore arrêté leur choix, ce qui compliquera l'attribution d'une somme compensatrice pour l'accroissement éventuel de distance entre le nouveau site et les abattoirs. J'ajouterai que la reconstruction des porcheries me semble impraticable sur l'île métropolitaine.

Un banc de terre noire existe sur le lot 174, pour lequel les pétitionnaires demandent $25,000, l'intimée n'offrant qu'une somme de $4,000. Cette terre sert à la préparation des platebandes d'ornementation et d'élément fixateur de

sols trop lourds ou glaiseux. M. Léo Varin, jardinier paysagiste de Ville St-Laurent, dit que le profit réel, si le fournisseur vend sans intermédiaire, peut atteindre $2.25 la verge cube. Robert Dagenais, le premier témoin appelé par l'intimée, déclare que, du printemps de 1953 à l'automne de 1955, ses frères et lui auraient vendu approximativement 500 verges cubes de cet adjuvant agricole, soit environ 170 verges cubes l'an, avec un profit annuel de $382.50, frais déduits. Selon les Dagenais, leur propriété renfermerait encore 13,000 verges cubes de terre noire qui, au même rythme d'écoulement, durerait 76 ans. M. Eugène Therrien, expert cité par la défenderesse, établit à 10,000 verges cubes cette contenance, quantité qui, à raison du montant offert de $450 l'arpent carré donne un total de $4,000 pour 8.96 arpents. Retenant la quantité mentionnée par Robert Dagenais, 13,000 verges cubes, et le profit annuel moyen de $382.50, la capitalisation à 5% de ce rendement correspondrait à $7,650. En pareil cas, il est d'élémentaire prudence de prévoir des périodes de mévente comme aussi la concurrence de jardiniers spécialisés. On doit dire que ces ventes peu actives ne constituaient chez les requérants, porchers de leur état, qu'un à-côté tout à fait secondaire. Une compensation de $6,000 paraît amplement suffisante.

Les facteurs principaux, qu'il importe de peser avec toute l'attention possible, ne sont autres, évidemment, que la valeur du terrain, des usines, celle du rendement réel du commerce, le chiffre de la perte de profits pendant la période de réinstallation et les dépenses afférentes au choix d'une localité plus éloignée des abattoirs.

Les requérants entendirent quatre témoins experts, MM. Aimé Gagnon, agronome, Maurice Beaudry, ingénieur professionnel, Joseph Ste-Marie, comptable agréé, Paul-Emile Demers, courtier en immeubles et évaluateur de bâtiments pour la Corporation de Ville St-Laurent. Les indemnités globales suggérées s'élèvent respectivement à:

Par Aimé Gagnon	$ 1,008,158.20
Par Joseph Ste-Marie	275,000.00
(et alternativement $200,000.00 advenant une cessation des affaires)	
Par Maurice Beaudry	169,737.00
Par Paul-Emile Demers	90,817.10

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M. Demers n'a pas recherché ce que pourrait être un dédommagement raisonnable pour l'interruption des affaires durant la période de reconstruction.

L'intimée, d'autre part, avait initialement offert une somme de $77,000, subséquemment réduite à $8,000, sous prétexte de précarité, parce que les expropriés maintiendraient leur porcherie en dérogation aux règlements municipaux de Ville St-Laurent. Une tranche de $40,000 des offres ci-dessus était affectée à l'expropriation des bâtisses, évaluation identique au montant de $40,349 recommandé par l'expert Demers.

Le 22 mai 1956, l'intimée, après permission, produisit une défense amendée où se lit, entre autres, le para. 28a:

> Si les pétitionnaires se voient dans l'obligation de discontinuer leur commerce, ce n'est pas à raison de la présente expropriation mais par le fait des autorités compétentes et pour la raison qu'ils ont jusqu'ici opéré ledit commerce à l'encontre de la loi et des règlements;

On sait quels sont les règlements allégués, les nos 33 et 39A (pièces 38 et 39), portés en 1930 et 1934 par l'autorité municipale de la Paroisse St-Laurent. Ils prescrivent un découvert de 1,000 pieds entre une porcherie et les maisons d'habitation, et de 1,500 pieds entre tel établissement et le chemin public. On n'y relève même pas l'obligation préalable d'un permis d'exploiter. Pareille réglementation ne contient rien de très menaçant et ne fut jamais invoquée à l'encontre des pétitionnaires qui, sans protestation aucune, agrandirent périodiquement leurs porcheries.

Cette longue et persistante tolérance peut ne pas être constitutive de droits acquis, mais d'autre part, autorisait-elle la volte-face à tout le moins étrange, sinon même un peu confiscatoire, décrite par l'expropriante en raison de cette mince hypothèse, et justifie-t-elle une compression d'offres de $77,000 à $8,480?

Assurément, l'autorité souveraine, s'appropriant un terrain pour des fins d'utilité collective, peut supputer l'intégrité du titre qu'elle acquiert sans être taxée pour autant d'exciper du droit d'autrui. Par contre, elle ne saurait exciper par anticipation des intentions d'autrui: celles, en l'espèce, d'une municipalité qui, depuis vingt-cinq ans, avalisait par un mutisme continu, les dérogations à sa réglementation civique. Et surtout nul ne saurait exciper de sa propre preuve en y contredisant. L'intimée, par tous

les moyens dont elle disposait, s'est employée à dévaloriser le lot 174, alléguant qu'il était impropre à l'agriculture comme aussi aux exigences basiques de la construction industrielle ou domiciliaire.

Elle n'a point paru différer d'opinion avec le courtier Paul-Emile Demers, qui reportait à cinq ans ou davantage l'expansion immobilière de ce secteur. Ce ne fut pas sans motifs plausibles, je présume, que l'expert Therrien accorda tout juste une valeur de $500 l'arpent quand l'expert Demers la haussait au niveau de $1,500. Si, présentement, les pétitionnaires sont empêchés d'adapter les constructions existantes au gré littéral des ordonnances de la Cité de St-Laurent, seule la prise de possession pratiquée le 7 janvier 1954 en est la cause.

Je dois déclarer que, dans le cas actuel, le passé, le présent et l'ensemble des conditions ambiantes auraient suffi à garantir aux Dagenais un long avenir de possession introublée.

Un civiliste d'éminente renommée européenne, le jurisconsulte belge Edmond Picard, aux pages 112, 113 et 114 de son *Traité général de l'Expropriation,* tome 1, étudie précisément cette complication de précarité. Avec les transpositions applicables à l'instance présente, la citation ci-après fera voir le cas à faire de cette prétendue précarité:

> L'indemnité pour être complète, doit-elle tenir compte des avantages dont l'exproprié jouissait à titre précaire, avec des chances plus ou moins grandes d'en voir durer la jouissance? . . . un propriétaire ayant obtenu d'établir sur son fonds un marché, mais sans concession pour une durée précise, il était à supposer que l'autorité eut toléré longtemps encore cette destination; l'expropriant vient rendre cette bienveillance inutile en s'emparant du bien au sujet duquel elle se manifestait.
>
> Les expropriés ont presque toujours élevé ici des prétentions trop exagérées pour qu'il fut difficile aux tribunaux de ne pas tomber dans une exagération contraire. Nous croyons quant à nous que la vérité réside dans une appréciation intermédiaire. Considérer comme certain dans son avenir l'avantage dont l'exproprié jouissait, est une erreur. Cet avantage n'était-il pas exposé à des eventualités? Ne pouvait-il pas tôt ou tard être anéanti par une résolution plus ou moins capricieuse de celui qui avait sur la chose un droit de disposition? *Mais d'un autre côté n'est-ce pas également une erreur et une iniquité de traiter la jouissance précaire comme si elle eut dû nécessairement disparaitre par le fait du propriétaire au moment même où l'expropriation est intervenue? N'était-il pas possible que sans celle-ci, elle eut eu encore une longue durée?* Dès lors si elle est prématurément anéantie n'est-ce pas à l'expropriation qu'il faut l'imputer et n'y a-t-il pas lieu d'accorder une indemnité en vertu du principe qui exige que pour être complète et équitable l'indemnité comprenne tous les préjudices qui ont l'expropriation pour cause? A notre

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avis la solution affirmative n'est pas douteuse et l'influence de l'incertitude qu'avait la situation de l'exproprié ne devra se faire sentir que dans la détermination du chiffre. Il est incontestable qu'on ne saurait attribuer à un avantage incertain dans sa durée la même valeur qu'à un avantage assuré. Il y aura lieu de tenir compte de toutes les circonstances et d'arriver autant que possible à une appréciation raisonnable.

En d'autres termes, on s'arrête, croyons-nous, beaucoup trop en matière d'expropriation à la situation de droit et trop peu à la situation de fait. . . .

On enseigne en général que l'indemnité ne doit pas comprendre le préjudice simplement *éventuel*. Cela est exact en tant qu'il s'agit de la menace d'un mal qui n'est pas réalisé au moment de l'expropriation et que cette expropriation vient désormais rendre impossible. . . .

En fonction des faits et de la doctrine qui précèdent, il ne m'est point loisible de faire acception utile de cette fin de non-recevoir inspirée par le langage peu comminatoire des pièces 38 et 39.

Reprenant ici l'examen de l'expertise, je citerai deux passages de celle conduite par M. Aimé Gagnon qui, je le pense, paraîtront suffisamment révélateurs pour justifier une mise à l'écart de ce rapport à tout le moins fantaisiste.

L'expert, dont je rapporte presque textuellement les paroles, appréciait les inconvénients résultant d'un nouvel établissement en dehors de Montréal et sans hésitation aucune il déclare: "Le roulage actuel des camions de l'entreprise se fait sur une distance de 25 milles des marchés. Les requérants ne trouveront de site convenable qu'à 25 milles au delà du grand Montréal ce qui doublera la distance annuelle de 45,000 milles la portant à 90,000 par an. L'allure horaire normale des camions est de 30 milles. Il faudrait donc 1,500 heures de roulage par année. Incluant dans un même montant les gages du camionneur et les dépenses inhérentes au roulage d'un camion, on obtient une dépense de $3 l'heure, ce qui signifierait des déboursés supplémentaires de $4,500 par année, soit 1,500 heures multipliées par $3. Donc $4,500, capitalisés à 5% font: $90,000". Et voilà.

Autre exemple. L'expert Gagnon ajoute que présentement les frères Dagenais et leur mère "travaillent en coopération". Ce négoce exige que deux et parfois trois des associés soient sur la route. Quand les trois s'absentent, Madame Dagenais demeure sur les lieux et surveille les conditions générales et la préparation des déchets alimentaires pour les animaux. Cette porcherie disparaissant, les Dagenais se sépareront, décide le témoin. Chacun d'eux

engagera un gérant et s'adonnera personnellement aux exigences des affaires qui requièrent leur présence au dehors. Le salaire d'un gérant compétent dans l'élevage du porc et l'administration d'une porcherie ne sera pas inférieur à $5,000 l'an. Ici encore nous devons prévoir une indemnité totale de $15,000, une capitalisation à 5% et une dépense de $300,000. Nous voici rendus au joli denier de $390,000 avant même d'avoir songé à la valeur du terrain, des bâtiments, de la terre noire et des ennuis causés par une interruption des affaires.

Avant de départager des prétentions aussi contradictoires et de rechercher l'indice d'une compensation équitable, il est opportun de poser les principes dont ce labeur devra s'inspirer.

Et d'abord l'art. 46 de la Loi sur la Cour de l'Echiquier, S.R. c. 98, prescrit que:

> 46. La Cour, en déterminant le montant qui doit être payé à un réclamant pour un terrain ou une propriété expropriée pour les fins d'un ouvrage public, ou pour dommages causés à un terrain ou à une propriété, en estime ou établit la valeur ou le montant à l'époque où le terrain ou la propriété a été expropriée ou à l'époque où les dommages dont il est porté plainte ont été causés. S.R., c. 34, art. 47.

L'application concrète de cette règle fut, à maintes reprises, l'objet d'interprétations judiciaires. Je me limiterai à celles qui ont davantage retenu l'attention des praticiens.

Le Conseil Privé, en 1914, dans l'affaire *Cedars Rapids Manufacturing and Power Co. v. Lacoste*[1] par l'organe de Lord Dunedin édictait que:

> 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.*
>
> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability as pointed out by Fletcher Moulton, L.J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground, *which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which made the undertaking as a whole a realized possibility.*

[1] [1914] A.C. 569.

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Les autres décisions auxquelles il est coutumier de référer répètent à quelques mots près ces mêmes normes d'appréciation qui, à mon sens déférent, font la part trop grande à la subjectivité d'appréciation.

Retenons ces deux critères. Premièrement la conpensation doit équivaloir à la valeur pécuniaire que le propriétaire attache raisonnablement à l'immeuble exproprié lors de la prise de possession; deuxièmement, cette valeur pour le propriétaire comprend tous les avantages actuels et futurs inhérents à son patrimoine mais cette valeur s'apprécie au temps de l'expropriation.

Ces mêmes règles sont réitérées dans les affaires: *Lake Erie and Northern Ry. Co. v. Schooley*[1], et *Pastoral Finance Association Ltd. v. The Minister*[2]. Enfin, M. le Juge Rand de la Cour Suprême du Canada déclarait dans l'instance *Diggon-Hibben, Limited v. His Majesty The King*[3]:

> . . . The statement means, . . . that the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

Il incombe donc d'examiner non seulement les principaux facteurs mais les aspects incidents du problème. Le premier n'est autre que l'estimation du terrain et des porcheries. Rappelons que les requérants demandent, par leur pétition, amendée le 14 mai 1956, $2,000 l'arpent, soit $18,000 pour les 9 arpents expropriés; l'offre initiale de la Couronne étant de $500 l'arpent, ou $4,480.

Pour le compte des Dagenais, M. Paul-Emile Demers, courtier en immeubles, pratiqua une expertise générale des biens affectés. Le résultat de ses recherches me paraît plus rationnel que celui de l'ingénieur Beaudry en ce qu'il fait acception de l'état véritable. Toutefois, ce n'est pas à dire que j'accepterai les coefficients particularisés qu'il attache à certains éléments. Je ne m'accorderai certes pas avec sa suggestion d'un prix de $1,500 l'arpent, mais la somme globale de $90,817.10, indemnité de rétablissement non comprise, mérite d'être discutée.

Monsieur Demers déposa au dossier plusieurs copies d'actes de vente de terrain situé dans la localité. Le tableau, pièce 121, libellé A à O, résume quinze de ces

[1] (1916) 53 Can. S.C.R. 416. [2] [1914] A.C. 1083.
[3] [1949] S.C.R. 712 at 715.

transactions et révèle un prix minimum de $1,710 et un prix maximum de $5,672.92 l'arpent carré. Deux objections majeures interdisent d'appliquer ces prix au présent cas. L'article 46 de la Loi, nous l'avons vu, édicte que la valeur d'un bien ou le montant des dommages doit s'établir à l'époque où la propriété est prise ou les dommages occasionnés, en l'occurrence, le 7 janvier 1954. Cet énoncé statutaire, comme bien d'autres, ne saurait recevoir une interprétation d'une rigueur littérale. C'est ce que décida récemment la Cour Suprême dans l'affaire de *Roberts and Bagwell v. The Queen*[1]. Le jugement unanime du plus haut tribunal au pays fut prononcé par M. le Juge Nolan dans les termes ci-après:

> In my view, evidence of a sale after the enactment can, in the absence of special circumstances, be relevant to the value prior to the enactment. The sale must be shown to be as free in all respects from extraneous factors such as prior sales and made within such time as the evidence shows prices not to have changed materially from those before the critical date. In other words, the mere circumstance of the sale being before or after a particular date cannot nullify the relevance of subsequent sales while the general market conditions have remained the same. The rule should allow the Court to admit evidence of such sales as it finds, in place, time and circumstances, to be logically probative of the fact to be found.

J'hésiterais à sanctionner l'admissibilité de transactions deux ans après la date critique, si, par ailleurs, un de ces facteurs étrangers à l'indice normal des prix (extraneous factors) ne s'était introduit de façon intense dès le mois de février 1956. Cette conjoncture fut l'annonce du percement du Boulevard métropolitain, qui décrira une longue diagonale à travers le territoire de Ville St-Laurent, d'un point donné sur le Chemin de la Côte de Liesse, pour se prolonger en direction de Pointe-Claire. Aussitôt, une fièvre de spéculation s'alluma avec des conséquences anormales, dont la vue de la pièce 121 procure un exemple concluant. Pour ces motifs, je dois écarter les ventes subséquentes à 1954 d'autant qu'il fut démontré que dès 1950, la construction prévue du Boulevard métropolitain déterminait déjà des acquisitions à des prix fabuleux. En regard de la pièce 121, nous avons le tableau dressé par M. Eugène Therrien, pièce I-9, avec les précisions essentielles de onze ventes en 1953, affectant des lots circonvoisins. Sur ce tableau, les montants varient de $600 à $3,000 l'arpent carré. Nous serions encore bien loin de $500 l'arpent, si

[1] [1957] S.C.R. 28 at 36.

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le témoin Therrien n'expliquait que l'étroitesse du lot 174 et sa condition bourbeuse ne le déclassaient tant pour fins de construction que pour fins agricoles. A ce sujet, M. Therrien spécifie que "la partie arrière du 174 comprend une terre basse et mal égouttée. Je m'y suis rendu trois fois et à chaque occasion il me fallut chausser des bottes. La photo I-10 montre l'étroitesse de ce terrain et aussi des flaques d'eau qui en indiquent le bas niveau. L'enlèvement de la terre noire accroît la présence de l'eau stagnante".

Monsieur Demers repousse cette défaveur et soutient que *"l'exiguïté, 99 pieds, en front de la propriété Dagenais n'enlève absolument rien à sa valeur marchande"*. Il signale la vente des lots 66, 67 et 69 appartenant à la succession Deslauriers, d'une largeur d'un demi-arpent chacun; les lopins 66 et 67 furent payés $250 l'arpent carré selon un jugement de la Cour de l'Echiquier en 1940. Dois-je comprendre que la juxtaposition des lots 66 et 67, larges d'un arpent, leur imprimait une valeur que le lot 174, avec 99.5 pieds de front, ne pourrait avoir? Monsieur Demers continue: "Aujourd'hui [octobre 1956] les Dagenais trouveraient de nombreux acheteurs pour leur propriété, *mais en 1954, au moment de l'expropriation, leur terre, comme les autres de cet arrondissement aurait bien pu ne pas trouver preneur. Toutes ces terres de la Côte St-François,* fait encore le témoin, *étaient dévaluées, dépréciées en 1954"*. Malgré cette dépréciation, Demers porte la valeur de ces terrains, à cette même époque, à $1,000 l'arpent carré, opinion difficilement conciliable, il me semble, avec cette autre, manifestée par le témoin lors de son contre-interrogatoire, que *"le prix des terres ayant front de quelque côté sur la Côte St-François était dérisoire avant l'annonce de l'ouverture du Boulevard métropolitan, il y a six ou sept mois, vers le mois de mars 1956"*. Ce témoin ajoutera que "actuellement le développement de Ville St-Laurent atteint le lot 483 où il s'arrête. Le lot 174 se trouve à $3\frac{1}{2}$ milles plus loin vers l'ouest". Demers affirme, sans hésitation, *"que l'industrie des Dagenais n'aurait pas été rejointe par l'expansion immolière avant cinq ans environ"*, et je me range, volontiers, à cette impression qui se dégage d'ailleurs de la comparaison de différentes expertises, de celle, particulièrement, d'Eugène Therrien.

Tout comme M. Demers, je pense que la reconstruction éventuelle des porcheries à Côte de Liesse exigerait un prix d'achat vraiment prohibitif. Les mêmes objections s'appliqueraient à tous les terrains avoisinants l'aéroport de Cartierville. Dès maintenant, j'envisage comme unique possibilité rentable le déménagement au delà de l'Île de Montréal et même de la région circonvoisine.

Puisque nous en sommes au chapitre, du reste fort bref, de la concordance de certaines opinions entre les parties, j'ajouterai qu'elles conviennent qu'il en coûterait autant de reconstruire les porcheries ailleurs que d'en pratiquer le réaménagement sur les 900 pieds de terrain non atteints par l'emprise de l'Etat. Enfin l'expert Therrien reconnaît que *"les porcheries expropriées n'ont aucune valeur de récupération"*.

Après mûre réflexion, je conclus que la plus value artificielle dont fut affecté le secteur, qui, depuis plusieurs années échappe à toute norme rationnelle d'appréciation, passant de $250 à près de $6,000 l'arpent, incite à rechercher un autre mode de calcul si, par ailleurs, il en existe de valable.

Deux autres experts, MM. Joseph Ste-Marie et Clément Primeau, tous deux comptables agréés, le premier cité par les requérants, le second par l'intimée, soumettent à la Cour une méthode à la fois plus scientifique et assurément mieux appropriée à l'équitable solution du litige, dans les circonstances connues. Ce procédé consiste à obtenir les revenus réels d'une période de cinq ans, si possible, à préciser la moyenne annuelle, puis à capitaliser la résultante selon des barèmes de 10 à 30%, d'après le degré d'importance et de stabilité de l'industrie.

Le Président de cette Cour avait en quelque sorte accrédité cette opération comptable dans la cause *The Queen v. Potvin*[1] disant que:

> While this method of appraising the value of farm property is comparatively new it is gaining acceptance: vide McMichael's Appraising Manual, 3rd edition, page 281. It is easy to appreciate why this should be so. It is, in my opinion, a sound approach to the determination of the value of an expropriated farm to its former owner to ascertain its productivity by computing the average annual gross revenues from its crop yields and deducting therefrom the appropriate costs of their production and to capitalize the net value of the production so ascertained at the appropriate rate.

[1] [1952] Ex. C.R. 436 at 444, 445.

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There must be many cases where the value of a farm can be more nearly accurately determined by this method of appraisal than by any other and I am of the view that the present case is one of them.

Un second économiste, Dewing, très écouté, paraît-il, préconise un mode identique d'évaluation à la p. 390 de son traité intitulé: *Financial Policy of Corporations*, 5e édition, vol. 1, dont suivent les passages appropriés:

SUMMARY STATEMENT OF CAPITALIZATION OF EARNINGS

From these various methods of approach, it is possible to throw industrial businesses into diverse categories in accordance with which we can form some estimate of the value of a business by capitalizing its earnings. These categories could be described in the following manner:

1. Old established businesses, with large capital assets and excellent goodwill—10% a value ten times the net earnings. Very few industrial enterprises would come within this category.

2. Businesses, well established, but requiring considerable managerial care. To this category would belong the great number of old, successful industrial businesses—large and small—12½% a value eight times the net earnings.

3. *Businesses*, well established, but involving possible loss in consequence of shifts of general economic conditions. They are *strong*, well established businesses, but they produce a type of commodity which makes them vulnerable to depressions. They require considerable managerial ability, but little special knowledge on the part of the executives—15%, a value approximately seven times the net earnings.

Madame Dagenais, préposée à la comptabilité, s'est acquittée assez sommairement de ce soin essentiel. Comme il arrive fréquemment, des notations importantes furent inscrites sur des bouts de papier qui n'ont laissé aucune trace. La comptabilité véritable commence en 1952. Un relevé acceptable, sans être un modèle du genre, fut préparé pour les exercices fiscaux 1952 à 1955 inclusivement par le comptable, J. Omer Désilets, et produit sous la cote 37. Force sera donc de se satisfaire des bilans de trois années: 1952, 1953 et 1954. J'admettrai celui de 1954 puisque certains besoins de l'exploitation, tels les contrats pour la cueillette des déchets sont conclus douze mois à l'avance. Voici maintenant le tableau des bénéfices réels des années susdites rapportés à la pièce 37:

1952	$ 21,195.24
1953	26,639.85
1954	32,913.75
	$ 80,748.84

Cette somme atteste une moyenne par an de $26,916.28, dont il faut ensuite déduire les salaires annuels que les quatre sociétaires ont négligé de s'attribuer. Sur ce point, je ne m'accorde pas avec la suggestion de l'intimée ni tout à fait avec celle de l'expert Demers, témoin des pétitionnaires. Voici l'attribution que je crois raisonnable de faire:

Madame Dagenais, comptabilité, surveillance générale, entretien domestique	$ 1,200
Robert Dagenais, gérant	4,000
Roland Dagenais	3,000
Réal Dagenais	3,000
Total	$ 11,200

Défalcation faite des rémunérations, le profit réel et annuel obtenu s'établit à $15,716.28.

Reste à déterminer un coefficient convenable de capitalisation. La porcherie Dagenais bien qu'elle ait attesté à date une constante progression, grâce au labeur et à l'esprit d'entente des associés, ne laisse pas toutefois de recéler quelques faiblesses. Tout bien pesé, elle dépend de la persistance de cette coopération familiale qui, un moment donné, peut être déjouée par des causes indépendantes de la volonté humaine: maladie, incapacité, décès prématuré. N'eussent été ces mauvaises chances toujours présentes, j'aurais appliqué le taux de 12½% à ce négoce exploité aux portes mêmes de la métropole canadienne. Je suis d'avis que le commerce d'alimentation n'est affecté qu'en dernier lieu par les perturbations économiques. S'il était permissible de confirmer ce sentiment par les faits de l'heure présente, je signalerais que, malgré la régression industrielle et le chômage généralisé, nous constatons la hausse ininterrompue du coût de la vie au triple chapitre du loyer, du vêtement et des denrées comestibles. Je m'arrêterai à un indice de capitalisation de 15%, soit un report de $104,775.20, dont, le cas échéant, l'on devra soustraire l'actif récupérable.

Monsieur Eugène Therrien a constaté, il est vrai, que les matériaux des porcheries n'avaient pas de valeur utile et que tout essai de remploi serait plus coûteux qu'une mise au rancart.

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Il n'en va pas ainsi de la bouilloire et des camions que les Dagenais pourront utiliser. Aimé Gagnon assigne un prix de $5,000 à l'appareil de cuisson, moins une dépréciation de 10% ce qui en établit la valeur à $4,500. Joseph Ste-Marie, comptable, entendu par les requérants, mentionne trois camions, l'un datant de 1955 et deux autres de 1956, qu'il évalue à $7,000, moins dépréciation approximative de 20%: $5,800. Le comptable Clément Primeau, de son côté, inscrit à la pièce I-38, un poste de $3,994.22 en regard de l'item "camions" que j'adopterai comme correspondant mieux à la dévalorisation réelle.

Deux autres conjonctures dommageables doivent aussi être liquidées: la perte de profits occasionnée par le déménagement de l'industrie et sa reconstitution ailleurs; l'estimation de la dépense supplémentaire de camionnage nécessitée par le choix d'un site plus éloigné que l'actuel.

L'intimée ne prenant pas immédiatement le terrain exproprié, laisse les exploitants en possession. Cette tolérance, depuis 1954, n'excuserait pas les frères Dagenais d'avoir différé le soin d'acquérir une autre propriété susceptible de convenir à la reprise de leur commerce. Six mois de la date de leur déguerpissement du lot 174 me semblent suffire à la remise à pied d'œuvre de l'entreprise et les demandeurs auront droit à une indemnité équivalente à six mois de profits réels, salaires non compris, soit un montant de $7,858.14.

L'indemnité pour roulage additionnel est d'autant plus problématique que maintes localités furent mentionnées sans indication de préférence pour aucune. C'est ainsi que l'on a suggéré St-Janvier de Terrebonne, à 17 milles du Pont de Cartierville; la Paroisse de Laprairie, à 7 milles de l'extrémité sud du Pont Victoria; St-Philippe, sur la route 9A, à 11 milles de l'extrémité sud du Pont Victoria; St-Mathieu, éloigné de 16 milles du point précité; la Municipalité de Delson, à plus de 15 milles du Pont Victoria; St-Constant, à 16 milles du même pont.

Une preuve, plutôt vague, laisserait croire que le site de la future porcherie allongerait d'au plus 10 milles le trajet à l'abattoir qui est actuellement, on le sait, de 20 milles.

Wilfrid Boudrias, propriétaire d'une porcherie à St-Isidore de Laprairie, livre annuellement de 600 à 700 lards à l'abattoir de la rue Bridge, une distance de 15 à 17 milles. Rien

n'empêcherait, semble-t-il, les Dagenais de choisir une localité qui ne serait pas éloignée davantage. Boudrias recueille, une fois le jour, les reliefs de table d'une trentaine de restaurants. Les requérants pourraient aussi réduire à l'unité les trois prélèvements quotidiens de vidanges, ce qui n'apparaît pas impossible. Or, 10 milles de plus, aller retour, font 20 milles par jour, et ces cueillettes s'effectuent dimanches, jours de congé, tout autant que les jours ouvriers. L'agronome Gagnon, et ce sera la seule de ses appréciations que je ratifierai, mentionne un prix de $3 l'heure pour l'essence motrice et les gages du camionneur. Vingt milles par jour font 7,300 milles par année, qui, à une vitesse horaire de 30 milles donnent 243⅓ heures de roulage à $3 l'heure: un déboursé de $730 l'an qu'il ne m'est pas loisible, cependant, de capitaliser, ne serait-ce qu'en prévision de la cessation des affaires. J'estime équitable d'allouer une compensation de $5,000 pour cet alourdissement des frais d'exploitation.

Quant à la réclamation de déménagement, je prends pour acquis, selon l'assertion de M. Therrien, qu'une reconstruction complète s'impose, les vieux matériaux ne valant pas d'être récupérés. Les six mois accordés pour réinstallation permettront de disposer du stock animal dès le moment de la notification de déguerpir qui, il y a lieu de le présumer, comportera un préavis raisonnable. Il a été dit ailleurs que la période d'élevage durait au plus six mois et j'ai l'impression que trois mois suffiront à rebâtir les porcheries. Les affaires reprenant, les messieurs Dagenais auront eu le temps requis à la reconstitution de leur cheptel.

La récapitulation des indemnités s'établit de la manière suivante:

Valeur du terrain et des bâtisses	$104,775.20
Terre noire	6,000.00
Indemnité (6 mois de perte de profits)	7,858.14
Indemnité (pour millage additionnel)	5,000.00
	$123,633.34

dont il faut enlever:

Pour camions et bouilloire	8,494.22
Total	$115,139.12

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Convient-il d'ajouter à cette allocation un montant de 10% pour tenir compte de la dépossession forcée? Dans la cause *Diggon-Hibben, Limited v. The King*[1], M. le Juge Rand, à la p. 713, exprime l'avis ci-après relaté:

> In the case of *Irving Oil Company v. The King*[2], it was held that while an allowance of 10 per cent for compulsory taking is not a matter of right, *in circumstances presenting difficulty or uncertainty in appraising values, such as were found there, the practice of making that allowance applied. Similar circumstances are present here*; in fact in the general character of the two situations there is no difference whatever. For that reason, I think the allowance should be made.

M. le Juge Estey, aux pages 719 et 720, retraçait l'historique du droit à cette compensation occasionnelle, nous citons:

> The allowance for compulsory taking is founded upon a long established practice in the Courts and is granted as part of the compensation. It is a factor in the compensation separate and apart from what would be included as disturbance allowance. So well established was the practice in Great Britain that as early as 1890 when it was deemed undesirable to make this allowance in connection with certain properties a statute was enacted to that effect (s. 21 of the *Housing of the Working Classes Act*, 1890, 53 & 54 Vict., c. 70). It was there provided that when land was taken in an unhealthy area no "additional allowance in respect of compulsory purchase" shall be made. The distinction between the allowance for disturbance and that for compulsory taking was emphasized in Great Britain in 1919 with the passage of the Acquisition of Land (*Assessment of Compensation Act*, 1919) where in sec. 2(i) it is specifically provided that an allowance for compulsory taking is not permitted under that Act while in sec. 2(6) it is specifically provided that rule 2 should not affect the allowance for disturbance. This provision is dealt with in *Horn v. Sunderland* (1941) 2 K.B. 26. In this Court the allowance for compulsory taking was granted in *Irving Oil Co. Ltd. v. The King supra* and prior thereto in *The King v. Trudel*[3]; *The King v. Hunting, et al.*[4]; *The King v. Hearn*[5].

L'honorable Juge Taschereau de la Cour Suprême du Canada appliquait de nouveau cette jurisprudence dans l'affaire de *Lavoie v. Le Roi*[6].

Pour parité de motifs, j'accorderai une indemnité de 10%, ce qui reportera l'allocation globale à la somme de $126,653.03.

En terminant, je dirai que des références particularisées aux autres témoins n'eussent guère aidé en raison du mode d'évaluation choisi. Tous ces témoignages, en effet, ou presque, traitaient du prix superficiaire des terres circonvoisines de Montréal et du coût des matériaux requis à l'érection de porcheries.

[1] [1949] S.C.R. 712 at 713, 719, 720.
[2] [1946] 2 S.C.R. 551.
[3] (1914) 49 Can. S.C.R. 501.
[4] (1917) 32 D.L.R. 331.
[5] (1917) 55 Can. S.C.R. 562.
[6] Rendue en 1949 mais non rapportée.

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La Cour, en conséquence, déclare par ce jugement que le dépôt d'un plan et d'une description desdits terrains et immeubles, effectué le 7 janvier 1954, au Bureau de la Division d'enregistrement de Montréal, a investi Sa Majesté la Reine, depuis la date précitée, des différents droits de propriété foncière sur le lot n° 174 du cadastre officiel de la Paroisse St-Laurent, comté de Jacques-Cartier, Province de Québec, selon que spécifié dans le document produit en cette cause sous la cote R-2 ainsi qu'au paragraphe 8 de la pétition amendée; que les requérants, sur remise par eux faite, de titres clairs, nets et libres de toute charge et hypothèque, établissant naguère leur droit à la propriété expropriée, recevront à titre d'indemnité liquidée une somme de $115,139.12, avec, en outre, 10% de ce montant, soit $11,513.91, pour dépossession forcée, faisant une compensation globale de $126,653.03, le tout sans intérêt, à diviser entre les quatre requérants suivant leurs droits respectifs, selon les proportions apparaissant à l'art. 13 de la pétition de droit amendée. Les requérants devront recouvrer les dépens taxables.

Jugement en conséquence.

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BETWEEN:

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

AND

GRANITE BAY TIMBER COMPANY LIMITED ..... RESPONDENT.

Revenue—Income Tax—Deduction claimed for capital cost allowance—"One or more transactions . . . between persons not dealing at arms length"—The Income Tax Act, 1948, c. 52, ss. 11(1)(a), 127(5)—S. of C. 1949, c. 25, s. 8(3).

In January 1947, A, B and C purchased all the outstanding shares of Granite Bay Logging Co. Ltd. and became its sole shareholders and directors. On November 5, 1947, acting on the instructions of A, B and C, a solicitor and his son incorporated the respondent company under *The Companies Act* (B.C.), subscribed for one share each and became its first directors. On November 10, 1947, A, B and C, as shareholders of the Granite Bay Logging Co. Ltd., authorized its voluntary winding up and the appointment of C as liquidator. On December 29, 1947, that company transferred its property to A, B and C pursuant to a document signed by C as liquidator purporting to be a resolution passed by the board of directors through the liquidator resolving that

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the company distribute all its assets subject to liabilities to the shareholders. The next day A, B and C sold the assets received by them on the distribution to the respondent company under an agreement in writing executed by themselves as vendors and by the respondent company as purchaser. The agreement was executed on behalf of the respondent as authorized by a resolution of its board of directors, the solicitor and son, who then resigned. Their respective shares were transferred to A and B, who became directors and allotted a share to C, who also became a director. The remaining shares were allotted to a company controlled by A, B and C.

In its 1950 income tax return the respondent claimed a deduction for capital cost allowance based on the price at which it purchased the property from A, B and C. The Minister disallowed the claim in part, proceeding upon the assumption that the property was acquired by the respondent in a transaction between parties not dealing at arms length, and that s. 8(3) of S. of C., 1949, 2nd Sess., c. 25, applied. The Income Tax Appeal Board allowed the respondent's claim in part, and the Minister appealed from the Board's decision.

Held: That despite the legal power with which the solicitor and his son were clothed both as shareholders and as directors as between themselves and the respondent company to act independently as they saw fit, there could be no doubt that their control as shareholders and their acts as directors were those of their clients, and that the situation was the same in principle as it would have been had their clients been the only shareholders and directors when the agreement was made. Consequently the agreement, which was the transaction by which the property became vested in the respondent, falls squarely within the meaning of the expression in s. 8(3) of "one or more transactions prior to 1949 between parties not dealing at arms length." *Minister of National Revenue v. Sheldon's Engineering Ltd.*, [1955] S.C.R. 637, followed.

2. That it was not necessary to refer to the provisions of s. 127(5) of *The Income Tax Act* since at the time of the sale it would be impossible to maintain that the parties were dealing at arms length. It followed that s. 8(3) applied and that the price mentioned in the agreement, on which respondent based its claim for capital cost allowance, was not the correct basis for the calculation thereof and that the assessment should be restored.

The appellant contended that the right to have the property of Granite Bay Logging Co. Ltd. distributed among the shareholders had devolved upon them by operation of law upon the passing of the resolution to wind up and had not become vested in them by virtue of a "transaction" within the meaning of s. 8(3).

Held Further: That in using "transactions" in s. 8(3) Parliament selected a word of far wider meaning than "sales" or "contracts" and the definition "the action of passing or making over a thing from one person, thing or state to another" represents most nearly the meaning of the word as used therein.

2. That the expression "one or more transactions" in s. 8(3) is wide enough to embrace all types of voluntary processes or acts by which property of one person may become vested in another without regard for the reason or occasion for such processes or acts and regardless of whether the process is undertaken or the act is done for consideration in whole or in part or for no consideration at all. As used in s. 8(3)

it includes any voluntary transfer of property between existing persons falling within the class referred to as "persons not dealing at arms length."

3. That in the whole series of transactions by which the assets of Granite Bay Logging Co. Ltd. became vested in the respondent, none could be regarded as having been made by persons dealing at arms length.

APPEAL from a decision of the Income Tax Appeal Board.

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

D. T. B. Braidwood and *T. Z. Boles* for appellant.

Max M. Grossman, Q.C. for respondent.

THURLOW J. now (March 13, 1958) delivered the following judgment:

This is an appeal by the Minister of National Revenue from the judgment of the Income Tax Appeal Board dated January 13, 1956[1], by which the respondent's appeal from an assessment of its income for the year 1950 was allowed in part and the matter referred back to the Minister for reconsideration and reassessment in accordance with the reasons for judgment given by the Board. The matter in issue in the appeal relates to the basis for determining the capital cost to the respondent of certain property in respect of which it claimed a deduction for capital cost allowance pursuant to s. 11(1)(*a*) of *The Income Tax Act* (S. of C. 1948, c. 52, as amended by S. of C. 1949, 2nd Sess., c. 25, s. 4). This section provides that, in computing his income, a taxpayer may deduct such part of the capital cost of the property, if any, as is allowed by regulation. The respondent based its claim for such a deduction on the price at which it purchased the property from Samuel Heller, Paul Heller and John H. Maier in 1947. The Minister, however, in making the assessment, proceeded upon the assumption that the property in question was acquired by the respondent in a transaction between parties not dealing at arms length and disallowed a portion of the allowance claimed by the respondent. In so doing, he applied the special provision of s. 8(3) of S. of C. 1949, 2nd Sess., c. 25, which was as follows:

(3) Where property did belong to one person (hereinafter referred to as the original owner) and has *by one or more transactions prior to 1949*

[1] 14 Tax A.B.C. 273; 56 D.T.C. 53.

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between persons not dealing at arms length become vested in a taxpayer who had it at the commencement of the 1949 taxation year (or who acquired it during his 1949 taxation year from a person whose 1948 taxation year had not expired at the time of the acquisition), the capital cost of the property to the taxpayer shall, for the purpose of subparagraph (i) of paragraph (*a*) of subsection one, be deemed to be the lesser of the actual capital cost of the property to the taxpayer or the amount by which

(*a*) the capital cost of the property to the original owner exceeds

(*b*) the aggregate of

(i) the total amount of depreciation for the property that, since the commencement of 1917, has been or should have been taken into account in accordance with the practice of the Department of National Revenue, in ascertaining the income of the original owner and all intervening owners for the purpose of the *Income War Tax Act*, or in ascertaining a loss for a year when there was no income under that Act, and

(ii) any accumulated depreciation reserves that the original owner or an intervening owner had for the property at the commencement of 1917 and that were recognized by the Minister for the purpose of the *Income War Tax Act*.

Neither the notice of assessment nor the Minister's notice of appeal shows, nor does the evidence disclose, what cost the Minister used as the basis of his calculation, and the only information on this point to be found in the record is contained in the assertions by counsel for the respondent (which counsel for the Minister did not dispute) that the basis used by the Minister was the cost of the property to Granite Bay Logging Co. Ltd., a company which had been the owner of the property before Samuel Heller, Paul Heller and John H. Maier became the owners of it. It has, however, been agreed between the parties that, if the price which the respondent paid for the property is held to be the correct basis on which to compute the capital cost allowance to which the respondent is entitled, the figures used in its income tax return are to be taken as correct, and in the other event the figures used by the Minister are to be taken as correct.

The issue in the appeal is whether or not the Minister was right in disallowing, as he did, a portion of the capital cost allowance claimed by the respondent for 1950. This issue turns on whether or not the subsection above quoted is applicable in the circumstances of this particular case. By its terms, the subsection is applicable if the property has become vested in the respondent *by one or more transactions prior to 1949 between persons not dealing at arms length*. Accordingly, in view of the rule that the burden

of showing error in an assessment rests on the taxpayer, the question for determination becomes that of whether or not the Minister's assumption that the property in question became vested in the respondent by one or more transactions prior to 1949 between persons not dealing at arms length has been disproved.

The events by which the property became vested in the respondent are as follows: On or about January 2, 1947, Samuel Heller, Paul Heller and John H. Maier purchased all the outstanding shares of Granite Bay Logging Co. Ltd., a company which had been incorporated in 1934 under *The Companies Act*, Statutes of British Columbia 1929, c. 11. On completion of the purchase, the three new shareholders, none of whom had previously been connected with the company, became its directors, replacing its former directors who then retired. On November 10, 1947, by a special resolution consented to in writing by all three shareholders, it was resolved that the company be wound up voluntarily under the provisions of *The Companies Act* and that John H. Maier be appointed liquidator of the company. *The Companies Act*, R.S.B.C. 1936, c. 42, which was in force at that time, provided as follows:

> 214. The commencement:
>
> (*a*) Of a voluntary winding-up shall be the time of the passing of the special resolution to wind up; . . .
>
> 215. Where a company is being wound up:
>
> (*a*) The company shall, from the commencement of the winding-up, cease to carry on its business, except so far as may be required for the beneficial winding-up thereof: Provided that the corporate state and corporate powers of the company shall continue until it is dissolved;
>
> (*b*) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the liquidator sanctions the continuance thereof;
>
> (*c*) The property of the company shall, after satisfaction of its liabilities and the costs, charges, and expenses properly incurred in the winding-up, including the remuneration of the liquidator, be distributed among the members according to their rights and interests in the company;
>
> (*d*) Every transfer of shares, except transfers made to or with the sanction of the liquidator, shall be void.

Subsequently, on December 29, 1947, by a document signed by John H. Maier as liquidator of the company and purporting to be a resolution passed by the board of directors of the company through its liquidator, it was

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resolved that the company distribute all its assets, subject to liabilities, to the shareholders of the company, Samuel Heller, Paul Heller and John H. Maier, and that the liquidator be authorized to execute and deliver all necessary transfers, consents and other documents necessary to fully transfer all the assets of the company to the said shareholders. No instrument of transfer was put in evidence, but it was stated in evidence by Mr. Samuel Heller that this resolution was carried out.

In the meantime, the respondent company had been incorporated on November 5, 1947 under *The Companies* Act, R.S.B.C. 1936, c. 42, by a solicitor and his son, who were employed by and acting on behalf of Samuel Heller, Paul Heller and John H. Maier. The solicitor and his son were the first directors of the respondent, and each of them had by the memorandum of association subscribed for one of the 10,000 shares without nominal or par value which the respondent was authorized to issue.

On December 30, 1947, by an agreement in writing made between Samuel Heller, Paul Heller and John H. Maier as grantors and the respondent as grantee, in which it was recited that the liquidator of Granite Bay Logging Co. Ltd. had distributed the assets thereof to the grantors, subject to liabilities, the grantors sold and transferred the same assets to the respondent, subject to liabilities, and the respondent agreed to assume and pay the liabilities as and when due and to indemnify and save harmless the grantors and each of them therefrom, and also to pay to the grantors the sum of $185,170.43. A schedule to the agreement lists the assets at $429,622.12 and the liabilities at $244,451.69, and shows the $185,170.43 as the difference. The agreement was executed on behalf of the respondent, as authorized by a resolution of its board of directors, consisting of the solicitor and his son, passed on the same day. On the same day, these directors resigned and were replaced by Samuel Heller and Paul Heller, who, along with John H. Maier, became the directors of the respondent company. Following this change of directors, one share was allotted to the solicitor and one to his son, and applications to transfer them to Paul Heller and Samuel Heller, respectively, were approved. The directors also allotted one share to John H. Maier, and the remaining shares to a company controlled by them.

On the trial of the appeal, the respondent neither contended nor offered evidence to show that the agreement of December 30, 1947 by which the respondent acquired the property from Samuel Heller, Paul Heller and John H. Maier was a transaction between parties dealing at arms length. On the contrary, counsel for the respondent stated in his opening that he was not going to argue that the solicitor and his son, who incorporated the respondent company for clients, were at arms length with them. In addition, the evidence adduced in cross-examination of Mr. Samuel Heller further reinforces the position that the solicitor and his son were at all material times acting for and on the instructions of Messrs. Samuel and Paul Heller and John H. Maier. In these circumstances, despite the legal power with which the solicitor and his son were clothed both as shareholders and as directors as between themselves and the respondent company to act as independently as they saw fit, there can be no doubt that their control as shareholders was the control of their clients, that their acts as directors were the acts of their clients, and that, for the purposes of this case, the situation was precisely the same in principle as it would have been if Messrs. Samuel and Paul Heller and John H. Maier had been the only shareholders and directors of the respondent when the agreement was made. Consequently, no matter how fair or reasonable the price, this agreement, which in my opinion was the transaction by which the property became vested in the respondent, falls squarely within the meaning of the expression "one or more transactions prior to 1949 between parties not dealing at arms length."

In *Minister of National Revenue v. Sheldon's Engineering Ltd.*[1] Locke J., in delivering the unanimous judgment of the Supreme Court of Canada, after referring to the various sections of *The Income Tax Act* in which the expression "not dealing at arms length" appears, said at p. 644:

> S. 127(5) does not purport to define the meaning of the expression generally: it merely states certain circumstances in which persons are deemed not to deal with each other at arms length. I think the language of s. 127(5), though in some respects obscure, is intended to indicate that,

[1] [1955] S.C.R. 637.

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in dealings between corporations, the meaning to be assigned to the expression elsewhere in the statute is not confined to that expressed in that section.

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

In my view, it is not necessary in this case to refer to the provisions of s. 127(5), for at the time when the property was sold to the respondent the respondent was wholly controlled by the persons who sold the property to it, and it would be impossible to maintain that these parties on the one hand and the respondent on the other were dealing at arms length. It follows from this that s. 8(3) applies and that the price mentioned in the agreement, on which the respondent based its claim for capital cost allowance, is not the correct basis for the calculation of such an allowance. It also follows, in view of the agreement already mentioned between the parties to the appeal, that the assessment should be restored.

Counsel for the respondent, however, approached the matter in another way. He asserted in argument that the Minister's computation is based on the cost of the property to Granite Bay Logging Co. Ltd. and that, in the Minister's computation, that company is regarded as the "original owner" referred to in s. 8(3). He then submitted that the property which originally belonged to Granite Bay Logging Co. Ltd. did not become vested in the respondent by "one or more transactions between persons not dealing at arms length" because the events or process by which the property of Granite Bay Logging Co., Ltd. became vested in its shareholders did not amount to a transaction within the meaning of that word in s. 8(3), and that, accordingly, there was no uninterrupted series of transactions between parties not dealing at arms length by which the property of Granite Bay Logging Co. Ltd. became vested in the respondent so as to invoke s. 8(3) and thus require that the capital cost allowance should be

based on the capital cost of the property to Granite Bay Logging Co. Ltd. More particularly, he contended that, upon the passing of the resolution to wind up Granite Bay Logging Co. Ltd., the property of that company devolved on its shareholders by operation of law, and that neither this devolution nor the resolution itself nor the action of the three shareholders in voting for it was a transaction within the meaning of s. 8(3).

The appellant's answer to this was to submit that the resolution to liquidate Granite Bay Logging Co. Ltd. was a transaction within s. 8(3) and, alternatively, that the process as a whole by which the assets of Granite Bay Logging Co. Ltd. became vested in Samuel Heller, Paul Heller, and John H. Maier, consisting of voting by them, the resolution to wind up the company, the resolution of the liquidator to transfer the assets to the shareholders, and the transfer of the assets by the company to them, constituted a transaction of the kind referred to in s. 8(3).

The word "transaction" is one of wide scope, and it is used in a variety of senses. In Webster's *New International Dictionary,* Second Edition, the following meanings are given:

trans-ac'tion . . . 1. The act or process of transacting, or an instance of such; as, averse to the *transaction* of business at this time.

2. That which is transacted or in the process of being transacted. Specif.: a A business deal; an act involving buying and selling; as, the *transactions* on the exchange. b *pl.* The records, esp. the published records, of action taken, addresses read, etc., at the meeting or meetings of a society or association; proceedings. Some societies restrict the term *transactions* to the published addresses, and *proceedings* to the published record of the business done.

3. *Philos.* An action or activity involving two parties or two things mutually affecting or reciprocally influencing one another.

4. *Roman & Civil Law.* An adjustment or compromise of a disputed claim between parties by mutual agreement.

Syn.—Proceeding, action; performance, discharge.

In the *Shorter Oxford Dictionary,* its meanings are given as follows:

Transaction. 1460. [ad. L. *transactionem,* f. *transigere;* see prec.] 1. *Roman* and *Civil Law.* The adjustment of a dispute between parties by mutual concession; compromise; hence *gen.* an arrangement, an agreement, a covenant. Now *Hist.* exc. as in 3 b. 2. The action of transacting or fact of being transacted 1655. 3. That which is or has been transacted; a piece of business; in *pl.* doings, proceedings, dealings 1647. b. *Theol.* In ref. to the Atonement, "transaction" has senses ranging from 1 to 3. (In sense 1

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chiefly in deprecation.) 1861. 4. The action of passing or making over a thing from one person, thing, or state to another—1691. 5. *pl.* The record of its proceedings published by a learned society. Rarely in *sing.* 1665.

The word appears in O. 16, r. 1 of the Rules of the Supreme Court of Judicature in England respecting joinder of parties to actions and in differing contexts in a number of statutes, and it has been judicially considered from time to time in the interpretation of such rules and statutes.

In *Bendir v. Anson*[1] Lord Wright M.R. in considering its meaning in O. 16, r. 1, said at p. 330:

> The word "transaction," I think, necessarily means an act, the effect of which extends beyond the agent to other persons. For instance, to take this particular case, the building of the premises by the defendant is an act which from one point of view is limited to the builder and to the area covered by the premises; but its effects on other premises extend also to those premises in respect of which a nuisance or an interference with an easement may be created by the building. In that sense the building of the premises may be regarded as a transaction, and I find on the authorities that that view seems to have been taken. As I have already said, I do not think that the word is very happily chosen. It seems to have been used in the first instance rather with reference to cases in which there was something in the nature of a contractual relation, or some relation of that nature between parties, but it has quite clearly been extended from that more limited connotation.

In *Barron v. Littman*[2] a taxpayer had taken short term leases, intending to sublet the properties at a profit. He sublet some at a higher rent than he paid, some at a lower rent, and some he failed to sublet at all. He was entitled under the statute to deduct losses sustained "in any transaction", but it was argued that a loss resulting from failure to sublet a property was not sustained "in any transaction." Viscount Simon, in dealing with this point in the case, said at p. 108:

> In my opinion, there was in each case a transaction out of which the loss arose. The transaction consisted in taking a lease of property with a view to reletting it and either succeeding or failing to relet it. It is just as much a transaction as would be the purchasing of an article by a trader, who seeks to resell it at a profit, and who either does sell it at such a profit or sells it at a loss or does not succeed in selling it at all. On the facts of the present case there clearly is a transaction, and this was the view of every member of the Court of Appeal. If all that could be said was that an owner of property, freehold or leasehold, had tried to find a tenant for it and had failed, it would be a question whether his unsuccessful effort could be regarded as a transaction. A similar difficulty would arise if the

[1] [1936] 3 All E.R. 326. [2] [1953] A.C. 96.

taxpayer had become the owner of property by bequest or inheritance, which he failed to relet. But, in the present case, no real difficulty arises on this first point.

Lord Normand also said at p. 112:

Neither the Special Commissioners nor Wynn-Parry J. decided whether there was a transaction within the meaning of section 27. All three members of the Court of Appeal held that there was a transaction. In my opinion, "transaction" is a comprehensive word which includes any dealings with property. The "transaction" entered into by the respondent as a dealer in property was the acquisition of leases of property, the attempt to sublet at a rent in excess of the rent payable by him, and the success or failure of this attempt. I therefore agree with the Court of Appeal on this point. I see no difficulty on the facts of this case, though there may well be difficulty on other facts.

In *Grimwade v. Federal Commissioner of Taxation*[1], a case much relied on by the respondent, the question was whether or not E. N. Grimwade, by voting at a meeting of a company, of which he had complete control, in favour of a resolution the effect of which was to reduce the value of his interest in the company and increase that of the interests of his children, had entered into a transaction constituting a disposition of property. Latham C.J., in delivering the judgment of himself and Webb J., said at p. 219:

But did E.N. Grimwade "enter into a transaction" when he voted for the resolutions reducing capital?

There may be a "transaction" with respect to the casting of a vote . . . But when a shareholder makes up his mind to vote in a particular way and casts his vote accordingly he cannot be said to be "entering into a transaction." A transaction by a person must be a transaction *with* some other person. In the circumstances mentioned there is no transaction with any person.

If a preference shareholder in a company voted in favour of reducing the rate of dividend upon preference shares in order to allow the company to pay some dividends to ordinary shareholders it would be an unreal description of what took place to say that that fact showed that the preference shareholder had "entered into a transaction." The result of a contrary view would be that each of the preference shareholders or at least all who voted for the resolution, would (if the intent of improving the value of ordinary shares were found to exist) be regarded as making a gift within the meaning of the *Gift Duty Act* to each of the ordinary shareholders. Presumably a dissenting minority would not be held to be engaged in a transaction of making a gift. If so, the majority of voting shareholders would be regarded as making the whole of the gift—which would be a remarkable result. It was suggested that even to abstain from voting against a resolution beneficial to a class of shareholders amounted to entering into a transaction within par. (*f*). All these contentions interpret

[1] (1948) 78 C.L.R. 199.

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the words "enter into a transaction" as if they had the same meaning as "do an act or abstain from doing an act." Such an interpretation gives no real effect to the words "enter" and "transaction."

We are therefore of opinion that E. N. Grimwade did not enter into a transaction constituting a disposition of property within the meaning of par. (*f*) in s. 4 and that therefore there was no gift upon which duty became chargeable.

In my view, while the authorities above mentioned, as well as the other cases cited by counsel, illustrate the scope and versatility of the word "transaction", none of them affords a sure guide to its meaning in s. 8(3). I do not think that the votes of the shareholders in this case can be regarded as transactions of the kind contemplated by s. 8(3), but that is far from saying that the resolution itself which resulted from such voting and became an act of the company was not such a transaction or part of such a transaction. In my opinion, the "transactions" referred to in s. 8(3) are not limited to contracts. True, the subject matter with which s. 8 deals is that of capital "cost", which suggests that "transactions" in s. 8(3) refers to transactions in the nature of contracts of sale in which the taxpayer incurs cost in purchasing property. No doubt, in the great majority of cases the transaction will be of that kind. But in using "transactions" in s. 8(3) Parliament selected a word of far wider meaning than "sales" or "contracts" and, except in so far as its wide meaning is necessarily limited by the context in which it is used, there is, in my opinion, no valid reason why the word should not have its full scope and meaning. Of the various meanings of the word, that stated in the fourth definition given in the Oxford dictionary, viz. "the action of passing or making over a thing from one person, thing or state to another," seems to me to represent most nearly the meaning of the word in s. 8(3). While it is limited in its context to transactions by which property can become transferred from one person and vested in another and by the words *between parties,* I do not think it is limited to sales of property nor to contractual transactions between parties. In adopting this view, I do not overlook the word *dealing,* but I regard it as applicable to and descriptive of the parties rather than as qualifying the word *transactions.* In my opinion, the expression "one or more transactions" in s. 8(3) is wide enough to embrace all types of voluntary

processes or acts by which property of one person may become vested in another without regard for the reason or occasion for such processes or acts and regardless also of whether the process is undertaken or the act is done for consideration in whole or in part or for no consideration at all. It may not be wide enough to embrace a transmission or devolution upon death but, as used in s. 8(3), I think it is wide enough to include any voluntary transfer of property between existing persons falling within the class referred to as "persons not dealing at arms length."

Applying this interpretation to the facts of the present case, I have come to the conclusion that the events or process by which a right became vested in the shareholders of Granite Bay Logging Co. Ltd. to have the residue of its assets, after payment of its liabilities, distributed among the shareholders was a transaction within the meaning of the word in s. 8(3). It is clear that, immediately prior to the passing of the resolution to wind up Granite Bay Logging Co. Ltd., none of the three shareholders had any right or title to the property of that company. See *Macaura v. Northern Assurance Co., Ltd.*[1], where at p. 633 Lord Wrenbury said:

> My Lords, this appeal may be disposed of by saying that the corporator, even if he holds all the shares, is not the corporation, and that neither he nor any creditor of the company has any property, legal or equitable, in the assets of the corporation.

It is equally clear that, by virtue of s. 215 of *The Companies Act,* R.S.B.C. 1936, c. 42, upon the passing of the resolution to wind up Granite Bay Logging Co. Ltd. the shareholders did have the right to have the property of the company distributed among them after satisfaction of the liabilities and the expenses of the winding-up. The events making up the transaction by which this result was accomplished, in my opinion, consisted of the resolution to wind up, which, from the point of view of the company, was all that was necessary to confer the right and was a transaction in the wide sense of the term, and the consent of the shareholders to this right being conferred on them. Without their consent, no right of property could be vested in any of them. In this case, in my view, their intention not to dissent is to be inferred from their common purpose, coupled with the fact that they passed the

[1] [1925] A.C. 619.

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special resolution by consenting to it unanimously in writing. That they consented in fact, is shown by their subsequent receipt and acceptance of property distributed pursuant to the resolution. This, in my opinion, is enough to turn the unilateral transaction of the company into a transaction *between parties,* within the meaning of the expression in s. 8(3). In this view, the fact that, in voting for the resolution, the shareholders were simply exercising their legal rights as shareholders, rather than entering into a transaction, has no bearing on the question. They do not become parties to the transaction by virtue of their having voted for the resolution but by reason of their consent to take property rights under the transfer which it effected.

As it is clear that, at the time of the passing of such resolution, the three shareholders who, through it, became entitled to rights in the company's property had and exercised complete control over the company for a common purpose of their own, the persons between whom the transaction took place fall within the description "persons not dealing at arms length" and, in my opinion, this is so whether one invokes the aid of s. 127(5) of *The Income Tax Act* or not. I therefore hold that the events by which a right became vested in the shareholders of Granite Bay Logging Co. Ltd. to have the residue of its property, after satisfaction of its liabilities, distributed among them, constituted a "transaction between parties not dealing at arms length" within the meaning of that expression in s. 8(3).

There was, however, another step in the process by which the property of Granite Bay Logging Co. Ltd. became vested in its shareholders. The effect of the transaction referred to was to vest in the shareholders not the property of the company as a whole but the right to have the residue of it distributed to the shareholders after payment of the liabilities. It was one of the functions of the liquidator to make provision for the satisfaction of the liabilities. Instead of satisfying them from the property and distributing the balance of it to the shareholders, what the company did through its liquidator was to transfer to the shareholders the whole of the property, subject to the payment by them of the liabilities. The shareholders, on the other hand, accepted this in place

of the distribution, to which they had become entitled, of what might remain after the liabilities had been satisfied. This, in my opinion, was also a transaction between the company and its shareholders.

There remains the question whether this transaction, as well, was one between parties not dealing at arms length. In entering into it, the company was governed by the decision of the liquidator, who had certain statutory functions to perform. In carrying out these functions, he had a wide discretion conferred by the statute, but in exercising that discretion he was subject to the right of the shareholders in general meeting to direct that certain things should not be done without the sanction of such a meeting. On the other hand, the statute did not empower the shareholders, as a body, to dictate action to be taken by the liquidator, and it is clear that, as shareholders, they had no legal power to require the liquidator to administer the company and distribute its property in the way which he followed. But these considerations do not conclude the matter. The three shareholders, in determining to wind up the company, had a common purpose to get rid of certain difficulties which were being encountered in connection with the company by winding it up and, at the same time, having a new company take over its undertaking. The transaction in question was but one step in the carrying out of that common purpose, and I see no reason to conclude that the liquidator's action in resolving to distribute the property in specie, subject to liabilities, was dictated by anything but that common purpose or that he was acting otherwise than as the agent of all three. On the contrary, despite the undoubted power of the liquidator to act independently as such, in my opinion the correct inference from the circumstances is that the liquidator, in determining to distribute the property of the company as he did, was in fact acting in furtherance of the common purpose and as the agent of the three shareholders, of which he himself was one. Accordingly, I am of the opinion that this transaction, as well, was a transaction between parties not dealing at arms length.

There is thus in the whole series of transactions by which the assets of Granite Bay Logging Co. Ltd. became vested in the respondent none which can be regarded as

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having been made between persons dealing at arms length, and it follows that the respondent's submission cannot be upheld.

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

Judgment accordingly.

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Apr. 11

BETWEEN:

GRANBY TOGS LIMITED .....APPELLANT;

AND

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

Revenue—Excess Profits Tax—Minister authorized to decide whether new business continuation of previous business—Meaning of "substantial interest" "a person or persons who has or have a substantial interest in the business" "by being members of the partnership that operated the business"—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, s. 3 as amended by S. of C. of 1946, c. 47, s. 1.

The proviso to s. 3 of *The Excess Profits Tax Act, 1940,* S. of C. 1940, c. 32, as amended, exempts from the tax certain joint stock companies which commenced business after June 26, 1944 for the first fiscal period of the new business unless, in the case of a joint stock company that commenced business after October 12, 1945, a person or persons who has or have a substantial interest by ownership of shares in the company that operates the business had, in the opinion of the Minister, a substantial interest in a previous business of which the new business is, in the opinion of the Minister, a continuation. The appellant, incorporated as a joint stock company to manufacture clothing, commenced after October 12, 1945, manufacturing children's sportwear in a plant and with equipment it purchased from Dominion Gaiter Manufacturing Co. The latter was a partnership which carried on the business of a clothing manufacturer. Z, who owned all the shares of the appellant company, owned a one third interest in Dominion Gaiter Manufacturing Co.

The appellant was assessed for excess profits on its first fiscal period of business. The assessment was affirmed by the Minister on the ground that the taxpayer was not entitled to exemption under s. 3 of the Act as, in the opinion of the Minister, it had continued the business formerly operated by the partnership of Dominion Gaiter Manufacturing Co. and the same person or persons has or have a substantial interest in both companies. The appellant appealed from the assessment.

Held: That Parliament considered the expressing of an opinion as to whether a new business is the continuation of a previous business an administrative rather than a quasi-judicial act and, by s. 3 of *The*

Excess Profits Tax Act, 1940, as amended, vested in the Minister in the fulfilment of his administrative duty, authority to express such opinion and tax the taxpayer accordingly.

2. That the Court will not interfere with the exercise of a discretion by the Minister unless it be shown that the Minister has acted in contravention of some principle of law. *Pioneer Laundry v. Minister of National Revenue* [1940] A.C. 127; *Minister of National Revenue v. Wright's Canadian Ropes Ltd.* [1947] A.C. 109 at 122.

3. That Z had a substantial interest in the appellant company through ownership of nearly all its shares and by his one third interest had a substantial though not a controlling interest in the partnership. *Manning Timber Products Ltd. v. Minister of Revenue* [1952] 2 S.C.R. 481 affirming [1951] Ex. C.R. 338; *Palser v. Grinling* [1948] 1 All E.R. 1 at 11, applied.

4. That the phrases "a person or persons who has or have a substantial interest in the business" and "by being members of the partnership that operated the business" as used in s. 3 of the Act, apply to one or more persons under the general rule for the construction of taxing statutes that the singular includes the plural and the plural includes the singular. *Partington v. Attorney General* L.R. 4 H. of L. 100 at 122, approved in *Versailles Sweets Ltd. v. Attorney General of Canada* [1924] S.C.R. 466 at 468.

APPEAL under *The Excess Profits Tax Act, 1940.*

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

J. J. Spector, Q.C. and *Philip Vineberg* for appellant.

Antoine Geoffrion, Q.C. and *J. D. C. Boland* for respondent.

FOURNIER J. now (April 11, 1958) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue dated May 2, 1952, affirming the assessment for Excess Profits Tax in respect of the appellant's taxation year 1946-47, ended May 31, 1947, on the ground that the taxpayer is not entitled to the exemption set out in the proviso to s. 3 of *The Excess Profits Tax Act,* as in the opinion of the Minister the taxpayer continued the business formerly operated by the partnership of Dominion Gaiter Manufacturing Co. and that the same person or persons had or have a substantial interest in both companies.

Section 3 of *The Excess Profits Tax Act* provides:

3. *Corporations and persons liable to tax.* In addition to any other tax or duty payable under any Act, there shall be assessed, levied and paid a

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tax in accordance with the rate set out in the Second Schedule to this Act upon the excess profits of every corporation or joint stock company residing or ordinarily resident in Canada or carrying on business in Canada:

Proviso.—Provided that where a corporation or joint stock company other than a controlled company whose standard profit is restricted by section fifteen A of this Act, in the opinion of the Minister

(*a*) has commenced business after the twenty-sixth day of June, nineteen hundred and forty-four, or

(*b*) carried on a substantially different business to which subsection four of section five of this Act is applicable and uses therein physical assets substantially different from those he used in the business he previously carried on,

the tax imposed by this section is not applicable to the profits of the first fiscal period of the new business or to the profits of the first fiscal period in which the said subsection four becomes applicable, as the case may be, unless, in the case of a corporation or joint stock company that has commenced business after the twelfth day of October, nineteen hundred and forty-five a person or persons who has or have a substantial interest in the business either by ownership of shares in the corporation or joint stock company that operates the business or otherwise had, in the opinion of the Minister, either by ownership of shares in the company that operated the business or by being members of the partnership that operated the business or otherwise, a substantial interest in a previous business of which the new business is, in the opinion of the Minister, a continuation.

The effect of s. 3 is to make subject to the tax all corporations or joint stock companies residing or carrying on business in Canada. But the proviso thereto exempts from the tax, during their first year of operations, companies that carry on a substantially new business with substantially new assets or began business after June 26, 1944, unless the company commenced business after October 12, 1945, or continued a previous business and some person or persons had a substantial interest both in the previous and in the new business.

The appellant, Granby Togs Ltd., was incorporated in 1946 and commenced business in that year, so it was exempt under subsection (*a*) of the proviso unless it fell within the ambit of the two exceptions of the exemption. Was it a new business or the continuation of a previous business? Was some person or persons "substantially interested" both in its business and in the business that it continued?

Those are the two questions to be determined in this case in acordance with the provisions of the Act above dealt with and the facts established before the Court.

The facts are hereinafter summarized.

Granby Togs Ltd. was incorporated at the instance of Abraham Zavalkoff. He was one of three partners who were carrying on a business as Dominion Gaiter Manufacturing Co. As such, they operated their business from 1924 to 1949. They were equal partners in the business. In 1949 the partnership was incorporated as Dominion Gaiter Manufacturing Co. Ltd., and all three had equal shares in this company and continued to operate the same business as previously.

Their main business was the manufacture, production and sale of children's coats. Certain accessories of these children's coats, such as hats, leggings, furs, were purchased from other manufacturers and sold by them as part of a matching ensemble. During the war years, finding it difficult to obtain these accessories from other makers, they leased a plant in Granby to manufacture all incidental items, such as leggings, furs, hats, to be sold as sets. They proceeded to do so and continued to do so though they undertook also war work till 1945, when the war ended. After the war, the partners decided to abandon their activities at the Granby plant and to purchase the accessories from outsiders.

Abraham Zavalkoff, one of the partners in the Dominion Gaiter Manufacturing Co., had Granby Togs Ltd. incorporated. It purchased most of the equipment of the Granby plant from the partnership along with new equipment. All the shares of this company were owned by Abraham Zavalkoff, with the exception of one qualifying share which was issued in the name of one of his partners, who became a director for some time, then retired.

The documentary evidence shows that the declaration of partnership of Dominion Gaiter Manufacturing Co., filed on May 27, 1929, states that the partnership was carrying on business as manufacturer of clothing. It operated its plant in Montreal to manufacture children's coats and it purchased the accessories from outsiders up until 1941. During that year, the partnership opened a plant in Granby, Quebec, where it manufactured the accessories. This is the plant taken over by the appellant, Granby Togs Ltd., in 1946. According to its letters patent,

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the appellant was incorporated also as a manufacturer of clothing. By contract between the appellant company and the partnership, the appellant took over the Granby plant, including most of the machinery and equipment therein contained, and commenced manufacturing children's sportwear, using for such purpose mostly the equipment purchased from the partnership and employing some of the employees who formerly worked for the partnership.

Pursuant to the above contract, all the appellant's business was factored and financed by the partnership and its products were sold by salesmen working for the partnership. The partnership made also initial advances of assets to the appellant to start its operations. It collected the bills due to Granby Togs Ltd., deposited the amounts in the company's account. The business transactions of the company seem to have been handled by the partnership at its office in Montreal. Its compensation was the consideration provided for in the contract. Accounts were prepared and settled by the parties at irregular intervals after reports and advice were given by auditors to them.

I believe the above were the relevant facts which the Minister had to consider before expressing his opinion that Granby Togs Ltd., the appellant, was a joint stock company which had commenced business after October 12, 1945, to continue a previous business operated by the partnership known as Dominion Gaiter Manufacturing Co. and not a new company incorporated to carry on substantially different business and using physical assets substantially different from those used in the Granby plant of the partnership.

Those were also the facts on which he had to base his opinion that the same person or persons had a substantial interest in both the appellant company and the partnership.

The general rule laid down in s. 3 of *The Excess Profits Tax Act* is that in addition to any other tax or duty payable under any Act there shall be assessed, levied and paid a tax upon the excess profits of every corporation or joint stock company residing or carrying on business in Canada.

This rule is subject to a proviso exempting from the payment of this excess profit tax the companies which *in the opinion of the Minister* have commenced business after June 26, 1944, or carried on a substantially different business and used therein physical assets substantially different from those used in the business previously carried on.

But the exemption does not apply when in the opinion of the Minister the taxpayer is a new corporation or company continuing the business formerly operated by another company or partnership and that the same person or persons has or have a substantial interest in both the new company and the former company or partnership.

It was established and the parties agreed that the appellant, Granby Togs Ltd., had been incorporated and commenced business after October 12, 1945. It is also in evidence that Abraham Zavalkoff was the owner of approximately one hundred per cent (100%) of the shares of the appellant company and held a one-third ($\frac{1}{3}$) interest in the partnership of the Dominion Gaiter Manufacturing Co.

The Minister, after finding as a fact that Abraham Zavalkoff during the fiscal period in question had a substantial interest in the business of the appellant through the ownership of shares in the appellant company,

Was of the opinion that

(*a*) Abraham Zavalkoff was one of the members of a partnership that had operated the business of the Dominion Gaiter Manufacturing Co., and

(*b*) the business of the appellant was a continuation of a previous business of manufacturing leggings, collars, hats and other accessories which had been carried on by Dominion Gaiter Manufacturing Co.,

and he based his assessment accordingly.

He now submits that the appellant comes within the exception to the proviso to s. 3 of *The Excess Profits Tax Act, 1940,* and that the tax was correctly imposed in accordance with the Act.

There is no dispute as to the fact that Abraham Zavalkoff had a substantial interest in the appellant company through the ownership of nearly all its capital

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stock, nor that he was one of the three members of the partnership which operated the business of the Dominion Gaiter Manufacturing Company before, during and after the fiscal year in question.

The Minister did not express any opinion in his defence as to whether the partnership interest of Abraham Zavalkoff in Dominion Gaiter Manufacturing Company was a substantial interest, but he did so in his decision of May 2, 1952.

It is an admitted fact that he held a one-third interest in the partnership. Could this one-third interest be considered as a substantial interest? There were three partners holding each a one-third interest, so it can be said that his interest was as substantial as that of each of the other partners. I do not think that the percentage test itself is sufficient to determine that the interest is substantial. One should consider all the facts and circumstances of the case, keeping in mind that a substantial interest does not mean a controlling or majority interest. *Vide Manning Timber Products Ltd. v. Minister of National Revenue*[1], affirmed by the Supreme Court of Canada in 1952[2].

The remarks of Viscount Simon in *Palser v. Grinling*[3] seem to me to be properly applied to this case. I quote:

> (5) *What does "substantial portion" mean?* It is plain that the phrase requires a comparison with the *whole rent*, and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. "Subsantial" in this connection is not the same as "not unsubstantial", *i.e.* just enough to avoid the *de minimis* principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, . . .

In the present case, wherein three persons (the father and two sons) are the only partners in the partnership, all three having an equal interest and taking an equal part in the operations of the business of the partnership, in my opinion each partner may be said to have a considerable and solid interest in the business; in other words, *a substantial interest* though they do not have a majority or controlling interest.

[1] [1951] Ex. C.R. 338. [2] [1952] 2 S.C.R. 481.
[3] [1948] 1 All E.R. 1 at 11.

In the concluding paragraph of s. 3, it is stated that "a person or persons who has or have a substantial interest in the business" and "by being members of the partnership that operated the business . . ." These phrases apply to one or more persons. It is argued that the wording of these phrases would exclude from the exception to the exemption the person who is the owner of shares in the new company and a member of the partnership, because the section uses the words "being members of" and not "a member of the partnership".

I cannot agree with this contention. Though in taxing acts the words are to be construed in their natural meaning, there are rules of construction to be followed. A general rule of interpretation is that the singular imports the plural and the plural includes the singular. As to the interpretation of fiscal statutes, I think that the general principles stated in the following cases are applicable to the present dispute.

In *Partington v. Attorney General*[1] Lord Cairns says:

> 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. . . .

And in *Versailles Sweets, Limited v. Attorney General of Canada*[2], Duff J., (as he then was) dealing with the same subject, said:

> . . . The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General.* 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* . . .

I believe the above rules of interpretation would justify the paraphrasing, in the present case, of the last paragraph of section 3 as follows: "Abraham Zavalkoff, a person who has a substantial interest by ownership of shares in the company that operated the business, had, by being a member of the partnership that operated the business . . ."

[1] [1869] L.R. 4 H. of L. 100 at 122. [2] [1924] S.C.R. 466 at 468.

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To be construed otherwise would imply or presume that the "exception to the exemption proviso" was applicable only when more than one person was involved. This would be bad law, because there is no such thing as presumption of exemption in taxing statutes.

In *Kennedy v. Minister of National Revenue*[1], Audette J. held:

> . . . There is no such thing as presumption of exemption, if anything, the presumption would be in favour of the taxing power. 37 Encly. Law and Prac. 891. Immunity from taxation by statute will not be recognized unless granted in terms too plain to be mistaken.

In *Lumbers and The Minister of National Revenue*[2], Thorson J. said:

> . . . 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. . . . (Affirmed [1944] C.T.C. 67; [1944] S.C.R. 167.)

It is now necessary to determine whether the appellant comes within the ambit of the concluding provisions of the section where the Minister's opinion may have the effect of excluding Granby Togs Limited from the exemption proviso.

In my view, the question "Is the business of the appellant a continuation of a previous business of Dominion Gaiter Manufacturing Co.?"—a question of fact—should be answered in the affirmative. In clear words, the section empowers the Minister to express his opinion on that fact. Though there is no limit to the right of appeal from a Minister's decision, generally the Court will not interfere with the exercise of a discretion by the Minister except on grounds of law. If he exercises his discretion on wrong legal principles, it is the duty of the Court to remit the case for reconsideration of the subject matter, stripped of these wrong principles. See decision of Privy Council in *Pioneer Laundry and Minister of National Revenue*[3].

[1] [1929] Ex. C.R. 36; [1928-34] C.T.C. 1 at 4.

[2] [1943] Ex. C.R. 202; [1943] C.T.C. 281 at 290-1.

[3] [1940] A.C. 127.

It was later stated in *Minister of National Revenue and Wrights' Canadian Ropes, Limited*[1], Lord Greene speaking (p. 122):

> . . . It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the Court cannot interfere. . . .

In 1942 the Supreme Court of Canada, dealing with a case under s. 98 of the *Special War Revenue Act,* held:

> S. 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal; and in any event it was clear that he acted honestly and impartially and gave respondent every opportunity of being heard; and his determination must be held to be binding.

In the case of *Pure Spring Co. Ltd. and The Minister of National Revenue*[2], Thorson J. held:

> The governing principle that runs through the cases is that when Parliament has entrusted an administrative function involving discretion to an authority other than the Court it is to be performed by such authority without interference by the Court, either directly or indirectly. Where a person has been given jurisdiction to form an opinion and act accordingly, the Court has no right to review such opinion or the considerations on which it was based; the accuracy of the opinion is quite outside its jurisdiction. . . .

The dispute being on a question of facts and the Minister being duly authorized to express his opinion on same and act accordingly, unless it would appear that he acted in contravention of some principle of law I do not think that the Court should interfere.

I have already found that a person who has a substantial interest in a company, through the ownership of shares, and who was a partner in a partnership of three persons having an equal interest and taking an equal part in the operations of the business of the partnership, had a considerable or substantial interest in that partnership, though he may not have a majority or controlling interest.

I have also found that the word "members" includes "a member" and that a person would fall within the framework of "members of the partnership".

As to the continuation of a previous business, it should be noted that the word "business" is not defined either in the *Income War Tax Act* or *the Excess Profits Tax Act.* There is no doubt that the term "business" is wide and

[1] [1947] A.C. 109.

[2] [1946] Ex. C.R. 471 at 490.

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indefinite and that it is extremely difficult to determine whether a series of operations constitute different businesses or merely branches or aspects of the same business. In the present case, both the appellant and the Dominion Gaiter Manufacturing Co. are on record as "manufacturers of clothing". Can their operations be considered as different businesses or only different branches or aspects of a same undertaking or business? Opinions may be far apart on the distinction.

After having heard the evidence and having made a careful study of the section I have come to the conclusion that the legislator did not entrust to the Court the power to determine the facts that should constitute "a continuation of a previous business". I am rather of the opinion that Parliament considered the decision as an administrative function involving the opinion of the Minister on the relevant facts in each case and assessing the taxpayer accordingly.

Therefore, I find that the authority vested in the Minister by s. 3 of *The Excess Profits Tax Act* to express an opinion as to whether a new business is the continuation of a previous business is an administrative act rather than a quasi-judicial one and that the Minister's action was required to fulfil his administrative duty.

For these reasons, the appeal is dismissed with costs.

Judgment accordingly.

BETWEEN:

INDUSTRIAL MORTGAGE AND TRUST COMPANY ..... APPELLANT;

1956
Mar. 22, 23
1958
Mar. 10

AND

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

Revenue—Income Tax—In computing income method regularly followed by taxpayer in computing profit determines whether amounts receivable as interest shall be included—"Method" defined—Income Tax Act, 1948, c. 52, ss. 3, 4, 6(b), 11(1)(d) and 129(9).

The appellant in computing its income for 1949, as it had in previous years, brought into account on a cash received basis revenue from all sources except interest on government bonds and a remnant of mortgages taken prior to 1942 which it accounted for on an accrual basis. In assessing the appellant the Minister added to the income reported the amount of mortgage interest which became due but was not paid in 1949 on mortgages the interest from which in 1949 and in previous years had been brought into revenue on the cash received basis. The Income Tax Appeal Board having affirmed the assessment the appellant appealed to this Court. It submitted that the method used by it to compute its income was in compliance with s. 6(*b*) of The Income Tax Act, had been accepted by the Minister in the past and, accurately reflected its income. The Minister argued that the appellant's accounting practice did not amount to a method of computing profit of either of the kinds mentioned in s. 6(*b*) and that as s. 6(*b*) had no application, resort must be had to s. 4 which declares the income of a business to be the profit therefrom for the year. That the computation of such profit must take into account all the earnings of the business for the year and that as the receivables in question were sums earned in the year and had value, they had been properly included and any computation which failed to include them would not accurately reflect the profit of the business for the year.

Held: That interest not received in the year may be included in computing the annual profit of a business if the method used for such computation is based on accounting principles which require that it be brought into the computation. Thus unpaid interest may become part of the income of a business by reason of the special meaning given by s. 4 of *The Income Tax Act* to the word "income" when it refers to the income of a business but this is subject to s. 6(*b*) which directs that the method regularly followed by the taxpayer in computing his profit shall determine the basis on which interest shall be brought into the computation.

2. That the word "method" is not used in s. 6(*b*) in a narrow or technical sense but means the system regularly followed by the taxpayer in computing his profit.

3. That the system may include different practices for accounting for revenue from different sources and still be regarded as a "method" within the meaning of that word in s. 6(*b*).

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4. That the practices followed by the appellant amounted to a "method" within the meaning of the section and, as it had been followed for seven years up to and including 1949, it was the "method" regularly followed by the appellant in computing its profit within the meaning of s. 6(*b*).

5. That since the practice of the appellant during the period in question was to include interest from mortgages in revenue only when received, s. 6(*b*) amounted to a statutory direction for bringing into the computation of the appellant's income on a "received in the year" basis the interest on all mortgages in respect to which the appellant had followed that basis and impliedly excluded the use of the "receivable in the year" basis.

6. That as the amount added by the Minister was interest receivable, to the extent of such addition, the assessment was not in accordance with the statute and could not be sustained.

7. That the Minister's computation was not a more accurate than that made by the appellant and was not an accurate estimate of the mortgage earnings of the appellant for the year 1949 and because of this the sum assessed as the profit of the business for that year was not an accurate estimate of such profit.

8. That s. 129(9) of the Act does not apply as the method of computing profit therein referred to was not one adopted by the taxpayer.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before Mr. Justice Thurlow at London.

John D. Harrison, Q.C. for appellant.

K. E. Eaton and *J. D. C. Boland* for respondent.

THURLOW J. now (March 10, 1958) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board[1] dismissing an appeal by the appellant against its income tax assessment for the year 1949. In making the assessment under appeal, the Minister added to the income reported by the appellant an amount representing mortgage interest which became due to the appellant in 1949 but which had not been paid at the end of that year. This amount was not included by the appellant in computing its profit for the year 1949, and the issue in the appeal is whether or not the amount so added must be brought into account in computing the income of the appellant for the year 1949 for the purposes of *The Income Tax Act*, S. of C. 1948, c. 52.

[1] 13 Tax A.B.C. 374; 55 D.T.C. 497.

In 1949 and for some years prior thereto, the appellant carried on the business of a mortgage and trust company at Sarnia, Forest and Petrolia in the Province of Ontario. The revenues of this business consisted of interest, dividends, rentals, profits on sales of real estate and securities and estate, trust and agency fees. Approximately eighty-five per cent of the total revenue was interest and most, though not all, of such interest was derived from mortgages and bonds. The revenues of the business fell into two divisions, those derived from the employment of the appellant's own capital funds or assets and those derived from the employment of funds deposited with the appellant or loaned to it on the security of guaranteed investment certificates which it issued. A separate account, known as the guaranteed trust account, was maintained for the assets or funds representing these trust deposits and guaranteed investment certificates, and the revenue from the operation of this part of the appellant's business was accounted for separately from that pertaining to the appellant's capital, but the profit, after providing for operating expenses and for interest payable to depositors and certificate holders, formed part of the profits of the appellant company.

In 1949 the appellant had revenue from the employment of its capital from interest on mortgages, agreements of sale, collateral and sundry loans, and corporation bonds, all of which was taken into its revenue account on a basis of cash received; that is to say, when, and not until, the interest was paid. It also had revenue from dividends, rental of buildings, rental of safety deposit boxes, estate, trust and agency fees, and profits on sales of real estate, all of which was also taken into its revenue account on the same cash received basis. At the same time, it brought into revenue on an accrual basis interest on Dominion Government, Dominion Government Guaranteed, Provincial Government and Provincial Government Guaranteed bonds. The amount so brought into revenue account from such bonds was the total amount of interest earned on such bonds from day to day during the year, irrespective of the dates in the year when interest became payable. It included interest which accrued (but was not received because it was not yet due) from the last interest payment date in the year to the end of the year, but did not include interest received during the year which had accrued but which had

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not become payable before the beginning of the year. The latter amount had been taken into revenue in the previous year. This was apparently the only deviation from accounting on a strictly cash received basis for revenue obtained from the employment of the appellant company's capital during the year in question. In so far as mortgage interest alone was concerned, it had been taken into revenue on the cash received basis since January 1, 1942 and most, if not all, other items of revenue had been accounted for on the same basis for some years prior to 1942.

In its guaranteed trust account, the appellant had revenue in 1949 from interest on mortgages, bonds, and savings accounts, from dividends, and from profits on sale of securities. Of these, interest on savings accounts, dividends and profits on sale of securities were all taken into revenue on the cash received basis. Interest on corporation bonds, as well, was taken into revenue on the same cash received basis, but the interest on Dominion Government, Provincial Government, Provincial Government Guaranteed, and municipal bonds was brought into revenue on the same accrual basis as previously described with respect to similar bonds in the appellant's capital account. Mortgage interest was also taken into revenue on a basis of cash received except that, with respect to a number of mortgage loans made by the appellant prior to 1942 and on which the interest payments had never been in default, the interest was brought into revenue on a similar accrual basis.

There was an explanation for this difference in the appellant's accounting practice in respect to the interest on these particular mortgages. Prior to 1931 the appellant's accounts pertaining to interest on all bonds, mortgages, agreements of sale, and collateral loans had been on an accrual basis, while revenues other than interest on these items were being accounted for on a cash received basis. Between 1931 and 1941, as a result of defaults in payment of mortgage interest and of the appellant having taken into revenue a large amount of mortgage interest which it could not collect, a number of changes in the method of taking interest into revenue were made, each tending to some extent to bring the method nearer to a cash received basis on all items except government bonds. By January 1, 1942, when the last of these changes was made, the method of accounting for mortgage interest was that of taking into revenue the

interest on all new loans on a cash received basis while carrying on on the accrual basis in respect to the interest on old loans on which the interest had never been in default. If the interest on such a loan subsequently fell into default, the accounting for interest on it was immediately put on a cash received basis. With respect to loans on which the interest had been in default prior to January 1, 1942, as a result of steps which had been taken by the appellant the amount of unpaid interest which had been taken into revenue did not exceed one year's interest in the case of any such loan. Interest on these loans, when received, was applied first to interest falling due in the year the payment was received and, secondly, in discharge of interest previously accrued which had not been included in the appellant's revenue. Such sums thereupon became part of the appellant's revenue in the year of such payment. If a payment exceeded the interest for the current year and all arrears of interest for previous years which had not been taken into revenue, the balance was applied to arrears of interest which had previously been taken into revenue while the accounting for interest on the mortgage was on the accrual basis, but as such interest had already been taken into revenue in the year when it accrued, such balance was not again brought into the appellant's revenue. Similarly, when a mortgage, the interest of which never had been in default, was paid off, the sum representing accrued interest from the last interest date in the previous year to the end of that year, which had been taken into the appellant's revenue in that year, was not again brought into revenue.

At this point it may be useful to summarize the accounting practices followed by the appellant in 1949 and previous years in taking sums into its revenue. They were as follows:

Item	*Basis*	*Practice in Effect From*
Capital Account:		
Dividends	cash received	Prior to 1931
Rentals		
Real Estate	cash received	
S/D Boxes	cash received	
Estate, trust and agency fees	cash received	
Profits on sales of real estate	cash received	
Interest		
Sundry obligations	cash received	
Mortgages	cash received	By Jan. 1, 1942 on all mortgages, new and old.

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Item	*Basis*	*Practice in Effect Fram*
Agreements of sale	cash received	Jan. 1, 1937 on agreements made after that date, on all agreements by Jan. 1, 1942.
Collateral loans	cash received	Jan. 1, 1942 on new loans; no old loans outstanding in 1949.
Bonds		
Corporation	cash received	no date given in evidence.
Dominion Government Dominion Gov't. Guaranteed Provincial Government Provincial Gov't. Guaranteed	accrual	Prior to 1931.
Guaranteed Trust Account:		
Dividends	cash received	Prior to 1931.
Profits from sale of securities	cash received	Prior to 1931.
Interest		
Savings accounts	cash received	Prior to 1931.
Mortgages		
(1) made after Jan. 1, 1942	cash received	Jan. 1, 1942.
(2) made prior to Jan. 1, 1942		
(a) if interest never in default	accrual	Prior to 1931.
(b) if interest had at any time been in default	cash received	By 1935 in the case of any mortgage then in default and in any other case any later date on which default occurred in payment of interest.
Bonds		
Corporation	cash received	no date given in evidence.
Dominion Government Provincial Government Provincial Gov't. Guaranteed Municipal	accrual	Prior to 1931.

In round figures, the sums taken into revenue in 1949 on the accrual basis as interest on government bonds was $120,000, out of total revenue of $357,000. Of the $237,000 making up the difference, some portion (the evidence does not show precisely how much) related to the residue of mortgages still on the accrual basis, but the great bulk of it represented the amount taken into revenue on the cash received basis from sources other than government bonds.

The revenues received by the appellant in 1949 as interest on mortgages and agreements of sale amounted to $169,951.35, and receipts of discounts and capitalized interest, which had not previously been brought into revenue, amounted to $6,582.22, making total revenue receipts of $176,559.07 from this source. This gross sum

included $485.26 which the appellant received in 1949 in payment of arrears of interest which had been brought into revenue in previous years on mortgages which had been in default, $14,807.61 which the appellant received in 1949 in payment of arrears of mortgage interest which had not been taken into revenue in previous years, and $4,606.52 for interest accrued in 1948 from the last interest payment date in that year to the end of the year on mortgages taken before 1942 which had never been in default. The last-mentioned sum had been taken into revenue in 1948. The appellant deducted the $485.26 and the $4,606.52 from the total receipts above mentioned, to leave a sum of $171,441.79 which it brought into its 1949 revenue account. It also brought into revenue $3,716.70 for interest accrued in 1949 but not received on mortgages taken prior to January 1, 1942 which had never been in default. The total of these last two sums, $175,158.49, was the sum included by the appellant in the revenue account accompanying its income tax return for 1949 as its revenue from mortgages and agreements of sale.

At the end of the year 1949 there was due to the appellant mortgage interest in arrears which had never been taken into revenue, totalling $14,040.71. There was also due to the appellant a total of $958.01 for mortgage interest in arrears which had been included in revenue in previous years.

In assessing the appellant's 1949 income, the Minister added to the income as reported the sum of $18,715.42 as interest receivable on mortgages, less the sum of $4,674.71 which the appellant had previously taken into revenue on the accrual basis. (The latter sum is made up of the $958.01 for arrears included in revenue in earlier years and the $3,716.70 for accruals in 1949.) This made a net addition to the revenue as reported of $14,040.71. Then from the income so calculated, the Minister deducted $4,692.64 as a reserve for doubtful debts, pursuant to s. 11(1)(*d*) of *The Income Tax Act*. He did not deduct the amount of interest received in 1949 which was due and in arrears at the beginning of 1949. As previously mentioned, this amounted to $14,807.61. Had he done so, the mortgage revenue so calculated would have amounted to $174,391.59, that is to say, $766.90 less than the amount reported by the appellant.

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It will be observed that, notwithstanding the deductions made by the Minister after making the addition, the net amount added by the Minister in computing the appellant's mortgage revenue was entirely made up of interest which, though it became due in 1949, remained unpaid at the end of that year. It is this amount, rather than the deductions, with which the Court is concerned on this appeal, and the question for determination is whether or not the Minister correctly included such amount in the computation and assessment of the appellant's income for 1949.

Section 3 of *The Income Tax Act* declares that the income of a taxpayer for income tax purposes is his income for the year from all sources and includes income for the year from all businesses and property. It is then provided by s. 4 that, subject to the other provisions of Part I of the Act, income for a taxation year from a business or property is the profit therefrom for the year. The statute does not define "profit", nor does it prescribe any particular method or system by which the profit of a business or property is to be computed, but one of the provisions of Part I to which s. 4 is expressly made subject is s. 6(*b*), which is as follows:

> 6. Without restricting the generality of section 3 there shall be included in computing the income of a taxpayer for a taxation year
>
> * * *
>
> (*b*) amounts *received in the year* or *receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit)* as interest or on account or in lieu of payment of, or in satisfaction of interest;

It may be noted that interest which is not received in the year is not income in the ordinary sense of the word because it does not come in. But, even though such unpaid interest is not received in the year, it may be necessary to include it in computing the profit of a business or property for a year if the method used to compute profit is based on accounting principles which require that it should be brought into the computation. In this way, unpaid interest which has become due during the year may become part of the income of a business or property by reason of the special meaning given by s. 4 to the word "income" when it refers to the income of a business or property. But this is subject to s. 6(*b*), which directs that the method regularly followed by the taxpayer in computing his profit shall determine the

basis on which interest shall be brought into the computation of the income of the taxpayer for the purposes of *The Income Tax Act*.

The argument advanced on behalf of the Minister for including in the computation of the appellant's 1949 revenue the amount in question, made up as it was of interest which became *receivable in the year* was that the accounting practices of the appellant did not amount to a method of computing profit of either of the two kinds mentioned in s. 6(*b*) of *The Income Tax Act,* that, accordingly, s. 6(*b*) has no application to this case except to indicate, by the expression *"receivable in the year"*, the limit to which Parliament intended interest should be included in computing profit, that because the matter cannot be resolved under s. 6(*b*) resort must be had to s. 4, which declares the income of a business to be the profit therefrom for the year, that the computation of the profit of a business of a year must take into account all of the earnings of the business for the year, including the receivables in question which were sums earned in the year and had value, and that any computation of profit in which such receivables are not brought into account does not accurately reflect the profit of the business for the year. This was followed by the submission that, in the Minister's computation, any uncertainty as to the value or collectibility of such receivables was adequately taken care of by the allowance of a deduction for doubtful debts.

This argument raises a question as to what is meant by the word "method" in s. 6(*b*) and a further question as to whether or not the appellant regularly followed a method of computing its profit. As I interpret it, the word "method" is not used in s. 6(*b*) in any narrow or technical sense but simply means the system or procedure which the taxpayer has regularly followed in computing his profit. The system or procedure, in my opinion, may be made up of a number of practices, and I can see no valid reason why, in a diverse business such as that of the appellant, such system or procedure could not include different practices for accounting for revenue from different activities or sources, depending on the nature of such activities or sources and of the revenues therefrom, and still be regarded as a "method" within the meaning of that word in s. 6(*b*). In my opinion,

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the practices followed by the appellant did amount to a "method" within the meaning of the section and, as that method had been followed by the appellant without change for the seven years immediately preceding 1949 and for 1949 as well, I have no hesitation in concluding that it was the "method" regularly followed by the appellant in computing its profit within the meaning of s. 6(*b*).

Now, in this method the practice followed by the appellant in accounting for interest revenue from all mortgages taken after January 1, 1942 and from all mortgages taken prior to that date on which the interest had been in default was that of including interest in revenue only when it was received. And while the accrual basis was still in use with respect to the decreasing remnant of mortgages taken prior to 1942, the interest on which had never been in default, the plain fact was that the appellant at no time during the period from the beginning of 1942 to the end of 1949 computed any part of its mortgage revenue, or for that matter any part of its revenue from any activity or source, by including interest or other revenue which had become receivable but was not received in the year. In this situation, I am of the opinion that s. 6(*b*) amounts to a statutory direction for bringing into the computation of the appellant's income on a *received in the year* basis the interest on all mortgages in respect to which the appellant had followed that basis. At the same time, since the *receivable in the year* basis was never followed by the appellant, s. 6(*b*) impliedly excludes its use as the basis for bringing the interest of such mortgages into the computation. As the amount added by the Minister was interest receivable on such mortgages, it follows, in my opinion, that, to the extent of such addition, the assessment is not in accordance with the statute and cannot be sustained.

There is, however, a further reason why, in my opinion, the assessment cannot be upheld. The main argument in support of the assessment was that the cash received basis used by the appellant to compute its mortgage revenue was not an appropriate method of computation of such revenue for the purposes of *The Income Tax Act* and that the method adopted by the Minister of computing such revenue by including receivable interest was the appropriate method and would reflect the true profit of the business for the year more accurately than the accounting practices followed

by the appellant. Whether or not, over a period of years, the method adopted by the Minister would reflect the true profit of the appellant's business more accurately than the appellant's method is a matter on which opinions may differ, but in the opinion of the only witness who gave evidence at the trial of the appeal the method followed by the appellant was more appropriate for the appellant's business and, in particular, for the computation of the appellant's mortgage revenue. This witness was Mr. C. A. Parker, a chartered accountant who has acted as auditor of the appellant company continuously since 1930, and, if it were necessary to come to a conclusion on this question, I would do so on the basis of his opinion. But even if over a period of years the method adopted by the Minister would be more appropriate I think it is clear that the Minister's computation of the appellant's mortgage revenue for 1949 was not a more accurate computation than that made by the appellant, for when, in computing revenue by the method which the Minister contends is more appropriate, receivables due at the end of the year are included as part of the earnings of the year, the receivables due at the beginning of the year which were earnings of previous years must be excluded from the computation. As previously mentioned, had this been done there would have been nothing for the Minister to add to the mortgage revenue as computed by the appellant. The mere fact that such receivables due at the beginning of 1949 had never been taken into revenue does not affect the matter. What is to be assessed is the profit for the year and, if the profit is to be computed on the basis of what has been earned in the year, what had already been earned before the year began does not enter into the computation. It follows, in my opinion, that the computation of mortgage revenue on which the assessment is made is not an accurate estimate of the mortgage earnings of the appellant for the year 1949, and because of this the sum assessed as the profit of the business for the year is not an accurate estimate of such profit.

Counsel for the Minister sought to overcome this objection of the assessment by invoking the special provisions of s. 129(9) of *The Income Tax Act*, but in my opinion this

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section does not apply where, as in this case, the method of computing profit referred to in the section is not one adopted by the taxpayer.

The appeal will be allowed and the assessment referred back to the Minister to be revised in accordance with the foregoing reasons. The appellant is entitled to its costs of appeal.

Judgment accordingly.

1957

Apr. 12

1958

Apr. 16

BETWEEN:

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

AND

CAINE LUMBER COMPANY ..... RESPONDENT.

Revenue—Income Tax—Capital cost allowance—Whether timber limit not operated by former owner purchased in non-arms length transaction depreciable property—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 11(1)(a), 20(2)(a), (3), (4) and 127(5).

In 1924 C purchased a timber limit for $250 on which he did no cutting and made no claim for capital cost allowance. In 1951 he sold the limit for $15,000 to the respondent company which he controlled. The respondent began cutting in 1952 and claimed capital cost allowance for that year based on the price it had paid C. The Minister reduced the claim by computing the allowance on the basis of the price C had paid. In support of his assessment the Minister argued that the limit was depreciable property which became vested in the respondent in a transaction that was admittedly between the parties not dealing at arms length with the result that, as provided by s. 20(2) of *The Income Tax Act*, the capital cost of the property to the respondent was deemed to be the amount that was the capital cost to C. The respondent contended that, as the limit did not become depreciable property until the 1952 operations, s. 20(2) did not apply, and as C, in whose possession the limit remained idle, had neither claimed nor been entitled to a deduction, the limit was not the depreciable property referred to in that section.

Held: The view that an asset assumes the quality of depreciability only after actual depletion is unwarranted: a timber limit is presumed depreciable.

2. That as the respondent had applied for and been allowed a deduction in respect of the capital cost of the timber limit, it was a "depreciable property" as defined by s. 20(3) of the Act and as the limit became vested in the respondent in a transaction between persons not dealing at arm's length, the provisions of s. 20(2) clearly applied.

APPEAL from a decision of the Income Tax Appeal Board.

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

F. J. Cross for appellant.

J. L. Lawrence for respondent.

DUMOULIN J. now (April 16, 1957) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated May 2, 1956[1], allowing the present respondent's appeal in respect of an income tax assessment for the 1952 taxation year.

The case was heard at Vancouver, B.C., on April 12, 1957.

The facts are as follows and agreed to in a joint statement filed as the hearing opened.

One Martin S. Caine, of Prince George, B.C., operated a sawmill and planing mill up to the year, 1949, when he organized a private company under the name and style of: Caine Lumber Company Ltd.; herein impleaded as respondent. This newly incorporated firm, with its Head Office in the City of Prince George, took over Martin S. Caine's former business.

In 1942, Caine had purchased a timber limit for $250, which he resold to the Company, in 1951, at a price of $15,000, getting book credit for this amount.

Although from the date of purchase to that of the sale, Caine expended a sum of $2,678.60, on account of this timber land for taxes, roads and camps, he never exploited it nor undertook cuttings, and, therefore never claimed any capital cost allowance.

It is freely admitted that this deal, between Caine and his namesake Company, was not an "at arms length transaction" (*vide* 1948 11-12 Geo. VI, c. 52, s. 127(5)).

In the year 1952, timber operations started and accordingly Caine Lumber Company produced its claim to a

[1] 56 D.T.C. 221; 15 Tax A.B.C. 69.

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capital cost deduction, pursuant to s. 11(1)(*a*) hereunder of *The Income Tax Act,* based upon its own purchase price of $15,000.

11(1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation,

The allowances referred to appear in Part XI of the Regulations, under the respective numeral and heading of 1100 and Schedule C.

Resuming now the recital of facts, Caine Lumber Company in its income tax return for 1952, according to the footage cut in that year, on a thousand feet ratio, divided by a capital price of $15,000, found an allegedly permissible deduction of $3,376.41. Initially, the Minister reduced this claim to $56.27, on the grounds that, conformably to the language of s. 20(2)(*a*), the purchase price of statutory moment was the original one of $250, at which Martin S. Caine acquired the limit in 1942.

Upon the Company filing a Notice of Objection, the Minister varied this assessment so as to include general and sundry maintenance expenses, previously incurred by Caine, in the sum of $2,678.60, thereby basing capital cost allowance on a purchase price of $2,928.60 instead of $250, and increasing by $602.94 the actual deduction to the taxpayer.

Appellant's position is stated in para. 9 of the Notice of Appeal reading:

9. The Appellant says that the said timber limit was depreciable property which did, after the commencement of 1949, belong to Martin S. Caine and had, by a transaction between persons not dealing at arms length, become vested in the Respondent, with the result that the capital cost of the property to the Respondent is deemed to be the amount that was the capital cost of the property to Martin S. Caine, by virtue of subsection (2) of Section 20 of the Income Tax Act.

The respondent counters that: (*vide* Reply to Appeal, paras. 8, 9 and 10)

8. . . . the said timber limit did not become depreciable property until the Respondent commenced operations on it in the year 1952 . . . and thus Section 20(2) of the Income Tax Act does not apply and the Respondent is entitled to the capital cost allowance as claimed by it.

9. . . . the said Martin S. Caine has never been allowed nor was he ever entitled . . . to claim a deduction . . . with respect to said property and hence the said timber limit was not the depreciable property referred to in Section 20(2).

10. . . . in the ordinary and proper sense standing timber is not depreciable property but is usually a growing or appreciating asset that is depleted by harvesting and in accordance with general business and accounting principles should be properly described as "depletable property" rather than "depreciable property".

The moot point turns on the proper interpretation of s. 20(2)(*a*) and 20(3)(*a*) of the 1948 *Income Tax Act*, c. 52, now quoted:

20(2) Where depreciable property did, at any time after the commencement of 1949, belong to one person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arms length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:

(*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

* * *

20(3) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

(*a*) "depreciable property of a taxpayer" as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year;

* * *

11(1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation,

(*b*) such amount as an allowance in respect of . . . a timber limit, if any, as is allowed to the taxpayer by regulation.

I, at once, note that s. 20(2) plainly points out who the actual taxpayer is: none other but the respondent. Then, a consequent application of s. 20(3)(*a*) thrusts upon Caine Lumber Company the quality of taxpayer and eliminates all doubt as to this timber land becoming not merely depreciable but also depreciated property from 1952 onwards, in connection to which respondent filed an allowance claim in the sum of $3,376.41.

But let us proceed to a broader perusal of the statutory enactments and of the parties' conflicting arguments. In my comprehension, at least, it savours of a play on words, respondent reading into the pertinent sections the alteration "depreciated property" in lieu of "depreciable property".

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The view that an asset assumes the quality of depreciability solely after depletion is akin to maintaining that man may be called mortal only when stark dead. Moreover, it appears self-evident that any property, such as this timber limit, ceases to be depreciable precisely after undergoing total depreciation. I can conceive of no better application of the age-long distinction between the elementary conditions known as *in posse* and *in actû*.

Respondent's second contention that Martin S. Caine, having left the property idle, never was entitled *"or able to claim a deduction . . .* with respect to it" practically defeats itself in suggesting the apposite reply. Truly, Caine, owner of a depreciable asset was potentially *"entitled"* to a deduction, that he was actually *"unable to claim"* because the requisite depletion never occurred.

A civil employee, for instance, is "entitled" to a pension the moment he permanently joins the service, but becomes the "recipient" thereof the day he leaves it. I need not elaborate these points further.

Lastly, respondent propounded a third and quite unexpected argument which I hesitatingly approach, since in despite of a close scrutiny I may have misconstrued it. To the best of my understanding it underscored in s. 20(3)(*a*) of the Act the words ". . . in computing income for that or a previous taxation year . . ." going on to hold the expressions: "that or a previous taxation year" as precluding all claims to subsequent deductions. The inferential conclusion, comprising also respondent's previous objections, was that s. 20(2), as drafted, failed to encompass this appeal's subject-matter. On this particular score, my only comment is that it fares no better than its two cognate contentions.

To summarize, albeit repetitiously, my opinion in the case, s. 20(2)(*a*) clearly contemplates a situation such as the instant one; its unambiguous wording applies, with alternative consequences, to every connotation, eventual or actual, of which the adjective "depreciable" is capable.

Proper interpolations made, the applicable taxing instrument would then read:

20(2) Where depreciable property did, at any time after the commencement of 1949, belong to one person (hereinafter referred to as the

original owner) [namely *Martin S. Caine*] and has, by one or more transactions between persons not dealing at arms length, become vested in a taxpayer, [i.e. *Caine Lumber Company, Ltd.*] the following rules are . . . applicable . . .

(*a*) The capital cost of the property to the taxpayer [*Caine Lumber Company, Ltd.*] shall be deemed to be the amount that was the capital cost of the property [$2,928.60] to the original owner [*Martin S. Caine*];

Directions for construing a taxing statute, suggested by Lord Cairns in *Partington v. Attorney General*[1] were approvingly quoted by Duff J., as he then was, in re *Versailles Sweets Limited v. The Attorney General of Canada*[2], hereunder cited:

[By Duff J.] The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General:*

> [By Lord Cairns] 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. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The words of the statute, as I see them, certainly fall short of the meaning wishfully attached to them in, amongst others, para. 10 of respondent's Reply to Appeal.

For the reasons stated above, the appeal is allowed. Respondent's income tax for the year ending on December 31, 1952, is hereby restored to the amount fixed by the appellant in its notification to respondent, dated November 29, 1954, as consistent with the statute, on the basis of a total capital cost to Martin S. Caine of $2,928.60. Appellant will recover the taxable costs.

Judgment accordingly.

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[1] L.R. 4 H.L. 100 at 122.

[2] [1924] S.C.R. 466 at 468.

1957
Apr. 10
1958
Apr. 17

BETWEEN:

GENERAL CONSTRUCTION COMPANY LIMITED ..... APPELLANT;

AND

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

Revenue—Income Tax—Whether payment on sale of interest in joint venture agreement, income or capital—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 6(c) and 127(1)(e) (R.S.C. 1952, c. 148, ss. 3, 4, 6(c) and 139(1)(e)).

The appellant company, under what was termed a "joint venture agreement", advanced 15 per cent of the working capital a contractor required to finance the laying of a pipe line and, upon final payment for the work, was to be refunded the amount it contributed plus 15 per cent of the profits. When the job was nearing completion the appellant sold its interest to the prime contractor and was repaid the sum advanced plus $90,000. The evidence was that the appellant had previously entered into a number of similar joint venture agreements but had never sold its interest in any of them prior to the completion of the contract. The Minister added the $90,000 payment to the appellant's reported income. The assessment was affirmed by the Income Tax Appeal Board. On an appeal from the Board's decision the appellant contended the sum was realized on the sale of a capital asset, namely its interest in the partnership created by the joint venture agreement and was not subject to income tax.

Held: That the $90,000 constituted the appellant's share of the profit earned under the joint venture agreement or, alternatively, its profit from an adventure or concern in the nature of trade and was taxable by virtue of ss. 3, 4, 6(c) and 127(1)(e) of *The Income Tax Act*.

APPEAL from a decision of the Income Tax Appeal Board.

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

W. Murphy, Q.C. and *H. W. Thomson* for appellant.

J. A. MacDonald and *F. J. Cross* for respondent.

DUMOULIN J. now (April 17, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1], dated August 30, 1956, dismissing a previous appeal from a decision of the Minister of National Revenue in respect of an income tax assessment for appellant's 1950 taxation year.

[1] 56 D.T.C. 1089; 15 Tax A.B.C. 337.

General Construction Co. Ltd., as its trade style implies, is engaged in heavy constructional undertakings: roads, paving jobs, erection of dams and buildings. It was incorporated in 1923, with Head Office in the City of Vancouver.

For the 1950 taxation year, respondent added to the Company's income tax return an amount of $90,000, assessable business profits received from Fred Mannix & Co. Ltd., pursuant to an agreement dated September 27, 1950, exhibit 5 in this case. General Construction Co. Ltd. objected on the grounds that the amount of $90,000 in issue was enhancement of a capital asset and therefore not an operational receipt.

Antecedent facts, leading up to the above-mentioned deal, show that on November 12, 1949, Fred Mannix & Co. Ltd., Canadian Bechtel Limited, and Bechtel International Corporation, collectively contracted with International Pipe Line Company for the construction of 441 miles of pipe line in the provinces of Alberta and Saskatchewan.

Shortly after, on November 23, 1949, a covenant, labelled "Joint Venture Agreement", exhibit 2A, intervened between the three firms above-mentioned, setting out, *inter alia,* the percentage of their respective participation to an interest in the construction contract (exhibit 2) of November 12 with International Pipe Line Company, to wit: forty per cent (40%) of the total undertaking in the case of Fred Mannix & Co. Ltd. ". . . *including,* reads article II, *the profits which may be realized by the joint venture . . .*"

A month later, December 19, 1949, a second "Joint Venture Agreement", exhibit 4, was entered into between, more particularly, General Construction Co. Ltd. and Fred Mannix & Company ". . . for the better procurement of the monies required for the performance of the said work . . . under the Mannix interest in the prime agreements," i.e. those of November 12 and 23, same year.

The significant provisions of this deal (exhibit 4) state that:

> II. AS between themselves and to the extent of the following percentages, respectively to wit:
>
> FRED MANNIX & COMPANY LIMITED ..... 70 per cent
> STANDARD GRAVEL & SURFACING COMPANY LIMITED ..... 15 per cent
> GENERAL CONSTRUCTION COMPANY LIMITED .. 15 per cent
>
> the joint venturers shall have and own an undivided interest in the Mannix

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interest, and in each and every asset thereof, including *the profits* which may be realized by the Mannix interest by virtue of the prime agreements; and likewise and to the same percentages, the said joint ventures shall assume and bear all of the obligations and liabilities arising from or out of the Mannix interest under the prime agreements, including losses.

* * *

III. THE initial *working capital* of the joint venture shall be contributed in cash by the joint venturers . . . in the percentages set opposite their respective names in Paragraph II above. It is agreed that additional working capital of the joint venture, as and when needed, shall be contributed by the joint venturers in the same percentages as set forth above.

And now, in para. VII of the agreement, the line of conduct, the obligations to obtain upon normal winding up of this enterprise are set out thus:

VII. UPON receipt of final payment for the contract work, the assets and liabilities of the joint venture shall be liquidated and the *capital contributions* of the joint venturers shall be returned and *profits* of the joint venture shall be distributed to the joint venturers in proportion to their interests in the joint venture as specified in Paragraph II above. By mutual agreement distribution of a portion of the *profits* of the joint venture *may be made before receipt of final payment for the contract work.*

Two conclusions, even at this early stage, may be safely reached, out of appellant's own words, namely: that this transaction was a joint venture, initiated with a view to reaping profits. In para. VII, just cited, the contrasting correlation is clearly drawn between the productive capital and the ensuing, hoped for, profits.

General Construction merged with Fred Mannix Company and another, or in business jargon "chipped in" to assist as associate "bailleur de fonds" in the ready financing of the pipe line contract. Nor was this participation a new departure for appellant, something unheard of so far in the policy of its business initiatives. Mr. Donald McAlister, the company's secretary, testified that similar engagements were contracted by General Construction before and after the joint venture of December 19, 1949, in sixteen or seventeen cases. However, cautions Mr. McAlister, this was the only time the Company disposed of its interest before the fruition of a scheme, a contingency nevertheless provided for in the concluding lines of para. VII, exhibit 4, and powerless, of itself, to impart any qualifying aspect to this matter.

From December, 1949, to the last days of September, 1950, the appellant company, in furtherance of its obligations, advanced to Fred Mannix & Co. Ltd. no less than $117,021.93, on the basis of a 15% contractual interest.

Early in September, 1950, appellant sold its interest to Fred Mannix & Co. Ltd., in circumstances explained at some length by Mr. Donald McAlister, from whose evidence these excerpts are taken (*vide* Transcript, pp. 11 and 12):

> Sometime in 1950, early September, Fred Mannix and company advised us *that it wouldn't be too long before the work would be completed,* and a decision would have to be made as to disposal of the equipment that had been rented to Bechtel . . . we met Mr. Mannix and the suggestion was made that since our company wasn't in the pipe line business . . . and due to the fact that Fred Mannix and company were active in pipe line business . . . we suggested to Mannix that . . . the logical person to take over the equipment would be Fred Mannix and Company, so we said, "Fred Mannix and Company [we] will sell you our interest and you automatically take over the equipment".

This suggestion, in perfect keeping with the terms of the joint venture deed, exhibit 4, could brook no reasonable refusal and materialized in a final indenture, exhibit 5, dated September 27, 1950, reading:

> AND WHEREAS General [Appellant] is desirous of assigning to Mannix all its right, title and interest in the said joint venture agreement;
>
> * * *
>
> 1. MANNIX agrees that it will assume all liabilities of the joint venture and shall pay and discharge same, and General hereby assigns to Mannix absolutely all its interest in and to the joint venture, and in consideration thereof Mannix shall pay to General all monies advanced by General to the joint venture less all monies paid by the joint venture to General, *plus the sum of Ninety-Thousand ($90,000) Dollars;*

Now, if this arrangement is not a clear cut, typical, instance of commercial profit taking, I must own I know of none that would be.

It received due implementation one month later, November 2, 1950, (letter, exhibit 13) in the dual form of a cheque from Mannix to General Construction for $138,249.74, and a summary statement as hereunder:

Cash advanced to Joint Venture	$117,021.93
Less repaid to date	68,772.19
	48,249.74
Plus	90,000.00
	$138,249.74

The appellant relies, *inter alia,* upon ss. 3 and 4 of *The Income Tax Act* (1948, S. of C. c. 52) to establish "... that the said sum of $90,000 was a capital receipt . . . on the sale of a capital asset namely, its Partnership interest in the Partnership created by the Partnership Agreement . . ." (Notice of Appeal, para. 10).

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Respondent, on the other hand, urges that ss. 3 and 4, properly construed, apply, and also ss. 6(*c*) and 127(1)(*e*), since the sum of $90,000 "was the appellant's share of the profit earned under the joint venture agreement . . ." or, alternatively, "profit from an adventure or concern in the nature of trade and therefore taxable by virtue of ss. 3 and 4, and para. (*e*) of s-s. (1) of s. 127." (Reply to Notice of Appeal, paras. 11 and 12).

Throughout, appellant's line of attack seemed predicated on the more than shallow assumption that what undisputably would be a trade receipt, if paid after completion of the pipe line job (exhibit 2), constituted enhancement or the selling price of a capital asset, merely because it was proferred and received some few weeks in advance.

The initial undertaking by Fred Mannix & Company (exhibit 2) to lay out 441 miles of pipe line was, admittedly, a commercial, profit seeking enterprise, within the ambit of the taxing statute. Subsequently, for financing convenience, the "Joint Venture Agreement" of December 19, 1949, (exhibit 4) was grafted on it. with provisions had for a profit taking percentage of 15%, in line with appellant's frequent practice. Surely then if the parent transaction is liable to income tax, its legitimate issue cannot claim a different surname or quality.

Moreover, the text of s. 6 and its s.s. (*c*), as well as of s. 127(1)(*e*), hereunder, does not permit of any other interpretation save that submitted by the respondent.

> 6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> (*c*) the taxpayer's income from a *partnership* or syndicate for the year whether or not he has withdrawn it during the year,
>
> * * *
>
> 127(1)(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and *includes an adventure or concern in the nature of trade* . . .

I am of opinion, therefore, that the decision of the Income Tax Appeal Board was right in subjecting to income tax the amount of $90,000 paid to appellant by Fred Mannix & Company Limited, during the 1950 taxation year, as properly being a trade profit.

For the reasons above, this instant appeal is dismissed and the respondent entitled to its taxable costs.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

1958
Apr. 28
May 12

BETWEEN:

TRANSOCEAN MACHINE COMPANY INC. ..... } PLAINTIFF;

AND

ORANJE LINE AND THE SHIP *PRINS WILLEM IV* ..... } DEFENDANTS.

Shipping—Bill of lading—Transshipment of goods permitted by contract of affreightment—Art. III r. 8 of the Hague Rules—Action for damages dismissed.

Defendant by bill of lading accepted on board its ship *Prins Willem IV* two motor cars for carriage from Hamburg, Germany to Saint John, New Brunswick to be delivered to the order of the plaintiff, its agents or assignees. Plaintiff's claim is that the defendants transshipped the cars at Rotterdam to another ship and as a consequence delivery was delayed and the plaintiff suffered damages. The Court found that the defendants acted reasonably and within the authority conferred by the contract of affreightment in exercising their right to transship the goods.

Held: That since the bill of lading expressly gave the defendants liberty to transship the goods and it was provided that defendants should not be liable for delay caused by transshipment or prolongation of the voyage plaintiff is not entitled to recover the damages claimed.

2. That the provisions in the bill of lading covering transshipment and prolongation of the voyage apply notwithstanding Art. III, r. 8 of the Hague Rules.

ACTION for damages alleged to have been sustained by delay in delivery of goods.

The action was tried before the Honourable Mr. Justice Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

Marcel Piché, Q.C. for plaintiff.

Léon Lalande, Q.C. for defendants.

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

SMITH D.J.A. now (May 12, 1958) delivered the following judgment:

The plaintiff's claim is for damages alleged to have resulted from the failure of the defendants to carry out their obligations under a certain contract of affreightment

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by which the defendants agreed to transport two automobiles from Hamburg, Germany, to Saint John, New Brunswick.

By bill of lading signed on December 7, 1954, the defendant line accepted on board its ship *Prins Willem IV* 2 Porsche motor cars for carriage to Saint John, New Brunswick, to be delivered to the order of the plaintiff, or its agents or assignees.

The plaintiff's complaint is that, instead of carrying out its contract, the defendants illegally transshipped these cars at Rotterdam from the *Prins Willem IV* to the *Prins Willem George Frederik*, another ship owned by the defendant line. It is alleged that, as a consequence of this transshipment, the delivery of the motor vehicles was so delayed that they were not available for the Christmas trade, with the result that the plaintiff lost the sale of the said vehicles and sustained the damages claimed.

I am convinced that the plaintiff's action is unfounded.

The Bill of Lading (Clause 1 of the Terms and Conditions) expressly authorizes the carrier "to transship or land and reship the goods at ports of shipment and transshipment, or at any other ports or into any other vessels or crafts for any purposes and to forward to destination by another vessel or craft". Furthermore, it is provided by Clause 2 of the contract of affreightment that the carrier shall not be liable for delay caused by transshipment and prolongation of the voyage. It has been held that such clauses as these have application notwithstanding Art. III r. 8 of the Hague Rules (of which Article III r. 8 of the Schedule to the *Water Carriage of Goods Act* (1952) R.S.C. Chapter 291, is a reproduction). Carver's *Carriage of Goods by Sea*, 9th Edition, page 190:

> An express liberty to deviate in the Bill of Lading will be effective notwithstanding Art. III r. 8. So also will be a liberty to transship.

See Branson, J. in *Marcelino Gonzalez v. Nourse*[1].

The proof satisfies me that in exercising their right to transship the defendants acted reasonably and within the authority conferred upon them by the contract of affreightment.

[1] [1936] 1 K.B. 565 at 574.

In the course of the argument counsel for plaintiff suggested that Canadian law had no application, it being the law of Germany which should govern. I do not propose to deal with this argument further than to state that it cannot avail the defendants in any case, since the law of Germany must be presumed in the present case to be the same as that of the Province of Quebec in the absence of allegation or proof to the contrary.

There are additional reasons why, in my opinion, the plaintiff's action must fail.

The plaintiff failed to show that the transshipment complained of had the effect of depriving the plaintiff of the advantage of exhibiting these motor cars for the Christmas trade. On the contrary, it is clear from the evidence that, even if said vehicles had been transported throughout on the *Prins Willem IV* and on schedule, they would have reached Saint John only on December 30th, whereas in fact they had landed at Saint John by the *Prins Willem George Frederik* on January 9th or 10th.

Not only does the proof fail to support the claim that the plaintiff sustained loss or damage because the said vehicles were not available for the Christmas trade, but, in the opinion of the Court, it falls short of justifying the conclusion that the plaintiff was deprived of any sales or loss of profit due to the fact that the said vehicles were, as a consequence of the transshipment, delivered at Saint John on January 9, 1956, rather than on December 30, 1955.

The Court is convinced that the proof does not establish that the plaintiff sustained any damage attributable to the transshipment of the said motor cars from the *Prins Willem IV* to *Prins Willem George Frederik* and that, even if such damages had been proved, they would have been too remote to engage the responsibility of the defendants.

There is nothing either in the contract of affreightment or in the correspondence leading to it to indicate that the plaintiff required delivery on or before any particular date and nothing to give the defendants notice that time was of the essence of the contract. It is well established that in cases of breach of contract the only damages recoverable are

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those which both parties to the contract could have reasonably foreseen at the time it was entered into. *Hadley v. Baxendale*[1]:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.
>
> Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.

Carver's *Carriage of Goods by Sea*, 9th Edition, pages 1014 and following.

On the whole therefore the Court concludes that the plaintiff's action must fail.

Action dismissed, with costs.

Judgment accordingly.

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Feb. 19, 20, 21 & 28

Apr. 18

BETWEEN:

STUYVESANT-NORTH LIMITED .....APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act S. of C. 1948, c. 52, ss. 3, 4 and 127(1)(e)—Appellant engaged in business of underwriting and trading in securities obtaining shares of mining company as consideration for advancing capital—Transaction made in ordinary course of appellant's business—Profit from sale of such shares constitutes income in hands of taxpayer—Appeal dismissed.

[1] (1854) 23 L.J. Ex. 179 at 183.

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STUYVESANT-NORTH LTD. v. MINISTER OF NATIONAL REVENUE

Appellant, incorporated in 1945, engaged in the business of underwriting and trading in securities and in such business it acquired shares both by purchases in the market and under contracts with mining and oil companies seeking to obtain capital to finance their undertakings by sale of shares of their capital stock. It is not a loan company nor has it been engaged in business as a moneylender in the ordinary sense. By two agreements it loaned money to a mining company receiving from that company the right to purchase shares at a price below the market price of such shares. The money loaned was to be used by the borrower to build a mill and was to be repaid in a certain manner with interest at five per cent. Appellant purchased the shares as provided in the agreements and subsequently sold them at a profit. The Minister assessed appellant for income tax on this profit. The appeal to the Income Tax Appeal Board was disallowed and a further appeal to this Court was taken.

Held: That each of the transactions was a transaction to obtain a right to acquire shares for sale in the course of its business and as engaging in contracts giving appellant the right to acquire shares at favourable prices so that profit might be made from selling them was one of the common methods employed by appellant in carrying on its business of dealing in shares, these transactions were not mere investments dissociated from the appellant's ordinary business but were in fact operations of that business.

2. That the appellant's ordinary business included that of making profit by acquiring and marketing shares and in carrying on this business one method commonly used was to enter into contracts in which it obtained rights to acquire shares; that the transactions in question were ones by which appellant obtained rights to acquire shares and the dominant purpose of appellant in entering into each of such transactions was to obtain the right to acquire such shares for sale in the course of its business and that the transactions themselves were connected with and part of a continuous course of dealing by the appellant with the mining company for the purpose of gaining profit by acquiring and marketing its shares.

3. That the transactions were transactions of the appellant's business within the meaning of the *Income Tax Act*, ss. 3, 4 and 127(1)(*e*) and the moneys realised from the sale of the shares were income and properly assessed.

APPEAL from a decision of the Income Tax Appeal Board.

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

H. H. Stikeman, Q.C., P. N. Thorsteinsson and *W. D. Goodman* for appellant.

D. W. Mundell, Q.C., and *J. D. C. Boland* for respondent.

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

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STUYVESANT-NORTH LTD. v. MINISTER OF NATIONAL REVENUE

THURLOW J. now (April 18, 1958) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board[1] dismissing an appeal by the appellant from an income tax assessment for the year 1951. In making the assessment, the Minister added to the income reported by the appellant a sum realized by the appellant in 1951 on the sale of certain shares of Donalda Mines Ltd. which the appellant had acquired through two transactions in each of which the appellant loaned a sum of money to Donalda at interest and, as part of the transaction, obtained the right to purchase a certain number of shares at a price far below the current market price. The Minister treated the receipts from the sale of the shares acquired pursuant to these transactions as income arising from the appellant's business, and the issue between the parties is whether or not he was correct in so doing.

The appellant was incorporated under the *Dominion Companies Act* in 1945 and for some years prior to and at the time of the events in question was engaged in underwriting and trading in securities. In this business, shares were acquired by the appellant both by purchases in the market and under contracts with various mining and oil companies seeking to obtain capital to finance their undertakings by sale of shares in their capital stock. The contracts usually took the form of a firm agreement on the part of the appellant to purchase a certain number of shares at a stated price and one or more options giving the appellant the right to purchase additional shares within times and at prices stated in the contract. In these contracts the price of the shares which the appellant undertook to buy was below the current market price, and this afforded the appellant some opportunity to sell them at a profit. In such cases, there would be a chance to make further profit in the event of an increase in the market price of the shares, and the option or options contained in the contract afforded to the appellant the opportunity to take advantage of any sufficient advance in market price without being bound to purchase the shares included in them. On the other hand, by undertaking to purchase a definite number of shares at a firm price the appellant ran the risk of loss if the market price should fall below that price before the shares were sold.

[1] 14 Tax A.B.C. 384.

In giving such a commitment, one of the matters of importance to the appellant was the purpose for which the mining or oil company required the capital which it would obtain from the sale of its shares. The appellant was interested in the speculative chance of a rise in the market price of the shares, and that chance was to a considerable extent dependent upon the money which the appellant paid for them being used for purposes holding possibilities of a discovery that might quicken the demand for them. For this reason, purposes such as the construction of a mill for the processing of ore bodies already discovered did not offer the same attraction to the appellant as purposes related to exploration for new bodies of ore or oil. Until the events in question, the appellant had never underwritten shares or debentures or advanced money to enable a company to finance the construction of a mill.

The contracts were not all alike. Sometimes there was no firm commitment but simply an option to purchase shares granted by the company to the appellant for some other consideration. And such consideration might be an advance by the appellant of money to be repaid by the mining or oil company, with provisions in the contract for recovery of the advance from moneys payable by the appellant if the option should be exercised.

The appellant is not a loan company, nor has it been engaged in business as a moneylender in the ordinary sense. But in the course of its business the appellant from time to time had made small advances to certain mining and oil companies with which it had business dealings, and it had made substantial advances in a few cases in the expectation of obtaining repayment from the moneys to accrue to the mining or oil company under prospective underwriting contracts. No interest or bonus was received, nor was any security taken by the appellant for any of these loans, though some of them were outstanding for considerable periods.

The shares acquired by the appellant through contracts with mining or oil companies were usually marketed over a period of time, depending on market conditions, and the appellant entered into such contracts only when it regarded the time and marketing conditions as appropriate. In the course of its business, the appellant also bought shares of the same companies on the market, not merely when the

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market price was attractive but also to support the market price and thus maintain an orderly market and protect the value of its holdings.

One of the mining companies with which the appellant had entered into contracts was Donalda Mines Ltd. By the first of the appellant's contracts with this company, which was dated July 5, 1949, the appellant undertook to buy 250,000 shares at 40 cents per share and was given an option to buy a further 250,000 shares at the same price. The appellant exercised the option and purchased all of the 500,000 shares included in the contract. By another agreement dated July 12, 1949, the appellant was granted an option to buy a further 500,000 shares of Donalda at prices ranging from 55 cents to $1 per share. What consideration was given by the appellant for this option does not appear. In October, 1949, the appellant purchased 50,000 of the shares included in the option at 55 cents. By a further contract, dated November 4, 1949, the agreement of July 12, 1949 was cancelled, and the appellant gave a firm commitment to buy 150,000 shares at 50 cents and obtained options on a total of 300,000 shares at prices ranging from 55 to 75 cents. This contract contained provisions, effective so long as the options subsisted, by which Donalda agreed that, without the consent of the appellant, it would not issue, sell or grant options upon its treasury shares, or alter its capital, or issue securities or create any charge or mortgage upon its properties or assets, or purchase additional mining properties or sell any properties it then had. By further provisions, Donalda agreed to supply the appellant with monthly statements pertaining to its financial affairs and, in priority to others, with information pertaining to its exploratory operations. It also agreed to provide the appellant with information as to its list of shareholders. The appellant purchased the 150,000 shares comprised in the firm commitment at 50 cents in November and December, 1950 and 50,000 of the shares included in the options at 55 cents on April 6, 1950. In the meantime, by two agreements dated February 24, 1950 and February 28, 1950 the times for the exercise of the options had been extended so that the last of them would not expire before October 1, 1950 and would not then expire until terminated by a seven-day notice. What consideration the appellant gave

for these extensions does not appear, the documents merely stating that the extensions were made in consideration of $1 and other valuable consideration.

In April, 1950, shares of Donalda were being traded on the Toronto Stock Exchange at 60 to 65 cents a share. The appellant held options on 250,000 of Donalda's remaining treasury shares, the last of which options could not be terminated prior to October 1, 1950, and so long as such options existed Donalda could neither sell treasury shares to anyone else nor borrow money on the security of its assets for the purpose of financing its undertakings. Under the market conditions then prevailing, the appellant was not anxious to exercise its options and acquire further shares at the option prices.

It was in this situation that the first of the transactions in question occurred. This was an agreement dated April 18, 1950 by which the appellant released its options and other rights under the agreement of November 5, 1949 and agreed to lend Donalda $100,000 in five stated consecutive instalments of $20,000 each, when requested within one year. In return Donalda agreed to use the money to procure and erect a mill and put it into operation within eighteen months, to repay the loan with five per cent interest in two years from the date of each advance, and to apply 60 per cent of the mine mill gross revenue towards the repayment of the loan in less than the two-year period. As part of the transaction, Donalda also agreed to sell to the appellant 100,000 of its treasury shares at five cents per share. The contract contained provisions, effective until the mill should be built and the loan repaid, restricting the right of Donalda to deal with its treasury shares and property and to provide information, all in terms almost exactly similar to those previously mentioned as contained in the contract of November 4, 1949. In addition, the agreement of April 28, 1950 contained the following clause, the terms of which were not expressly restricted to the duration of the loan:

8. Donalda agrees that it will not sell or option to sell any of its unissued treasury shares, except on condition that it will give Stuyvesant the first opportunity of purchasing the said shares on the same terms as they are being offered for sale or option to any other purchaser and Stuyvesant shall have thirty days within which to elect whether to purchase the said shares in whole or in part.

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Though the agreement was made in April, 1950, the moneys to be advanced under it were not in fact advanced until December of that year and January and February of the following year. The 100,000 shares were issued by Donalda and received by the appellant proportionately as each advance was made, and the appellant paid the five cents per share for them. In the meantime, the appellant had arranged for a Mr. Bain to participate in the transaction to the extent of 25 per cent. Mr. Bain reimbursed the appellant to the extent of $25,000 and received 25,000 of the shares at five cents each.

Evidence as to the negotiations leading up to this transaction was given by Mr. A. G. Fisher, a chartered accountant who was the general manager of the appellant and negotiated the agreement on its behalf. He stated that he was approached by Mr. Arthur P. Earle, the president of Donalda, now deceased, who requested that the appellant lend Donalda $100,000 and that he (Fisher) was given to understand that the cost of building a mill on the Donalda property had far exceeded the estimate given by Donalda's engineers and that Donalda was short of funds and required the loan to complete the mill. This strikes me as strange in view of the fact that none of the moneys arranged for in April were advanced before the following December and even more strange in view of the fact that the minute book of Donalda, which was introduced in evidence by the appellant, indicates that the estimate for the construction and equipment of the mill was presented to a meeting of the directors of Donalda in June, 1950 and it was at that meeting that the directors authorized its mine manager to purchase equipment and erect the mill. I think Mr. Fisher is mistaken and has confused the situation obtaining at the time of the negotiation of the first loan with the circumstances in which the second loan was arranged. Mr. Fisher also stated that initially the arrangement between Donalda and the appellant was that the appellant should get the 100,000 shares as a bonus without any payment for them, but before the contract was drawn up it was discovered that Donalda was restricted by one of its by-laws from issuing shares at a discount greater than 95 per cent and the parties thereupon amended the arrangement to express this part of

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it as a sale at five cents per share. In explaining this change in the arrangement, he said in the course of his examination in chief:

A. We found out that the only way this transaction could be completed, that is the loan transaction, would be to either pay the five cents per share or have Donalda go to its shareholders and have the by-law amended. By this time too much would have elapsed, and the need was fairly imminent, and we agreed to pay 5 cents per share for that stock.

Q. What need are you talking about there?

A. Donalda's financial needs.

* * *

Q. Just before the Court rose yesterday we got into an argument about market price—just to go back there for a moment, because it had a relation to something else you were telling us, namely, the reason the contracts of April, 1950 and April, 1951 provided for the purchase of shares at five cents. Would you give us those reasons again, and then we will talk about market value.

A. After Mr. Earle had approached Stuyvesant-North through me, and we had negotiated the loan and the bonus arrangement on the basis that we were to get a share of Donalda for every dollar that was loaned to the company, the matter was then turned over to lawyers for drafting an agreement. They found that there was a discount by-law that prevented Donalda from issuing shares at less than five cents per share, and we had no intention of purchasing shares. The deal was definitely a loan, but the negotiations had gone too far and too much time had elapsed; so, *rather than awaiting any change of the discount by-law, we decided that we would not quibble* about the five-cent price and we went ahead. We agreed to comply with the by-law and went ahead and made the loan on that basis.

Q. You stated you were not going to quibble about that five cents. At the time that the contract April, 1950 was entered into, do you know what price shares of Donolda were selling at on the Toronto Stock Exchange?

A. Shares were selling in the 60 to 65-cent range.

In cross-examination he said:

Q. In the result you purchased them?

A. There was a provision in the agreement that we pay Donalda five cents a share.

Q. And what it boils down to is this: You paid over a certain sum of money and you got shares; in the agreement you got the right to do that?

A. Under the loan agreement, yes.

Q. And then you did it?

A. Yes.

Q. I asked you this before, but I would like to clear it up: Why were the option agreement of November 4 and the extension agreements cancelled?

A. Because market conditions were such at the time that we did not really want to acquire additional Donalda shares.

* * *

Q. No moneys have been taken down since the preceding April, until December 18th. I understood you to say the immediate negotiation of the agreement was urgent. How do you account for that?

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A. I don't know the Donalda financial structure as such. I only knew that the costs were running away above the estimates. I don't know whether Donalda was able to keep their creditors patient in the interval or not.

Q. You had said you did not wish to wait for an amendment to the discount by-law because of the urgency of entering into the agreement. The first advance was made some seven months later.

A. I don't think I said that.

Q. I think I am quoting you accurately.

A. I don't think I said that. I think what I did say was that in order to get the shares at anything other than 5 cents *we would have had to wait* for a change in the by-law, and *we weren't going to quibble* about the five cents.

It will be observed that it was the appellant who was anxious to avoid the delay incident to a change in the by-law and that its desire to consummate the transaction without delay was such that it would not quibble about paying for the shares a sum which was the equivalent of a full year's interest on the loan. From this it seems clear that the main object of the transaction, so far as the appellant was concerned, was to obtain the shares.

On January 17, 1951 a further contract was made between the appellant and Donalda by which the appellant undertook to buy 75,000 shares at 45 cents and obtained an option to buy a further 75,000 shares at the same price. Under this contract, the appellant purchased the 75,000 shares included in the firm commitment, but it did not exercise the option.

In April, 1951, the second of the agreements in question in these proceedings was made. At that time the mill was not yet completed, and Donalda was in need of money to complete it. By this agreement the appellant undertook to lend Donalda $125,000 in two instalments, one of $50,000 on April 21, 1951 and the other of $75,000 on April 30, 1951. Donalda, on its part, agreed to use the money to complete its mill and to repay the loan with five per cent interest on April 1, 1952 and earlier than that from the first moneys received from the operation of the mill, but on a pro rata basis with the earlier loan. It also agreed to sell to the appellant 125,000 shares of its capital stock at five cents per share. At that time, shares of Donalda were being traded on the Toronto Stock Exchange at 52-53 cents. Arrangements were made for several others to participate in this loan, and the appellant itself participated in it to the extent of $50,000, which it advanced in two payments, one of $25,000 on April 5, 1951 and the other of the same

amount on April 13, 1951. Again the shares were issued by Donalda and received by the appellant proportionately as the advances were made.

In October, 1951, by another contract the appellant undertook to advance to Donalda $15,000 which Donalda agreed to use for drilling and exploration purposes on its property in locations to be approved by Donalda's engineers, but subject also to the approval of the appellant. By the terms of the contract, Donalda agreed to repay the advance on February 11, 1953 and also gave the appellant an option to buy the whole or any part of 50,000 shares at 40 cents and the right, if it exercised the option, to recover payment of the advance from the moneys payable to Donalda for the shares. The shares included in this option formed part of a purchase of 150,000 shares at 40 cents made by the appellant in January, 1952. In the meantime, between December 3 and 13, 1951, the appellant sold on the market the 125,000 shares which it had obtained through the loan transactions and thereby realized the sum in question in this appeal. The appellant continued to sell Donalda shares throughout December of 1951, and at the end of that year had sold such shares short to the extent of 45,000 shares. The loans in question were not in fact paid from the proceeds of production of the mill but were liquidated after they became due in part from the proceeds of sales of shares under subsequent contracts between Donalda and the appellant.

In support of the assessment of the receipts from the sale of the shares in question as income, the Minister relied on ss. 3, 4 and 127(1)(*e*) of *The Income Tax Act,* S. of C. 1948, c. 52. These sections are as follows:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

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

127. (1) In this Act,

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

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The position taken by the Minister is that the receipts from the sale of the shares were income from the appellant's business within the meaning of these sections.

For the appellant it was submitted that the two transactions in which the appellant obtained rights to acquire the total of 125,000 shares at five cents were loan transactions beyond the scope of its ordinary business of underwriting and trading in shares, that the appellant was not in the business of moneylending, these being the only occasions on which the appellant has made commercial loans—meaning by commercial loans, loans carrying interest and a bonus and secured by promissory notes, that accordingly such transactions should be regarded as capital transactions in which the rights to acquire the shares were the appellant's compensation for incurring the capital risk involved in lending substantial sums of money without security to a company such as Donalda, that such rights were capital rights and the moneys received on sale of the shares were merely proceeds of the realization of capital assets. It was also argued that, even if the purchases of the shares pursuant to the contracts and the sales of them must be regarded as having been made in the course of the profit-making activities of the appellant, the right to acquire the shares at five cents was a capital right, and in computing the profit attributable to the purchase and sale of the shares the value of such right should be deducted from the proceeds as if such capital right had been brought into inventory by a notional transfer by the appellant of its capital to its inventory at the market value of such right. In the view I take of the case, it is unnecessary to deal with this alternative argument.

In my opinion, it is important to note that the issue to be determined does not depend on the narrow question whether or not, as between the appellant and Donalda, the right to purchase the shares was given by Donalda and received by the appellant as a premium or bonus to compensate for a capital risk, but on the broader question whether or not the receipts from the sale of the shares were receipts of the appellant's business. For, even assuming that the rights were bonuses or premiums and were given and received to compensate for the capital risks involved in making the two loans and could, on that account, be regarded as capital if the loans were mere investments, such

bonuses or premiums could not be so regarded if they were obtained in the course of the operation of the appellant's business. This distinction is clearly expressed in *Californian Copper Syndicate v. Harris*[1], where the Lord Justice Clerk said at p. 165:

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

In the present case, despite the fact that the transactions in question were loans for definite periods, carrying interest and involving a very material risk that the principal sums might never be repaid or recovered, and despite the fact that the appellant's business activities had not included the making of loans of that kind, the principal, if not the sole purpose of the appellant in entering into the transactions was not to earn the interest so provided for but to obtain the right to acquire shares at a favourable price and to realize the profit that could be made from their sale. In my judgment, this clearly appears from the evidence of Mr. Fisher above quoted. Moreover, when entering into the transactions, the only purpose of the appellant with respect to such shares was to sell them on the market, a purpose which it proceeded to carry out in the ordinary course of its business. From the point of view of the appellant, each of the transactions was, accordingly, a transaction to obtain a right to acquire shares for sale in the course of its business. When this fact is considered in the light of the further fact that engaging in contracts giving the appellant the right to acquire shares at favourable prices so that profit might be made from selling them was one of the common methods employed by the appellant in carrying on its business of dealing in shares, in my opinion it becomes

[1] 5 T.C. 159.

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apparent that these transactions were not mere investments dissociated from the appellant's ordinary business but, in truth, operations of that business. The fact that as loan transactions they differed from others in which the appellant obtained the right to acquire shares for its business is, no doubt, a feature to be taken into account in reaching such a conclusion, but it is well settled that that circumstance does not conclude the matter. In *Atlantic Sugar Refineries Ltd. v. Minister of National Revenue*[1] Kerwin J. (as he then was) put the matter thus at p. 707:

> The Court of Appeal in England decided in *Imperial Tobacco Co. v. Kelly*, [1943] 2 All E.R. 119, that the intention with which a transaction was entered into is a feature that should be considered under the British Income Tax Act. That is an important matter under our Act but the whole sum of the circumstances must be taken into account in determining whether a profit arose as part of the taxpayer's business. A number of cases are referred to in the reasons for judgment in the Court below and they, with others, were discussed fully in argument before us. Some are on the point whether the individual or company concerned was carrying on any business and, as has been pointed out several times, a company comes into existence for some particular purpose and, therefore, different considerations apply to it than would apply to an individual. Other decisions consider what bearing upon the issue has the circumstance that it was an isolated transaction, and it is settled that the mere fact that that was so does not dispose of the matter.

In my opinion, the loans made by the appellant cannot be regarded as mere investments unrelated to the appellant's business. Elements of an investment were, no doubt, present, but present as well in each case was the circumstance that the increment to be obtained from the loan transaction included and was mainly that of a right to shares for sale in the course of appellant's business. Investment in one sense it may have been, but it was not mere investment, for it was investment made for the purpose of an operation of the appellant's business of dealing in shares.

Moreover, the evidence, instead of showing that these transactions were separate and apart from the day-to-day transactions of the appellant's business, in my opinion, supports the contrary view. At the time of the negotiation of the first loan contract Donalda, as a result of previous dealings with the appellant in the course of the latter's business, was obligated by the options and other provisions of the contract of November 4, 1949 to deal only with the appellant, at least in so far as its endeavours to raise further

[1] [1949] S.C.R. 706.

moneys for its projects were concerned. The release of such options and provisions, constituting, as they did, rights of the appellant obtained in the course of its business, was a necessary step to enable Donalda to enter into the first of the transactions in question and formed part of the transaction itself. The first loan transaction is thus connected with the earlier underwriting transactions. Next it appears that the contract evidencing the first of the loan transactions contained agreements by Donalda in favour of the appellant similar to those contained in the earlier agreement, plus an additional clause affording the appellant a right to purchase Donalda treasury shares in priority to anyone else. It can hardly be doubted that any shares that might have been acquired under this clause would have been acquired as inventory and on trading account. And since, under the provisions of the loan contract, Donalda thereafter could not raise money to finance its undertakings by the sale of its shares or by charging or selling its property except with the appellant's consent, the circumstances suggest the inference that the subsequent underwriting contracts with the appellant and the terms included in them, such as the clause giving the appellant a voice in the location of Donalda's drilling operations, resulted to some extent from the rights obtained by the appellant under the first loan contract. In my opinion, the loan transactions in question cannot be dissociated from the other transactions between the appellant and Donalda, but on the contrary were connected with such other transactions in what was a continuous course of dealing by the appellant with Donalda for the purpose of gaining profit from the acquisition and marketing of its shares.

The situation, as I find it, is thus one in which (1) the appellant's ordinary business included that of making profit by acquiring and marketing shares, (2) one of the methods commonly used by the appellant in carrying on this business was that of entering into contracts in which, for various kinds of consideration, the appellant obtained rights to acquire shares, (3) the transactions in question were transactions by which the appellant obtained rights to acquire shares, though in a somewhat unusual way, (4) the dominant purpose of the appellant in entering into each of such transactions was to obtain the right to acquire such shares for sale in the course of its business, and (5) the trans-

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actions themselves were connected with and part of a continuous course of dealing by the appellant with Donalda for the purpose of gaining profit by acquiring and marketing its shares. Certain other indicia, such as the source of the funds advanced and the fact that the certificates for the shares were not kept physically separate from other Donalda shares belonging to the appellant, were also urged as showing the revenue nature of the transactions, but, while such facts are consistent with the Minister's contention and might in a close case be of some importance, I prefer to rest this judgment on the facts above mentioned. In my opinion, the transactions in which the appellant acquired and sold the shares were transactions of the appellant's business within the meaning of the sections of *The Income Tax Act* above referred to, and the moneys realized from the sale of the shares were, accordingly, income and were properly assessed.

Counsel for the appellant stressed the judgment of the Court of Appeal in *Lomax (H. M. Inspector of Taxes) v. Peter Dixon & Son Ltd.*[1], where certain premiums and discounts obtained by an English company from its wholly owned Finnish subsidiary company in refunding an indebtedness of the subsidiary to the parent company over a long period were held to be capital and not subject to income tax, but in my opinion that case is clearly distinguishable from the present one. The question which was there being considered by the Court of Appeal was not whether or not the discounts and premiums in question were profits of a trade but whether or not they were income chargeable to tax under Case V of Schedule D of the English statute as income from possessions out of the United Kingdom or under Case III of Schedule D as discounts, and the judgment was that they were not subject to tax under Case V or Case III. In the course of a judgment with which the other members of the Court agreed, Lord Greene M.R. discussed considerations which are relevant in determining when a premium or discount should be treated as income and when not, but I think it is clear that, in doing so, he was considering such premiums and bonuses for the most part where they arise in situations of investment not within the scope of a trade, for after citing

[1] 25 T.C. 353.

examples of cases in which the question whether or not a discount or premium was capital or income might be resolved from the contract itself pursuant to which the discount or premium was received, and of some cases in which the contract afforded no answer he said at p. 362:

> A rather different case is that of a moneylender who stipulates for payment by instalments of a sum very much larger than that which he lends. From a business point of view, the excess, one would have thought, is referable largely, if not mainly, to the capital risk. So long as the moneylender is carrying on his business this is immaterial since he will be assessed under Case I, of Schedule D. It is part of his business to take capital risks.

I regard this passage not as limiting the application of Case I of Schedule D in situations of this kind to those in which the transaction is entered into by a moneylender in the course of his business but merely as the citation of an example of a kind of case in which the discount or premium would be taxable as a profit of a trade. At p. 363 Lord Greene continued:

> I refer to these problems not for the purpose of attempting to solve them but in order to show that there can be no general rule that any sum which a lender receives over and above the amount which he lends ought to be treated as income. Each case must, in my opinion, depend on its own facts and evidence *dehors* the contract must always be admissible in order to explain what the contract itself usually disregards, namely the quality which ought to be attributed to the sum in question.

In my opinion, the considerations discussed by Lord Greene for determining when a premium or discount might be treated as income and when not, when such premiums or discounts arise in situations of investment not within the scope of a trade, and not conclusive where, as here, the question to be determined is whether or not the rights obtained as a bonus or premium were receipts of the business of the taxpayer, for while such considerations may indicate that the bonus or premium is capital rather than income when the transaction is viewed as a mere investment, the bonus or premium may, nevertheless, be income if it is a receipt from a transaction carried out *in what is truly the carrying on or carrying out of* the taxpayer's business.

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

Judgment accordingly.

1957
Oct. 24
1958
May 2

BETWEEN:

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

AND

BEN CONSTANT ..... RESPONDENT.

Revenue—Income Tax—Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4 and 127(1)(e)—Income or capital—Profits on erection and sale of apartment building constitute income—Appeal allowed.

Respondent and another formed a partnership to build and sell houses which they did and profited thereby. They then incorporated a company and transferred to it all assets of the partnership except one piece of land, ownership to which they kept for the purpose of putting up an apartment building for themselves to hold as an income producing asset of their own. By a verbal agreement the company undertook to erect the apartment on a cost basis plus a supervision fee of $6,000. Money was borrowed by the partners for the purpose of construction and offered to the company as part payment. When the building was completed the partners found themselves indebted to the company for a sum they could not finance. Consequently the apartment was sold at a price which netted each partner a profit of $8,760.48. The respondent and his partner were assessed income tax on this amount. An appeal to the Income Tax Appeal Board was allowed. The Minister of National Revenue appealed to this Court.

Held: That the whole transaction has all the earmarks of a business or trading transaction carried on as a profit making scheme and follows the same pattern as that followed by the partnership and the company in similar operations, and the profit made did not result from the enhancement of any investment but rather from the operation of an adventure in the nature of a business in carrying out a scheme for profit making.

2. That the profits made from the apartment building constitute income in the hands of the taxpayer and the appeal is allowed.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

Paul Ollivier and *Claude Couture* for appellant.

P. F. Vineberg for the respondent.

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

FOURNIER J. now (May 2, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated November 22, 1955, whereby it was held that the one-half share of the net gain, amounting to

$8,760.48, from the sale of an apartment building owned by the respondent and another party was a capital gain and not income taxable under the Income Tax Act, 1948. Also that the Minister's assessment including the above amount as taxable income be vacated and the matter referred to the Minister to deduct the said sum from the respondent's income for the taxation year 1950 and reassess accordingly.

The appellant contends that in computing the respondent's income for 1950 he included the amount of $8,760.48 because it was his share of the profits arising upon the sale of a property of which he was, with another person, a co-investor. On the other hand, the respondent submits that the property in question was built for him and a co-owner for investment purposes; therefore, the sale of the property constituted the realization of a capital asset.

I will summarize the relevant facts.

The respondent was an electrical contractor when in 1944 he entered into a partnership with Morris Shindel to build and sell houses, mostly of the duplex type. The partnership proceeded to construct duplexes, sold them and made profits in the operation of the business. In 1948 the partners organized and incorporated a company under the name of Shindel and Constant, Incorporated, to continue the construction business of the partnership which was dissolved. Its assets were transferred to the company with the exception of a piece of land on Côte Ste-Catherine Road, Outremont. The respondent and Morris Shindel kept the ownership of this land for the purpose of putting up an apartment building for themselves. It would not be for sale but held as an income producing asset of their own. They would lease the apartments, collect the rents, meet their obligations and have the residue as personal income. They were equal partners in this business venture as they were equal owners of the shares of the company.

In accordance with a verbal agreement, the company undertook to put up the apartment building on a cost basis plus a supervision fee of $6,000. The partners borrowed $105,000 from a company dealing with mortgages and offered it to the company as part payment of the project. When the building was completed they were indebted to the company in an amount of $38,000. This amount included $8,000 which the company had borrowed from the bank; $6,000 from other parties; $21,000 owed to the trade, arising

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out of the construction; $3,000, balance of the supervision fee. As the partners could not finance the payment of this debt and the company was pressed for the payment of these moneys, they decided to sell the apartment and did so at a price of $168,000. By this transaction they realized a net gain of $17,520.80 to be divided equally between themselves. They paid the $38,000 and loaned the balance to the company to continue its construction business, which at that time was the building of apartments for sale.

The issue on the appeal is whether the profit or gain of the respondent arising from the sale of a property known as No. 4865 Côte Ste-Catherine Road, Outremont, Que., is taxable income within the meaning of sections 3, 4 and 127(1)(*e*) of the *Income Tax Act,* 1948, and amendments or a capital gain.

In the *Income Tax Act,* Statutes of Canada, 1948, c. 52, effective January 1, 1949, sections 3, 4 and 127(1)(*e*) read as follows:

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

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

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

127. (1) In this Act,

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

Before determining if the provisions of the above sections of the Act are applicable to the present case, it is necessary to keep in mind certain facts which establish the relationship of the parties involved: the respondent, his partner, the partnership and the company.

When the partnership was formed, Morris Shindel, one of the partners, owned land which he turned over to the partnership as his share in the association. When this land was used up as site for the buildings put up, the partnership purchased other sites. On two of these sites, the partnership built two houses of two flats for the partners them-

selves. Each partner became the owner of one of these houses. They live in one of their flats and rent the other, thereby deriving income from same.

When the partnership was dissolved and the company incorporated in 1948, the business of constructing houses and duplexes had become more or less profitable, so the company decided to build apartments. Though the partnership had been dissolved for building purposes, it seems that it continued as to the ownership of a piece of land. As this building site was situated in a district known as an apartment district, the owners decided to use this land as a site for an apartment.

Their company undertook to construct the apartment. I am led to believe, if I understood the evidence, that their only asset was a building lot, valued at approximately $7,500, which they contributed to the undertaking. The apartment building was sold for $168,000 and the partners realized a gain or profit of $17,520.80. It follows that the building cost $150,480 less the value of the land, which would mean that the cost of the construction itself was about $143,000. To meet this obligation, the partners borrowed $105,000, leaving a balance of $38,000 which was financed by the company. This justifies the statement that all the respondent and Morris Shindel invested in the venture was a piece of land of a value of $7,500.

Counsel for the appellant based his argument on sections 3 and 127 of the Act and submitted that the *income of a taxpayer* is his income from all sources including income from *businesses* and that business includes an adventure or concern in the nature of a trade. The respondent's undertaking being an adventure in the nature of a trade, any gain or profit therefrom was taxable income.

Counsel for the respondent countered by contending that the ultimate gain by the respondent was the result of an isolated operation and that to be taxable income the gain or profit had to be derived from a series of transactions amounting to a trade or business. Personally, the respondent had never been in the business of constructing buildings for sale. His motive in this instance was to create an asset which would assure him of an income for his old age.

I am of the opinion that in determining whether the gain in this case should be considered as *taxable income* or a capital gain one should not be limited to the question—Does

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the transaction above described constitute a trade or business? I rather believe that all the facts and circumstances of the undertaking should be considered in relation to the general definition of "Income" in section 3, to see if the transaction fits into the framework of the definition. In the affirmative, the gain derived therefrom would be *taxable income.*

Even before the coming into force of the Income Tax Act (1948), wherein section 127(1)(*e*) extends the meaning of the word "business" to include an adventure or concern in the nature of trade, the above rule was expressed in clear terms in *Californian Copper Syndicate v. Harris*[1] by Clerk, L.J., at pp. 165 *et seq.*:

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

In *The Atlantic Sugar Refineries v. The Minister of National Revenue*[2] the same rule was expressed in the following words:

> 2. That whether the gain or profit from a particular transaction is an item of taxable income cannot be determined solely by whether the transaction was an isolated one or not. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and its surrounding facts.

The decision was affirmed by the Supreme Court of Canada.

The same view was expressed in *McDonough v. The Minister of National Revenue*[3]:

> 2. That the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom.

As to the respondent's intention of putting up an apartment building for investment purposes or keeping the building as an income producing asset, it is a feature which

[1] [1904] 5 T.C. 159. [2] [1948] Ex. C.R. 622.

[3] [1949] Ex. C.R. 300.

should be considered. But all the circumstances of the undertaking must be kept in mind in determining whether the gain arose from an adventure or concern in the nature of a trade, or the result of a profit making scheme. If it is established that the sum assessed has been found as profits of a business, the intention or motive is immaterial. In the case of *Mersey Docks and Harbour Board v. Lucas*[1] it was held that

> It is also well established that once the sum assessed has been ascertained to be profits of a trade or business, neither the motive which brought these profits into existence nor their application when made is material.

This rule was followed in *Minister of National Revenue v. Saskatchewan Co-operative Wheat Producers*[2].

So it may be said that an isolated transaction and the intention or motive which brought about this transaction cannot be considered as a conclusive test that the gain derived therefrom is or is not income subject to tax without looking into all the facts and circumstances of the operation.

The question now to be answered is—Was the sum of gain that was made in this case, in view of the evidence adduced, a mere enhancement of value by realizing the investment?

What was the investment? The only possible answer to this question is—A piece of land to be used as a site for building purposes, land which was taken out of the assets of a partnership which were transferred to a company incorporated to continue the business or trade of the partnership, to wit, the construction of buildings to be sold. The fact is that the respondent and his associate were both tradesmen interested in the building field. The partnership was formed to join their knowledge, skill and assets in that line of endeavour. The company, the shares of which were held by the same two persons, continued in the same business but changed over from the construction of houses, duplexes and triplexes to the construction of apartment buildings. The company's first undertaking was the building of an apartment house as above related. Afterwards, it continued to operate in the same line of construction with its assets and the moneys it borrowed from the respondent and his associate, moneys realized from the sale of the above apartment house.

[1] (1883) 8 App. Cas. 891.

[2] [1928-34] C.T.C. 47 at 54.

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After hearing the witnesses and later reading the evidence, I found it difficult at times to understand if they were speaking of the project as their personal affair or the business of the company. As to that matter, they themselves were somewhat confused.

One thing I am convinced of is that the partners did not have the means to build such an apartment without the assets of their company and were in no position to finance the sums owing to the creditors after the completion of the work. The sale of the building was their only solution. They knew very well their personal financial position, as they knew that of their company, when they embarked on this project, and I am sure they knew they would be in no position to keep the building for income purposes. Those being the facts, it is impossible to think that the undertaking was an operation in the nature of an investment to create an income producing asset. I cannot agree with the argument that the leasing of the apartments before the sale of the building establishes that the associates intended to keep the building as a personal investment. At the time of the leasing they already knew they could not meet their obligations and would sell to pay their debts. I rather believe that by leasing the apartments they were in a strong position to obtain a more favourable price for the building.

The Minister, in assessing the respondent's taxable income, having fully disclosed to the taxpayer why, in fact and in law, he had added to his return for the taxation year 1950 the amount of the profit made on the sale of the building, the burden of proof that he had erred either in fact or in law fell on the taxpayer though he was respondent in the appeal.

There is no doubt in my mind, in view of the evidence as a whole, that the respondent failed to discharge the onus of proving the allegations of his reply to the appellant's notice of appeal.

The whole transaction has all the earmarks of a business or trading transaction carried on as a profit making scheme. It follows the same pattern as that followed by the partnership and the company in similar operations. I find that the profit made did not result from the enhancement of any investment but rather from the operation of an adventure in the nature of a business in carrying out a scheme for profit making.

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For these reasons, in my judgment the profits made as a result of the putting up of an apartment building on a property known as No. 4865 Côte Ste-Catherine Road, Outremont, and the sale of same by the respondent and his associate fall within the ambit of "taxpayer income" as provided for in section 3 of the Income Tax Act, 1948, and the amounts of these profits were properly added to the respondent's income tax return for the taxation year 1950.

Therefore, the appeal is allowed with costs.

Judgment accordingly.

1957

Mar. 25

1958

Apr. 23

BETWEEN:

FRANK L. BURNET, EXECUTOR OF THE WILL OF JEAN BROWN, DECEASED ..... APPELLANT;

AND

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

Revenue—Succession Duty—The Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, s. 2(m), 5(1), 5(2)—"Succession"—"All such property shall be valued as of the date of death"—Refund of taxes as result of departmental policy established subsequent to death not part of estate—Appeal allowed.

The appellant is the executor of the will of Jean Brown, deceased, who was the sole beneficiary and executrix of the will of her sister Sarah Brown who died in 1947. Succession duties payable in respect of Sarah Brown's estate were levied by the Department of National Revenue and were fully paid by Jean Brown in 1948. In 1950 the respondent as the result of a directive issued in 1947, five months after the death of Sarah Brown, and a substitution therefore issued in 1949, at the request of Jean Brown paid to her a certain sum of money being the amount of a downward revision of income and excess profit taxes payable by Sarah Brown in respect to the years 1945 and 1946 as determined by the respondent after changing the result of certain sales of her cattle in those years from income to capital receipts. Respondent then reassessed Sarah Brown's estate for succession duties by adding that sum of money to the dutiable value of her property thereby increasing the amount of the succession duty which said amount was paid. After Jean Brown's death the present appellant as executrix of her will filed a Notice of Dissatisfaction which was disallowed by the Minister and an appeal was then taken to this Court.

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Held: That the payment to Jean Brown was a payment to her in her own right and not in that of Sarah Brown.

2. That since at the time of Sarah Brown's death no ruling existed as that under which the money was repaid to Jean Brown, no valid claim to some future departmental policy could at the time of Sarah Brown's death form part of her estate and pass on from her to Jean Brown.

3. That Jean Brown exercised a personal right when claiming repayment of the money which, therefore, cannot be integrated with the remainder of her dead sister's possessions.

APPEAL under the *Dominion Succession Duty Act.*

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

T. J. Duckworth for appellant.

R. S. Dinkel for respondent.

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

DUMOULIN J. now (April 23, 1958) delivered the following judgment:

This is an appeal on behalf of the late Jean Brown, executrix of the will of Sarah Brown, deceased, now represented by her executor, Frank L. Burnet, against an assessment of succession duties made and subsequently confirmed in 1950, by the Minister of National Revenue, on the estate of the above-mentioned Sarah Brown.

It is necessary to set out at some length the particular and I would say, quite exceptional circumstances surrounding the matter.

The agreed statement of facts, filed in Court, relates that Sarah Brown and her sister, Jean, each owned an undivided one-half interest in a ranch at Pekisko, Province of Alberta, which, naturally, they operated in partnership.

Sarah Brown died on March 31, 1947, instituting Jean sole beneficiary and executrix of her will.

On July 16, 1948, the respondent issued a statement of succession duties payable in respect of Sarah Brown's estate, and, on August 12, same year, the amount therein demanded was completely acquitted by Jean Brown, the executrix.

Here, respondent, in paras. 3 and 4, introduced, as an explanatory factor, information which, upon first reading, might seem irrelevant, it goes thus: on July 7, 1945, the Minister of National Revenue, in the estate of one Anton

Esphetter, "had ruled that crop, produce and livestock on hand at the date of death was, for income tax accounting purposes, a capital asset in the hands of the beneficiary."

Jean Brown "asked respondent to extend the so-called 'Esphetter Rule' to the Sarah Brown estate".

Resuming the proper sequence of events, we then see that "on the 4th day of September, 1947 [five months after Sarah Brown's demise] the respondent *under the hand of his deputy* [the italic is mine] issued and published Directive No. 78 by the provisions in which a rancher could apply to the respondent to have his cattle . . . on hand as at a certain date constitute capital for income tax accounting purposes, and on the sale of such animals termed 'a Basic Herd', the proceeds would be Income Tax and Excess Profit Tax free in the hands of the recipient. This Directive was replaced by Directive No. 230 dated November 17th, 1948, which, in turn, was replaced by Directive No. 263 dated March 23rd, 1949, [or two years later than Miss Brown's death] *all of which are under the same hand* and of substantially the same effect."

Prior to the issuance of Directive No. 78, it is conceded, no departmental ruling in reference to "Basic Herd" had ever obtained. Since the latest departure of March 23, 1949, apparently contained more alluring terms, Jean Brown waived her previous request under the "Esphetter rule", and applied for the benefits of the "Basic Herd", on December 2, 1949, "as at the 1st of January, 1945". In 1950, respondent granted this demand; para. 8 of the joint statement explicitly admits that:

> 8. Following which acceptance and approval the Respondent paid to Jean Brown the sum of $8,234.08, *which was the amount of the downward revision of the Income and Excess Profits Taxes payable by Sarah Brown in respect to the years 1945 and 1946* as determined by the Respondent after changing the result of certain sales of her cattle in those years from income to capital receipts.

Having seen the inception of this litigation, let us next look at its sequel. Respondent, through its Succession Duty Branch, then proceeded to reassess Sarah Brown's estate, proportionately with the addition of $8,234.08 to the dutiable net value of the property, thereby increasing the succession dues by an amount of $3,459.91, "which sum was paid by the Appellant" according to the concluding words of para. 9. And there the matter stood at the time

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of Miss Jean Brown's death, on May 3, 1953. The present appellant, in virtue of s. 38 of the *Dominion Succession Duty Act* (S. of C. 1940-41, c. 14), in his capacity of Testamentary Executor, filed a Notice of Dissatisfaction which the Minister disallowed, persisting in his former assessment.

The point at issue, quite a subtle one, is: did this repayment to Jean Brown, by the Department of National Revenue, Taxation Division, in 1950, automatically merge itself into a successional increment to which she became entitled as Sarah's legatee, or, inversely, did Directive No. 263 (Basic Herd ruling), of March 23, 1949, endow Jean Brown with a personal, individualized right, completely sundered from all hereditary transmission? More concisely: was Jean Brown refunded those eight thousand two hundred odd dollars in her own or in her sister's right? The alternative result pointing at either a personal and succession duty free asset or to some devolved and therefore taxable benefit.

I carefully noted the arguments respectively submitted by counsel. Of these, two are of special significance, presenting a clear-cut statement of the contending interpretations.

The appellant stresses that "at the time of Sarah Brown's demise, March 31, 1947, no ruling existed such as the Basic Herd Directive No. 263, dated March 23, 1949". Consequently, no vested claim to some future departmental policy could, at the time of Sarah Brown's demise, form part of her estate and pass on from her to Jean.

On behalf of respondent, it is urged that Sarah Brown's estate, or more exactly, its devolution on Jean, carried with it a latent ability to all benefits eventually resulting from the Basic Herd provisions of September 4, 1947, and March 23, 1949, since Miss J. Brown became the legal successor *of a testatrix who, had she lived, could have availed herself of this fiscal abatement.* Should this assumption prove admissible, adds respondent, then the surviving sister obtained, in 1950, a refund of $8,234.08 as sole beneficiary of her late relative, such repayment evidencing an altered basis of taxation from income and excess profits, of a revenue and operational character, *to a decidedly capital asset, liable to consequential succession duties, as of the date of Sarah's death, though paid back only in 1950.*

To begin let us dispose of the "Anton Esphetter ruling", issued in 1945. The testatrix never resorted to it; therefore, I can detect no connecting link between this and the subsequent "Basic Herd" directive. True, the universal legatee filed under the former rule but was completely released therefrom and extended the privileges of a new provision, concerning which it is agreed that: (Statement of Facts)

6. Prior to the issuance and publication of said Directive No. 78 no similar statutory provision, Directive or Departmental ruling in reference to a "basic herd" had been issued or published or acted upon by the Respondent.

Effective continuity between these consecutive measures, in view of known facts, seems hardly tenable.

The bare statement that Sarah Brown, surviving until the issuance of Directive No. 263, would have ready access to its benefits, is of little assistance in the case, since the dire truth paints another picture. Admittedly, Miss Jean Brown obtained, in 1950, a proportionate refund of income taxes paid by the testatrix some years past. However, the guiding criterion is concerned with the cause more than with its result. In other words, what was the nature of the enabling disposition and in whom did it originate? Obviously none other than Directive No. 263 of March 23, 1949, that authorized Jean Brown to file, in her own right and name, a request dated December 2, 1949.

The *Dominion Succession Duty Act* (4-5 Geo. VI, 1940-41, c. 14 and amendments), in my comprehension, contemplates transmissibility of possessions and rights at the time of a testator's death. How could it be otherwise; since acquisition by a deceased person is a material impossibility, so are *post mortem* transmissions. Where nothing is gained, nothing passes on.

Supposing Sarah Brown who, we know, died March 31, 1947, had bequeathed so many bank shares to her universal legatee and that, two or three months later, subscription rights had been allotted to shareholders of record at closing time, May 1, 1947, what would the outcome be? Similar accretions possess a pecuniary value, yet would they be considered increments of the estate, or in the light of a personal benefit accruing to the heir in her own name and not through testamentary devolution?

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Dumoulin J.

In the Act "Succession" is described thus:

> 2(*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof *upon the death of any deceased person* . . .

Section 5(1) specifies that:

> . . . for the purposes of this Act, *all such property shall be valued as of the date of death*, . . .

Rights of any description, being in the nature of intangible property, must, at the same period, assume some degree of identity to constitute a transmissible asset.

Lastly, and as an instance of merely remote analogy, I might quote a few lines of s-s. (2) of s. 5:

> . . . the duty payable by each successor shall not be subject to any increase or decrease by reason of appreciation or depreciation in the value of the property included in a succession *after the date of death* or by reason of maladministration or any other cause whatsoever.

Not without hesitation, I reached the conclusion that Jean Brown exercised a personal right when claiming the amount of $8,234.08, which, therefore, cannot be integrated with the remainder of her late sister's possessions.

The view I take excuses me from expressing an opinion concerning the legality of the several departmental policies that appellant forcibly attacked as transcending the powers and authority of a deputy minister, and derogatory to s. 6(1)(*b*) of the *Income War Tax Act* (1927, R.S.C., c. 97 and amendments).

In 1946, the learned President of this Court decided a point of law of some similarity in re: *Trapp v. Minister of National Revenue*[1]. Both parties in the instant case may find Mr. Justice Thorson's remarks, on p. 256 of the report, profitable reading.

For the reasons above, this appeal is allowed; the reassessment by respondent of Sarah Brown's estate, under Form S.D. 7 No. 89612, dated July 14, 1950, is vacated and annulled; the amount of $3,459.91, purporting to be succession duties paid by appellant, is to be reimbursed to the latter, and the case will be referred to the Minister for necessary action. Appellant is entitled to his taxable costs.

Judgment accordingly.

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[1] [1946] Ex. C.R. 245.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1958
Mar. 27 & 28
June 11

BETWEEN:

LIONS GATE LUMBER CO. LTD. .....PLAINTIFF;

AND

THE SHIP *FRANCES SALMAN* .....DEFENDANT;

AND

RICHMOND TUG BOAT CO. LTD. ....THIRD PARTY.

Shipping—Collision between defendant ship and boom of logs—No proper lights on towing tug or boom at time of collision—Action against defendant ship dismissed.

Held: That where a collision occurred between defendant ship and a boom of logs in tow of a tug which did not exhibit proper towing lights on the tug or the tail end of the boom defendant ship cannot be held liable for damages resulting from the collision.

ACTION for damages caused by collision between defendant ship and a boom of logs.

The action was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty, for the British Columbia Admiralty District, at Vancouver.

W. D. C. Tuck for plaintiff.

J. R. Cunningham for defendant.

Granville Mayall for third party.

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

SIDNEY SMITH D.J.A. now (June 11, 1958) delivered the following judgment:

This suit concerns a collision between the defendant ship and a boom of logs of eighteen sections in tow of the tug *Skooter*. A third party was joined, namely, the Richmond Tug Boat Co. Ltd., who were the charterers of the tug.

The tug in tow had been weather-bound in Dogfish Bay, Gabriola Pass, on March 31 of last year. During the afternoon the weather moderated and the tug master decided to proceed to his destination, Vancouver. While

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LIONS GATE LUMBER CO. LTD. v. THE SHIP *Salman* AND RICHMOND TUG BOAT CO. LTD.

Sidney Smith D.J.A.

crossing the strait the weather became threatening and he decided to turn back and regain further shelter. His log entry was as follows:

17.00 Thrasher Rock. Light easterly. Turned back. Westerly coming up.

Half an hour later the boom was struck by the said steamship and cut in two about the middle. The night was dark but clear.

The steamship had left Powell River and was on her way to Victoria and Los Angeles. She is of Swedish nationality. Evidence was given on her behalf by her master, the chief officer and the British Columbia pilot, Captain Simpson. The latter two were on her bridge at the material times and the master came up immediately after the collision. I accept the evidence of these three officers without hesitation. They impressed me as being thoroughly competent and they gave their testimony in a thoroughly seamanlike manner. I do not accept any conflicting evidence on the part of the plaintiff's witnesses. I am satisfied that a vigilant lookout was kept by both the chief officer and the pilot and that no proper lookout was kept by either of the men on the tug.

The main issue in the case was as to whether the tug was showing the proper lights at the material times and whether there was a light at the tail end of the boom. Admittedly the tug was not showing the required towing lights under Article 3 of the Regulations for her uppermost light was an "all-round" light at the top of her mast. It is idle to say that this was not misleading. Apart from this, however, I find that she exhibited no other towing lights or a stern light, and moreover that if she carried a light on the tail end of the boom it was in such condition, or so fixed, as not to be visible to those on the *Frances Salman*.

There will be judgment for the defendant with costs.

Judgment accordingly.

BETWEEN:

OXFORD MOTORS LIMITED .....APPELLANT.

AND

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

1957
Apr. 15 & 16
1958
May 8

Revenue—Income—Income Tax—The Income Tax Act, R.S.C. 1952, c. 148, ss. 2, 3 and 4—Rebate—Capital or income—Forgiveness of debt—Allowance on sale of cars is income—Appeal dismissed.

Appellant company, an importer and distributor of British motor cars, purchased from the English manufacturer, being in financial difficulties and having a large number of the cars on hand in Vancouver, B.C., was granted a rebate by the manufacturer of $250 on each car sold provided that credit for that amount would be allowed only on the manufacturer being advised that payment by appellant was made on account of indebtedness to it in an amount of the C. I. F. value of the cars on which a rebate was claimed.

Appellant was assessed for income tax for the year 1952 for the total value of the cars sold in that year which assessment was confirmed by respondent and from which appellant now appeals to this Court alleging that the allowance of $250 per car was a capital increment arising from a genuine forgiveness of debt.

Held: That the assessment of appellant for income tax for the year 1952 is confirmed and the appeal dismissed since the unitary allowance of $250, added to each separate sale operates as a broadened margin of possible profits and such gain when earned would be entered into the appellant's Profit and Loss balance account and be gain by way of income to appellant.

APPEAL under *The Income Tax Act.*

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

D. N. Hossie, Q.C. and *A. B. Ferris* for appellant.

F. J. Cross and *G. R. Schmitt* for respondent.

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

DUMOULIN J. now (May 8, 1958) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue, dated October 5, 1954, confirming the previous income tax assessment of the above taxpayer, Oxford Motors Limited, for the year 1952.

The case was heard at Vancouver, B.C., on April 15 and 16, 1957.

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OXFORD MOTORS LTD. v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

I would immediately note that matters concerning Plimley Automobile Company Ltd., will be dealt with as a distinct issue bearing record No. 98065, one reference only will be made to it presently.

At all times material, Oxford Motors Limited was an importer and distributor of Morris (British) motor cars purchased from the overseas manufacturers, Nuffield Exports Limited (hereinafter referred to as Nuffield), of Cowley, Oxford, England.

On October 1, 1951, appellant and Plimley Automobile, thereafter conducting their respective business jointly, entered upon a partnership agreement (exhibit 1), especially with a view to reduce their operational costs. Section 6 of this covenant reads:

> 6. The net profits of the business shall be divided between the partners equally and they shall, in like proportion, bear all losses including loss of capital.

The partnership's commercial name and style was: British Car Centre.

Prior to September 30, 1951, Oxford Motors had on hand something like 3,749 Morris cars bought from Nuffield. Since the said date coincided with the end of appellant's fiscal year, its balance-sheet revealed an indebtedness of £513,295:18:5, to the vendors, or the Canadian monetary equivalent of $1,540,789.26.

It is said that official credit restrictions and controls imposed periodically from October 25, 1950, on (see exhibits 47, 48, 49, 51), seriously hampered the automobile trade with the unfortunate result that appellant became overstocked, carrying a heavy load of unsold cars.

Insistence on maturing payments of the overdue instalments would have forced Oxford Motors into bankruptcy, and ensured a meagre measure indeed of satisfaction to Nuffield, who appraised this situation in quite a businesslike manner.

In September, 1951, two representatives of the creditor firm visited Vancouver and after investigating the appellant's financial position, offered, as a way out of this quandary, very helpful terms, clearly outlined in para. (b),

hereunder, of exhibit A, an extract from minutes of Morris Motors Ltd. (Nuffield), of a meeting held September 7, 1951:

(b) To give Canadian distributors a *rebate* (italics are mine) of $250 each on the vehicles which were to remain in Canada, estimated at a total of 3,749 at the end of August. This *rebate* would be effective from September 1st, 1951, *and would not be passed on to customers.*

This proposal, upon acceptance by Nuffield's Board of Directors, was then notified to Oxford Motors Ltd., in a letter (exhibit 20) dated September 18, 1951, essential excerpts of which are:

With reference to the *rebate scheme* already explained to you by Mr. Ian Hay, I have now received cable instructions from England how this will operate and this is as follows:

1. Returns to be made fortnightly, subject at our option to periodical check by local Nuffield representative.
2. Model, chassis number, engine number, date of sale and name of purchaser to be advised to the undersigned.
3. *Credit will be allowed only on receipt of advice from our bankers of payment by distributor of bills corresponding in amount to at least C.I.F. value of cars on which rebate claimed.*
4. *All rebates will be applied exclusively towards liquidation of further outstanding bills.*

. . .

W. S. Kennah,
Representative,
Nuffield Exports Limited.

The terms alluded to are expressed as follows in s. 12 of appellant's Statement of Facts:

12. As a matter of procedure it was arranged that credit be given the Appellant on its unpaid accepted drafts then held by Nuffield as payments were from time to time made by the Appellant. At the beginning credit was given against payments made from proceeds of sales of Morris cars then on hand, *but after a short period credit was given against payments regardless of source.*

This last assertion, which I italicized, refers to exhibit 40, a written communication of February 11, 1952, from Nuffield to H. Plimley, President of Oxford Motors, intimating a new policy or rather the discontinuance of the rebate scheme as per March 31, 1952.

In part, this document entitled "Rebates" reads:

When the rebate arrangement now in operation was originally announced it was made clear that it could be withdrawn at any time.

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To this inference of a sudden cessation of rebate grants, at Nuffield's option, Mr. Horace Plimley took exception in the course of his evidence.

Reverting to exhibit 40, it goes on to say:

> The basis of the arrangement was that you would qualify for a *rebate* of $250 for each Morris vehicle *sold retail,* either by you or one of your Dealers, from stocks existing at the time of the original announcement, to be credited to you upon receipt by us of a remittance corresponding in value to that of the c.i.f. price of the car sold, and that such credit would be applied by us in retiring other outstanding bills.
>
> It is felt that the time has now come when this arrangement should be reviewed, and we therefore give you notice that we intend to discontinue the granting of rebates after March 31, 1952. . . .
>
> In order to make the arrangement more flexible *during the remainder of its term of operation* we propose
>
> (1) to dissociate the granting of the rebate from actual sales. Between now and the end of March you will be allowed to qualify for the rebate *upon payment of drafts, regardless of whether the funds used for such purposes arise from sales or not.*

Nuffield's second departure, then, obtained merely during the intervening period: February 11 to March 31, 1952, when the arangement of September, 1951, definitely lapsed.

Dealing, as we are, with the appellant's income tax assessment for 1952, it is essential to ascertain in which year the disputed transactions, evidenced by payment of credit bearing drafts, arose.

Mr. Horace Plimley, President of Oxford Motors Ltd., testified that: "On September 30, 1951, appellant owed drafts in the total sum of $1,540,789.26, for debts all incurred in the year ending September 30, 1951. These drafts were drawn by Nuffield Exports for cars delivered to Oxford Motors".

"In the fiscal year of 1952, by Sept. 30," adds this witness, "that indebtedness had subsided to $198,216.30; such reduction resulting from the 25% abatement plan. Credits of $483,185.91, as per Sept. 30, 1952, represented the aggregate car allowances of $250.00 per ($1,000.00) unit."

Mr. Plimley also tells us that: "No new cars had been ordered from Nuffield in 1952", and "all these debits or charges were contracted in 1951, carried over as an outstanding liability to the year 1952, amounting to $1,540,789.26, the final payment made, December 9, 1952, in the fiscal year closing September 30, 1953". Exhibits 53, D and E, were quoted being respectively (53): a breakdown

of the decrease of sales transacted in 1951 by Oxford Motors Ltd., compared with sales for 1950; (D): Financial statement of Oxford Motors Ltd., as at September 30, 1951, and British Car Centre's statement for the fiscal year ending September 30, 1952; (E): Appellant's balance-sheet for fiscal period ending September 30, 1952.

This unitary discount of $250 per car sold was not, even partially, passed on to customers since, in Mr. Horace Plimley's words: " I didn't care to reduce the selling price of the motor cars on hand, because the company needed all the money it could get hold of". Nonetheless, the rebate was extended to some of appellant's dealers, a fact, or more accurately still, a factor hardly consistent with a fixed and static forgiveness of debt, in nowise conditioned by the number of sales, as the claimant would have it appear.

The witness, whose statement on this score I carefully noted, specified that: "The company handed down some of this rebate to its dealers. We instituted our own rebate scheme, subject to cancellation at any time, and which varied from $50 to $300. In many cases nothing was allowed to dealers. Our normal percentage of profit for selling a car at list price would mean adding twenty-five per cent (25%) to cost price and passing over eighteen per cent (18%) of that to our dealers retaining seven per cent (7%) for our own profit."

A forgiveness of debt, it would seem, is not usually portioned out in this way.

Regarding the basic nature of the September 1951 deal, Mr. H. J. Jenkins, Nuffield's Commercial Manager, examined on a Commission, at Oxford, England, on the eighth day of October, 1956, does not deny what we already know. This bulky report was gone through in Court; some few quotations will suffice. Mr. R. V. Cusack, for appellant:

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126 Q. . . . What steps, if any, did Nuffield Exports take to assist Oxford Motors to continue the sales of Motor cars?

A. In the first place we authorized them to take whatever steps they considered necessary either to reduce the selling price of cars or to make it possible for them to give larger allowances for tradings [corrected to trade-ins].

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129 Q. I have mentioned, perhaps wrongly, the figure of 1,000 dollars. Was the 250 dollars related in any way to payment in thousands?

A. Very roughly it was about 25 per cent of the total, the average value of a car being about 1,000 dollars.

130 Q. Assuming that credit of 250 dollars was given on a thousand dollars, that would leave 750 actually to be paid over. Is that right?

A. Speaking in estimated figures, yes.

On Mr. Eaton's cross-examination, for the respondent:

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(in fine) 203 Q. What I would like to clarify is this. Would you consider that reduction in the total indebtedness as having taken place at the time when Nuffields received the rebate claim forms or at the time Nuffields issued the credit notes?

Page 29

(top) A. *Not until they issued the credit note. There would be nothing on the books until that time.* (Italics are mine).

Page 59

308 Q. But it was a condition of the allowance of the credit that Oxford Motors established to the satisfaction of Nuffield that cars in respect of which rebates were claimed had actually been sold?

A. That was originally the arrangement.

At this point may be given the last relevant facts alleged by appellant who, in s. 17, complains that the respondent, on April 28, 1953, levied a tax in the sum of $5,275.67 "in respect of the Appellant's income for the 1952 taxation year", since it is claimed "the Appellant incorrectly reported its 1952 taxable income as being $10,469.42", in lieu of an operational loss, in that year, of $230,856.02, according to s. 19.

Section 18 of the Statement of Facts traces this error to the British Car Centre partnership, Oxford Motors Ltd. and Plimley Automobile Co., each crediting to itself one-half, viz., $241,592.96 of the over-all discounts of $483,185.91 obtained during 1952.

The conclusion reached and the point of law relied upon are made sufficiently clear in s. 3 of Part B hereunder partly reproduced:

3. The assessment is illegal, incorrect, contrary to law and contrary to Sections 3 and 4 of the Income Tax Act in that a capital gain in the amount of $241,592.96 realized by the Appellant in its 1952 taxation year as a result of a forgiveness of part of a debt by a creditor has been improperly included in the income of the Appellant for that year, . . .

Quite naturally, although not decisively, respondent, after a denial of its opponent's pleadings on the law, stresses that Oxford Motors Ltd., was taxed on the strength of its own returns and, at all events, conformably to ss. 2, 3 and 4 of the Act.

The question then to be decided is whether or not this allowance of $250 for each and every auto sold constituted a capital increment arising from a genuine forgiveness of debt. No pay of the maturing drafts, no allowance of $250, had conceded Mr. Horace Plimley, who was succeeded in the witness box by Mr. Lionel Kent, a Vancouver chartered accountant. At Plimley's request, Mr. Kent went over the company's financial statements and records for the material periods. Of this expert and rather concise evidence, the gist is that "the abatement would not give rise to a trading item included in the firm's trading account, but should be listed in the company's surplus account and not on its profit and loss trading sheet", with a consequent opinion that it must be considered a capital gain.

Commenting upon exhibit E (page B, Oxford's Profit and Loss balance-sheet as per September 30, 1952), Mr. Kent declared he considered "the figures of sales incorrect, because they do not exactly show the proper relation between the abatement and the cost of sales by Nuffield; again they fail to establish a correct relation between that reduction to Oxford Motors and its own scheme passed on to its individual dealers".

Now, I lay no claim to any particular training or lore in scientific accountancy, but even so, I feel strongly impelled to hold this latter assertion completely alien to the subject-matter.

Lastly, and on cross-examination, the witness agreed that "if this additional gain (the $250 discount per unit) was earned in the course of selling those cars, then it would become a trading gain".

No technical definitions of such current expressions as "forgiveness of debt" or "rebate" have been penned, explanatory notions only are available. Yet an important distinction, implying contradictory effects, differentiates the one from the other. As mentioned above, forgiving a debt rests on some definitely ascertained result operating *nunc pro tunc,* independently of posterior actuating terms.

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Usually, conditions conducive to a release are antecedent rather than subsequent.

In the Oxford Shorter English Dictionary, V° Rebate, we read:

> A reduction from a sum of money to be paid, a discount; also a repayment.

The initial part of this sentence could equally qualify writing off a debt; Black's Law Dictionary affords, it would seem, a more germane suggestion of this word's ordinary meaning:

> *Rebate* . . . A deduction or drawback from a stipulated payment, charge, or rate, (as, a rate for the transportation of freight by a railroad,) *not taken out in advance of payment, but handed back to the payer after he has paid the full stipulated sum.*

A closer approach still to the question at bar may be had in Halsbury's Laws of England, V° Rebate, vol. XVII, p. 148, No. 307.

> Whilst in one sense it is not accurate to describe a rebate or allowance off the price of goods or services as a trade receipt, *yet inasmuch as it affects the outgoings payable in respect of goods or services, and thus increases trade profits, it is a proper item to be taken into account in arriving at a balance of profit.* In determining whether or not a rebate allowed is an item affecting profit *the question is, Does the rebate affect an item properly included as an expense in a trading account? If so, the rebate is itself an item on a trading or income account* . . .

The chartered accountant, Mr. Kent, it will be remembered, conceded that "if the gain was earned in the course of selling the cars (in the affirmative, *vide* Plimley's and J. H. Jenkins' testimonies; also exhibits 20 and 40, *inter alia*), then such profit would constitute a trading gain".

A cogent application of a rebate as a trade receipt appears in re *Westcombe v. Hadnock Quarries, Ltd.*[1]

In this case, certain agreements between a railroad company and Hadnock Quarries Ltd. "provided for the construction of siding accommodation at the quarries. The cost of construction was borne by the firm, and the Railway Company agreed to allow to Hadnock Quarries at half-yearly intervals . . . sums equal to 10 per cent of the Railway Company's share of the receipts in respect of traffic conveyed to or from the siding". Rowlatt, J. wrote ". . . it (the 10% discount) is a benefit on revenue account. If in the course of their trading they send some goods and the Great Western Railway Company receive £50 as freight,

[1] (1929-32) 16 R.T.C. 137 at 142-143.

where it passes over their system, on those goods, then the quarry company get £5 given to them, and that diminishes the freight which they have paid to the Railway Company. It is a distinctly revenue matter. If they do not do the annual trade, which is of course what earns the revenue, they do not get the allowance. If they do the trade, they do get the allowance ton by ton, and that, I think, decides that matter in favour of the Crown. . . . that is to say, he (referring to *Jones v. Commissioners of Inland Revenue*) took something which rose or fell with the chances of the business. When a man (or a firm) does that he takes an income; it is in the nature of income, and on that ground I decide the case."

As regards writing off a debt, I would simply refer the parties to the *Mexican Petroleum*[1] and *Geo. T. Davie*[2] cases, wherein the dividing mark between a rebate and a forgiveness is very aptly drawn.

My understanding then of what actually occurred here is that the unitary allowance of $250, tacked on to each separate sale, operates as a broadened margin of possible profits. And such gains, when earned, would of necessity be written into the company's Profit and Loss balance account, and in due course allotted as dividends to shareholders. I must consequently find this assessment to have been levied in accordance with the provisions and requirement of the Act.

Finally, those excuses, tentatively alleged in the last seven lines of respondent's s. 17, did not meet with any supporting evidence.

For the reasons above, this appeal is dismissed, the decision of the Court being that the assessment of appellant's income for taxation year 1952, was properly made in keeping with ss. 3 and 4 of the *Income Tax Act*. The respondent is entitled to be paid his costs after taxation.

Judgment accordingly.

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[1] (1929-32) 16 R.T.C. 587.

[2] [1954] Ex. C.R. 280.

1957
Apr. 16
1958
May 14

BETWEEN:

PLIMLEY AUTOMOBILE COMPANY LIMITED ..... APPELLANT.

AND

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

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 2 and 3—Income or capital—Forgiveness of debt not a trading profit—Appeal allowed.

Appellant, an importer and distributor of motor cars, purchased largely from Standard Motor Company Ltd. of England, was heavily indebted to that company. In September of 1952 Standard in order to induce appellant to continue in business and gradually pay off this debt agreed to forgive 15 per cent of the indebtedness provided that the remaining indebtedness after deduction of the 15 per cent should be paid by regular stated payments. This arrangement was carried out by both parties and all stipulated instalments on account of the indebtedness were made. Appellant was assessed for income tax on the amount of indebtedness forgiven by Standard. This assessment was confirmed by respondent and an appeal to this Court was taken by appellant.

Held: That the amount of the forgiveness of debt made by Standard to appellant does not constitute a trading receipt but is a capital gain.

APPEAL under *The Income Tax Act.*

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

D. N. Hossie, Q.C. and *A. B. Ferris* for appellant.

F. J. Cross and *G. R. Schmitt* for respondent.

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

DUMOULIN J. now (May 14, 1958) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue, dated October 5, 1954, affirming his previous assessment of the above taxpayer's income for the taxation year, 1952.

The case was tried at Vancouver, B.C., on April 16, 1957.

I would at once point out that all matters concerning Oxford Motors Limited were decided in a separate judgment, record number 98064.

At all material times, the appellant, Plimley Automobile Company Ltd., acted as importer and distributor of Standard, Rolls Royce and Jaguar motor cars, purchased from the respective manufacturers in England, more particularly from The Standard Motor Co. Ltd., (hereinafter referred to as "Standard"), of Banner Lane, Coventry.

Especially with the hope of reducing overlapping costs, appellant and Oxford Motors, on October 1, 1951, formed a partnership under the firm name and style of "British Car Centre", thereafter carrying on their businesses jointly, each associate "being entitled to one-half of the profits and liable for one-half of the losses (cf. exhibit 4, s. 6)".

It is contended in s. 8 of appellant's Statement of Facts that official restrictions, imposed upon consumer credit in 1950-51 by the Government of Canada (exhibits 47, 48, 49, 51 of case No. 98064), were largely responsible for Plimley Automobile's ensuing predicament.

By September, 1952, the appellant was indebted to Standard in the amount of £222,480 "evidenced by numerous sight drafts drawn by Standard and accepted by Plimley Automobile Company, all of which were then past due" (Statement of Facts, s. 14), and far beyond the company's financial reach.

In the month of September, 1952, says the appellant (Statement of Facts, s. 16), so as to induce Plimley Automobile to continue its operations and gradually pay off the heavy debt owing "Standard agreed to forgive the sum of £1,668 together with a further sum of £37,146 (the latter amount being 15% of the original indebtedness of £247,642) on condition that the net indebtedness of £123,666 remaining, after certain other credits had been applied, should be paid by monthly payments of £27,500 each on the 24th days of October, November and December, 1952, on the 24th day of January, 1953, and a further amount of £13,666 on the 24th day of February", same year.

These arrangements are set out with all necessary particulars in a letter (exhibit 2) dated September 29, 1952, from Standard Motor Co. Ltd., Banner Lane, Coventry, to Horace Plimley, Esq., Vancouver, the President of Plimley Automobile Company. I would quote paras.

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1 (partially) and 4(*a*) which read:

(1)	The debt was originally	£ 249,310
	We agree to cancel our Invoice for Special Charges	1,668
		£247,642
	And to grant you a 15% Allowance on the balance of £247,642	37,146
	Leaving a balance of	£ 210,496

. . .

(4) The foregoing offers are made on the understanding that:—

(a) The 15% Allowance of £37,146 and the Credit of £1,668 referred to at (1) will not remain as a debt after the payment by you of the balance of £123,666 on the dates indicated above.

Since £60,000 had been paid previously and another allowance of £26,830 extended for "Paint Claims", the net debt outstanding became, as per date, stabilized at a total figure of £123,666.

The conditions above were honoured upon maturity and all the stipulated instalments duly met.

Notwithstanding this satisfactory achievement, the appellant declares its trading activities for the 1952 taxation year actually show an over-all deficit of $227,969.54 (Statement of Facts, s. 19).

Strangely, however, Plimley Automobile drew up its appropriate 1952 income tax return in a different light, revealing a "profit of partnership (i.e. the British Car Centre merger), for the year" of no less than $27,246.82, with a one-half share amounting to $13,623.41 (cf. Reply to Notice of Appeal, Part B, s. 2).

Accordingly, respondent levied a tax on the appellant in the sum of $3,815.06, for 1952 (Statement of Facts, s. 17).

The upshot of this imposition appears in s. 17 of the Notice of Appeal, it being claimed that "Appellant incorrectly reported its 1952 taxable income as being $13,554.20". Section 18 vouchsafes the explanation that: "As a result of the partnership with Oxford Motors (who benefited of a 25% rebate on their purchase price of each separate Morris car), the Appellant took credit for the amount of $241,592.95", or half of $483,185.91, sum total of rebate credits gained by Oxford Motors Ltd. during the 1952 fiscal year.

"Therefore," concludes appellant, "the assessment is illegal, . . . contrary to Sections 3 and 4 of the Income Tax Act in that a capital gain . . . of $241,592.95, realized by the appellant in its 1952 taxation year as a result of a forgiveness of part of a debt by a creditor, has been improperly included in the income . . . for that year . . ."

The points of law raised in the Notice of Appeal, particularly in ss. 8, 9 and 10 of Part B, are that an allowance, such as the present one, constitutes a forgiveness or release of past indebtedness which, if unconnected with the transaction when the debt was incurred, far from a trading receipt, is a capital gain dehors the ambit of taxable income.

Respondent, in turn, denies such interpretations of the law, adding that Plimley Automobile Co. was assessed upon its own computation of profits for 1952 and, at all events, pursuant to ss. 2, 3 and 4 of the Act.

In its main outline, the case hinged on facts closely allied with those of Oxford Motors, offering but little distinctive evidence.

Appellant's principal executive officer, Mr. Horace Plimley, the only significant witness heard, testified to the correctness of every statement alleged in the Notice of Appeal, specifying the company's debt "was incurred mainly in the early part of 1951 for cars shipped and received".

The question to be decided is whether or not the 15% allowance granted September 29, 1952, an aggregate £37,146 (exhibit 2), culminated in a forgiveness of debt.

In its every day acception, in nowise an unworthy criterion, the above expression usually implies an ascertainable and permanent result in contradistinction to a rebate or discount, liable to be *earned* from now on according to set terms. Normally, a release is predicated on conditions antecedent rather than subsequent.

Should it be permissible to cite the related Oxford Motors case, I might then perceive a distinguishing element. There, we had a strictly conditional discount of $250, based on the purchase price of $1,000 per car, and accruing or *"earned"* merely *"if and when"* a sale to a client took place. "No pay, no allowance (i.e. rebate)!"

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had said Mr. Horace Plimley, qualifying the Nuffield-Oxford arrangement. Presently, we have before us a somewhat different situation: a clear-cut abatement of thirty-seven thousand odd pounds sterling, untrammelled by any restrictions or posterior happenings, and summed up into a neatly tabulated balance. Should this savour of a certain subtlety, it nonetheless remains my comprehension of the jurisprudence actually obtaining.

As for the spread over payments, they do not detract from this releasing transaction, but rather tend to enhance its *ex gratia* nature.

Counsel for the respondent argued "that any benefit to appellant under this scheme could fall only during the fiscal year of 1953, starting October 1, 1952, and closing on September 30, 1953."

With this view, the facts revealed would hardly agree. September 29, 1952, ultimate day of that fiscal year, is the date of the releasing authority, viz., Standard's letter to Horace Plimley, exhibit 2, for debts,—unpaid sight drafts,—gradually incurred in the course of 1951, as reported by Mr. Horace Plimley. If this construction is accurate, it then leaves very little room for any attempt at raising a like issue.

All due allowance had between the instant matter and the leading English precedent regarding an abatement of debt, I believe this particular objection bears some similarity to one of those several features disposed of in *British Mexican Petroleum*[1], I quote from Lord Thankerton's speech:

> My Lords, I am of opinion . . . that the account to 30th June, 1921, cannot be reopened, as the amount of the liability there stated was correctly stated as the finally agreed amount of the liability and the subsequent release of the Respondents proceeds on the footing of the correctness of that statement.
>
> The Appellant's alternative contention . . . is equally unsound, in my opinion. I am unable to see how the release from a liability, which liability has been finally dealt with in the preceding account, can form a trading receipt in the account for the year in which it is granted.

[1] (1929-32) 16 R.T.C. 570 at 592.

Previously, while discussing this same case on its basic merits, i.e. the essential components and legal consequences of forgiving a debt, Rowlatt, J. in the King's Bench Division, had spoken thus (at pp. 584-585):

P. 584

I do not understand it myself in the least—that in the year of release, when the business entered into a new lease of life and a new bargain was struck, the amount released must be brought into the revenue account . . .

P. 585

How on earth the forgiveness in that year of a past indebtedness can add to those profits I cannot understand. It is not a matter depending upon the form in which the accounts are kept. It is a matter of substance, looking at the thing as it happened, as a man who knows nothing of scientific accountancy might look at it—it is the receipts against payments in trading.

The salient fact in the *British Mexican Petroleum* affair was that this Company, against payment by it of £325,000 to Huasteca Limited, an oil-producing enterprise, was given a full release of the balance remaining due, viz., £945,232.

The decision above was applied, after an exhaustive perusal of its several factors, by Cameron, J., in re *Geo. T. Davie and Sons Ltd. v. Minister of National Revenue*[1].

There, appellant, Geo. T. Davie & Sons, a dry dock owner and ship builder, upon completion of certain contracts owed $914,000 to Canadian Commercial Corporation, a Crown company. By an agreement, of November 2, 1949, between the Crown and appellant, the indebtedness was abated in respect of two large amounts totalling $734,813.83. It was held that: (p. 281)

3. The mere cancellation or abatement of an undisputed trade debt does not give rise to taxable income in the hands of a taxpayer whose trade debt has been cancelled or abated. The abatement of a capital indebtedness cannot give rise to taxable income. . . .

Cogent reasons for arriving at such a result are adduced by Cameron, J., at pages 294-295 of the official report:

The facts in the *British Mexican Petroleum* case are, of course, somewhat different from those in the instant case. There the debt which was abated was incurred in the ordinary course of trading and it was held that the accounts for the earlier period in which most of the debt had been incurred could not be re-opened and those accounts readjusted because of the abatement; and also that the amount of the abatement could not be brought into account in the later period in which some part of the debt had been incurred and the abatement made. As I read

[1] [1954] Ex. C.R. 280 at 294-295.

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the judgment of Rowlatt, J., he considered the benefit received by the taxpayer as something quite outside the scope of its trading activities; something which was conferred on it "as an act of grace although business methods were behind it". Lord MacMillan, in disposing of the suggestion that the amount of the abatement should be treated as a revenue item in the taxation period in which the abatement was made, stated his reasons in these few sentences:

> I say so for the short and simple reason that the Appellant Company did not, in those eighteen months, either receive payment of that sum or acquire any right to receive payment of it. I cannot see how the extent to which a debt is forgiven can become a credit item in the trading account for the period within which the concession is made.
>
> In my view, that case is authority for the proposition that the mere cancellation or abatement of an undisputed trade debt does not give rise to taxable income in the hands of a taxpayer whose trade debt has been cancelled or abated, subject perhaps to the question reserved by Lord MacMillan and which I have referred to above. That being so, it cannot be found that the abatement of a capital indebtedness—as in the instant case—can give rise to taxable income.

A careful review impels me to signal out some connection with those above cited precedents and to conclude accordingly.

The characteristic traits of a forgiveness of debt attach to the transaction at issue; then to the extent of £38,814, computed back into Canadian currency, at exchange rates obtaining on September 29, 1952, both allowances extended to appellant in exhibit 2 do not constitute a trading receipt but a capital gain.

Appellant's claim, stated in Part B, s. 3, to a capital amount of $241,592.95 goes far beyond the basic allegations. The enabling instrument, exhibit 2, to an abatement of debt shows the pardoned amount as £38,814. How then could I subscribe to more than was really forgiven.

The decisive consideration, however, is that in the Oxford Motors' appeal, record No. 98064, "credits" for $483,185.91 were declared rebates and trading receipts. It obviously becomes impossible in another suit to contradictorily hold that half this amount or $241,592.95, assumes the dual character of also being an abatement of debt.

Tersely put the problem is: *Who* remitted *What* and *to Whom*; Who relating to Standard Motors, What standing for £38,814, and to Whom for Plimley Automobile Ltd.

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The British Car Centre, a private unincorporated entity, cannot, in this respect, link the discounts extended by Nuffield Exports Co. to Oxford Motors Ltd. with a forgiveness of indebtedness granted by Standard Motors to Plimley Automobile.

For these reasons, I think the appeal must be allowed. The tax of $3,815.06 levied on appellant's income for taxation year 1952, by assessment bearing date of April 20, 1953, will be vacated, and the matter referred back to the Minister for the purpose of reassessing the appellant in accordance with these findings. The appellant is entitled to be paid his taxable costs.

Judgment accordingly.

1956

Jan. 16 & 17

1958

Jun. 30

BETWEEN:

WESTERN LEASEHOLDS LIMITED ..... APPELLANT.

AND

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

AND BETWEEN:

WESTERN MINERALS LIMITED ..... APPELLANT.

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1)—The Income Tax Act, 1948, c. 52, ss. 3, 4, 42 and 50(6)—Statutes of Canada 1949 (2nd Session), c. 25, s. 53—Income—Capital or income—Payments for options to purchase oil rights—Payments when options exercised—Payment for leases—Compensation for cancellation of part of contract—Income in hands of taxpayer and not receipts on account of capital—Disallowance of deductions claimed as exploration expenses and filing fee—Taxpayer not entitled to interest moratorium on unpaid tax—Appeals dismissed.

Appellants are limited companies incorporated in 1944 under the laws of the Province of Alberta and at all relevant times herein were owned and controlled by the same shareholders and directors. The purposes

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of incorporation included the exploration and development of oil properties. Minerals is the owner of the freehold mineral rights in 496,000 acres and Leaseholds, the operating company, was given the right to lease all or any of these rights on a royalty basis.

In 1946 and in 1947 Leaseholds by arrangement with Minerals, granted Shell Oil an option to purchase the mineral rights in a stated number of acres and was paid $30,000 and for a similar option granted Imperial Oil, it received $250,000. Imperial Oil in 1949 and 1950 exercised its option and paid to Leaseholds about $2,000,000, and in 1949 Leaseholds also received $900,000 under a leasing agreement made with Barnsdall Oil. Leaseholds was assessed for income tax on all these receipts and Minerals was also assessed for income tax on the sum of $234,000 paid it by Leaseholds in 1949 and 1950 as compensation for a change made in the principal leasing agreement entered into between the two companies, providing for a reduction in royalty payable on certain acreage. These receipts were credited on the books of the appellants to capital reserve and appeals from assessments for income tax on the payments of $30,000 and $250,000 respectively to the Income Tax Appeal Board were dismissed. A further appeal was taken to this Court from such dismissals. Other matters in issue in these appeals were brought directly to this Court which also considered the disallowance of certain deductions from income claimed by appellants and disallowed by the respondent.

Held: That the payments received by Leaseholds in 1946 and 1947 constituted income from a business and therefore within the definition of income in s. 3(1) of the *Income War Tax Act*. The receipts in 1949 and 1950 were receipts from a business or property and therefore within the provision of s. 3 of the *Income Tax Act* 1948, as amended.

2. That whilst Leaseholds' ultimate purpose may have been to develop and explore its oil properties, as stated in evidence, a statement of the intention with which a transaction was entered into is not of itself the only nor most important test to be applied; the acquisition and disposal of mineral rights was clearly within the objects and power of Leaseholds as shown by its Memorandum of Association and any profit derived from such transactions would be income derived from a business, and since the company lacked the necessary capital to carry on exploration and development of its properties, the only way such could be acquired was by disposing of a substantial portion of its rights by sublease or sale, and in engaging in such subleasing or selling Leaseholds was carrying on a business for profit and any money received thereby is income and subject to income tax.

3. That certain payments made to lease brokers by Leaseholds on behalf of a wholly-owned subsidiary company for the purpose of the latter acquiring and taking title to gas and oil leases in the Provinces of Saskatchewan and Manitoba were loans from Leaseholds to the subsidiary and as such not deductible from income within the provision of s. 53 of c. 25, Statutes of Canada, 1949, nor were they "annual payments" within the terms of the Statute since they were made to the lease brokers once and for all.

4. That the sum of $750 paid by Leaseholds to the Province of Alberta as a filing fee on these reservations is not deductible within s. 53 above since it is not an annual payment.

5. That the sum of $234,000 received by Minerals in 1949 and 1950 pursuant to the agreement entered into with Leaseholds providing for cancellation of a portion of the original agreement between the two companies is income and taxable as income from its business, since the original contract was an ordinary commercial contract made in the course of carrying on trade or business, namely, the disposal of Minerals' products; Minerals never intended to go into production on its own account and could make a profit only by the disposal in one form or another of such minerals as it owned.

6. That Minerals was not entitled to benefit from the interest moratorium provided by s. 50(6) of the *Income Tax Act*, c. 52, Statutes of Canada, 1948. *Provincial Paper Ltd.* v. *The Minister of National Revenue* [1955] Ex. C.R. 33 followed.

APPEALS under *The Income War Tax Act* and *The Income Tax Act*.

The appeals were heard before the Honourable Mr. Justice Cameron at Ottawa.

H. H. Stikeman, Q.C., N. D. McDermid, Q.C. and *G. McCarthy* for appellants.

D. W. Mundell, Q.C. and *K. E. Eaton* for respondents.

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

CAMERON J. now (June 30, 1958) delivered the following judgment:

At the request of the parties, these appeals were heard together. As the two appellant corporations were at all relevant times owned and controlled by the same shareholders and directors and as many of the issues in appeal arose out of transactions in which both appellants participated, it will be convenient to dispose of all the issues in one opinion. For the sake of brevity, I shall hereinafter refer to Western Leaseholds Ltd. and Western Minerals Ltd. as "Leaseholds" and "Minerals" respectively.

In 1943, Mr. Eric L. Harvie of Calgary, Alberta, a barrister and the senior partner in the firm of Harvie and Arnold, acquired the freehold mineral rights in some 496,000 acres in the province of Alberta from the receivers of British Dominions Land Settlement Corporation and Anglo-Western Oils Ltd., the former company being the registered owner of the mineral rights therein and the latter company holding a 999-year lease of such minerals. While he had made the agreement to purchase in his own name, Mr. Harvie was minded to turn it over to what was

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called "the Harvie Group", consisting of Mr. Harvie, his three children, his two law partners, Messrs. Arnold and Crawford, Miss Connor, who was Mr. Harvie's secretary, and a geologist, Mr. W. G. Dekoch. Both in the Group and in the companies later formed, Mr. Harvie had at all times the controlling interest.

In order to eliminate the difficulties which might be met by disagreement among or the death of any of the members of the Group, it was decided to incorporate two companies, one of which would own the freehold rights in the minerals (Minerals) and the other of which would be the operator (Leaseholds). Accordingly, under the *Alberta Companies Act*, Minerals and Leaseholds were incorporated in April, 1944. From Exhibits 2, 3, 4 and 5, it appears that the Memorandum of Association and the Articles of Association of each company were in identical terms. In each case, the company was authorized to issue 50,000 Class A common shares and 50,000 Class B common shares, without nominal or par value. Later herein it will be necessary to refer in more detail to the objects and powers set out in the Memorandum of Association.

By agreement dated July 7, 1944 (Exhibit 8), Mr. Harvie agreed to sell to Minerals all his interest in said minerals. Thereby, Minerals (as purchaser) agreed to convey to Harvie (as vendor), or his nominees, the 100,000 shares representing all its authorized capital. Harvie agreed to pay all unearned increment taxes and fees payable on the preparation and registration of the documents and all municipal and mineral taxes to the end of 1944. Minerals agreed to assume and carry out all obligations agreed to be assumed or carried out by Harvie under the provisions of his agreement to purchase and to indemnify him in respect thereof. Clause 3(c) thereof provided as follows:

> 3. As consideration herefor the Purchaser shall:
>
> (c) Grant to the Vendor, or at his request, to his nominee an option in the form and on the terms set forth in Agreement for Leases of even date hereto, between the Purchaser herein as "Owner" and Western Leaseholds Ltd. (the nominee of the Vendor herein) as "Operator", a copy of which Option Agreement has been approved by the parties thereto and the Vendor herein and signed by them for identification. The purchaser doth hereby release and forever discharge the Vendor of all claims and demands hereunder which are assumed by Western Leaseholds Ltd. under the said Agreement for Leases.

On the same date, Harvie entered into an agreement with Leaseholds (Exhibit 7) by which he assigned to it all the rights acquired by him under his agreement with Minerals, except the 100,000 shares allotted to him. In consideration therefor, Leaseholds agreed to allot to him or his nominees all its authorized capital; to issue to him Perpetual Redeemable Participating Income Debentures of a face value of $250,000; and to perform all the obligations it, as Operator, had entered into in the Agreement for Leases next referred to.

Exhibit 10 is the Agreement for Leases dated July 7, 1944, between Minerals (therein called the "Owner") and Leaseholds (therein called the "Operator"). It related to all the minerals in respect of which the Owner became the registered owner under the transfers. *Inter alia* it provided:

2. The owner hereby grants the Operator up to and including the 31st day of December A.D. 2940, the sole and exclusive right to acquire a lease and/or leases of the said minerals in the form and upon the terms and conditions included in the draft lease attached hereto as Schedule "B", and subject to the terms and conditions hereinafter set forth.

3. The Owner will grant the Operator a lease or leases covering any or all of the said minerals in respect to any or all of the said lands as may be from time to time requested by the Operator. Each lease shall be for such term as specified by the Operator and the Owner agrees to renew any such lease, cancel same, or grant a new lease or leases in respect to the said minerals, as from time to time requested by the Operator; PROVIDED that the term of any lease so granted shall not extend beyond the 31st of December, A.D. 2940.

4. IT IS UNDERSTOOD AND AGREED that the Operator shall be entitled to operate under the said leases on its own behalf or may at its sole election grant subleases in respect to any or all of the said minerals, which subleases may be on such terms and conditions specified by the Operator, provided the terms and provisions of the leases between the parties hereto are given effect to, the Owner agrees to consent and approve of any such sublease if requested by the Operator.

By clause 5, the Operator agreed to pay the Owner during the term of the agreement (a) all municipal and mineral taxes assessed against or payable by the Owner in respect of the said minerals; (b) a minimum annual sum of $1,000 exclusive of taxes but inclusive of any royalties payable; and (c) costs of preparation and registration of documents.

Then s. 6 provided that, when not in default, the Operator could from time to time surrender its right to acquire lease or leases on fulfilling certain conditions. Schedule B thereto is a draft lease which *inter alia* provides that the

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Operator shall pay the Owner (Minerals) a royalty in cash of 10 per cent. of the current market value of all leased substances produced, saved and sold from the said leased lands.

In January 1945, the Receivers of the former corporate owners and lessees conveyed the mineral rights direct to Minerals. Exhibit 6 is a sample of the duplicate certificate of title showing Minerals to be the owner of an estate in fee simple in "all mines and minerals other than gold and silver which may be found to exist within, upon or under" the lands therein described. In a few of the other titles there were other specific reservations of certain minerals such as coal.

As a result of these transactions, Minerals became the registered owner of the mineral rights so registered in its name, subject to the right of Leaseholds to lease such part or parts thereof as it desired until the year 2940 on the terms mentioned. Exclusive of taxes and the minimum annual payment of $1,000, Minerals' sole prospect of benefiting from the ownership of the minerals was to be derived from the royalties of 10 per cent. reserved to it in any lease it might grant to Leaseholds, unless, of course, Minerals and Leaseholds later agreed to a modification of the agreement. Leaseholds, on the other hand, had nothing except the right to call upon Minerals for such lease or leases as it might require. Harvie and his nominees—presumably the members of the "Harvie Group"—had received all the authorized stock in both companies and $250,000 in debentures of Leaseholds.

Exhibit 16 is an agreement dated May 15, 1946, between Minerals and Leaseholds. Therein it is recited that Leaseholds had received from the Shell Oil Company of Canada an offer to acquire an option to *purchase* the petroleum, natural gas and related hydrocarbons (other than coal) in approximately 300,000 acres of the lands referred to in the Agreement for Leases dated July 7, 1944 between Minerals and Leaseholds (Exhibit 10); that Shell, under the provisions of its offer, would be acquiring the interest of both companies in such products in the said lands and had requested that both companies enter into the agreement; and that it was in the interest of both companies to accept the said offer. The agreement provided that both

companies would sign the proposed Shell agreement; that in the event of Shell purchasing any mineral rights thereunder, Minerals would be entitled to receive out of the purchase price $2 per acre in settlement of its interest in the mineral rights so purchased and Leaseholds should be entitled to the balance of the fixed price.

On the same date, the agreement (Exhibit 15) was signed with Shell, the vendors of the first part being Minerals and Leaseholds. Thereby, Shell agreed to pay $30,000 as payment for the option to purchase said products in the said acreage. The option granted was for the calendar year 1946, with provisions for extensions on certain terms. If Shell took up the option in 1946 or 1947, it was to pay $20 per acre for the first 10,000 acres; $15 per acre for the second 10,000 acres; $10 per acre for the third 10,000 acres; and $5 per acre for additional acreage. If it purchased in 1948, 1949 and 1950, these rates were increased by $5 per acre. Shell was under no obligation to drill for or produce any petroleum it might so purchase, but it was obligated to pay "royalty shares" of all petroleum produced, sold or removed at the rate of $2\frac{1}{2}$ per cent. on acreage purchased in 1946; that rate increased by 1 per cent. per annum, according to the year of purchase, to a maximum of $6\frac{1}{2}$ per cent. if purchased in 1950—the last year to which the option could be extended. Shell paid the sum of $30,000 for the option which expired on December 31, 1946, without being exercised. That amount was entered in the accounts of Leaseholds as "capital reserve".

By letter dated February 4, 1947 (Exhibit 18) Minerals and Leaseholds confirmed to Imperial Oil Ltd. the terms of an option granted that day to the latter. The option was to *purchase* the petroleum, natural gas and related hydrocarbons (other than coal) in approximately 193,000 acres, until December 31, 1951. The purchase price was to be at the rate of $25 per acre for the first 10,000 acres; $20 and $15 per acre respectively for each of the next two additional 10,000 acres; and $10 per acre for any additional acreage. There was to be no drilling commitment on the part of Imperial, but royalties were reserved as follows—on acreage purchased in the first year, 3 per cent.; but increasing by 1 per cent. for acreage purchased in each of

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the succeeding years to a maximum of 7 per cent. on acreage purchased in the fifth year. The option payments were fixed at $50,000 annually, payable in advance "with the privilege to us of requiring prepayment of all the annual option payments, provided that you are notified of our election to acquire prepayment, on or before the 1st day of June, 1947". Pursuant to that provision, Imperial was required to pay and did pay $250,000 in full of "the option payments" in 1947. The full sum of $250,000 was carried by Leaseholds to "capital reserve". The agreement further provided that all option payments could be applied on account of the purchase price up to the extent of one-half of the purchase price. As shown by Exhibit 18, the full sum of $250,000 was later applied on account of the "purchase price".

In assessing Leaseholds for the taxation years 1946 and 1947, the respondent added to its declared income the two sums of $30,000 and $250,000 received from Shell and Imperial for their options to purchase. An appeal was taken to the Income Tax Appeal Board and, by a majority, the appeals were disallowed. An appeal is now taken by Leaseholds to this Court.

All other matters now in issue in these appeals were brought directly to this Court.

Pursuant to the agreement of February 4, 1947, Imperial Oil on February 2, 1949, exercised its option in respect of 2,208.50 acres at the purchase price of $25 per acre—a total of $55,212.50 (Exhibit 18). It elected to pay one-half of the purchase price out of the pre-paid option payments of $250,000—as provided for in the option—and forwarded its cheque for the sum of $27,606.25. That amount was placed by Leaseholds in its capital reserve.

Again, in 1950, Imperial Oil exercised its option to purchase all these products in specified acreages, the balance of the optioned lands being taken up in full on December 29, 1950 (Exhibit 18). The total payments made by Imperial in 1950, after allowing for the balance of the option payments of $250,000, amounted to $1,953,771.65. That amount was retained by Leaseholds and added to its capital reserve. In assessing Leaseholds, the respondent added to its declared income the sum of $27,606.25 in 1949, and the sum of $1,754,227.10 (being the payments of

$1,953,771.65 received from Imperial Oil less certain deductions of $199,544.55) for the taxation year 1950; Leaseholds now appeals from these assessments.

On January 1, 1949, Minerals entered into an agreement (Exhibit 20) with Barnsdall Oil Company and three other corporations—collectively called therein the "Operator" and referred to hereinafter as "the Barnsdall Group"—by which Minerals

> hereby grants, leases, lets and demises unto the Operator the sole and exclusive right and privilege to explore for by geological, geophysical and other means (whether now known or hereafter discovered or adapted to petroleum exploration), drill for, mine, produce, store and thereafter remove from the Operator's Lands and dispose of the Petroleum Substances the property of the Owner, which may be found to exist within, upon or under the Operator's Lands, in each separate Operator's Unit.

As shown by Exhibit 21, a letter dated February 22, 1949, from Leaseholds to Minerals, that agreement with the Barnsdall Group was negotiated by Leaseholds and was entered into by Minerals at the request and direction of Leaseholds pursuant to the latter's right to call for leases by the agreement of July 7, 1944 (Exhibit 10). The agreement covered about 146,000 acres. As shown by Exhibit 21, the consideration received by Minerals for the agreement, namely, $914,243.75 in cash, and the reservation of a royalty of 12½ per cent. of petroleum substances taken from the land, was to belong to Leaseholds except for the overriding royalty of 10 per cent. reserved to Minerals by the agreement with Leaseholds of July 7, 1944. In 1949, Leaseholds received the cash payment of $914,243.75 and carried it to its capital reserves. In assessing Leaseholds, however, this amount (less certain deductions) was added to the declared income and from that assessment Leaseholds now appeals.

Leaseholds also appeals from assessments made upon it for the years 1949 and 1950, such appeals relating to certain deductions claimed, but disallowed in the assessments. I shall postpone consideration of these matters and of the appeals of Minerals Ltd. until I have disposed of the issues to which I have referred.

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These matters are as follows:

(a) The receipt of $30,000 from Shell Oil and of $250,000 from Imperial Oil for their respective options in 1946 and 1947. As I have said, the Income Tax Appeal Board dismissed the appeals in reference to these two matters.

(b) The receipt of $27,606.25 from Imperial Oil and of $914,243.75 from the Barnsdall Group in 1949.

(c) The receipt of $1,754,227.10 from Imperial Oil in 1950.

What, then, is the true nature of these receipts? The assessments as to the receipts in 1946 and 1947 were made on the basis that they constituted income from a business and were therefore within the definition of income in s. 3(1) of the *Income War Tax Act*. As to the receipts in 1949 and 1950, the assessments were made on the basis that they were income from a business or property and therefore within the provisions of s. 3 of *The Income Tax Act*, 1948, as amended.

For Leaseholds, it is submitted that its business is and always has been that of exploring for and developing oil properties; that it had never been the intention to deal in options and leases as a business and that, in fact, it had not carried on such business; that the transactions which resulted in these receipts were all transactions of a capital nature and that the receipts were merely the realization of part of its capital assets, that capital asset, it is said, being the right to call for mineral leases from Minerals under the agreement of July 7, 1944.

Counsel for Leaseholds attached great importance to the evidence of Mr. Harvie as to his intentions regarding that company at the time he had it incorporated. For many years, he had been interested in the natural resources of the province and his policy had generally been to acquire rights, to hold and develop them himself, and if unable to do so, to abandon them. His personal wish was "to develop these minerals, find out what we have and proceed to develop them ourselves". He said that if he had not brought in partners, he might well have carried out that intention. His associates, Arnold and Dekoch, having other ideas, he acceded to their suggestions to take another approach. By "another approach", I assume that he meant

the disposal of at least some of the minerals either by leases or by options to purchase instead of having the development and production carried out by the company itself.

A statement of the intention with which a transaction is entered into is not of itself the only, nor the most important test to be applied. As stated by the President of this Court in *Cragg v. M. N. R.*[1]

> Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. The conclusion in each case must be one of fact.

As I have stated above, Leaseholds was incorporated in April, 1944. Its objects as disclosed by the Memorandum of Association (Exhibit 3) are very wide and include the following:

> (*a*) To acquire by purchase, lease, concession, license, exchange or other legal title, mineral properties, mines, mining lands, real estate, leases, easements, permits, reservations, concessions or any interest therein, minerals and ores and mining claims, options, powers, privileges, water and other rights, patent right, letters patent of invention, processes, and mechanical or other contrivances, and either absolutely or conditionally and either solely or jointly with others and as principals, agents, contractors, or otherwise, and to lease, place under license, sell, dispose of, and otherwise deal with the same or any part thereof, or any interest therein.
>
> (*c*) To prospect for, open, explore, develop, work, improve, maintain and manage gold, silver, copper, nickel, coal, iron, petroleum, natural gas, and other mines, quarries, mineral and other deposits and properties, and to dig for, raise, crush, wash, smelt, assay, analyze, reduce, amalgamate, and otherwise treat ores, metals, and minerals, whether belonging to the company or not, and to render the same merchantable, and to sell and otherwise dispose of the same or any part thereof, or any interest therein.
>
> (*n*) To make, acquire, manage, produce, hold, operate, use, dispose of, import and export, and otherwise deal in and with the said substances and products, rights to and interests in lands and other properties from which they may be derived; drilling, pumping, mining, milling, reducing, refining, smelting, and other plants, equipment or apparatus for producing, manufacturing, or otherwise working such substances and products; pipe lines, pumping stations, tank cars, tank ships, boats, barges, towboats and other conveyances; tanks, terminals, docks, and any other rights and properties, real personal or mixed, which may be necessary or convenient to the conduct of any of the said businesses.

The acquisition and disposal of mineral rights was therefore clearly within the objects and powers of Leaseholds, as shown by its Memorandum of Association. *Prima facie,* therefore, any profit realized from such transactions would be income derived from its business.

[1] [1952] Ex. C.R. 40 at 46.

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In *Anderson Logging Co. v. The King*[1], Duff J. (later C. J. C.), in delivering the judgment of the Court, said:

> The sole raison d'etre of a public company is to have a business and to carry it on. If the transaction in question belongs to a class of profit-making operations contemplated by the Memorandum of Association, *prima facie*, at all events, the profits derived from it is a profit derived from the business of the company.

In a later case, *Sutton Lumber & Trading Co. Ltd. v. M. N. R.*[2], Locke J., in delivering the judgment of the Court, said:

> The question as to whether or not the present appellant was engaged in the business of buying timber limits or acquiring timber leases with a view to dealing in them for the purpose of profit is a question of fact which must be determined upon the evidence. It may be noted that the memorandum of the appellant, while including the power to sell or dispose of timber properties, *to deal in* timber licenses is not one of the objects stated as it was in the *Anderson* case. Had it in fact included such an object, the evidence in this case demonstrated that the company at no time carried on or intended to carry on any such business. Unlike that case, in the present matter all the available evidence as to the activities carried on or intended to be carried on by the company in the fifty years prior to the time of the trial of this section was given or tendered by the appellant. The decision in that case does not, in my opinion, affect this matter.

In the instant case, counsel for Leaseholds submits that upon the whole of the evidence it should be found as a fact that the company was not engaged in the business of acquiring mineral rights with a view to dealing in them for the purpose of profit.

An effort was made at the trial to minimize the importance of these stated objects in the Memorandum of Association. Mr. Arnold, who was Mr. Harvie's junior partner, prepared the original Memorandum of Association in what is called the Short Form, intending to rely to a substantial extent on statutory powers conferred on all companies by *The Companies Act of Alberta*. Mr. Harvie, however, was accustomed to using the longer form and on his insistence the objects were set out in full. They were therefore included deliberately and not by chance as was suggested.

Then it will be noted that by clause 4 (*supra*) of the basic agreement of July 7, 1944 (Exhibit 10) between Minerals and Leaseholds, the parties clearly contemplated the possibility of Leaseholds granting subleases, in respect

[1] [1925] S.C.R. 45 at 56.

[2] [1953] 2 S.C.R. 77 at 93.

to all or any of the minerals on such conditions as it might determine and suitable provision was made therefor. In this connection, it may be noted that while the royalty reserved to Minerals was 10 per cent. of production, the customary royalty in such matters was 12½ per cent.

On the evidence, I have no hesitation in finding that one of the purposes in the minds of the officers of Leaseholds was that of ultimately going into production on its own account. But from the outset, it was also apparent that they could not do so without disposing of substantial portions of their minerals by sublease or sale. Mr. Arnold made the position quite clear when he stated that there were tremendous areas involved and "we could not possibly do it ourselves. We had to have help, and we had to have help from major companies who could afford to speculate in a very cold area which they had abandoned before".

In explaining why the agreement with Shell Oil was entered into, he said, "Well as I said before, our primary interest in any negotiation there was two-fold. We were extremely anxious to interest the major companies in going back into that area and exploring for oil and if they spent money there—it was either a question of us going in and doing it ourselves. We did not have the money to do it and we were anxious that someone go in there and explore."

Lacking the necessary capital to satisfactorily explore the lands and drill wells, they were obliged to resort to other steps to obtain their objectives. What they actually wanted was to enter into agreements with others, including some of the major oil and gas companies, by which the latter would undertake to explore and do the drilling, a very costly operation and at that time considered to be also a very risky operation. These companies, however, were unwilling to undertake the obligation of drilling and in the result, Leaseholds finally consented to modify their original requests and consented to the options to purchase (as in the case of Shell and Imperial Oil) and to the Leases to the Barnsdall Group. It was hoped by Leaseholds that the very substantial down payments for these options to purchase and for the lease, coupled with the rentals and increasing royalties in succeeding years would spur the other parties to complete their exploration and drill wells at an early date. If that were done, the company would

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benefit not only by the rentals and royalties received, but by the benefit that would accrue to the lands still held, if gas or oil were discovered by the purchasers or lessees.

When one takes into consideration the number of such transactions, the acreages involved, the rapidity with which Leaseholds disposed of its rights after they were actually acquired, it is apparent that such transactions were not characteristic of a company which merely wishes to hold an investment. On the contrary, they indicate the carrying out of a policy which was followed continuously from almost the inception of the company to dispose of the mineral rights at a profit by selling or leasing them. I do not suggest that they at any time abandoned the other plan they had in mind, namely, to go into production themselves when they were in a position to do so. The fact is that at least until the end of 1947 they did no drilling or development on their own account, their field activities being confined to certain surveys and mapping of the land. In later years Leaseholds went into production on a very large scale, and at the date of the trial was said to be the second largest producer in the field. The financing of this part of its operations was made possible by the funds derived from its sales or subleases of mineral rights.

In all, Leaseholds entered into some nine agreements to sublet or sell their mineral rights. In addition to the Shell, Imperial Oil and Barnsdall agreements already mentioned, there were the following:

A reservation—i.e., a right to explore with an option to purchase—was granted to A. E. Verner by letter dated October 4, 1944, over some 2,300 acres in consideration of the payment of $1,146.35 (Exhibit 34). That reservation (called P.R.3) also refers to an earlier petroleum reservation No. 2 granted to Verner on June 1, 1944, the rights in which were cancelled by P.R.3. A further reservation was granted for about 20,000 acres to Rusylvia. In both of these cases, while there were no legal obligations on Leaseholds to grant these reservations, it is said there was a moral obligation to continue them due to verbal promises made by the original owners. Then by letter dated October 10, 1945 (Exhibit 12) a similar reservation was granted to one Cameron over some 5,000 acres, the consideration being $682.30. A reservation was also granted to one Evans, the

particulars of which are not clear. Again on November 1, 1946, Minerals granted a lease to Leaseholds over three-quarter sections in the Leduc area (Exhibit 29), and on the same date Leaseholds issued a sublease (Exhibit 17) on the same property to Imperial Oil for a period of ten years or so as long as gas and oil could be found thereon. The rental was one dollar per acre and the royalty reserved $12\frac{1}{2}$ per cent. of the market value of production.

It is important also to note the magnitude of the acreages leased or sold. As I have said, the original acreage acquired by Minerals and which Leaseholds had the right to lease, was 496,000. The Shell option to purchase related to some 300,000 acres and after it expired, the new option to purchase to Imperial Oil covered 193,000 acres. The later agreement with Barnsdall, entered into while the Imperial Oil option was in effect, covered 146,000 acres. These facts seem to indicate clearly that Leaseholds had adopted a definite plan to turn its rights to account by leasing or selling them at a profit. It may be noted here that the main Imperial Oil option was for the *purchase in fee* of the minerals and their options were taken up in succeeding years on that basis. In the final result, however, Imperial requested that it be given a 979 years' lease of the hydrocarbons instead of a conveyance and by the agreement Exhibit E, Minerals, with the concurrence of Leaseholds, granted such a lease dated December 30, 1950, the royalty reserved being 9 per cent. The evidence indicates that Imperial requested the lease instead of the conveyence due to difficulties experienced in the Land Titles Office in the registration of titles in fee with royalties reserved.

Finally, by agreement dated December 30, 1950 (Exhibit E), Minerals signed an Agreement of Settlements and Adjustments and, subject to the adjustments and agreements, the Agreement for Leases dated July 7, 1944, was terminated. *Inter alia*, the new lease to Imperial Oil was to remain in effect. All monies payable for the purchase price by Imperial Oil were to be the property of Leaseholds excepting for $234,394.68, being the amount paid by Leaseholds to Minerals as consideration for reducing the royalty payable under the Agreement for Leases (10 per cent.) to 9 per cent., which was the royalty reserved to Minerals by the new agreement with Imperial Oil. This latter item

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will be referred to later in connection with Minerals' appeals. Minerals also granted a petroleum and natural gas lease to Leaseholds for 996 years over 293,568 acres (including the land covered in the Barnsdall lease). The royalty reserved to Minerals by the new lease was 10 per cent. of production.

It is of particular interest to note, also, that Leaseholds had actually negotiated the Shell Oil option before it entered into the agreement with Minerals, by which both Minerals and Leaseholds would enter into the agreement with Shell. Similarly, the main agreement with Imperial Oil was signed by both Minerals and Leaseholds on the same day (Exhibit 18). The Leduc lease to Imperial Oil was sublet by Leaseholds on the same day it took up the lease from Minerals. In the same way, Leaseholds negotiated the Barnsdall Agreement, authorized Minerals to enter into the agreement directly with Barnsdall without having itself actually acquired the mineral leases. There is, therefore, the clearest indication that as to these very substantial acreages, Leaseholds had no intention of retaining any rights therein (except for rents and royalties reserved) or of drilling for and producing oil or gas therefrom. It had prevented itself from doing so unless, of course, the options to purchase leases were surrendered.

In my view, no distinction can be drawn between the five items of profit now under consideration. They are all gains which fall within the test laid down in *Californian Copper Syndicate v. Harris*[1], namely, whether the amount in dispute is "a gain made in an operation of business in carrying out a scheme for profit-making". That principle was approved in a judgment of the Privy Council in *Commissioner of Taxes v. Melbourne Trust*[2], and in *Ducker v. Rees Roturbo Development Syndicate*[3]; it has been followed in a great many Canadian cases.

Generally speaking, a business is operated for the purpose of making a profit and the pursuit of profits may be carried on in a variety of ways and by different operations. In the instant case, it seems to me that the business of Leaseholds was carried out in two stages and involved two different operations. While the purpose of ultimately

[1] 5 T.C. 159. [2] [1914] A.C. 1001.
[3] [1928] A.C. 132.

developing its own resources may have been kept in mind throughout, the first operation necessarily consisted of the acquisition and disposition of mineral rights so as to acquire funds with which to enter into the second stage, namely, the drilling for and operation of oil and gas wells on its own account. The possibility of disposition of the mineral rights had been contemplated since the company was formed. In dealing with its mineral rights in this fashion, it did not do so accidentally but as part of its business operations, and although possibly that line of business was not of necessity the line which it hoped ultimately to pursue, it was one which it was prepared to undertake, and, by its charter, had power to undertake.

Reference may usefully be made to the case of *Ducker v. Rees Roturbo Development Syndicate, Ltd.*, cited above. The facts and findings are set out in the headnote as follows:

The respondent company was formed primarily for the purpose of acquiring the benefit of an invention relating to centrifugal pumps, and it acquired from the inventor his existing patent and two-thirds of any foreign patent rights in respect of the invention, the inventor reserving to himself the remaining one-third. In the course of its business the company acquired further English and foreign patents in connection with the invention. The main business of the company was the granting of manufacturing licences under its patents, but it always contemplated the possibility of a sale of its interest in the foreign patents. The respondent company and the inventor granted to an American company a licence to manufacture under a United States patent with an option to purchase, which was exercised.

Upon an appeal by the respondent company against assessments to income tax and excess profits duty upon a sum representing the company's share of the proceeds of the sale of the United States patent, the company claimed that the sum in question was a capital asset and not a profit of its circulating capital. The Special Commissioners decided that profits on the sale of patents arose in the course of the company's business and were chargeable to tax and duty:—

Held, that the Special Commissioners had not wrongly directed themselves, and that there was ample evidence to support their conclusion of fact.

The test laid down by the Lord Justice-Clerk (Macdonald) in *Californian Copper Syndicate v. Harris* (1904) 6 F. 894; 5 Tax Cas. 159 approved.

Lord Buckmaster in delivering the judgment in the House of Lords (all the other judges concurring) said at p. 141:

Turning to the findings of the Commissioners, I find that they set out in detail the circumstances connected with the working of this company, and, in particular, the reports, which begin in 1907 and continue down to

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1918. These reports show that the directors were contemplating from the beginning the possibility of the sale of some of these patents. It is quite true that they preferred not to sell them if a sale could be avoided, but the statement in para. 11 of the case is quite plain, that "the possibility of the sale of the foreign patents or rights has always been contemplated by the appellant company in respect of such interest as it possessed in the foreign patents." It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property, but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake.

My Lords, I find myself unable to see that in this case the Commissioners have wrongly directed themselves, and if they have not wrongly directed themselves, there appears to me to be abundant evidence upon which their conclusion of fact could be supported. It is for this reason that I think this appeal should be allowed.

In my opinion, the profits here in question were gains made in the carrying on or carrying out of a business and in the scheme for profit-making. Those relating to the years 1946 and 1947 are therefore within the definition of income as found in s. 3(1) of the *Income War Tax Act;* as a result, the appeals from the Income Tax Appeal Board in respect of these years will be dismissed with costs, and the assessments made upon Leaseholds affirmed. Those profits relating to the years 1949 and 1950 fall within the provisions of ss. 3 and 4 of *The Income Tax Act* 1948 and are therefore taxable profits. The respondent therefore was right in adding these amounts to the declared income of the appellant and the appeals in regard thereto will be dismissed.

I turn now to certain deductions claimed by Leaseholds for the years 1949 and 1950 and disallowed in part by the respondent. In 1949, Leaseholds caused to be incorporated Prairie Leaseholds Limited as a wholly-owned subsidiary for the purpose of acquiring and taking title to gas and oil leases in the provinces of Saskatchewan and Manitoba. In 1949, Leaseholds for and on behalf of Prairie Leaseholds disbursed $63,404 to individual lease brokers in payment for such leases, covering 108,510 acres, all of which were taken in the name of Prairie Leaseholds. In its annual return for that year, Leaseholds claimed as a deduction $10,851 of that amount which represented the amounts which the lease brokers had paid to owners as "lease rentals" and that amount was apparently allowed as a

proper deduction. In addition, Leaseholds claimed a further deduction of the balance of $52,553, that amount having been kept by the lease brokers as their profit on the transaction. This deduction was disallowed in full by the respondent.

Similar transactions took place in 1950, Leaseholds expending $157,225.12 for leases on approximately 240,000 acres. It claimed and was allowed $37,086.52 as "lease rentals", but its claim for the balance of $120,138.60—which was of a like nature as the claim for $52,553 in 1949—was likewise disallowed.

Counsel for the appellant submits that these two items of $52,553 and $120,138.60 are deductible under the provisions of s. 53 of c. 25, Statutes of Canada, 1949 (Second Session) as amended, the relevant portions thereof being as follows:

53. (1) A corporation whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natuarl gas may deduct in computing its income, for the purposes of The Income Tax Act, the lesser of

(*a*) the aggregate of the drilling and exploration costs, including all general geological and geophysical expenses, incurred by it, directly or indirectly, on or in respect of exploring or drilling for oil and natural gas in Canada
  (i) during the taxation year, and
  (ii) during previous taxation years, to the extent that they were not deductible in computing income for a previous taxation year, or

(*b*) of that aggregate an amount equal to its income for the taxation year
  (i) if no deduction were allowed under paragraph (*b*) of subsection one of section eleven of the said Act, and
  (ii) if no deduction were allowed under this subsection,
  minus the deduction allowed by section twenty-seven of the said Act.

(2) (Not relevant)

(2A) In computing a deduction under subsection (1) or (2) no amount shall be included in respect of a payment for or in respect of a right, licence or privilege to explore for, drill for or take petroleum or natural gas other than an annual payment not exceeding $1.00 per acre.

In the appellant's Notice of Objection for 1949 it was stated:

In the year 1949 through its wholly-owned subsidiary, Prairie Leaseholds Limited, the taxpayer acquired certain petroleum and natural gas leases in the province of Saskatchewan and paid the sum of $52,553 to various lease brokers. The said payments were annual payments made in respect of a right, licence or privilege to explore for, drill for or take petroleum or natural gas and did not exceed one dollar per acre.

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A similar statement appears in the Notice of Objection for 1950.

It is unnecessary for me to say anything as to the amounts which were allowed as deductible expenses for these two years. Whether or not those amounts were properly deductible under s. 53 (*supra*), does not now concern me as they were, in fact, allowed by the assessment.

I am fully satisfied, however, that the amounts now in dispute were properly disallowed. In no proper sense can it be said that these payments were annual payments within the meaning of s-s. (2)A of s. 53. In my view, the "annual payment" therein referred to relates to a payment made or to be made by the taxpayer for its right to explore for, drill for or take petroleum or natural gas, *during each year* for which the taxpayer has the right, licence or privilege in question. Here the amounts in question represent the profit of the lease brokers who upon the completion of each transaction dropped out of the matter entirely and were not thereafter entitled to any further payment by the appellant in respect of that transaction.

The real nature of these payments was revealed by the evidence at the trial. It is true that they were made by the appellant to the lease brokers, but in every case the payments were made by Leaseholds for and on behalf of Prairie Leaseholds Limited which was itself without funds to pay for the leases. Exhibit 27 is a copy of an agreement dated January 2, 1950, between Prairie Leaseholds Limited (as owner) and Western Leaseholds Limited (as operator). The recitals therein are as follows:

> WHEREAS the Owner has acquired and is continuing to acquire in the Provinces of Alberta, Sasktachewan and Manitoba mineral rights, including petroleum and natural gas leases and/or other mineral leases, by the purchase of such rights and leases or of interests therein;
>
> AND WHEREAS the owner has applied to the Operator for a loan to finance the purchase of such mineral rights including leases as aforesaid and has agreed to grant leases or subleases thereof, as the case may be, to the Operator on the terms and conditions hereinafter set forth.

The evidence of Mr. Meech, general manager, and director of Leaseholds, was that this agreement related to all the leases acquired by Prairie Leaseholds whether in 1949, 1950 or later. In cross-examination, Mr. Meech

was referred to certain questions asked him on his examination for discovery and admitted that they were correctly reported. They are as follows:

Q. Did Western Leaseholds lend this money to Prairie Leaseholds or do you remember how the transaction was handled?

A. I believe Western advanced an open account to Prairie Leaseholds but I will have to inform myself.

Q. What do you mean exactly by open account?

A. Loans.

Then as a result of undertakings given at the examination for discovery to produce further information, Mr. Meech on behalf of Leaseholds wrote to his counsel, Mr. Stikeman, a letter dated August 4, 1955, giving certain additional information which was conveyed to counsel for the respondent (Exhibit F). It includes the following questions and answers.

(*c*) Q. Who actually made the payment of $52,533 to the lease brokers?

A. Western Leaseholds Limited on behalf of Prairie Leaseholds Limited.

(*d*) Q. Did Western Leaseholds lend this money to Prairie Leaseholds?

A. Yes.

While these answers relate specifically to the year 1949, there is nothing to indicate that they do not also apply to the year 1950.

From this evidence it is abundantly clear that these amounts, while paid out by Leaseholds directly to the lease brokers were, in fact, considered by both Leaseholds and Prairie Leaseholds to be loans by the former to the latter. There is not a tittle of evidence to suggest that they ever were anything but loans. As such, s. 53 above referred to is of no assistance to the appellant. The appeal as to these amounts for the years 1949 and 1950 will therefore be dismissed.

The Minister also disallowed the claim of Leaseholds to deduct from its income the sum of $750 paid by it in 1949 to the province of Alberta as a filing fee on three reservations in respect of a right, licence or privilege to explore for, drill for or take petroleum and natural gas, which amount is said not to exceed one dollar per acre. Mr. Meech stated that in the provincial regulations under which the fee was payable, it is referred to as a "filing fee" and is payable but once, at the time of making the application. The claim for this deduction is made under the

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provisions of s. 53, above referred to. There is very little evidence as to the nature of this expenditure, neither the provincial regulations nor the reservations acquired being put in evidence. The only evidence is that it is a filing fee in respect of the acquisition of petroleum and natural gas reservations (which I may assume gave the appellant certain rights of exploration and possibly an option to later acquire a lease) and the fact that it was paid once only. In view of my earlier comments as to the meaning of an "annual payment" as these words are used in s-s. (2)(a) of s. 53, I am unable to find that this payment falls within the provisions of s. 53. It is not suggested that it is deductible under any other provisions of *The Income Tax Act*. Accordingly, the appeal on this item will be disallowed.

In the result, therefore, the appeals of Leaseholds for the years 1949 and 1950 must fail, and will be dismissed with costs. Inasmuch as certain other matters relating to the assessments for these years were (by consent) referred back to the Minister for reconsideration and re-assessment at the trial, the matter which I have now determined will also be referred back to the Minister for the purpose of completing the re-assessment.

There remains for consideration the appeals of Minerals in respect of the assessments made upon it for the years 1949 and 1950. Leaseholds paid Minerals $34,850.13 in 1949 and $199,544.55 in 1950 under the circumstances presently to be mentioned. Minerals considered these receipts to be on capital account and did not include them in its income tax returns, but in assessing Minerals, the respondent added the full amounts thereof to its declared income. Minerals now appeals from such assessments.

It will be recalled that by the terms of the main Agreement for Leases between Minerals and Leaseholds dated July 7, 1944 (Exhibit 10), the latter was required to pay to the former 10 per cent. of the current market value of all leased substances produced, saved and sold from the lands leased by Leaseholds. By the main agreement with Imperial Oil dated February 4, 1947 (Exhibit 18), Imperial was required to pay Leaseholds a royalty of 3 per cent. on acreage purchased in the first year of the option, that royalty increasing, however, by 1 per cent. per year in

each of the succeeding years to a maximum of 7 per cent. By a letter-agreement dated December 31, 1947 (Exhibit 19) between Minerals and Leaseholds, it was agreed that Leaseholds should retain the $250,000 option money paid by Imperial and that in respect of the Imperial agreement, Minerals would grant to Leaseholds an exclusive option to purchase from time to time up to 7 per cent. of its royalty on the following basis:

	Per acre
On the first 10,000 acres	$2.63 for each 1% purchased
" " second " "	2.10 " " " "
" " third " "	1.58 " " " "
" " balance of acreage	1.05 " " " "

The only clear evidence relating to these payments of $34,850.13 and $199,544.55 is found in a paragraph of Exhibit 32—an agreement between Minerals and Leaseholds dated December 30, 1950 and called "An Agreement of Settlement and Adjustments". *Inter alia* that agreement provided:

1. Re Agreement for Leases, dated the 7th day of July, A.D. 1944, hereinafter referred to as the "Agreement for Leases".

It being agreed between the parties hereto that the option rights for leases under the provisions of Agreement for Leases shall be terminated after giving effect to the following, namely:

(*a*) The following presently existing Agreements shall remain in full force and effect:

(3) Petroleum and Natural Gas Lease, dated the 15th of January, A.D. 1951 (to be effective from the 31st of December, A.D. 1950) made between Minerals as "Lessor" and Imperial Oil Limited as "Lessee", hereinafter referred to as "Imperial Oil Lease", covering One Hundred Ninety-three Thousand, One Hundred Thirty-seven and Seventy-nine One Hundredths (193,137.79) acres more or less. It being agreed that Western Leaseholds relinquishes all rights and claims in respect to the said lands or lease, SUBJECT To Leaseholds being entitled to all monies paid by Imperial Oil Limited as the purchase price for the said lease, under the terms of the Option Letter, dated the 4th of February, A.D. 1947, addressed to Imperial Oil Limited, and signed by each of the parties hereto excepting the sum of Two Hundred and Thirty-four Thousand, Three Hundred and Ninety-four Dollars and Sixty-eight Cents ($234,394.68), being the amount paid by Leaseholds to Minerals as consideration for reducing the royalty payable under the Agreement for Leases from Ten Percent (10%) to Nine Percent (9%), which sum was computed on the basis set forth in letter between the parties hereto, dated the 31st day of December, A.D. 1947.

The item of $234,394.68 mentioned therein is made up of the two payments made by Leaseholds to Minerals, namely, $34,850.13 in 1949 and $199,544.55 in 1950.

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By an agreement of the same date between Minerals and Imperial Oil (Exhibit E), Minerals leased to Imperial Oil for nine hundred and seventy-nine (979) years the petroleum and natural gas and all related hydrocarbons other than coal in 193,137.79 acres, Minerals reserving to itself a 9 per cent. cash royalty. There is no evidence as to why Imperial Oil agreed to pay a 9 per cent. royalty when under its original agreement it was required to pay smaller royalties for lands taken up under its option in the years 1949 and 1950.

Counsel for Minerals submits that these amounts were capital receipts and ought not to be regarded as forming part of the profits arising from the carrying on of its trade or business. For the Minister it is contended that they were income from the business carried on by Minerals or, alternatively, that they were income from property and that consequently the profit therefrom is taxable income under ss. 3 and 4 of *The Income Tax Act*.

I must confess that I have found more difficulty in reaching a conclusion on this point than on any of the other matters now under appeal and the opinion which I have finally arrived at, and will now endeavour to state, was reached only after a very complete examination of the facts and after reaching a definite conclusion as to the nature of the receipts in question.

Counsel for Minerals submits that in effect Leaseholds purchased 1 per cent. of the Imperial Oil royalty from Minerals. I do not think that that is quite so. While the amount of the payments may have been computed on the basis of the formula contained in the agreement of December 31, 1947 (Exhibit 19), Leaseholds did not actually acquire 1 per cent. of the Imperial Oil royalty. It is clear that after December 30, 1950, Minerals was entitled to the full royalty of 9 per cent. and Leaseholds was entitled to no part thereof.

It seems to me that the only reasonable interpretation to be put upon that part of the Agreement of Settlements and Adjustments, which I have cited above, is that Minerals and Leaseholds thereby agreed to cancel that part of their contract of July 7, 1944 (Exhibit 10) by the terms of which Leaseholds was bound to pay Minerals 1 per cent. more royalty than Imperial Oil by the terms of

the new agreement of December 30, 1950 would thereafter pay Minerals, namely, 9 per cent. The consideration for the cancellation of that part of the contract was the total of the several amounts paid in 1949 and 1950.

Mr. Stikeman submitted that compensation paid for the cancellation of the contract under these circumstances was a capital receipt. He relied on certain statements in the *Van Den Berghs Ltd. v. Clark*[1] case—a decision of the House of Lords. In that case Van Den Berghs, which carried on the business of manufacturing and selling margarine and other products, entered into a profit sharing and non-competition agreement in 1908 with a Dutch company. Due to difficulties occasioned by the First World War, the companies were unable to compute their several share of the profits and it was therefore subsequently agreed that the agreements would be cancelled for the future upon the payment to Van Den Berghs of the sum of £450,000. In the House of Lords it was held that such payment was for the cancellation of the Van Den Berghs' future rights under the agreements which constituted a capital asset and that the money so received was therefore a capital receipt. At p. 431 Lord MacMillan stated:

> Now what were the Appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the Stated Case "pooling agreements", but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the Appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily in itself an item of income. As Lord Buckmaster pointed out in the case of the *Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue,* 12 T.C. 427 at p. 464: "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test".

That case, however, is clearly distinguishable on its facts. Lord MacMillan was careful to point out the special nature of the "pooling agreements" that were there cancelled and to distinguish the cancellation of such agreements from

[1] 19 T.C. 390.

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the cancellation of ordinary commercial contracts made in the course of carrying on trade. In the paragraph immediately following that cited, he said:

> The three agreements which the Appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary, the cancelled agreements related to the whole structure of the Appellants' profit-making apparatus. They regulated the Appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an organisation of a trader's activities can be regarded as an income disbursement or an income receipt. Mr. Hills very properly warned your Lordships against being misled as to the legal character of the payment by its magnitude, for magnitude is a relative term and we are dealing with companies which think in millions. But the magnitude of a transaction is not an entirely irrelevant consideration. The legal distinction between a repair and a renewal may be influenced by the expense involved. In the present case, however, it is not the largeness of the sum that is important but the nature of the asset that was surrendered. In my opinion that asset, the congeries of rights which the Appellants enjoyed under the agreements and which for a price they surrendered, was a capital asset.

In my opinion, the contract cancelled in the instant case was an ordinary commercial contract made in the course of carrying on trade or business, namely, the disposal of Minerals' products. The evidence is clear that Minerals never intended to go into production on its own account. It could make a profit only by the disposal in one form or another of such minerals as it owned. By the Agreement for Leases with Leaseholds, it obligated itself to dispose of all its minerals to the latter company (or its assigns)—an ordinary commercial transaction made in the course of what was undoubtedly its business, and entered into for the sole purpose of profit making, as evidenced by its reservation of a 10 per cent. royalty. It had virtually no business operation other than complying with the requirements of Leaseholds (or its assigns) from time to time and the supervision of such contracts as it entered into pursuant thereto.

In my opinion, the principle to be followed is that stated in *Short Brothers Ltd. v. Commissioners of Inland Revenue*[1]. The facts appear in the headnote as follows:

(1) The Appellant Company in the first case contracted in February and March, 1920, to build two steamers, but in November of that year agreed to the cancellation of the contracts in consideration of the payment of the sum of £100,000, which was paid to it on 26th November, 1920. The Commissioners of Inland Revenue took the view that this sum should be included in the computation of the profits of the Company for the accounting period of twelve months ending on 30th June, 1921 (the final accounting period of the Company for the purposes of Excess Profits Duty).

The Company contended that the said sum was a capital receipt, and alternatively that, if it was a revenue receipt, it should be apportioned over the periods during which the work under the contracts would have been performed and should not be regarded as a profit wholly attributable to the accounting period in question.

Held, in the Court of Appeal, that the said sum was chargeable to Excess Profits Duty as a receipt in the ordinary course of the Company's trade, and must be included in the profits for the accounting period ending on 30th June, 1921, in which it became payable and was in fact paid.

At p. 972 Lord Hanworth, M. R., said:

It is not denied that Messrs. Short Brothers, Limited, carry on a business of building ships, and in the course of carrying on their business they must enter into a great number of contracts—contracts, some of which are fulfilled, possibly, some of which are broken, some of which, possibly, are terminated; but in all such matetrs it is not argued that Messrs. Short Brothers, Limited, have less power than other business firms to determine whether or not they will bring to an end, upon terms which they are disposed to agree, contracts which they have entered into, contracts which, for one reason or another, are to be terminated in the interests of one party or the other to the contract. Once one sees that a contract may be determined in the course of business, it appears to me that we have the answer to the problem which is put before us.

Reference may also be made to *The Commissioners of Inland Revenue v. The Northfleet Coal and Ballast Co. Ltd.*[2] and to *Burmah Steam Ship Co. Ltd. v. Commissioners of Inland Revenue*[3].

For these reasons, I am of the opinion that the compensation moneys so received for the cancellation of a portion of the contract—the only portion thereof in which Leaseholds had any interest—was taxable income of Minerals in the years 1949 and 1950. The appeals on this point must therefore be dismissed.

Western Minerals also appeals in respect of an interest charge made upon it by the respondent, dated September 22, 1953, for its taxation year ending December 31,

[1] 12 T.C. 955. [2] 12 T.C. 1102.
[3] 16 T.C. 67.

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1950. It filed its return for that year within six months of the end of its fiscal year, namely, on June 30, 1951. On July 31, 1951, the respondent forwarded to the appellant a Notice of Assessment which for the sake of clarity I shall refer to as the first Notice of Assessment. That notice showed a tax levied of $23,789.79, with an equal amount paid on account and no unpaid balance. Under date of September 9, 1953, the Minister, acting under the provisions of s. 42 of *The Income Tax Act,* forwarded a Notice of Reassessment indicating a tax levied of $215,049.32; after crediting the payments on account of $23,789.79, there was added an interest charge of $25,300.17, showing a balance unpaid of $216,559.70. This notice refers to the Notice of Assessment of July 31, 1951, as the "original assessment". Again, for the sake of clarity, I shall refer to this notice of September 9, 1953, as the second Notice of Assessment.

Subsequently, on September 22, 1953, the respondent forwarded to the appellant a further Notice of Re-assessment called "Revised Assessment Replacing Assessment Issued September 9, 1953". This final notice was apparently issued to correct a mathematical error in the computation of interest drawn to the attention of the tax officials by the appellant and resulted in the reduction of the interest charges by about $355. While the appeal is taken from the revised assessment dated September 22, 1953, the appellant's counsel does not contend that this third notice has any bearing on the particular "interest" point now in issue.

This portion of the appeal is based on s-s. (6) of s. 50 of the Act.

> 50. (6) No interest under this section upon the amount by which the unpaid taxes exceed the amount estimated under section 41 is payable in respect of the period beginning 12 months after the day fixed by this Act for filing the return of the taxpayer's income upon which the taxes are payable or 12 months after the return was actually filed, whichever was later, and ending 30 days from the day of mailing of the notice of the original assessment for the taxation year.

In its Notice of Appeal, the appellant submitted that the first "genuine assessment" was that mailed to it on September 22, 1953, but at the trial his argument was that the second notice of September 9, 1953, was in the circumstances to be mentioned, the first or original Notice of

Assessment. If that be so, then he submits that under s-s. (6), the appellant is relieved from duty for the period June 30, 1952 (being twelve months after the date fixed for filing the return) to October 9, 1953 (being thirty days from the date of mailing of the notice on September 9, 1953) which the appellant says was the notice of the original assessment.

For the Minister, it is submitted that the original assessment was that contained in the first notice of July 31, 1951, and that consequently, on a proper interpretation of s-s. (6) of s. 50, the appellant is not relieved from payment of any interest payable under the other provisions of s. 50.

To support his submission, Mr. Stikeman relied on the evidence of A. O. Ellis, taken on examination for discovery on October 25, 1955. Mr. Ellis at all relevant times was director of taxation at the Calgary office of the Department of National Revenue (Income Tax) where the returns were filed and the assessments made and the Notices of Assessment forwarded. He personally had no part in the processing of the return or in the assessment, but had informed himself as to the procedure followed. From his evidence, it appears that the T2 return was received by the mailing unit on June 30, 1951, accompanied by a cheque for $23,789.79, the full amount of the tax payable as computed by the appellant. Then the cashier issued a receipt for the remittance which was mailed to the taxpayer and the cashier initialled the return showing that the amount said to have been remitted was received. The return was then sent to "assessing control"; a check was made in the ledger accounts as to any credits claimed or paid. It was then sent to the "assessment section"; then the assessor examined the return and the net profit shown therein; he reviewed the company's figures, reconciling the profits shown in the attached statements with the profits shown on the T2 return, and thereby reached a basis for computing the tax as estimated by the taxpayer. He accepted the company's reconciliation and accepted the figures as stated in the T2 return, indicating on the T2 return that he had assessed the return. Then the assessor computed the tax on the income as shown in the return. Having verified that the tax as computed by the appellant corresponded with his own computation of assessment and

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having verified the amount of payments as received by the accounting department, he completed Form T-6-7-L containing the information from which Form T-6-7-A—the Notice of Assessment—was prepared by a typist. Then the return and the computation so made were sent to the checking unit where a check was made as to the work of the assessor and the typed Notice of Assessment to ensure that there were no typographical errors. This last step was a mere mathematical computation and the assessor's computation of the income was not there questioned. One copy of the Notice of Assessment was sent to the taxpayer and others were retained for internal use. The procedure which I have outlined was apparently followed in the case of the first Notice of Assessment dated July 31, 1951.

At some stage, the T2 return was segregated for further investigation, but whether this was done before or after the first Notice of Assessment was mailed is not shown. That investigation by the assessing section took place at some time between the date of issue of the first and second Notices of Assessment. The assessor who reviewed the return had left the department, but Mr. Ellis outlined what steps were probably taken. He would review the financial statements in detail, and they are lengthy and involve a great many claims for deductions of various sorts. He would consider all the items of a contentious nature bearing on the assessment, and after preparing a summary of his requirements to complete the review, would secure the necessary information either from correspondence with the company or by consultation with its officials or by reference to its books and records. Having secured the required information and computed the tax payable, the appellant was re-assessed and was sent the second Notice of Assessment dated September 9, 1953.

As I have noted above, the contention is that the second assessment dated September 9, 1953, is in fact the "original assessment" referred to in s. 50(6). The submission is that the first assessment was invalid and incomplete, that the Minister did not comply with the provisions of s. 42(1), namely, with all despatch to examine each return of income and assess the tax for the taxation year—and,

more particularly, it is alleged, as the examination of the return is incomplete and as it was at some stage marked "for further review".

In my opinion, the matter is concluded by the judgment of the learned President in *Provincial Paper Ltd. v. M.N.R.*[1]—a judgment with which I respectfully agree. In that case, the Minister by his assessor had accepted the taxpayer's return as correct and had assessed it accordingly. Subsequently, the return was reviewed and the taxpayer was re-assessed. There, as here, the taxpayer contended that the first assessment was not the original assessment and claimed the benefit of s-s. (6) of s. 50. In that case it was held:

Held: That it is not for the Court or anyone else to prescribe what the intensity of the examination of a taxpayer's return in any given case should be. That is exclusively a matter for the Minister, acting through his appropriate officers, to decide.

2. That there is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is exclusively for the Minister to decide how he should, in any given case, ascertain and fix the liability of a taxpayer. The extent of the investigation he should make, if any, is for him to decide.

3. That the Minister may properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment.

On p. 39 the President stated:

But the basic fallacy in the contention lies in the assumption that the Minister is precluded from ascertaining and fixing a taxpayer's liability on the basis of the assumed correctness of his income tax return but must do something else and that if he does not do so he has not made an assessment. While the Minister is not bound by the taxpayer's return, as was emphasized in the *Dezura* case ([1948] Ex. C.R. 10 at 15), there is nothing in the Act to prevent him from accepting it as correct and fixing the taxpayer's liability accordingly. In *Davidson v. The King,* [1945] Ex. C.R. 160 at 170, I made the statement that the taxpayer's own return of his income, while not binding upon the Minister, may be the basis of the assessment made by him and I pointed out that it was reasonable that this should be so, since the taxpayer knew better than anyone else what his income was.

The Minister may, therefore, properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment.

[1] [1955] Ex. C.R. 33.

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Counsel for the appellant in thise case submitted that this case should be distinguished from the *Provincial Paper* case mainly on the grounds that at some stage the taxpayer's return was "in some fashion identified as being segregated for further investigation". It is urged that if it was marked for further investigation before the initial assessment was made, such assessment was incomplete and invalid in that the Minister had failed adequately to comply with the provisions of s. 42(1), his examination of the return being incomplete.

While the return was at some stage set aside for further review—a review which led to the reassessment of September 9, 1953—there is no evidence to establish when it was so set aside. I am therefore quite unable to distinguish the facts in this case from those in the *Provincial Paper* case in any essential matter. It follows, therefore, that the Notice of Assessment dated July 31, 1951, was the notice of the original assessment referred to in s-s. (6) of s. 50 and that the appellant is not entiteld to the benefits of that subsection. The appeal on this point will therefore be dismissed.

In the result, therefore, all the appeals of Leaseholds and Minerals which were not disposed of at the trial with the consent of the parties will be dismissed with costs.

The assessments made upon Leaseholds for the years 1946 and 1947 will be affirmed.

Inasmuch as certain other matters in the appeals of both Leaseholds and Minerals for the years 1949 and 1950 were referred back to the Minister for reconsideration and re-assessment at the trial, I think it inadvisable to affirm the assessments made for those years and these matters will be referred back to the Minister for the purpose of enabling him to make such further re-assessments as may be necessary.

Judgment accordingly.

1958

Jun. 23

Jul. 7

BETWEEN:

BERBACK QUILTING LIMITED .....APPELLANT.

AND

THE REGISTRAR OF TRADE MARKS ..RESPONDENT.

Trade Mark—Trade Marks Act 1-2 Elizabeth II, s. 46(1)—Extension of time in which to file opposition granted one person does not permit others to file oppositions within the extended time.

Held: That an extension of time granted to one person to file an opposition under s. 46(1) of *The Trade Marks Act*, 1-2 Elizabeth II., c. 49 does not have the effect of permitting others to file oppositions within the extended time.

APPEAL from a decision of the Registrar of Trade Marks.

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

Gordon F. Henderson, Q.C. for appellant.

S. F. M. Wotherspoon, Q.C. for Sanitized Process (Canada) Limited.

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

FOURNIER J. now (July 7, 1958) delivered the following judgment:

This is an appeal from the decision of the Registrar of Trade Marks, dated March 27, 1958, in the matter of an application by Berback Quilting Limited for an extension of time for the filing by the appellant of a statement of opposition against application serial No. 243,576 filed on December 23, 1957, by Sanitized Process (Canada) Limited for registration of a certification trade mark consisting of the word "SANITIZED" and advertised in the issue of the Trade Marks Journal of January 22, 1958.

On February 12, 1958, G. H. Wood & Co. Limited requested by letter an extension of time until March 22, 1958, for filing a statement of opposition to the said application. The reason given was that it was desirous of consulting other manufacturers and of considering the situation in the trade before making a decision with regard to filing an opposition. The request was granted upon certain terms. But having been unable to complete its

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investigation, it requested further extensions on March 21 and April 18, 1958. The applicant having consented to same, the extensions were allowed. On May 20, 1958, the solicitor for G. H. Wood & Co. Limited advised by telegram the Registrar that the Company had no objection to the registration of a certification trade mark in the terms of the application on file and waived any right it had to file a statement of opposition. The Registrar, on May 22, 1958, allowed the application for registration of a certification trade mark consisting of the word "SANITIZED".

On February 28, 1958, the applicant, Sanitized Process (Canada) Limited, filed a statement of claim in the Court, claiming an injunction to restrain the appellant from infringing the alleged rights it had in the word "SANITIZED" as a certification mark.

On March 22, 1958, the appellant filed a statement of opposition to the application in the Trade Marks Office. On March 24, 1958, the appellant made an application requesting an extension of time within which the statement of opposition could be admitted. On March 27, 1958, the Registrar refused to extend the time and returned the statement of opposition on the grounds

a) that an extension of time granted to one person to file an opposition under s. 46(1) of the act does not have the effect of permitting others to file oppositions within the extended time; and

b) that he was not satisfied that the appellant was entitled to an extension of time pursuant to the provisions of s. 46(2) of the act.

On the day the application for registration was allowed, to wit, on May 22, 1958, the appellant made an *ex parte* application before the presiding judge in chambers for an order that no registration shall be granted by the Registrar pursuant to application serial No. 243,576 until this court has had an opportunity of hearing and deciding the appeal. Cameron J. ordered that the Registrar take no further step in disposition of the application until June 5, 1958; that the appellant, on notice to the respondent and Sanitized Process (Canada) Limited, may apply to this court for continuation of the order until the appeal had been heard and

decided; that the respondent and/or Sanitized Process (Canada) Limited, on notice to the appellant, may apply to this court to set aside the order.

In the appeal, it is submitted that the Registrar erred in refusing to extend the time under s. 46(2) and that he erred in holding that an extension of time granted under s. 46(1) of the *Trade Marks Act* to one person to file a statement of opposition does not have the effect of permitting others to file statements of opposition within the extended time.

Sanitized Process (Canada) Limited applied for registration of a certification mark under s. 23(1) of the *Trade Marks Act* 1-2 Elizabeth II., c. 49 which reads as follows:

23. (1) A certification mark may be adopted and registered only by a person who is not engaged in the manufacture, sale, leasing or hiring of wares or the performance of services such as those in association with which the certification mark is used.

This appeal is only concerned with an order for extension of time for the filing of a statement of opposition to the application of Sanitized Process (Canada) Limited.

The section to be considered and construed as to requests for extensions of time is s. 46 of the act.

46. (1) If, in any case, the Registrar is satisfied that the circumstances justify an extension of the time fixed by this Act or prescribed by the regulations for the doing of any act, he may, except as in this Act otherwise provided, extend the time after such notice to other persons and upon such terms as he may direct.

(2) An extension applied for after the expiry of such time or the time extended by the Registrar under subsection (1) shall not be granted unless the prescribed fee is paid and the Registrar is satisfied that the failure to do the act or apply for the extension within such time or such extended time was not reasonably avoidable.

By the above provisions of the act, the Registrar is vested with discretionary power to grant or refuse an extension of the time fixed by the Act or prescribed by the regulations for doing any act. But his discretion must be exercised within the framework of the act and under circumstances justifying the extension.

As was stated, the application was made pursuant to the provisions of s. 23(1) of the act. After receiving the application, the Registrar satisfied himself that it complied with the requirements of s. 29; that the certification mark was registrable and that the applicant was a person entitled

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to registration of the mark because it was not confusing with another mark for the registration of which an application was pending; and he arrived at the conclusion that he could not refuse the application pursuant to the provisions of s. 36(1) of the act. Then he caused the application to be advertised in the manner prescribed by the Trade Marks Rules.

The rule applicable is rule 17. It reads as follows:

17. The Registrar shall cause to be published weekly a Trade Marks Journal containing

(a) every advertisement made pursuant to subsection (1) of section 36 of the Act;

The time within which a statement of opposition to an application may be filed is one month from the date of the advertisement.

37. (1) Within one month from the advertisement of an application, any person may, upon payment of the prescribed fee, file a statement of opposition with the Registrar.

No statement of opposition to the application was filed during the time specified, but during that period G. H. Wood & Co. Limited, by letter dated February 12, 1958, requested an extension of time until March 22, 1958. This extension of time was granted to the above Company on February 18, 1958. Other extensions, up to May 22, 1958, were granted to the same party with the consent of the applicant. On May 20, 1958, the solicitors for G. H. Wood & Co. Limited advised the Registrar by telegram that the Company had no objection to the registration of the certification mark in the terms of the application on file and waived any right it had to file a statement of opposition. This would seem to have terminated the extension of time. Following this, the Registrar, on May 22, 1958, allowed the registration.

The appellant submits that during the extension of time granted to G. H. Wood & Co. Limited any person was entitled to file an opposition to the application.

I cannot agree with this submission. It is true that, according to s. 37(1) of the act, any person may file a statement of opposition within one month from the advertisement of the application. But if no statement of opposition is filed or no request for an extension of time to file such a statement is made during the period of one month from the advertisement, the Registrar is in duty bound to follow the directions contained in s. 38(1) of the act.

38. (1) When an application either has not been opposed and the time for the filing of a statement of opposition has expired or it has been opposed and the opposition has been decided finally in favour of the applicant, the Registrar thereupon shall allow it.

The last words of this section—"the Registrar thereupon shall allow it" are mandatory. The Registrar has no choice. When the application has not been opposed and the time for the filing of a statement of opposition has expired, he must allow the registration.

This being so, the extension of time provided for by s. 46(1) must be applied for prior to the expiration of the time fixed by the act. In my opinion, the wording of the section cannot be construed otherwise, because the moment the time for the filing of the statement of opposition has expired the applicant is entitled to the registration and the Registrar shall allow the registration.

Any person, before the time fixed for filing a statement of opposition, may apply for an extension of time. After the expiration of the time fixed and up to the date on which a registration is allowed, the Registrar, in his discretion, may grant an extension of time, if he is satisfied that the circumstances justify such an extension. The Registrar, in this case, was not satisfied that the circumstances justified an extension of time to the appellant.

After perusing every document on the Registrar's file and the notice of appeal and hearing arguments pro and and con by counsel for the appellant and for Sanitized Process (Canada) Limited, I have come to the conclusion that the reasons given by the Registrar were, in my opinion, valid reasons for refusing the application for an extension of time for the filing of a statement of opposition to the application.

Though there is doubt as to the exact hour at which the registration was allowed on May 22, 1958, I am convinced that, when the appellant appeared before Cameron J. with an *ex parte* notice for an order that no registration should be granted by the Registrar until this court had heard and decided the appeal, the registration had been allowed. This having been the case, the granting of the appellant's appeal could have no effect. The certification having been registered, it would remain on the register though the appellant

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succeeded in obtaining an extension of time to file an opposition. The statute provides for procedure to have the registration expunged.

Furthermore, I do not believe that the Registrar's decision has the effect of prejudicing the appellant's position. There is now a dispute before this court between the appellant and the intervenant and every question of fact or of law which is alleged in the statement of opposition can be alleged as part of the appellant's pleadings in the above procedure.

For these reasons, the appeal is dismissed, but, following the practice in such cases, there will be no order as to costs.

Judgment accordingly.

1958

Feb. 4

July 4

BETWEEN:

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

AND

ALFRED MANASTER .....RESPONDENT.

Revenue—Income Tax Act, R.S.C. 1952, c. 148, s. 5, 6(v), 139(1)(aj)—Income or capital—"Retiring allowance"—Money paid to partner to terminate his interest in agreement—Method of payment—Amount received by respondent not compensation in nature of a retiring allowance—Appeal from decision of Income Tax Appeal Board dismissed.

Respondent in association with his father and a brother caused to be incorporated a joint stock company which engaged in the business of building and selling residential properties, the shares and interests of the company being equally divided among the three. Later they entered into an arrangement with another group known as Schouella Bros. & Co. of Canada to carry on the business of purchasing and subdividing land and constructing and selling buildings erected thereon. Two agreements entered into by the parties provided for the incorporation of companies and the methods to be followed by them in their operations, the business relationship of each of the groups or parties and their respective rights and interests in the companies.

The companies operated for a time when difficulties arose between the parties and a final agreement was entered into between them by which the prior agreements were cancelled, the respondent and his associates sold their shares in the two companies to Schouella Bros. for a certain sum of money and were also paid by Schouella Bros.

a further sum for the cancellation and termination of the agreements of which sum the respondent, his father and brother each received $10,833.33. In assessing his income the appellant added this amount to his declared income. On appeal to the Income Tax Appeal Board this assessment was set aside. The appellant appealed from such decision to this Court.

Held: That the receipt of the sum of $10,833.33 by respondent was in the nature of a capital asset and not an income receipt to be included in computing his income.

2. That the agreements entered into between the parties were not commercial contracts; they created companies to operate in certain fields of activities and realise profits which, in the framework of the agreements, would be distributed equally between the parties; the agreements were not for the engagement of personnel or employees.

3. That the amount received by the respondent is not a compensation in the nature of a retiring allowance; he was not a member nor an officer of the Schouella Bros. of Canada, having never been employed by that organisation.

4. That the mode of payment of the sums agreed upon for the termination of the agreements, whether made in cash, by cheque or cheques of the parties obligated, or by cheques of outsiders, is immaterial as the money was received for the cancellation and termination of the respondent's activities as a builder in association with the Schouella Bros. of Canada.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

Paul Ollivier and *Claude Couture* for appellant.

S. W. Weber, Q.C. and *J. H. Blumenstein* for respondent.

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

FOURNIER J. now (July 4, 1958) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated January 7, 1957, allowing the appeal of the then appellant, Alfred Manaster, in respect of his income tax assessment for the taxation year 1954.

The respondent in his return of income for the taxation year 1954 reported as taxable income the amount of $3,855.56. The appellant assessed the taxable income at $14,881.89 so as to include a sum of $10,833.33. The respondent objected to this assessment on the ground that the sum of $10,833.33 received in the above taxation year

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did not constitute taxable income but was a receipt of a capital nature. The appellant, some time later, confirmed the assessment as having been made in accordance with the provisions of the *Income Tax Act*. The respondent appealed to the Income Tax Appeal Board from this assessment. The appeal was heard and allowed and the Board referred the assessment back to the Minister for reassessment, so that the amount of $10,833.33 be deleted from the respondent's taxable income for the taxation year 1954.

It is from this decision that the appellant appeals to this Court.

The appellant contends that in computing the respondent's income for 1954 he included the amount of $10,833.33 because the receipt of same fell within the framework of sections 5, 6(*a*)(*v*) and 139(1)(*aj*) of the *Income Tax Act*, which deal with the question of income from office, employment and retiring allowances, and that the sum received was in the nature of a retiring allowance and consequently taxable income.

On the other hand, the respondent submits that he received the said sum in pursuance to the terms of an agreement which establishes that the consideration for the payment was twofold. First, the payment was made in part for the sale and transfer of shares of two incorporated companies to the Schouella Bros. group, and, second, for the termination and annulment of certain agreements. In both cases the receipt would be of a capital nature and non-taxable.

To solve the question as to whether the sum involved in this appeal is income or capital in character, one has to carefully consider the facts of the case and the law applicable to those facts. It has been repeatedly said that there is no single or infallible test for settling the question of whether a receipt is of an income or capital nature. Each case depends on its own particular facts and circumstances.

In *Simon's Income Tax*, 2nd ed., vol. 1, p. 32, para. 44, the rule is put in the following words:

> There being "no single, infallible test" it is nevertheless useful to consider some of the factors which have been held, once the particular facts of the case have been ascertained and any relevant documents construed, to throw light on the character of an item for the purpose

now under discussion. Attention must be concentrated on the receipt or payment itself; the fact that the consideration for it is of a revenue or capital nature is not determinative, for just as an item of income, such as an annuity, may be purchased from capital, so the right to future payments of income may be commuted for a capital sum.

The evidence before the Court covers the relevant background and activities of the persons involved directly or indirectly in this dispute; their negotiations leading to the signing of agreements which have a considerable bearing on the issue; the agreements; and, finally, the termination and cancellation of these agreements and the consideration for the payment of the sum received by the respondent.

The respondent, his father and a brother were associated in the business of constructing buildings of various types and were known as "the Manasters". In 1952 they had set up and incorporated a joint stock company, known as The Century Construction Company. Its objects were varied, but its main purpose was the erection and sale of buildings, mostly of residential structures. The shares and interests of this company were equally divided among the three Manasters. From the date of the incorporation of their company in June 1952 up to January 1954, they were engaged in the building of bungalows and duplexes. During that period 100 units were erected. As there was a ready market for these types of houses, every home built was sold. As the Manasters had a long and wide experience in the building business, their company seems to have been a success.

Some time during the last months of 1953 and January 1954, another group of persons known as the Schouella Bros. & Co. of Canada, a registered partnership composed, it would seem, of 11 members of the same family, some of them being conversant with the fact that the Manasters had experience in construction business, approached them with a proposition to join together to set up a joint stock company to purchase land, have it subdivided and construct and sell buildings, mostly of the residential type. The Manasters would bring in the operation of the company their know-how and funds and the Schouellas would put up most of the capital required and their experience in land dealings.

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After exhaustive negotiations, the parties arrived at an understanding which was put down in detail in a series of three agreements, one executed and signed on January 28 and two on February 12, 1954, before Notary M. J. Garmaise. These agreements have been produced as exhibits and form part of the evidence in this case.

In the first agreement, the parties state that they have incorporated a company by Letters Patent of the *Quebec Companies Act* under the corporate name of "Meteor Homes Ltd." for the object of building small homes and also for other purposes, as they may, from time to time, see fit. The financial set-up is then described—the shares to be divided equally between the two groups. The capital required for the building operations to be supplied equally by the parties, but not for the land. The purchase of the land to be financed by the Schouella group by way of loans to the company. The association for the conduct of the affairs of the company was to be for five years, unless the company was dissolved earlier in the case of losses or dissatisfaction of a majority of the directors of the conduct towards the company of its directors or share-holders. The parties stipulated and agreed that the shares of the company should not be transferred to third parties until they had been offered respectively to the parties to this agreement. In the event of dissolution, the price at which such shares would be offered was the value set upon such shares in the last annual balance sheet of the chartered accountant, who was then the auditor of the company. The parties being respectively the owners of a one-half interest in the company, and, to prevent a dead-lock at any time in the operation of the affairs of the company, they each divested themselves of one fully paid and non-assessable share of the common stock of the company in favour of their notary (Max Garmaise), who would become a director of the company and who would have a deciding vote; the parties holding an equal number of shares and having each two directors.

The discussion before the Court dealt mostly with clause 7 of the agreement, which reads as follows:

7. In view of the greater building experience of the first parties (the Manasters), it is agreed that salaries shall be established to be divided among the first parties as they see fit, to a total of Twenty-One Thousand Dollars ($21,000.00) per year, and that the salaries shall be established to be

divided among the second parties (the Schouellas) active in the enterprise as they may see fit, in the amount of Fourteen Thousand Dollars ($14,000.00) per year. These salaries, however, shall start only from the actual date of construction.

This clause was amended and modified, as to the amount of the salaries, by agreement of February 12, 1954. The figures of $21,000 and $14,000 were deleted and replaced respectively by the figures "$14,000" and "$7,000".

A second agreement was executed and signed by the same parties, before the same notary, on February 12, 1954, to set up and incorporate another company, to be known as The Meteor Century Builders Ltd. This company would have an authorized capital of $1,000,000. Each party was to subscribe immediately for 100 common shares of $100 each and 900 preference shares, also of $100 each; $20,000 to be paid by each party immediately and the balance to be paid later. The object of this new company was to take over the financing of the purchases of land required by Meteor Homes Ltd. for its building operations. This document recites most of the clauses of the first agreement and deals at length with matters of corporate financing which are of no relevancy to this dispute.

These agreements determined the methods to be followed by the companies to be set up in their operations, the business relationships of each of the groups or parties and their respective rights and interests in the companies. The companies were then organized and incorporated. When this was done, the companies proceeded to purchase lands for building sites and to erect small homes. During the life of the agreements, from January 28 to July 9, 1954, Meteor Homes Ltd. put up between 36 and 40 houses. One model house had been completed and 36 were in various stages of construction, up to the latest stage of plastering, at the termination of the agreements, and the moneys expended on the project amounted to about $300,000.

Serious difficulties arose between the two parties in their relations as shareholders of the companies and as parties to the agreements. The trouble stemmed from the doubts and suspicions of one group as to the honesty and integrity of the members of the other group, though it would seem that the suspicions were not well founded. At all events,

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their lack of understanding and harmony were such that their relations became intolerable, impossible and culminated in their termination of their association.

This was finalized by another agreement between the same parties, executed and signed on July 9, 1954, before Notary Max Garmaise, who was a shareholder and director of the two companies and who acted as conciliator and arbitrator between the parties.

This agreement declares that the agreement of January 28 and the two agreements of February 12, 1954, are hereby cancelled and annulled. The first parties (the Manasters) sell to the second parties(the Schouella Bros.) all the shares of the common and preferred stock of The Meteor Homes Ltd. issued to them for the sum of $25,000, which they acknowledge having received, and agree to sign on demand all necessary documents for the transfer of the said shares. The same transaction between the same parties takes place as to the shares of The Meteor Century Builders Inc. The shares owned directly or indirectly by the Manasters are sold to the Schouella Bros. for the sum of $20,000; payment is made and received and the transfer of the shares is agreed to. An additional sum of $32,500 was paid by the Schouellas to the Manasters for the cancellation and termination of the agreements.

Clauses (4) and (5) of the agreement, the subject of the whole discussion between the parties in this appeal, read as follows:

(4) In consideration of the termination of the Agreement between the parties and of the assumption by the Second Parties of the undertaking, the Second Parties agree to pay to the First Parties the sum of Thirty-two thousand five hundred Dollars ($32,500.00) which the First Parties acknowledge to have received to their satisfaction at the execution hereof and whereof quit.

(5) The Parties agree that the termination of the said partnership and the payments herein above specified are made in full and final settlement of any claim of whatever nature of the First Parties against the companies involved or against the Second Parties and of any claims of whatever nature of the companies or of the Second Parties against the First Parties, the parties acknowledging to have settled all accounts between them and to be content and satisfied therewith.

This amount of $32,500 was divided equally between the Manasters. The respondent received 1/3 of the amount, to wit $10,833.33. The same amount was received by Joseph

Manaster and Leon Manaster. In the case of the two first named, the appellant in assessing their income added $10,833.33 to their declared income. As to the third named, his income for 1954 has not been assessed.

Is this sum of $10,833.33 taxable income and does it come within the ambit of the terms of the sections of the Act on which the appellant relies? This is the question to be answered.

The sections mentioned are 5, 6(*a*) (*v*) and 139(1)(*aj*); they read as follows:

> Sec. 5—Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year . . .
>
> Sec. 6—Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> (*a*) amounts received in the year as, on account or in lieu of payment of, or in satisfaction of
>
> (*v*) retiring allowances,
>
> Sec. 139(1)(*aj*)—"retiring allowance" means an amount received upon or after retirement from an office or employment in recognition of long service or in respect of loss of office or employment (other than a superannuation or pension benefit), whether the recipient is the officer or employee or a dependant, relation or legal representative;

The above provisions of the Act relate to one source of income provided for in paragraph (*c*) of s. 3 of the *Income Tax Act*. The Act does not define income nor capital; it only indicates and describes the different sources of income and the methods of computing same. It also details the classes of income to be included in the computation. The appellant in this instance submits that the sum involved is not income from businesses or property but is income derived from office and employment, particularly as a retiring allowance.

There is no doubt that the sum of $10,833.33 was paid to the respondent after difficulties and disputes arose between the parties. The agreements were cancelled and terminated following negotiations which led to the signing of an agreement whereby, in consideration of the termination of the agreements which existed between the parties, the respondent received a lump sum. Nothing was said about a contract of hire between the parties which entitled them to receive salaries or retiring allowances. It was made in settlement of any claim of whatever nature the parties

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may have had against each other or the companies involved and the parties acknowledged to have settled all accounts between them.

The main object of the agreements was to have incorporated two companies and determine the methods and principles to be applied in their operations; also the business relationship between the parties and the companies and the results of the activities of the companies to be shared by the parties. The companies were set up to purchase building sites and to erect small houses. The agreements were terminated but the existence of the companies was not affected. The only change made was the transfer of common and preference shares of the two companies by the members of the first party to the members of the second party and the dissolution of their partnership. When the associates of both parties worked for the companies they were paid for the services rendered, and nothing else. The moneys received by the respondent for services rendered to The Meteor Homes Ltd. were duly reported in his return of income. The agreements were in existence for a very short period and the companies were in no position to justify, as provided for in the agreements, a balance sheet of their annual operations.

The more one studies the agreements and the facts of the case, the more one finds similarities between these agreements and facts and the agreements and facts of the *Van den Berghs Ltd. v. Clark* case[1].

In that case two companies, in competition, carried on an extensive business as manufacturers of margarine and other substitutes for butter. The companies entered into an agreement to carry on their business independently and to share profits and losses in the proportion which, on an average of five years, the profits of the rival tradings in margarine bore to each other. Two other agreements intervened to the same effect but relating to other activities. Disputes arose and became subject to an arbitration of such complexity and duration that the companies came to terms by which the agreements were rescinded and one company paid to the other a certain sum "as damages", but the parties did not specify the cause of action in respect of which the damages were paid.

[1] [1935] A.C. 431.

The House of Lords held "that this sum was in the nature of a capital asset and not an income receipt to be included in computing the income of the receiving company."

At page 442 of the report, Lord Macmillan made the following observations:

> The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products, or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary the cancelled agreements related to the whole structure of the appellants' profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundanmental an organization of a trader's activities can be regarded as an income disbursement of an income receipt. ... The agreement provided the means of making profits, but they themselves did not yield profits.

In my opinion the agreements in the present instance were to the same effect. They were not commercial contracts; they created companies to operate in certain fields of activities and realize profits which, in the framework of the agreements, would be distributed equally between the parties. They related to the whole structure of their profit-making companies. They regulated the companies' activities, defined what they might and might not do, and affected the whole conduct of their business. The agreements were not for the engagement of personnel or employees. They established the structure and mechanism of their income earning machine. This machine had been wisely and carefully devised, defined, organized and regulated and was an asset which would have operated successfully if circumstances and the relationship of the parties had not intervened to hamper its operations. Disputes arose and difficulties encountered were such that it was only after lengthy negotiations that the parties arrived at a settlement of the situation. The terms of the settlement are embodied in the agreement of cancellation and termination of their agreements of association. Now, was the sum involved received on the compromise of the dispute arising out of operations of the companies by the shareholders or officers or as a compensation in the nature of a retiring

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allowance? The evidence as a whole is foreign to the idea that the parties were entitled to a retiring allowance in the event of a dissolution of the association or that the sum involved was paid or received for that object.

According to the statute, "retiring allowance" means an amount received upon or after retirement from an office or employment. The Schouella Bros. of Canada was a partnership of which the respondent was not a member nor an officer, having never been employed by their organization. He was only a member of one of the parties who signed the agreements. Had he been employed by the Schouellas, the sum could perhaps have been paid in recognition of long service. But even that condition could not have been met, the agreements having been in force only some five months. Or, says the statute, in respect of loss of office or employment. He could not lose what he did not have. In my view the amount received by the respondent cannot be considered as a compensation in the nature of a retiring allowance.

It was contended that the sum of $32,500 paid by the Schouellas to the Manasters could not have been paid for the sale and transfer of the shares of The Meteor Homes Ltd. and The Meteor Century Builders Ltd. held by the Manasters and sold and transferred by them to the Schouellas, because they had received the amounts they had paid for the said shares. This may be literally true. But were the amounts received equivalent to the value of those shares? We will never know, because the agreements provided that, if it were deemed advisable to dissolve their association before the expiration of the life of the agreement, the value of the shares of the companies would be that set upon such shares in the last annual balance sheet rendered by the chartered accountant who was then the auditor of the companies, without regard to profit or loss in the interval—the word "interval" is mine. The agreement mentions the word "interview", which has no meaning in the sentence and must have been written through a clerical error. An annual balance sheet was never rendered, on account of the duration of the agreement.

It was also argued that the fact that the sum was paid by a cheque of The Meteor Homes Ltd. indicates that the company was paying this amount as a compensation of the

loss of salaries which the Manasters would have received if they had continued to erect the buildings during the life of the agreement. The document cancelling and terminating the agreements had nothing to do with the above company. There is no evidence that the company had obligated itself to pay the salaries mentioned in clause 7 of the first agreement. This was an undertaking of the parties to the agreement.

In my opinion, the mode of payment of sums agreed upon for the termination of the agreements, whether made in cash, by cheque or cheques of the parties obligated, or by cheques of outsiders, is immaterial to the issue in this case.

Furthermore, the document states that the payment was made in consideration of the termination of the agreement and the assumption of the undertaking by the Schouella Bros. of Canada. The termination of the agreement and the payments made put an end to any dispute concerning the accounts, claims or counterclaims which may have existed between the parties and the companies. Though it was not specified what the termination meant to the parties, it can readily be deduced that the Schouellas wished to take over the two companies in which both parties had an equal interest and to force or have the Manasters agree to abandon their interest in the association. This association, created by the agreements, constituted, in my opinion, an "asset" which, in the words of Lord Atkinson, "ought not to be confined to something material". See *British Insulated and Helsby Cables Ltd. v. Atherton*[1].

I believe that the Schouellas having acquired experience in the construction business felt that they had no more need of their associates and did their best to buy them out. Having succeeded, they became the sole owners, through the companies, of an income producing enterprise, which was clearly to their advantage.

On the other hand, the Manasters, having been, by circumstances, forced to agree to the cancellation and termination of the agreements, certainly sustained a loss, which seems to have been acknowledged, at least tacitly in the agreement, and agreed that the sum of $32,500 would be sufficient compensation for their consent to the dissolution

[1] [1926] A.C. 222.

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of the association. It seems unreasonable to me to believe that they would have agreed to withdraw from the association just for the reimbursement of the sums they had put up to purchase the shares.

In the *Van den Berghs v. Clark* case above cited Lord MacMillan, concluding his remarks, says (p. 442, *in fine*):

> I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an organization of a trader's activities can be regarded as an income disbursement or an income receipt.

This statement, in my opinion, is applicable to the facts of this case, even if the money received by the respondent was by way of a cheque of The Meteor Homes Ltd. What means the Schouellas employed to have a cheque issued by the company to the Manasters is of no concern of the Court and does not affect the issue.

So I find that the sum of $10,833.33 received by the respondent was in the nature of a capital asset and not an income receipt to be included in computing his income, because it was not income covered by the provisions of sections 3, 5, 6(*a*)(*v*) and 139(1)(*aj*) of the *Income Tax Act*.

The appeal is dismissed with costs.

Judgment accordingly.

1957

April 15

1958

Sept. 4

DISTILLERS CORPORATION SEAGRAMS LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Holding company's income derived from income and interest paid by subsidiaries—How deduction of expense determined—The Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a) and 12(1)(c), 127(1)(n).

Section 12(1) of *The Income Tax Act* provides that in computing income no deduction shall be made in respect of

(*a*) an . . . expense except to the extent that it was made . . . by the taxpayer for the purpose of producing income from a business of the taxpayer;

(*c*) an . . . expense to the extent that it may reasonably be regarded as having been made for the purpose of producing exempt income in connection with property the income from which should be exempt.

Section 127(1)(*n*) of the Act defines "exempt income" as "money . . . received or acquired by a person in such circumstances that [it is] by reason of any provision of Part I, not included in computing his income."

The appellant, a holding company, derived over 90% of its income from shares held in other companies, mostly wholly-owned subsidiaries, and the remainder from interest on debentures and loans to them, plus a small amount of exchange profits. In filing its income tax returns for 1950, 1951 it deducted annual expenses incurred in the general administration of its business less a small fraction which it attributed to dividends from companies it did not control. The Minister apportioned the expenses between the dividend and other income in proportion to the respective amounts of such income and disallowed the portion of the expenses attributed to the dividend income. On an appeal from a judgment of the Income Tax Appeal Board affirming the assessment.

Held: That under both ss. 12(1)(a) and 12(1)(*c*) of *The Income Tax Act* the limitation imposed on the deductibility of an expense is determined by the purpose for which it was incurred, rather than by the result.

2. That the deductibility or non-deductibility of an expense is not dependent on its having, produced or not produced, or even been calculated or likely to produce income, but rather by consideration of how the income was to be produced from the appellant's business.

3. That the appellant's capital was invested in shares and loans to subsidiaries and was thus empolyed for the purpose of gaining income in the form of dividends and interest.

4. That the expenses in question were incurred generally for the same purpose and, an apportionment being necessary to determine that portion of them which may reasonably be regarded as having been incurred for the purpose of gaining income, that proportion of them which the appellant's investment holdings in shares bears to its total investment may reasonably be regarded as having been incurred for the purpose of producing dividend income.

5. That such basis meets the test of s. 12(1)(*c*) and that applied by the Minister does not.

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

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

Lazarus Phillips, Q.C. and *Philip Vineberg* for appellant.

Maurice Paquin, Q.C. and *Paul Ollivier* for respondent.

THURLOW J.:—This is an appeal from the judgment of the Income Tax Appeal Board[1], dismissing an appeal by the appellant against income tax assessments for 1950 and 1951.

[1] 12 Tax A.B.C. 36; 55 D.T.C. 18.

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The matter in issue is the right of the appellant in computing its income for income tax purposes to deduct certain expenses incurred by the appellant in each of the years in question. In both years the bulk of the appellant's income (more than ninety per cent of it) was from dividends on shares which the appellant held in other companies, most of which were wholly owned subsidiaries of the appellant. These dividends were all exempt from tax under s. 27 of *The Income Tax Act,* S. of C. 1948, c. 52, as amended by s. 12 of S. of C. 1949 (2nd Sess.), c. 25. The remainder of the appellant's income was interest on debentures of and loans to some of the appellant's subsidiary companies and some small amounts of exchange profits. In each of the years in question, annual expenses were incurred for a number of items pertaining to the general administration of the appellant corporation and in reporting its income in its income tax returns, the appellant deducted the expenses so incurred (less a small fraction which it attributed to dividends from companies which it did not control) from its gross income receipts. The Minister, in making the assessments, apportioned the expenses between the dividend and other income in proportion to the respective amounts of such income and disallowed as a deduction the portion of the expenses so attributed to the dividend income. The appellant appealed to the Income Tax Appeal Board, and it is from the judgment of the Board dismissing such appeal that the present appeal is brought. The issue in the appeal is whether or not, in computing the appellant's income for the years in question for the purposes of *The Income Tax Act,* the appellant is entitled to deduct any portion of the amount so disallowed.

The nature of the activities or means by which the appellant's income was obtained is outlined as follows in paragraph 2 of the notice of appeal, which was admitted by the Minister in his reply:

> 2. The Appellant is a holding company which has in its virtually static portfolio the shares, debentures and other securities, of its wholly-owned or controlled subsidiaries. The status of the Appellant in this respect has been unchanged since it was organized. No measures are ever taken by the Appellant to change or switch any share investments or security holdings. Any changes in the holding of securities have been brought about merely through re-organizations from time to time of its subsidiaries by way of merger or consolidation, or as a result of the acquisition of shares of wholly-owned or controlled subsidiaries. These

subsidiaries are engaged in the alcoholic beverage business only, and there is no diversification of any investment portfolio in the sense applicable to investment trusts or other holding or security companies organized for the purpose of acquiring ownership of securities in a series of operating companies whose operations may be dissimilar, and as a rule are dissimilar one from the other. The Appellant is a holding company whose assets are more or less frozen and of a permanent nature. The Appellant as such is not engaged in the business of buying and selling securities, or even of acquiring securities of a diversified nature or otherwise for investment purposes.

This description was somewhat amplified by evidence that in 1950 the appellant neither acquired nor sold any shares and that in 1951 it sold no shares but invested $7,500 in shares of a subsidiary company. In the latter year its shareholdings declined as a result of the redemption by a subsidiary of a large block of redeemable shares held by the appellant. In 1950 loans totalling $610,523.67 were made to subsidiary companies and in 1951 new loans totalling $2,315,607.89 were made, bringing the total of monies on loan to subsidiaries to $17,983,615.17. The appellant's gross income receipts for the two years in question were as follows:

	1950	*1951*
Dividends	11,381,978.40	15,160,119.76
Interest	657,856.19	477,816.71
Exchange profits	1,096.79	78.59
	$ 12,040,931.38	$ 15,638,015.06

From these receipts the appellant sought in each year to deduct the following less the proportion thereof which the dividends from companies other than subsidiary companies bore to the whole income.

	1950	*1951*
1. General expense	288.87	1,167.65
2. Directors' fees	2,000.00	2,000.00
3. Provincial Capital Tax	1,550.10	1,550.00
4. Audit fees	5,275.32	7,622.65
5. Interest on bank loans	79,321.85	63,994.11
6. Legal fees	130.00	1,036.71
7. Stock transfer expense	49,585.42	69,079.59
8. Listing fee for common stock	3,987.50	3,842.50
9. Printing and Stationery	31,128.64	34,126.60
10. Proxy expense	429.87	298.02
	$173,697.57	$184,717.83

Of these total amounts the Minister, in assessing the appellant's income, disallowed as deductions from gross income $164,191.80 for 1950 and $179,072.88 for 1951 on the

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ground that they were applicable to non-taxable income. In each year the amount so disallowed was the proportion of the total expenses which the dividend income of the appellant bore to the total gross income receipts.

On the trial of the appeal, no witnesses were called by either party, but by agreement the evidence taken before the Income Tax Appeal Board was put in as evidence. This included the evidence of Mr. Andrew Maxwell Henderson, a chartered accountant who was the Secretary-Treasurer of the appellant company and who gave it as his opinion that all of the expenses in question were incurred to earn taxable income and none of them to earn inter-company dividends. Mr. Frank E. Sandilands, a chartered accountant associated with the appellant's auditors, on the other hand, expressed the opinion that the expenses in question were ordinary corporate expenses that a company must incur in corporate set-up when its shares are listed on various stock exchanges and that, according to accounting practice, they were properly deductible from income. It was his opinion that the audit expenses should not be attributed specifically to the earning of either the dividend or the interest income of the appellant and, when questioned as to the stock transfer expenses, he said that the item had as much to do with the earning of interest as it had to do with dividends from subsidiaries.

Briefly summarized, the evidence relating to the several specific items was as follows:

1. *General expense.* For 1950 this item included minor filing fees, charges on dividend cheques, and travelling expenses of directors in connection with the indebtedness of an American company to the appellant. No details of the amount spent on such travelling expenses was given. When asked as to the item of general expense for 1951, Mr. Henderson said: "That again consists of travelling on Distillers Corporation Seagrams Limited business principally with our American company in connection with interest and what-have-you that they are paying us—the paper work and what not required in connection therewith." He also said that no travelling was ever required in connection with the dividend income.

2. *Director's fees.* These were fees paid to two of the appellant's directors.

3. *Provincial Capital Tax.* These items were for taxes paid to the Province of Quebec under what was referred to as the *Quebec Corporate Tax Act.* The *Corporation Tax Act,* Statutes of Quebec 1947, c. 33, which I think is the statute referred to, imposes tax on corporations which carry on business in that province.

4. *Audit fees.* These were fees paid to the appellant's auditors.

5. *Interest on bank loans.* These items were for interest paid on the unpaid balance of two loans totalling $8,000,000 made in 1946 to assist in the redemption of preferred stock. No further detail was given as to what the sum borrowed was in fact used for.

6. *Legal fees.* For 1950 this item was for legal advice relating to Quebec succession duties, obtained for the benefit of certain non-resident shareholders. No explanation was given as to what the item was incurred for in 1951.

7. *Stock transfer expenses.* These were sums paid to two trust companies for their services as transfer agents and registrars of the appellant company's capital stock and to dividend disbursing agents for their services as such.

8. *Listing fees for common stock.* These were annual fees paid to the New York Stock Exchange for listing the appellant's common stock.

9. *Printing and stationery.* This item was for printing the annual report of the appellant to its shareholders and similar expense incurred in complying with extensive requirements of the New York Stock Exchange and the Security Exchange Commission.

10. *Proxy expenses.* These were sums paid to brokers for sending out proxies and annual report material to shareholders.

The Income Tax Act contains the following provisions relating to the deduction of expenses in computing income for income tax purposes:

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

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(c) an outlay or expense to the extent that it may reasonably be regarded as having been made or incurred for the purpose of gaining or producing exempt income or in connection with property the income from which would be exempt.

Exempt income is defined as follows by s. 127(1)(n):

(n) "exempt income" means money, rights or things received or acquired by a person in such circumstances that they are, by reason of any provision in Part I, not included in computing his income and includes amounts deductible under section 27.

The position taken by counsel for the Minister in support of the disallowance was that all the expenses were incurred by the appellant in order to enable it to continue as a corporation, that without incurring them the appellant would have been unable to continue as a holding company and would accordingly have been unable to earn its income, that the expenses were thus incurred to earn income from the appellant's business of holding investments but cannot be traced exclusively to one type of income or another, that in this situation s. 12(1)(c) applies to prohibit the deduction of such proportion of the expenses as can reasonably be regarded as having been incurred for the purpose of gaining the dividend income which is exempt from tax, and that the portion of the expenses which can reasonably be regarded as having been incurred for the purpose of gaining or producing the dividend income is the proportion of them which the dividend income bears to the whole income.

In my opinion, the matter cannot be resolved in this way, nor can all of the expenses be dealt with in the same way. Both the position so taken and the assessment itself involve the underlying assumption or admission that, as claimed by the appellant, all of the expenses were incurred in fact for the purpose of gaining or producing income from the appellant's business. But for such an assumption or admission, no part of any of them could be allowed as a deduction for the deduction of the whole of them would be prohibited by s. 12(1)(a). Now, in my view, the evidence does not contradict or disprove this assumed fact in so far as it relates to the first five items of expense, that is to say, those for general expenses, directors' fees, Provincial Capital Tax, audit fees, and interest on bank loans, and to the legal fees as well for 1951. All of such expenses may very well have been incurred for the purpose of gaining or producing income from the appellant's business, and the evidence, so far as it goes, tends to support the fact so assumed.

In this situation, two questions arise on s. 12(1)(*c*); first, can these expenses reasonably be regarded as having been incurred to any extent for the purpose of gaining or producing exempt income, that is to say, dividends; and, secondly, if so, to what extent may they reasonably be so regarded?

In my opinion, the answer to the first of these questions is that, in the circumstances, these expenses can reasonably be regarded as having been incurred to some extent for the purpose of gaining or producing exempt income. Save in respect of travelling expenses, the amount of which was not given in evidence, I think the view of Mr. Sandilands that these items have as much to do with dividends as with interest income is preferable to that of Mr. Henderson, for I am unable to see how any of these expenses except the travelling expenses can be regarded as having been incurred for the purpose of gaining or producing interest income alone or dividend income alone. The fact is that they were incurred generally in the pursuit of income from the appellant's business, and, the purpose of that business being to gain income in the form of dividends from shares and interest from loans, it follows in my view that in the circumstances these expenses may reasonably be regarded as having been incurred to some extent for the purpose of gaining dividend income.

This brings me to the question of the extent to which these expenses may reasonably be so regarded. The Minister, as previously mentioned, apportioned the expenses between the interest and dividend income in proportion to their respective amounts. In so doing, he did not depart in principle from the method of apportionment which the appellant had used in calculating its income in its income tax return. But the appellant, in calculating its taxable income, had simply followed a formula which had been used and accepted in earlier years, and while the Minister was not bound to follow what was done in earlier years if it was not in accordance with *The Income Tax Act,* neither in my view is any inference of an admission as to the reasonableness of that method to be drawn against the appellant. The principle so followed, in my view, is not an appropriate one for determining the extent to which these expenses may reasonably be regarded as having been incurred for the purpose of gaining dividend income. It seems to me that

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the principle so applied involves and is based on the assumption that in some way the income of the appellant has been produced by or resulted from the incurring of the expense, an incident which is neither true in fact nor necessary in point of law. Under both ss. 12(1)(*a*) and 12(1)(*c*) the limitation imposed on the deductibility of an expense is determined by the purpose for which it was incurred, rather than by the result. Nor is the deductibility or non-deductibility of an expense dependent on its having produced or not produced or even been calculated or likely to produce income. In my opinion, the extent to which these expenses may reasonably be regarded as having been incurred for the purpose of gaining dividend income cannot be resolved by reference to the appellant's income receipts, but I think it can be resolved in a rough way by consideration of how income was to be produced from the appellant's business. The appellant's capital was invested in shares and in loans to subsidiary companies and was thus employed for the purpose of gaining income in the form of dividends and interest. The means of obtaining this income was that of holding the investments and receiving the income as it accrued. The expenses in question were incurred generally for the same purpose and in the same pursuit. An apportionment being necessary to determine, that portion of them which may reasonably be regarded as having been incurred for the purpose of gaining dividend income, I am of the opinion that the proportion of them which the appellant's investment holdings in shares bears to its total investment holdings may reasonably be regarded as the extent to which these expenses have been incurred for the purpose of producing dividend income. There may be other bases on which the apportionment might also be reasonably made, but in my view the one suggested meets the test of s. 12(1)(*c*), while that applied by the Minister does not.

Different considerations apply to the remaining items of expense, namely the legal expense for 1950, incurred for legal advice for the benefit of certain shareholders, and the stock transfer expense, listing fees for common stock, printing and stationery in connection with the annual meeting of shareholders and proxy expense. The purpose for which these expenses were incurred appears from the evidence, and I am quite unable to understand on what basis it can be

said that any of them was incurred for the purpose of gaining or producing income from the appellant's business or in the pursuit of its income-gaining activities. No doubt they are expenses which, as Mr. Sandilands said, must be incurred by a corporation whose shares are listed on the stock exchanges, but they are incurred in the course of the appellant's dealings with its own shareholders as shareholders and in connection with the administration incident to the capital structure and arrangements of the appellant, rather than in carrying out activities which form any part of the business or process or function or means by which the appellant's income is gained or produced. In my opinion, the evidence as to these expenses disproves the assumed fact on which the assessment was based because it shows that they were not incurred to any extent for the purpose of gaining or producing income from the appellant's business. Their deduction is, accordingly, prohibited by s. 12(1)(*a*), and not only a fraction but the whole of them should be disallowed as deductions.

In this view, it is unnecessary to consider whether or not the deduction of any of them is also prohibited by s. 12(1)(*b*).

In the result, the appellant is entitled to deduct the whole of the travelling expenses forming part of the items for general expense. The remainder of the items for general expense and the items for director's fees, provincial capital tax, audit fees, interest on bank loans, and legal expense for 1951 should be apportioned on the basis mentioned, and the appellant should be allowed to deduct the portion thereof not attributed to the investment holdings in shares, the dividends on which would be exempt from tax. No portion of the remaining items should be allowed as a deduction.

The appeal will be allowed and the assessments referred back to the Minister for revision in accordance with these reasons. As in the result the appellant obtains some of the relief sought, it is entitled to its costs of the appeal.

Judgment accordingly.

1958
Sept. 25, 26, 27
Oct. 9

BEAVER LAMB AND SHEARLING COMPANY LIMITED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Revenue—Excise Tax—Taxpayer under mistake of law paid excise on sheepskin processed into "Mouton"—Recovery of money paid—Application for refund barred by prescription—Payments made under duress recoverable—The Excise Tax Act, R.S.C. 1927, c. 179 as amended, s. 80A(1) as re-enacted by 1952, c. 27(1), s. 105(1)(a)(b), (6).

Section 80A(1) of the *Excise Tax Act*, R.S.C. 1927, c. 179, as amended, provides for payment of excise tax on all furs dressed in Canada; s-s. (1) of s. 105 for a refund in case of overpayment or payment in error; s-s. (6) that where, by mistake of law or fact, monies have been paid or overpaid as taxes imposed by the Act, they shall not be refunded unless an application has been made in writing within two years after the monies were paid or overpaid.

The suppliant paid the Department of National Revenue (Customs and Excise) $24,605.37 prior to June 1, 1953 and $30,000 on February 1, 1954 as excise taxes on deliveries of processed sheepskins known as "mouton". By Petition of Right it sought to recover on the grounds that the payments were made in error and overpayment; that an application for refund was made prior to June 1, 1953 and that, as the Supreme Court of Canada on June 11, 1956 had held in *Universal Fur Dressers & Dyers Ltd. v. The Queen*, [1956] S.C.R. 632, that s. 80A(1) did not apply to "mouton", the excise taxes in suit were imposed and collected by the agents of the Crown unlawfully. At the trial it was allowed to amend and pleaded alternatively that the $30,000 was paid involuntarily and under duress, consisting of the threat of criminal proceedings and the imposition of penalties and fines against the suppliant and its president, or that the sums were paid in protest.

Held: That in respect of its product "mouton" the suppliant was never liable for the payment of the excise tax provided by s. 80A.

2. That the suppliant failed to establish that the application for a refund referred to in s. 105(6) of the Act was ever made.

3. That even had it been made and received, it would not be entitled to recover the $30,000 as a refund, since no application, as required by s. 105(6) of the *Excise Tax Act*, was made within two years after such refund became payable.

4. That there was no evidence to support the contention that any of the payments were made "under protest".

5. That there was uncontradicted evidence that the $30,000 payment was made under duress or compulsion, and as it was not a voluntary payment, the suppliant was entitled to recover that sum from the respondent. *Brocklebank Ltd. v. The King*, [1925] 1 K.B. 52; *Maskell v. Horner*, [1915] 3 K.B. 106.

PETITION OF RIGHT to recover excise tax.

Hugh Plaxton, Q.C. and *Robert McKercher* for suppliant.

D. S. Maxwell and *G. T. Gregory* for respondent.

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CAMERON J.:—In this Petition of Right, the suppliant seeks to recover from the respondent substantial sums paid to the Department of National Revenue (Customs and Excise)—hereinafter to be called the Department—on or after June 15, 1951. The suppliant is a company incorporated under the laws of Ontario, having its head office at Uxbridge, its business, until its plant was destroyed by fire in July 1953, having been that of processors of sheepskins, a substantial part of its product having been converted into "mouton". The Department for many years had considered "mouton" to be within the category of "furs" and accordingly it had required the suppliant and other firms engaged in the production of "mouton" to pay excise tax "on all dressed furs, dyed furs, and dressed and dyed furs, dressed, dyed, or dressed and dyed in Canada" in accordance with the provisions of s. 80A(1)(ii) of *The Excise Tax Act*, R.S.C. 1927, c. 179, as amended.

Universal Fur Dressers and Dyers, Ltd., a company also producing "mouton", contested the validity of the assessment to excise tax on "mouton" on the ground that it was not a fur within the meaning of s. 80A, and by a decision of the Supreme Court of Canada[1] its contention was upheld. It is clear, therefore, that in respect of its product "mouton", the suppliant was never liable for payment of the excise tax provided for in s. 80A. It does not follow as a matter of course that the suppliant by reason of that fact alone is entitled to a refund of the amounts so paid. Parliament has made provision for the circumstances under and the manner in which refunds may be made. The relevant section of *The Excise Tax Act* under the heading "Deductions, Refunds and Drawbacks", is as follows:

105. (1) A deduction from, or refund of, any of the taxes imposed by this Act may be granted

(*a*) where an overpayment has been made by the taxpayer;

(*b*) where the tax was paid in error;

* * *

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

[1] [1956] S.C.R. 632.

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Section 105 consists of seven subsections, but those parts which I have omitted are, in my view, irrelevant to this issue. Some reference was made to s-s. 5 which reads:

(5) No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act, or under any regulation made thereunder.

That subsection, it seems to me, is restricted to such refunds as are specifically provided for in the Act or under any regulation made thereunder, examples of which are found in s-ss. 2 and 3 of s. 105 relating to goods sold to Her Majesty in right of any province of Canada, or where goods are sold as ship's stores, after payment of the tax. I was not referred to the regulations and I have not found anything in the Act which states when the refunds such as those herein claimed "first became payable under the Act".

The claim as originally advanced was based entirely on the allegation that the sums paid were so paid in error and in overpayment. These allegations were as follows:

3. Your Suppliant paid to the agents of Her Majesty the Queen, the Deputy Minister of National Revenue, Customs and Excise Division, the sum of $24,605.27 as and on account of excise taxes on the delivery of processed sheepskins known as mouton during and prior to June 1, 1953.

4. Your Suppliant paid to the agents of Her Majesty the Queen, the Deputy Minister of National Revenue, Customs and Excise Division, a further sum of $30,000 on February 11, 1954, as and on account of excise taxes relative to delivery of like products prior to June 1, 1953.

5. Your Suppliant paid the sums referred to in paragraphs 3 and 4 hereof in error and in overpayment and made application to the Deputy Minister of National Revenue, Customs and Excise Division, on or about June 1, 1953 for refund of the said amounts in accordance with the Excise Tax Act, Stat. of Can., 1947, Chapter 60, and with the Departmental practice in existence at that time.

At the trial and on the application of the suppliant, I allowed certain amendments to be made to the Petition of Right by the addition of two paragraphs in which it was alleged in the alternative that as to the payment of $30,000, such payment was made involuntarily and under duress, and that both amounts were paid under protest. For the moment I shall pass over these alternative claims and consider only the original allegations.

Exhibit 8 is an agreed summary of the excise taxes actually paid by the suppliant under s. 80A in the period June 1, 1951, to June 30, 1953. The Act requires that every person liable to pay taxes under that section shall file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of such furs and pay the tax returns. Then s. 106 provides for monthly returns and payments of any deficiencies and for penalties. Exhibit 8 sets out the details of the daily and monthly returns for the period mentioned, the total amount paid being $24,605.26—just one cent less than the amount stated in para. 3 of the Petition of Right. As will be noted later, a great many of these returns were admittedly false. Exhibit 6 comprises the daily returns for the months of May, June and July, 1953.

Following a routine audit of the suppliant's books and records in March 1953 by Mr. Belch (an experienced auditor in the Department) and an associate, it was found that the returns were fraudulent in a great many cases. Mr. Herbert Berg, president of the suppliant company and its main shareholder, admitted to Mr. Belch, as he did at the trial, that such was the case. The scheme of operations was as follows. The suppliant sold two main products, namely, shearlings and "mouton", the former of which was clearly not subject to the tax imposed by s. 80A. In shipping goods to purchasers who were aware of the fraudulent plan, the invoices in many cases showed "shearlings" to have been shipped where, in fact, "mouton" was supplied. In other cases where the purchaser was not a party to the scheme, the invoice sent to him correctly showed the proper proportion of shearlings and "mouton" actually shipped; the office copy of the invoice, however, was made out in different form and in many cases showed shipments of shearlings where "mouton" had been actually supplied. It was from these two types of false invoices that the excise tax returns were made out on many occasions.

Following the audit and the discovery of the fraud, various assessments were made upon the suppliant, based in part, I take it, on the admissions of Mr. Berg as to the details of the fraudulent invoices. Finally, the suppliant was notified on April 17, 1953 (Exhibit 3) that its total

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indebtedness for excise taxes and/or other charges amounted to $61,722.36. Thereafter, Mr. Berg interviewed various officials of the Department and about May 28, 1953, a well-known Montreal solicitor made representations on behalf of the suppliant. As I have noted, the factory of the suppliant was destroyed by fire on July 19, 1953, and no operations have been carried on since that time.

After that date, a distinguished Toronto counsel was engaged by the suppliant and after interviews and correspondence, something in the nature of a settlement was arrived at as appears from the letter of Mr. Sim, Deputy Minister of National Revenue, Customs and Excise, dated September 15, 1953, to that counsel (Exhibit 5). The arrangement was that the suppliant would pay $30,000 in cash on account of the excise tax arrears, would plead guilty to a charge of making false or deceptive statements in its monthly sales and excise tax returns required to be filed by the Act, and covering the months of August and September 1952, involving additional taxes of $5,000. In November 1953, the suppliant pleaded guilty to the charges, incurred penalties of $10,000 (double the amount of the tax evasion specified), and was fined $200, all of which was paid. Cheques aggregating $30,000 on account of arrears of taxes were in the hands of the Department on September 15, 1953, but apparently were not taken into account until February 11, 1954 (Exhibit 4). In the meantime, by Order in Council dated January 21, 1954, authority was granted for remission of taxes and interest penalties in the sum of $17,859.04 principal and $7,587.34 interest (Exhibit B). The item of $30,000 so paid is the second amount now claimed as a refund. No claim is made in respect of the $10,000 penalty.

Whether the provisions of s. 105(1), which I have quoted above, confer a statutory right upon a taxpayer to a refund of taxes in the case of overpayment or error, or whether the expression "may be granted" is permissible, I need not stop to consider. It is abundantly clear from the provisions of s-s. 6 that a refund in case of payment or overpayment due to a mistake of law or fact shall not be made "unless application has been made in writing within two years after such monies were paid or overpaid". Here the error was clearly one of law, the Department construing the product

"mouton" as falling within the term "furs" in s. 80A and the suppliant making its payments as to both the sums claimed, on the same basis.

It will be recalled that in the pleadings the suppliant alleges that it made an application for refund of the said amounts on or about June 1, 1953. There is no allegation in the pleadings that the application was in writing, but at the trial evidence was led which, if believed, would indicate that on or about June 15, 1953, an application in writing was prepared and posted, the letter being addressed to Mr. David Sim, the Deputy Minister. The burden of proof lies on the suppliant to establish that an application in writing such as is required by the subsection was made.

Mr. Joseph Abrams, of the Canadian Abattoir, Ltd., is a minor shareholder in the suppliant company and the father-in-law of Mr. Berg. He says that he received a letter from Donnell and Mudge dated June 12, 1953 (Exhibit 1) that firm also being engaged in the production of shearlings and "mouton". It intimated that steps were being taken in the industry to test the validity of the assessment to excise tax on "mouton" and recommended him to join with the others in so doing and to make application for a refund of taxes paid within the previous two years. Abrams says he read over that letter on the telephone to Berg, intimating that he should do likewise. Attached to the letter are samples of the application for refunds said to have been sent in by Donnell and Mudge, and another, presumably by Universal Fur Dressers and Dyers.

Berg says he received Exhibit 1 and the sample letters accompanying it and on or about June 15, 1953, he dictated a letter addressed to Mr. David Sim, the Deputy Minister, to his bookkeeper and secretary, Mrs. Marie Forsythe; that when the letter was typed, he read and signed it and gave it to Mrs. Forsythe, saw her stamp it and gave instructions to post it. He says it asserted a claim that "mouton" was not properly subject to tax, claimed a refund for the last two years and also for a refund of any payments subsequently made. He did not see the letter posted. He admits that no reply to that letter was ever received and that neither before nor after that date did he make any other claim to any refund, either orally or in writing, or during the course of the negotiations for settlement. He admits, also, while

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knowing that no reply had been received, that he made no inquiries as to why the Department had not replied. He also swore that he had Mrs. Forsythe prepare a statement of the amount of tax paid on "mouton" from January 1, 1951, to May 1953, similar to Exhibit 2, and that this was enclosed in his letter to Mr. Sim. Exhibit 2 itself is said to have been forwarded to the company's auditors and consequently to have escaped destruction in the fire. It concludes an item of $3,720.38 for tax paid in June 1953, this item having been added by Mr. Berg.

Mrs. Forsythe stated in evidence that she had prepared such a letter on the instructions of Berg, had submitted it to him for approval and signature, had stamped the envelope, and as usual had deposited it with other letters in the post office at Uxbridge. She stated, also, that she had prepared the statement similar to Exhibit 2 on Mr. Berg's instructions and that it had been enclosed in a letter to Mr. Sim.

If this evidence regarding the sending of the letter and statement stood alone and if I believed these witnesses, there would seem little doubt that an informal application for refund had, in fact, been posted. The respondent denies that any such letter or statement was ever received and evidence was led to establish that such was the case. I was informed as to the practice followed in the Department as to the indexing and filing of incoming and outgoing mail. Such a letter applying for the refund of tax would in the normal course be referred to the refund section where it would receive almost immediate attention. A reply would be sent at once and the necessary forms supplied to the applicant. Records would be kept of the application and any correspondence connected therewith. The evidence clearly establishes that after the most careful and repeated searches, no trace could be found of any such application or statement or of any reply thereto. The Department of National Revenue, Customs and Excise has hundreds of employees and while the possibility of human error or omission may be present, it is clearly shown that such errors in matters of this sort practically never occur. In the

ordinary course of things, the applicant would receive a reply in the course of two or three days, but both Mr. Berg and Mrs. Forsythe admitted that no such reply had been received.

There are also substantial grounds for doubting the veracity of both Mr. Berg and Mrs. Forsythe. It will be noted that the item of $30,000 now claimed, while less than the total amount originally claimed by the Department, relates entirely to taxes which the suppliant by its fraudulent records and returns had endeavoured to escape paying. Berg was the author of the plan as he admitted to the Department's auditor and at the trial. In his evidence he endeavoured to protect Mrs. Forsythe by stating that "he could not remember" whether she knew of or participated in the falsification of records and returns. I do not believe that statement. As manager and operator of this small business, Berg would undoubtedly be aware of everything that went on in the office and what knowledge Mrs. Forsythe had of the frauds. Exhibit A—a statement given by Mrs. Forsythe to an inspector in the fire marshal's department and to which I will refer later—provides the clearest proof that Berg did in fact know that Mrs. Forsythe had full knowledge of and was a party to the carrying out of the frauds, on his instructions.

In direct examination, Mrs. Forsythe stated expressly and vehemently that she had no knowledge of and had not participated in any way in the falsification of records and returns; that she had merely done what she was told to do and that Berg had never disclosed the fraudulent plan to her. Again there is the most cogent evidence to the contrary.

Mr. Belch, the departmental auditor, states that as an auditor his opinion was that it was impossible for the bookkeeper, Mrs. Forsythe, to have made the false returns without knowledge that they were fraudulent. He stated, also, that Mrs. Forsythe had voluntarily told him that in making

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out the duplicate invoices she had taken steps in some cases to ensure that the duplicate or office copy of the invoice did not correspond with the original which was sent to the customer.

But the most important evidence relating to the credibility of Mrs. Forsythe is Exhibit A—a three-page statement signed by Mrs. Forsythe on each page. It was produced from the custody of the witness R. J. Simmons, an inspector in the office of the fire marshal of Ontario who was sent to Uxbridge to ascertain the cause of the fire. For reasons stated at the trial, I ruled that this document was both relevant and admissible notwithstanding the vigorous objection of counsel for the suppliant.

While Mrs. Forsythe admitted that she had signed the document which had been read over, she expressly denied having given the answers to the questions, stating that she was confused at the time and was frightened and perhaps threatened by the inspector who was accompanied by a local police constable of the Ontario Provincial Police. The evidence of Simmons, to which I give full credit, is that the statement was completely voluntary, was fully understood by Mrs. Forsythe, and that no threats whatever were used at any time. The questions and answers are in his handwriting and both he and the accompanying constable signed each page. I need say no more about this document than that it clearly admits full knowledge on the part of Mrs. Forsythe of the frauds planned by Berg and the steps taken by her over a period of years in falsifying the records and returns at the direction of Berg.

The conduct of Berg would also tend to indicate that an application for a refund was never made. He was unable to produce a copy of his application, alleging that it was destroyed at the time of the fire. It is highly probable, I think, that such an important piece of evidence in which a claim was allegedly made for refunds of $25,000 or more and for later payments to be made, would have been kept in a safe place. The company's safe, holding a number of

the important books and cash, was salvaged. The letter itself is said to have been sent by ordinary mail and not registered. Surely to such a request an answer in due course would have been expected and if not forthcoming, enquiries would have been made promptly. Nothing was said by Berg to Belch at any time about such a letter; nor did Berg or either of his solicitors mention the matter at any time when interviewing or corresponding with the Department officials. Why was it not mentioned during the course of negotiations for settlement which resulted in the suppliant making further payments of over $40,000? Surely the departmental officials, if aware of the outstanding request for a refund, would not have made any settlement whatever without taking into account and finally disposing of the alleged application. There is no evidence to suggest that Berg ever advised the suppliant's solicitors that while he would consent to paying the arrears of taxes, he would later advance a claim to recover the whole amount so paid on the basis of a prior letter written by him.

The settlement was not one made "without prejudice". At that time there was no contention that a claim for a refund had been made or would be made or that the suppliant was not liable for payment of the taxes, the only matter in question being the quantum of the unpaid taxes.

I have no hesitation whatever in accepting the evidence of Belch and Simmons as completely truthful and where it is in any way in conflict with that of Berg or Mrs. Forsythe, I must reject the latter. In view of the admitted falsification of the records and returns of Berg and the other matters to which I have referred as indicating that no application for refund was ever made, and the fact that his evidence relating to the application is entirely self-serving, I do not accept his evidence as proof that such an application was ever made. Moreover, I must also reject the evidence of Mrs. Forsythe relating to the alleged application. Her denial at the trial of any knowledge of the falsifications or any complicity therein is so much at variance with her

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statements found in Exhibit A that I am unable to believe her or to attach any weight whatever to her evidence. There is, therefore, no credible evidence before me that any application for a refund was made. It follows, therefore, that the suppliant has failed entirely to establish that the application referred to in s. 105(6) was ever made.

That finding is sufficient to debar the suppliant from recovering a "refund" under the provisions of s. 105. It is clear, however, that even had I found that such an application in writing as is required by s. 105(6) had been made in June 1953 and had been received, the suppliant would not in any event be entitled to recover the item of $30,000 *as a refund* under that section since no application therefor was made within two years *after* that amount was paid or overpaid. As I have said, the cheques in payment of the $30,000 were in the hands of the Department not later than September 15, 1953, and were taken into account not later than February 11, 1954. Admittedly, no application of any sort was made thereafter until these proceedings were instituted on November 1, 1957.

In view of my finding that no application for a refund was ever made, it becomes unnecessary to consider the further submission on behalf of the respondent that as no application was received by the Department, there never was in fact an "application".

I turn now to the alternative claims as stated in the amendments to the Petition of Right allowed at the opening of the trial. They are as follows:

8*a*. In the alternative to paragraph 4 your Suppliant alleges and the fact is that the said sum of $30,000 was paid to Her Majesty through the agency of the Department of National Revenue, Customs and Excise Division involuntarily and under duress. Such duress consisted of the threat of criminal proceedings and the imposition of large penalties and fines against the Suppliant and the President thereof.

8*b*. In the further alternative to the allegations set out in paragraphs 3 to 5 inclusive herein, your Suppliant alleges and the fact is that the said sums referred to in the said paragraphs were paid to Her Majesty as aforesaid under protest.

It will be convenient to first consider the allegation in para. 8*b* that both amounts claimed were "paid under protest". As regards the first claim—that of $24,605.26—it

relates entirely to amounts paid prior to the date of the alleged letter of application about June 15, 1953, and there is not a tittle of evidence to support the contention that any of the payments aggregating this amount were "paid under protest". Berg stated expressly that all payments up to the end of June 1953 were paid voluntarily. In the interviews and correspondence that followed after that date, the only disputed point was one of quantum and when the final settlement was worked out, nothing is shown to have occurred which would indicate that the other item, namely, $30,000, was paid under protest. I must, therefore, entirely reject this plea.

There remains only the alternative claim that the $30,000 payment was made involuntarily and under duress.

On this point, counsel for the suppliant referred to a number of exhibits which in my view have no bearing on this matter. Exhibit 12 is a letter from the Collector to the suppliant dated September 3, 1953, intimating that it had failed to file returns for June and July as required by the Act and stating that by such failure it had rendered itself liable to payment of the penalty provided. The suppliant was in default in making such returns and penalties were provided in the Act. This letter, therefore, merely drew attention to the existing law and could not be considered as amounting to duress. The same may be said also about Exhibits 3, 9 and 10, in which there are "demands" for payment of the assessments made. Exhibit 11 is a letter dated July 13, 1953, by the Deputy Minister to Mr. Eudes of Montreal, then solicitor for the suppliant. It relates to an interview of May 28 when Mr. Eudes had suggested that the suppliant's auditors be given an opportunity to further examine the assessment with a view to establishing whether or not the suppliant would wish to challenge the Department's figures. Mr. Nauman, of the Department, had then intimated that he would have no objection to such an examination, but as the amount involved was very large, he laid down the condition that 50 per cent. of the amount of the assessment be paid and that the suppliant would have until June 10 to decide whether it would take advantage

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of the arrangement. The suppliant did nothing in the matter and the letter merely indicates that the proposal would be withdrawn unless accepted by July 20; if 50 per cent. of the assessment were not then paid on account, it was intimated that the Department would proceed without delay to place the matter before the Court. I am unable to find anything in this letter which amounts to duress. In the opinion of both parties, substantial amounts were long past due and the only possible uncertainty was the precise amount of the arrears. In intimating that Court action would be taken if the offer were not accepted, the Department was merely carrying out its duties as required by the Act, or at least as the Department then construed its duties to be.

On this point, the suppliant relies mainly on statements made to Berg by Mr. Nauman, a senior executive in the Department, and on other matters which followed. After the issue of the increased assessments, Berg came to Ottawa in April 1953 to interview Mr. Labarge, another official of the Department, and was taken by the latter to see Mr. Nauman. Berg states that he was told by Mr. Nauman that if the full amount of the assessments were not paid, prosecution would follow and that he (Berg) would be sent to jail; that the falsification of records had been going on for a long time and that the Department proposed to make an example of him. Further unsuccessful efforts were then made by Mr. Eudes on behalf of the suppliant. After the fire in July, the Department followed the procedure laid down in s. 108 of the Act and in order to ensure collection of the amount claimed, prohibited the fire insurance companies from paying the fire loss to the suppliant and the suppliant's bankers from paying out the amounts held on deposit. Finally, with the assistance of its Toronto counsel, the settlement above mentioned was agreed upon, the $30,000 was paid, and the bank account and the fire insurance monies released to the suppliant. Later, the charge was laid, the suppliant pleaded guilty, and the penalties and fines were paid.

Neither Nauman nor Labarge gave evidence at the trial and consequently Berg's evidence as to the above threats is uncontradicted.

It is well settled that a payment made under duress is deemed to be involuntary and may be recovered in an action for money had and received to the use of the payor.

In Halsbury's *Laws of England*, 3rd Ed., Vol. 8, p. 240, the proposition is stated thus:

417. A person who voluntarily pays a sum of money on another person's demand cannot claim a return of it from a payee as money had and received to his use, for, since he might have resisted the demand, the payment must be taken to have been voluntary; but if the payment is made under duress or some form of compulsion other than legal compulsion, it is deemed to be involuntary, and the sum paid is recoverable in this form of action.

* * *

A payment is not considered voluntary when made under threat of a penal action, or of an execution, even though no execution could lawfully issue; or when illegally demanded and paid under colour of an Act of Parliament or of an office, or under an arbitrator's award which is *ultra vires;* or when one party is in a position to dictate terms to the other; nor is a payment considered voluntary merely because the person making it has not waited to be sued or has been allowed time for payment. There may be "practical" as well as "actual legal" compulsion.

The case of *Brocklebank, Ltd. v. The King*[1] is cited as authority for the statement that a payment is not considered voluntary when illegally demanded and paid under colour of an Act of Parliament. There the headnote in part is as follows:

The Shipping Controller, purporting to act under the authority of the Defence of the Realm Regulations, required as a condition of a licence to the suppliants to sell one of their ships to a foreign firm that they should pay a percentage of the purchase money to the Ministry of Shipping, and the suppliants paid the said percentage. On a petition of right to recover back the money so paid:—

Held, (1.) That the imposition of the condition was illegal, and that the payment was not a voluntary payment.

Bankes, L.J. stated at p. 61-2:

The sum paid was £34,920, and it is for recovery of this amount that the petition of right is brought. The whole of the facts relating to the demand of this sum of money are contained in a few letters and in what

[1] [1925] 1 K.B. 52.

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passed at the above-mentioned interview. The learned judge came to the conclusion, after considering the evidence, and the authorities which were cited to him and to us, that the payment was not a voluntary one. I entirely agree with this view. The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless. I do not propose to go through the evidence or to discuss the authorities, as upon the materials before the Court it seems to me impossible to disturb the judge's conclusion on this point.

In *Hooper v. Mayor & Corp. of Exeter*[1], the facts were that the Corporation of Exeter exacted harbour dues from the plaintiff in respect of exempted articles. The plaintiff paid in ignorance of the exemption. It was held that the plaintiff was entitled to recover back the money so paid. Lord Coleridge, C.J. said at p. 458:

From the case cited in the course of the argument it is shewn that the principle has been laid down that, where one exacts money from another and it turns out that although acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery.

I am of opinion that that principle should be adopted here, and that accordingly the plaintiff is entitled to recover his money on the ground that he has paid it involuntarily.

Smith J. was of the same opinion and added:

The question is if the money has or has not been paid by erroneous payment. Here the plaintiff brings his limestone to the quay, and the defendants demand and receive a toll they are not entitled to. I agree that, upon the authority of *Morgan v. Palmer*, 2 B & C. 729, and of another case—*Steele v. Williams*, 8 Exch. Rep. 652—the plaintiff should be entitled to recover these amounts so erroneously paid by him for dues and which cannot be considered as voluntary payments.

The leading authority on cases of this kind is *Maskell v. Horner*[2]. The headnote to that case is as follows:

From September, 1900, to June, 1912, the plaintiff carried on business as a dealer in produce in the vicinity of Spitalfields Market. As soon as he commenced business the defendant, who was the owner of the market, demanded tolls from him under threat of seizure of his goods if he refused to pay, and on the first occasion the plaintiff objected to pay and actual seizure took place. The plaintiff then consulted a solicitor, and upon

[1] (1887) 56 L.J.Q.B. 457. [2] [1915] 3 K.B. 106.

learning that other dealers outside the market paid tolls he, acting upon the solicitor's advice, paid the tolls under protest, and, thereafter, he, or his agents acting upon his instructions, always paid the tolls under protest. Subsequently, whenever the plaintiff challenged the defendant's right, or disputed the amount of tolls, in particular cases there was a seizure or threat of seizure followed by payment under protest.

From the decision in *Attorney-General v. Horner* (No. 2) [1913] 2 Ch. 140, it appeared that the tolls had been unlawfully demanded, and, in consequence, the plaintiff brought this action for money had and received to recover the tolls so paid, claiming that he paid them (1.) under a mistake of fact and (2) not voluntarily but under the pressure of seizure of his goods:—

Held by the Court of Appeal, confirming the decision of Rowlatt J. on this point, that the plaintiff did not pay under a mistake either of law or fact, but because he found that other sellers were paying tolls and he did not wish to be involved in litigation with the defendant, and that the plaintiff could not recover under this head of claim; but

Held, further (Pickford L.J. doubting), reversing the decision of Rowlatt J. on this point, that the circumstances of the payments and the conduct of the plaintiff throughout the period of years showed that he only paid to avoid seizure of his goods and never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction, and that he was entitled to recover under this head of claim the sums paid during the last six years immediately preceding this action, the earlier payments being barred by the Statute of Limitations,

At p. 118 Lord Reading C.J. said:

Upon the second head of claim the plaintiff asserts that he paid the money not voluntarily but under the pressure of actual or threatened seizure of his goods, and that he is therefore entitled to recover it as money had and received. If the facts proved support this assertion the plaintiff would, in my opinion, be entitled to succeed in this action.

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C.B. and per Parke B. in *Atlee v. Backhouse,* 3 M & W. 633, 646, 650). The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity

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BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy v. Manley*, 1 C.B. 594, 602, 603). There are numerous instances in the books of successful claims in this form of action to recover money paid to relieve goods from seizure.

Counsel for the respondent cited a number of cases, including that of *William Whiteley Ltd. v. The King*[1]. The facts are summarized in the headnote as follows:

The suppliants carried on a large business in which they employed a large number of assistants who had all their meals on the premises, and for the service of these meals the suppliants employed a number of men as cooks and waiters. The Inland Revenue authorities said that these waiters were "male servants" in respect of whom duties were payable, and in an interview in the year 1900 the supervisor of taxes told the secretary of the suppliant company that in his opinion the waiters were "male servants" and that the duties were payable, and that if they were not paid the suppliants would incur penalties, and upon that the duties were then paid by the suppliants in each year in the belief that they had no option except to do so. From 1903 onwards the duties were paid with a protest that the waiters were not "male servants" within the meaning of the Act and that the duties were not payable, but the Commissioners of Inland Revenue gave their opinion that the waiters were "male servants" and the duties were payable. In 1906 the suppliants refused to pay, and upon proceedings being taken for penalties, the Divisional Court held that the waiters were not "male servants" and that the duties were not payable. On a petition of right to recover back the moneys so paid:

Held, that the moneys having been paid under a mistake, not of fact, but of law, could not be recovered back, either on the ground that they were paid under duress or compulsion, or on the ground that they were paid in discharge of a demand illegally made under colour of an office.

Walton J. came to the conclusion that there was nothing in the case which amounted to compulsion. At p. 745 he stated in part:

The question which I have to decide here is whether the payments made during the years which I have mentioned—from 1900 to 1905—were or were not voluntary payments. Was there any duress here? I cannot find any evidence of duress or compulsion beyond this, that the supervisor, the officer of Inland Revenue, told Messrs. Whiteley Limited that in the opinion of the Commissioners of Inland Revenue these duties were payable, and that if they were not paid proceedings would be taken for penalties. That is the only evidence of anything which could be called duress or compulsion. The suppliants knew all the facts. They had present to their minds plainly, when these payments were made, that there was a question as to whether upon such servants as those in question duty was payable.

[1] (1909) 101 L.T. 741.

They themselves raised that question and they paid the duties. They could have resisted payment. . . . I think the most that took place was this, that the officer of Inland Revenue told the suppliants that in his opinion and in the opinion of the Commissioners of Inland Revenue the duties were payable. The suppliants knew that that was only an expression of opinion. They knew that the Commissioners of Inland Revenue could not determine whether the duties were payable or not. . . . In these circumstances I have come to the conclusion that there was nothing in this case which amounted to compulsion.

In the instant case, I have no hesitation in finding on the uncontradicted evidence of Berg that the payment of $30,000 was made under duress or compulsion. It will be recalled that legal proceedings were threatened against the suppliant, that Berg was threatened with imprisonment, that the main assets of the company—namely, its bank account and its right to receive payment from the fire insurance company—were under seizure by the Department. There is no evidence to indicate that up to the time of the settlement, the officials of the Department had withdrawn their threats of criminal proceedings against Berg. The seizure of the bank account and of the insurance monies remained in effect until after the payment of $30,000 was made; and the Department insisted as a term of the settlement that the suppliant should be charged and would plead guilty to making fraudulent returns.

As has been stated above, the demand for payment of the taxes was illegal. For the reasons stated, I am of the opinion that the payment of $30,000 was not a voluntary payment but was made under duress or compulsion and that the suppliant is therefore entitled to recover that sum from the respondent.

There will therefore be judgment declaring that the suppliant is entitled to recover from the respondent the sum of $30,000, a part of the relief claimed in the Petition of Right, which will otherwise be dismissed. The suppliant is also entitled to be paid its costs after taxation thereof.

Judgment accordingly.

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Oct. 7
Oct. 23

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

IRONCO PRODUCTS LIMITED .....PLAINTIFF;

AND

A/S *MOTOR TRAMP* .....DEFENDANT.

Shipping—Practice—Admiralty Rule 200—Motion to set aside order renewing writ and extending time for service dismissed.

Held: That Admiralty Rule 200 justifies an extension of time for serving a writ.

2. That the Court where it has power should disregard technical objections tending to prevent litigation of reasonable claims.

MOTION to set aside an order renewing a writ and extending time for service of same.

The motion was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

J. R. Cunningham for the motion.

Douglas McK. Brown contra.

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

SIDNEY SMITH D.J.A. now (October 23, 1958) delivered the following judgment:

In this action, which is *in personam*, I made an *ex parte* order on August 11 last renewing the writ and extending the time for its service in Denmark, and of notice thereof to September 30, 1958. The notice was duly served and the defendant moved to set aside my order. The main ground for this motion was that I could not make such an order, under my own ruling in *Donald H. Bain Ltd. v. The Ship Martin Bakke*[1].

I do not doubt that my decision in that case was right on the facts, but on further consideration I think I should modify the generality of what I said there on the power to

[1] (1955) Ex. C.R. 241.

extend. On looking up my notes of that case, I find that Admiralty Rule 200, which gives a Judge general power to enlarge time, even after its prescribed expiration, was not cited.

As I pointed out in that case, there is a difference between the language in that of a Supreme Court writ and of a writ in this Court, the latter not referring to a possible extension of time for service. But on the whole I do not think that this is material here, since Rule 200 expressly gives power to enlarge a time fixed by "forms". In England extension is governed by R.S.C. Order 64, rule 7, which is the same as the corresponding Supreme Court rule in this province. In *Re Jones*[1] it was held that this rule justified extension of time for serving a writ in a common law action after expiry of the time; and that decision was applied in Admiralty in *The Espanolets*[2].

As pointed out in the latter case, although the power of extension given is unlimited, Judges have held that no extension should be given where a limitation on the action had run in the meantime, unless a special statute gave express power to extend after the period. In the *Martin Bakke* case, a limitation had run, which I think justified my refusal to extend there, to say nothing of other material considerations arising from the action being one *in rem*. So far as my reasoning was based on the absence of power to extend, it must be modified in view of Rule 200.

It is not suggested here that any statute of limitations has run, but affidavits have been filed to show that I should have exercised my discretion against extension because the plaintiff's solicitors had not shown due diligence in serving the writ, and it was said the delay was not adequately explained. I think possibly greater diligence could have been shown, but that there was a *bona fide* misunderstanding between the solicitors as to the authority of those negotiating for the "ship" interests, and that there was

[1] (1877) 25 W.R. 303. [2] (1920) P. 223.

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reasonable excuse for the delay in service. I am decidedly of opinion that the Court, where it has power, should lean against technical objections tending to prevent the litigation of reasonable claims.

I therefore hold that my former order should stand. However as my language in the *Martin Bakke* case gave grounds for the motion, its dismissal will be without costs.

Order accordingly.

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