1968

CANADA
LAW REPORTS

RAPPORTS JUDICIAIRES
DU CANADA

Exchequer Court of Canada
Cour de l'Échiquier du Canada

PAUL A. RAYMOND, C.R.

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

Official Law Editors

Arrêtistes

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Ottawa, 1968

90300—1

JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

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

PUISNE JUDGES:
THE HONOURABLE JOHN DOHERTY KEARNEY
(*Appointed November 1, 1951*)
THE HONOURABLE JACQUES DUMOULIN
(*Appointed December 1, 1955*)
THE HONOURABLE ARTHUR LOUIS THURLOW
(*Appointed August 29, 1956*)
THE HONOURABLE CAMILIEN NOËL
(*Appointed March 12, 1962*)
THE HONOURABLE ANGUS ALEXANDER CATTANACH
(*Appointed March 27, 1962*)
THE HONOURABLE HUGH FRANCIS GIBSON
(*Appointed May 4, 1964*)
THE HONOURABLE ALLISON ARTHUR MARIOTTI WALSH
(*Appointed July 1, 1964*)
THE HONOURABLE RODERICK KERR
(*Appointed November 1, 1967*)

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The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.
The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty District—appointed October 8, 1959.
The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.
The Honourable THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed September 28, 1961
The Honourable GEORGE ERIC TRITSCHLER, Manitoba Admiralty District—appointed October 19, 1962.
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ATTORNEY-GENERAL OF CANADA:
The Honourable PIERRE ELLIOTT TRUDEAU

SOLICITOR GENERAL OF CANADA:
The Honourable L. T. PENNELL

JUGES
DE LA
COUR DE L'ÉCHIQUIER DU CANADA

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

PRÉSIDENT:

L'HONORABLE WILBUR ROY JACKETT
(*nommé le 4 mai 1964*)

JUGES PUÎNÉS:

L'HONORABLE JOHN DOHERTY KEARNEY
(*nommé le 1er novembre 1951*)
L'HONORABLE JACQUES DUMOULIN
(*nommé le 1er décembre 1955*)
L'HONORABLE ARTHUR LOUIS THURLOW
(*nommé le 29 août 1956*)
L'HONORABLE CAMILIEN NOËL
(*nommé le 12 mars 1962*)
L'HONORABLE ANGUS ALEXANDER CATTANACH
(*nommé le 27 mars 1962*)
L'HONORABLE HUGH FRANCIS GIBSON
(*nommé le 4 mai 1964*)
L'HONORABLE ALLISON ARTHUR MARIOTTI WALSH
(*nommé le 1er juillet 1964*)
L'HONORABLE RODERICK KERR
(*nommé le 1er novembre 1967*)

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Son honneur VINCENT JOSEPH POTTIER, district d'amirauté de la Nouvelle-Écosse—nommé le 8 février 1950.
L'honorable ARTHUR IVES SMITH, district d'amirauté de Québec—nommé le 16 juin 1950.
L'honorable ROBERT STAFFORD FURLONG, district d'amirauté de Terre-Neuve—nommé le 8 octobre 1959.
L'honorable DALTON COURTWRIGHT WELLS, district d'amirauté d'Ontario—nommé le 28 janvier 1960.
L'honorable THOMAS GRANTHAM NORRIS, district d'amirauté de la Colombie-Britannique—nommé le 28 septembre 1961.
L'honorable GEORGE ERIC TRITSCHLER, district d'amirauté de Manitoba—nommé le 19 octobre 1962
GORDON R. HOLMES, C.R., district d'amirauté de l'Île du Prince-Édouard—nommé le 24 mai 1963.
L'honorable HAROLD GEORGE PUDDESTER, district d'amirauté de Terre-Neuve—nommé le 4 juin 1963.
L'honorable JAMES DOUGLAS HIGGINS, district d'amirauté de Terre-Neuve—nommé le 28 mai 1964.

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L'honorable CHARLES WILLIAM TYSOE, district d'amirauté de la Colombie-Britannique—nommé le 31 janvier 1963.
Son honneur REGINALD D. KEIRSTEAD, district d'amirauté du Nouveau-Brunswick—nommé le 28 février 1957.
L'honorable ANDRÉ DEMERS, district d'amirauté de Québec—nommé le 26 novembre 1965.

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

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

PROCUREUR GÉNÉRAL DU CANADA:
L'honorable PIERRE ELLIOTT TRUDEAU

SOLLICITEUR GÉNÉRAL DU CANADA:
L'honorable L. T. PENNELL

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EN SA JURIDICTION DE COUR
DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

90296—1

BETWEEN:

CATHAY RESTAURANTS LIMITED .....PLAINTIFF;

AND

KAI CHIN .....DEFENDANT.

Ottawa 1966
Oct. 25
Nov. 7

Trade marks—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 12(1)(2), 18(2), 31—Injunction restraining defendant from infringing registered trade mark and also passing-off—Counterclaim to expunge plaintiff's registered trade mark "Cathay House"—Prior use—Action dismissed and counterclaim upheld and trade mark "Cathay House" expunged.

In a case stated for the trial of an action for infringement and a counterclaim for expungement of the registration of the trade mark "Cathay House", which had been registered by the plaintiff in respect of several items of food and in respect of the service of food and alcoholic beverages, it was agreed that if the trade mark was at the date of its registration either clearly descriptive or deceptively misdescriptive of the character or quality of the wares and services in association with which it was used by the plaintiff or of the conditions of or the persons employed in their production or of their place of origin, the registration should be expunged. The case also stated that the plaintiff used the trade mark in association with food of a kind known generally to the public as Chinese food sold by the plaintiff on a take out basis and in association with the service of food and beverages served in a restaurant decorated in a Chinese motif and operated by persons of Chinese origin.

No attempt was made to justify the registration under provisions of the Trade Marks Act permitting registration of a descriptive trade mark on proof of such use of it by the applicant as to have caused it to become distinctive.

Held, that the trade mark "Cathay House" was clearly descriptive of the Chinese character of the food and services in association with which it was used and that its registration should be expunged.

ACTION for infringement of trade mark.

W. G. Burke-Robertson, Q.C. for appellant.

Robert C. McLaughlin, for respondent.

THURLOW J.:—In this action the plaintiff claims an injunction and other relief in respect of alleged infringement of its registered trade mark CATHAY HOUSE and in respect of alleged passing-off by reason of the defendant's use in its business of the trade mark CATHAY CAFE. The defendant besides denying that his use of the mark CATHAY CAFE constitutes infringement or passing off challenges the validity of the plaintiff's registration of the mark CATHAY HOUSE and by counterclaim asks that it be expunged.

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CATHAY RESTAURANTS LTD. v. KAI CHIN

Thurlow J.

The action and counterclaim came to trial on a case stated by consent in the following terms:

The Plaintiff and the Defendant hereby agree that:

1. The Plaintiff registered the trade mark "CATHAY HOUSE" on the 24th day of December, 1958, as No. 112679 as applied to the sale of meats, vegetables, including bean sprouts, fish including shell fish, poultry, pastry and noodles and the service of food in restaurants. On the 19th day of June, 1959, the statement of services in the above described registration was amended to include serving of alcoholic beverages of all kinds.

2. The Defendant has carried on a restaurant business under the name "CATHAY CAFE" at premises known as 505 Princess Street, in the City of Kingston, in the Province of Ontario, since the month of November, 1959, and sells substantially the same wares and provides substantially the same services as the Plaintiff.

3. The Plaintiff has since the date of the registration of its trade mark, "CATHAY HOUSE", continually used the said trade mark in association with its wares and services and has applied the said trade mark to its wares and services.

4. The Plaintiff carries on a restaurant business and food take-out service at 228 Albert Street, in the City of Ottawa, and Province of Ontario. The majority of the foods served in the restaurant and sold on a take-out basis to which the trade mark "CATHAY HOUSE" is applied, are of a kind generally known to the public as Chinese food. The aforesaid restaurant is decorated in a Chinese motif and operated by persons of Chinese origin.

The questions for the opinion of the Court are:

1. Whether the trade mark, "CATHAY HOUSE", was at the date of its registration either clearly descriptive or deceptively misdescriptive of the character or quality of the wares and services in association with which it was used by the Plaintiff or of the conditions of or the persons employed in their production or of their place of origin;

2. Whether the use of the trade mark, "CATHAY CAFE" and the use of the trade mark "CATHAY HOUSE", in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are sold or performed by the same person.

If the Court should answer Question 1 in the affirmative, Counsel agree that the entry in the Trade Marks Register maintained pursuant to the Trade Marks Act and relative to the registration by the Plaintiff of the trade mark, "CATHAY HOUSE", registered September 24, 1958 as No. 112679, be expunged.

If the Court should answer Question 1 in the negative and Question 2 in the affirmative, Counsel hereby consent to judgment being given declaring:

(a) An injunction restraining the Defendant, his servants and agents from infringing the Plaintiff's registered trade mark as above set forth, and from selling or offering or exposing or

advertising services, or procuring to be sold or distributed food products under the name CATHAY HOUSE or as presently used by the Defendant, CATHAY CAFE, or under any other word or name which, by reason of colourable resemblance to the Plaintiff's trade mark, is likely to cause confusion, or is likely to lead to the inference that the said services incorporate the wares or services of the Plaintiff, and from in any other manner or passing off or enabling and assisting others to pass off services and food products not being the Plaintiff's products, as and for the services and products of the plaintiff;

(b) An injunction restraining the Defendant from further use of the name, "CATHAY CAFE", in connection with the business carried on by the Defendant;

(c) An injunction restraining the Defendant from directing public attention to his wares and services in such a way as to cause or be likely to cause confusion in Canada between his wares and services and the services and wares of the Plaintiff and in particular from using the word "CATHAY" in association with any of his wares and services.

The parties have concurred in stating in the form of a special case the above question of law for the opinion of the Court herein.

Several other matters which were stated in the course of argument were:

(a) that the parties were in agreement that both marks were well-known in their respective municipal areas;

(b) that the plaintiff's registration of the trade mark CATHAY HOUSE was secured on the basis of it being registrable under section 12(1) of the *Trade Marks Act*[1] and not under sections 12(2) and 31 on proof that it had been so used in Canada as to have become distinctive at the date of the application for its registration; and

(c) that any claims for relief beyond that defined in the case were abandoned.

It was conceded in the course of argument that if the answer to the first question should be in the affirmative the action would fail and the counterclaim succeed and that it would in that event be unnecessary to answer question 2. It was also conceded on question 1 that it was essential to the plaintiff's case that there be no identity in the public mind between the word CATHAY and the

[1] S. of C. 1952-53, c. 49.

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Thurlow J.

name CHINA and that if any identity between CHINA and CATHAY exists in the minds of the public at large the answer to the question should be in the affirmative. The plaintiff's case as put was thus rested entirely on the submission that no such identity exists. Assuming the existence of such an identity, it is therefore also unnecessary to deal with the question whether the mark CATHAY HOUSE is clearly descriptive of the character or quality of the wares and services in association with which it is used by the plaintiff or of the conditions of or the persons employed in their production or of their place of origin.

Turning then to the meaning, if any, of the word CATHAY in the expression CATHAY HOUSE the first impression that it makes on my mind is that it connotes an oriental land or place or something characteristic of such a land or place as opposed to anything else that might be conceivable, such as any physical object, and the second impression is that that land or place is China. No evidence was given as to what the word might mean to any other member of the public but counsel in the course of argument referred to a number of dictionaries and other works, including *The Shorter Oxford Dictionary, The Concise Oxford Dictionary, The Oxford Dictionary of English Etymology,* the *Encyclopedia Britannica, Webster's Third International Dictionary* and *Larousse du XX^e Siècle.* The word CATHAY does not appear in *The Shorter Oxford Dictionary.* It does, however, appear in the others where the following meanings are given:

The Concise Oxford Dictionary, Fifth Edition, 1964:

> CATHAY—(Arch. & poet. for) China. (f. med. L Cat(h)aia, f. Kitah, race name).

The Oxford Dictionary of English Etymology 1966:

> CATHAY—(Northern) China. ...Kitai, name of the inhabitants (still the Russ. name for China), f. name of the alien dynasty Khitan. Hence Cathayan Chinese,...

Encyclopedia Britannica, Volume 5, 1954:

> CATHAY—the name by which China became known to mediaeval Europe....

Webster's Third New International Dictionary 1961:

> CATHAY—(Cathay China, fr. ML Cataya, Kitai, of Turkic origin; akin to Kazan Tatar Kytai China...)

Larousse du XX^e Siècle 1929:

> CATHAY—ou Catay (le), nom donné à la Chine, depuis Marco Polo, par les auteurs occidentaux du moyen âge. Dans le *Roland furieux* de l'Arioste, la belle Angélique est une princesse du Cathay.

The following meaning is also given in Funk and Wagnall's *New Standard Dictionary of the English Language* (1963)

> CATHAY—...n (Poet.) China.

To my mind the significant fact which emerges from these references is that though the usage of the word is said to be archaic and poetic the meaning of it as given in all of them is China.

The plaintiff submitted that the word CATHAY has no meaning today but I do not think that can be taken as a fact where the word undoubtedly has an ancient meaning and is used with that meaning in poetic works. Since it is the ancient name of China it must, I think, be taken as meaning China in the minds of the public at large. In a trade mark it thus connotes something more than other kinds of expressions which, even if suggestive of oriental character, have no meaning whatever, whether ancient or modern in either the English or the French language. In the trade mark CATHAY HOUSE, as applied to a restaurant and to the Chinese food sold or served there, it appears to me to proclaim and describe the Chinese character of the establishment and to be clearly descriptive of the Chinese character of the food and services in association with which it is used.

I am accordingly of the opinion that the answer to the first of the questions posed in the stated case should be in the affirmative. I should not, however, part with this part of the case without observing that while the result is that the trade mark was not registrable in respect of such wares or services except under section 12(2) of the *Trade*

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Thurlow J.

Marks Act and then only to the extent provided for in section 31, it was, and may yet be, open to the plaintiff to obtain a valid registration of the mark to the extent provided by these sections on proof that it had been so used by the plaintiff as to have become distinctive. The present registration might also have been maintainable in the present action either in whole or in part or as to some less extensive area than the whole of Canada under section 18(2) of the Act but no attempt was made to justify the registration under these provisions and the matter appears to me to be concluded against the plaintiff by the agreement stating the case which specifically provides for expungement of the registration as the consequence of the answer which I have given to question number 1.

I may add with respect to question 2 that if it be assumed that CATHAY HOUSE at the date of its registration either (a) was inherently distinctive; or (b) had been so used in Canada by the plaintiff as to have become distinctive, I should have thought that the use by another of the mark CATHAY CAFE in the same area in association with substantially the same wares and services would be likely to lead to the inference that the wares or services associated with such trade marks were sold or performed by the same person and that that question should therefore be answered in the affirmative.

The action will be dismissed and on the counterclaim an order will go expunging the plaintiff's registration in the Register of Trade Marks under number 112679 of the Trade Mark CATHAY HOUSE. The defendant will have his costs of the action and counterclaim.

BRITISH COLUMBIA ADMIRALTY DISTRICT

Vancouver 1967 Jan. 9-11

BETWEEN:

BURRARD TOWING LTD., J. L. GISBOURNE, V. MONTGOMERY, L. HELLAN and H. GLANVILLE ..... PLAINTIFFS;

AND

T. G. McBRIDE & CO. LTD. (Owner of the barge *D.M. 60*) and LAFARGE CEMENT OF NORTH AMERICA LTD. ..... DEFENDANTS.

Shipping—Salvage—Tug hauling barge asking for aid of second tug—Whether towage of barge is salvage—Amount of compensation.

Shipping—Costs—Action for salvage—Tender of payment—Procedure—Costs—Court's discretion as to—Admiralty Rules 90, 91, 92, 131, 135.

Whilst hauling a barge laden with cement against the wind in the choppy waters of Comox harbour the tug *Dexter's* engine over-heated and her master asked the tug *Leslie Ann* for a pull. The *Leslie Ann* came alongside and took over the towage of the barge. The owners and crew of the *Leslie Ann* brought action for salvage. Defendants offered plaintiffs $1,364 and subsequently $1,500 for the *Leslie Ann's* services and pleaded tender in the statement of defence subsequently filed, paying $1,500 into court.

Held, the award should be $1,300. The tow by the *Leslie Ann* amounted to salvage because of the danger of the barge grounding and because the *Leslie Ann* came to her aid seasonably. As the salvage service was of short duration and no undue risk or extraordinary skill were involved it would be unreasonable to increase the amount of the award by reason of the substantial value of the barge and its cargo. *Humphreys et al v. The M/V "Florence No. 2"* [1948] Ex. C.R. 426, applied.

Held also, defendants had complied substantially though not exactly with Admiralty Rules 90, 91 and 92 re tender, and in exercise of the court's discretion as to costs under Admiralty Rules 131 and 135 plaintiffs should have their costs of action up to and including the statement of claim and the defendants all costs thereafter. The *"Creteforest"* [1920] P. 111, applied.

ACTION for salvage.

J. R. Cunningham for plaintiffs.

W. O. Forbes for defendants.

May 5

NORRIS D.J.A.:—This is an action for salvage, the vessels involved being the tug *Leslie Ann,* chartered by the plaintiff Burrard Towing Ltd. and at all material times

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BURRARD TOWING LTD. *et al.* *v.* T. G. MCBRIDE & CO. LTD. *et al.*

Norris D.J.A.

manned by the plaintiff Gisbourne as master, the plaintiff Montgomery as mate, the plaintiff Glanville as engineer and the plaintiff Hellan as deckhand, and the tug *Dexter* with the barge *D.M. 60* in tow, the tug being owned by Lloyd Towing Co. Ltd., which in turn was owned by Iorwerth Dalgleish Lloyd, who was the master of the tug, one McKenzie, a deckhand, being the only other member of the crew. The barge was owned by the defendant T. G. McBride & Co. Ltd. and was chartered to the defendant Lafarge Cement of North America Limited, which was the owner of the cargo of some 3,930 barrels of bulk cement in the barge. The barge was of a value of between $185,000 and $200,000, the cement being valued at about $17,000.

The tug *Leslie Ann* is a steel tug of 41 tons gross, 48′ in length, 15.8′ in breadth and 7.7′ in depth in the hold, and is valued at about $50,000. Her engine is a diesel engine of 475 h.p. The plaintiff Gisbourne has a one-third interest in the plaintiff Burrard Towing Ltd., the charterers of the *Leslie Ann*. The tug *Dexter* is of a registered tonnage of 15 tons gross, is 40′ in length, 12.5′ breadth and 3.8′ in depth in the hold. It is powered by a 170 h.p. diesel engine. There is no claim for salvage in respect of the *Dexter*.

The barge *D.M. 60* is a steel cement barge of about 120′ in length, with a main breadth of 40′. The stem and stern are square and raked. Her depth in the hold is about 11′. Her gross tonnage under the tonnage deck is some 471.82 tons. Her superstructure is some 287.09 tons, her total gross tonnage being 758.91 tons. The cargo of cement is carried above deck and pumped out through an air slide system and the evidence is that water in the hull would not get at the cement cargo, and the barge would have to be completely submerged for water to get at the cement, *i.e.*, to a depth of approximately 24 feet.

The events giving rise to this claim are as follows:

In the late afternoon of October 5, 1965, the tug *Leslie Ann* was berthed at a pier in Comox harbour. About this time the deepsea tug *La Bonne* delivered the barge *D.M. 60* with its cargo of cement to the *Dexter* in Comox harbour so that the *Dexter* would tow the barge to the wharf of the defendant Lafarge up the Courtenay River. The draught of the *La Bonne* was such as not to permit that vessel to go up the river and she tied up to a buoy in Comox harbour.

The tug *Dexter* with the barge *D.M. 60* in tow proceeded through Comox harbour, up the Courtenay River to the Lafarge wharf which was about a mile and a half from the mouth of the river where the *Dexter* took over the barge. When the *Dexter* reached the Lafarge wharf, due to the fact that it was not convenient to moor the barge there because of weather conditions and the unsafe condition of the wharf, the master of the *Dexter* decided to return to Comox harbour, to turn the barge back to the deepsea tug *La Bonne* from which it had previously obtained delivery.

On a consideration of all the evidence I find that while the wind had increased from about 35 mph to a 55 mph wind, the water in Comox harbour at relevant times was not overly rough, which fact would appear to be due to the nature and topography of the harbour. The master of the *La Bonne,* whose evidence I accept, stated that it was "a heavy chop not a heavy sea". None of the crew of either the *Leslie Ann* or the *Dexter* found it necessary to wear life jackets even when taking over the tow of the barge.

When the *Dexter* reached the harbour, the master Lloyd endeavoured by radio telephone to communicate with the *La Bonne,* which was moored in deep water, but was unable to get an answer. At about this time the engine of the *Dexter* began heating due to the fact that the barge was being towed against the wind, which was at that time a southeast wind. The master of the *Dexter* then called the *Leslie Ann.* There is some slight dispute as to exactly what was said. I find from the evidence that when the *Leslie Ann* answered, the master of the *Dexter* stated to the master of the *Leslie Ann* that his engine was heating and that he would "like a pull".

The master of the *Leslie Ann* said he would come. He was thanked by the master of the *Dexter,* and the *Leslie Ann* then proceeded to a point alongside the *Dexter* and the plaintiff Hellan boarded the barge, removed one of the lines of the *Dexter* and attached one of the bridles. The *Dexter's* deckhand, McKenzie, was on the barge at the time and he removed the other *Dexter* line and attached the other bridle from the *Leslie Ann.* He then stepped from the barge to the *Leslie Ann* without trouble while the vessel was moving. He had been able to walk along the

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barge without difficulty and without holding on to the guard rail in spite of the fact that he was wearing rubber boots. He said that no water was coming over the barge and that he got wet from the rain and not from the sea. He went to the galley on the *Leslie Ann* and found no water on the floor. The *Dexter* then left and the *Leslie Ann* pulled the barge to a place in the harbour where it was later taken over by the *La Bonne.*

I find on the evidence that the whole operation from the time that the *Leslie Ann* was called until the barge was later turned over to the *La Bonne* took between half an hour and three-quarters of an hour.

The Courtenay River empties into Comox harbour and like those parts of the coast which are estuarian, in Comox harbour there are shallows and mudbanks which at low tide are completely bare but which at high tide have some 10 feet or more in depth of water. There are rocks or boulders in the water at points along the shore bank, particularly to the northwest of the harbour.

Lloyd, the master of the tug *Dexter,* has been engaged in river towing and is not certificated. His experience and knowledge of the area in question in this action is indicated in the following passages from his evidence:

Q. Captain Lloyd, you're the Master of the tug *Dexter,* and you are also the principal owner and operator of the firm known as Lloyd Towing Company?

A. Yes.

Q. And the *Dexter* and Lloyd Towing Company generally are engaged, amongst other things, in river towing in the Courtenay River?

A. Yes.

Q. And where do you live?

A. Comox.

Q. How long have you worked in the Courtenay River towing?

A. I've been going on thirty years.

Q. Thirty years?

A. Yes.

Q. When did you start?

A. '37.

Q. And have you been engaged continuously in towing in the Courtenay River since 1937?

A. Yes, with occasional trips out, but principally there.

Q. You take occasional trips to other places, but basically you work on the Courtenay River?

A. Yes.

Q. And I suppose then you must be familiar with the river and particularly in the area of Comox?
A. Yes.
Q. And do you tow exclusively for the Defendants in this case, Lafarge Cement, Deeks-McBride, and those people, or do you tow for anyone who hires you?
A. I tow for anyone that hires me.

* * *

Q. Incidentally, how many times have you towed barges up that river, Captain?
A. Thousands.
Q. Literally thousands?
A. Yes, literally thousands.

Gisbourne, the master of the *Leslie Ann* has had a tow boat master's certificate since 1951 and has been a tugboat master since 1952, and since 1943, save for about a year and a half during the latter part of World War II, has worked continuously on tugboats. That he was not particularly familiar with the area is indicated in the following passages from his evidence:

(Speaking of Lloyd's call on the radio telephone)

A. I can't remember whether that was the exact words or not, your Honour. It's quite a while back now.
Q. Anyway, he said, "come and help me".
A. Yes. So I looked at the chart, and being unfamiliar with the river there I didn't think I could get in there at all.

* * *

A. Well, the deck hand, Hellan—I had him bring the bridles out of the hold.
Q. That is, the towing bridles.
A. Yes. To get the towing gear ready. Then we let go and went to his aid, and I had Hellan show me the way in there as best he knew it.
Q. Now, where were you—where did you handle the vessel from on the way out?
A. On the flying bridge.

* * *

Q. And what route did you take to get into where the—would you mark with a red pencil, as you recall it, the route taken by you with—was there someone with you for a while on the flying bridge?
A. Yes. Well, the deck hand was showing me the way in.

* * *

Q. Well, I put it to you, Witness, that at first the emergency consisted in whether this steel barge would be blown ashore on a mud bank or not.
A. Well, I'll put it this way; when I went in there, I did not know the construction of that bottom. I hadn't towed in there. I mean, that tug was no tug to be going in there with—

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and from the evidence of Hellan, the deckhand on the *Leslie Ann*:

Q And you were a deck hand.

A. Yes. He told me where the bridles were. I went out to the stern of the boat, and mean time they were starting the motors, or motor, and I pulled the bridles out, and had to untie them. They were rolled up, And by then I'd cast off the stern, I believe, and I'd run up to the bow, and I showed Larry approximately what the best, to my opinion—

MR. CUNNINGHAM:

Q. What did you do with the ship when you went to the boat? What was it doing?

A. We'd broken outside the break water, and I was on the side of the boat at the time, and then I had motioned to Larry when to turn in, and when he turned, I started to sound.

The evidence of Gisbourne supported to some extent by the evidence of Hellan places the barge at the point where the *Leslie Ann* took over close to Robb Bluff and the boulders on the shore, and very considerably to the north-west of the place where the master of the *Dexter* placed it, which was near the shallows and mudbanks and also closer to the piers. McKenzie, the deckhand, was born in Comox and has lived all his life there. To the extent that his recollection goes, he supports the evidence of the master of the *Dexter*. Particularly, I find the evidence of the witness Hellan uncertain, vague and untrustworthy and I accept the evidence of McKenzie who was not, as Gisbourne and Hellan were, directly interested in the result of these proceedings.

The evidence of Captain George Armitage, a marine surveyor, who had visited Comox harbour on several occasions by land, sea and air, was largely of a general nature as to harbour conditions on those occasions and on hypothetical situations. It would have been more valuable if, having been shown by a witness who was to testify as to the facts, the place where the *Leslie Ann* was alleged to have taken the barge in tow, he was able to give more exact evidence as to where boulders and rocks were and in what part of the harbour the bottom consisted of mudflats. He had no experience with cement barges. He gave evidence that the lay of the land would increase the velocity of the wind but as there was no dispute that it was 55 mph at the material times, this was not of importance. He did not, and as he was not there presumably could not, give evidence

as to the sea. He gave evidence that the double daily rate of towage was often paid where there was some risk but not necessarily great risk.

There was evidence that the daily rate for the *Leslie Ann* was about $680. There was also evidence that Lloyd had charged $1,280 for pulling to Comox wharf a tug which ran out of fuel at the bell buoy in Comox Bar.

Having heard the witnesses and observed their demeanour I accept the evidence of the master of the *Dexter* as to the position of all the vessels and generally as to the conditions, in preference to that of the master of the *Leslie Ann* and the deckhand Hellan. Further, in the conditions there prevailing, the position of the takeover as indicated by the master of the *Dexter* is the more likely one. In all maritime operations a considerable element of danger exists and I cannot accept the almost terrifying picture of the danger to all concerned and to the vessels, painted by the plaintiffs. In my opinion the possibilities of danger to the *Leslie Ann* and its crew and to the *Dexter* and its crew and the barge *D.M. 60* have been exaggerated out of all reason.

The acceptable evidence does not satisfy me on a balance of probabilities that there were rocks or boulders in such a location in relation to the place where the *Leslie Ann* put lines on her that the *D.M. 60* was in danger of being damaged by them. At best for the plaintiffs on such evidence it might be said that there was a possibility that the barge might have been grounded on the mudflats without damage to the barge hull, mechanism or the cargo of cement.

As to the danger to the barge, Gisbourne testified on cross-examination:

Q. Would you agree with me that to go ashore on a hard mud bank is not a particularly hazardous thing for a flat-bottomed steel barge to do?

A. No; but if there had been water under that cement—

Q. Yes. You do not know the construction of the barge, though, do you?

A. No. I've never towed the barge.

Q. No one from the Dexter indicated to you that there was any question of life being in danger, or any thing of that sort did they?

A. It was all done so fast that there wasn't too much conversation.

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Gisbourne testified that none of the personnel involved wore life jackets and I find on the evidence that danger to life, over and above a normal maritime risk, was not involved in the operation which is the subject matter of this action.

I accept the statements of Lloyd, the master of the *Dexter* as to other available help, testified to as follows:

MR. FORBES: Q. Did you say anything to the *Leslie Ann* indicating that you needed help in the way of salvage or rescue?

A. No.

Q. Did you in fact need such help? I'm not asking you if you needed help. I'm asking you if you needed help in the sense of being rescued?

A. No, no.

Q. Had the *Leslie Ann* replied "yes, I'll come and pull you but I'll put in a salvage claim" of, let's say, over a thousand dollars, what would your answer have been?

A. I would have told him to stay at the dock.

Q. Why? What alternatives did you have?

A. There was another boat, towboat in Comox Wharf, the *Seaview* which I could have phoned quite easily?

Q. Who runs the *Seaview*?

A. Mr. Jack French.

Q. Yes.

A. There was also aircraft boats there—

Q. Yes.

A. —would come out.

Q. Yes.

A. There was also boats over at the Crown Zellerbach Logging Company which would come if I so requested them, but the reason that I took the *Leslie Ann*, he was right there and handy, and so forth.

Q. Now supposing that the situation had been left for you and *La Bonne* alone; and assuming, of course, that the *La Bonne* would not have become aware of the situation until she actually did see you and started coming out,—

A. Yes. Well—

Q. —what would you have done? How would you have handled that situation if the *Leslie Ann* had not been there at all and you hadn't called on other tugs?

A. Well, I had the alternative of turning and going back up the river again. Mind you, while I was here, (indicating) I wasn't going backwards. I was making headway all of the time. I'd made headway about up to here actually all the way—

Evidence by him as to the locality where he was picked up is as follows:

Q. I see. Now I want to ask you next about this locality, the general area where you were in fact picked up by the *Leslie Ann*. Have you ever seen anything aground there?

A. Oh yes, yes.

Q. Well, tell the Court about that, please. What type of vessels have you seen aground there?
A. Well, nearly always there's oyster barges aground there. They put them, ground them and load them on at night when the tide goes out.

THE COURT: What's that?

MR. FORBES: He says there's nearly always oyster barges there. They put them aground and load them when the tide goes out at night.
A. Yes, all this area is an oyster bed, (indicating).
Q. That includes the area where you were?
A. Yes.
Q. And what's an oyster barge made of, steel or wood?
A. Wood.
Q. Have you yourself deliberately grounded anything there?
A. Yes.
Q. What?
A. Some 30-foot by 90-foot scows.
Q. Some 30 by 90 foot wooden scows?
A. Yes, wooden scows, loaded.
Q. Loaded?
A. Loaded, yes.
Q. Why would you ground scows in that location?
A. Well, a couple of years ago we were dredging out the river and towing these scows out to sea. Well, we stayed in the river till it was quitting time, and then proceed out over the flats and the barge would ground, and leave it there till the next tide and tow it out. You couldn't get right out with the full scow.
Q. And this was a normal, routine operation?
A. Yes. I think we did that three times on that job.
Q. Now—

THE COURT: What was the job?
A. Dredging the Courtenay River. The scows had about 500 tons of mud on them.

MR. FORBES: Q. Did any of those scows sustain damage—
A. No.
Q. —by those groundings?
A. No, never heard of it.
Q. Now what do you say as to these big four or five foot sharp boulders that are supposed to be in this location? Do you know of any such boulders?
A. Yes. There are a few just along the shoreline, as indicated here, (indicating).
Q. Where's that?
A. Right here, (indicating).
Q. You are pointing into Robb Bluff?
A. Yes.
Q. Now apart from those boulders that are marked as such on the chart, are you aware, or can you tell the Court whether or not there are any boulders in that locality?
A. Yes. There are a few scattered along on this shoreline, you know.

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Q. At the shoreline?
A. Yes, all along.
Q. Well, could you mark those in with, let's say, X-s.
Yes, You've drawn some boulders there along the shoreline. Now were there any boulders on the sea bed anywhere near where you were?
A. No.

The general principles to be applied in connection with a claim to salvage are well known and there is no great difficulty in understanding them. It is in the application of those principles to the circumstances of each particular case that difficulty arises.

Kennedy on Civil Salvage (4th Ed.) at p. 5 describes a salvage service as follows:

> A salvage service in the view of the Court of Admiralty may be described sufficiently for practical purpose as a service which saves or helps to save a recognised subject of salvage when in danger, if the rendering of such service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty owed to the owner of the salved property nor to the interest of self-preservation.

As to danger, *Kennedy* at p. 14 states:

> . . . the danger necessary to found a salvage service, whether it arises from the condition of the vessel or of her crew or from her situation, is a real and sensible danger. On the one hand, it must not be one either existing only in fancy or vaguely possible, and, on the other hand, it need not be absolute or immediate. It must, however, it is submitted, be at least so near, so much a just cause of present apprehension, that, in order to escape out of it or to avoid it (as the case may be), no reasonably prudent and skilful seaman in charge of the venture would refuse the salvor's help if it were offered to him upon the condition of his paying for it the salvor's reward.

I adopt as part of this judgment the statement of my predecessor, the late Mr. Justice Sidney Smith, in *Humphreys et al v. The M/V "Florence No. 2"*[1]:

> The factors which go to the making of a salvage award are well-known and well-established, but may bear repetition here. They are, first, the degree of the danger to the property salved, its value, the effect of the services rendered, and whether other services were available; next, the risks run by the salvors, the length and severity of their efforts, the enterprise and skill displayed, the value and efficiency of the vessel they have used, and the risks to which they have been exposed here. The amount of the award depends on the degree in which all, many, or few of these factors are present.

Some effort was made by plaintiffs' counsel to elicit from witnesses, and particularly from Captain Armitage, an

[1] [1948] Ex. C.R. 426 at p. 434.

interpretation of Lloyd's call for assistance as a distress call. This was a matter on which the words as accepted by the trial Judge must speak for themselves and be interpreted by him in the light of all the evidence as to what was said and in view of the circumstances prevailing at that time as found from the evidence. I interpret the call from the *Dexter* as a call for towage because of the not unusual circumstance of the engine over-heating as the *Dexter* forced its way with its tow against the wind.

In my opinion this is a case of "a salvage service performed by means of towage", as my predecessor said in *Humphreys et al v. The M/V "Florence No. 2", supra,* at p. 429, and it is lifted into the higher category of salvage on account of the reasonable possibility of the barge becoming grounded on the mudflats and because the *Leslie Ann* seasonably came to her assistance even although I find that there were services available as testified to by the master of the *Dexter*. I do not think that the salvors ran undue risk, nor was there undue risk to the crew of the *Dexter;* the length of the salvage service was short—although that is only one factor and not a determining one. The master and crew of the *Leslie Ann* did not display any out-of-the-ordinary skill, efficiency or enterprise.

I have taken into consideration the fact that the value of the barge and its cargo was substantial but in the circumstances of this case it would be totally unreasonable to award an amount for salvage based on that value. I have in mind the paraphrase of the judgments in the relevant authorities as stated in *Kennedy, supra,* at p. 181 as follows:

> "The value of the property saved is a most material and important consideration," "for in proportion to that value is the benefit to the owners, and that is one of the primary principles in settling the amount of remuneration"; but "the court must not be induced by it to award a sum which is out of proportion to the services of the salvors."
>
> See *"The Amerique"* [1874] L.R. 6 P.C. 468;
> *"The Glengyle"* [1898] P. 97, at p. 103;
> *"The Port Hunter"* [1910] P. 343.

Leonard C. Clemiss, a marine supervisor employed by the defendants, produced a diver's report (Ex. 17) made immediately after the events in question to the effect that there was no damage to the barge except a small dint which was old damage, and a number of scratches on the

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paint on the port side, that the company's steel barges, including the *D.M. 60* were often deliberately grounded, and that in 1965 the *D.M. 60* was on the rocks in Active Pass without damage, that in January, 1966, he inspected the bottom of the *D.M. 60* and there was no damage which could be attributed to the events of October 5, 1965. This evidence was in answer to the evidence of Gisbourne that the barge grounded on the stern end. With reference to a bill from Bel-Aire Shipyard Ltd. dated October 13, 1965, which read as follows:

M. V. Leslie Anne

TO: Dock vessel.
Build blocks.
Labour
File wheel.
Undock vessel. $65.00

Gisbourne testified:

Q. And you put the vessel on the ways in Vancouver.
A. Yes, that's right.

Q. What did you see, yourself?
A. Well, all of her propeller blade tips were bent, and you could see—

THE COURT: What did you say? The propeller blades bent?

A. Yes. And she was marked on her keel, where she had been coming and sitting.

Q. Marked on the keel?
A. Yes.

Q. What do you mean, marked?
A. Well, she was all scraped on her shoe, like. Right at her shoe, where the marks were, right at her rudder shoe.

MR. CUNNINGHAM:

Q. And did you incur an expense with respect to the docking, undocking and the propeller work?
A. Yes.

Q. Yes. And would you explain—there is an entry on this invoice, "file wheel". What does that mean?
A. That's to straighten the tips up.

Q. Of the wheel?
A. Yes.

Q. Which is the propeller.
A. Yes.

* * *

THE COURT: What is this item, "file wheel"?

MR. CUNNINGHAM: My Lord, that is—the expression "wheel" also means "propeller", and "file wheel"—

THE COURT: What would that imply? Filing it?

MR. CUNNINGHAM: Simply that the ends were bent over, and they filed them—well, perhaps the Witness should explain, my Lord. If you could Captain Gisbourne?

A. Your Honour, we wanted the boat in a hurry, back again, so rather than take the wheel off, and send it up to—

THE COURT: It is not a question of straightening anything out, it is just simply to file off the edges.

A. Where they were burred over. Ordinarily, if you had time, you would take the wheel right off, and get it fixed properly.

MR. CUNNINGHAM:

Q. What is your opinion as to what had caused this burring of the—
A. Well, when she was hitting there. It's obvious.

Q. This is when she was hitting during the salvage operation.
A. Yes.

As to the marks, Hellan also testified:

MR. CUNNINGHAM:

Q. Now, you were on the *Leslie Ann* when she was on the ways at Bel-Air. Do you recall that?
A. Yes.

Q. And did you have occasion to look at the bottom when she was on the ways?
A. Yes.

Q. What did you see? Just explain briefly what you saw.
A. I'd seen the shaft. Each blade had a nick or two.

THE COURT: What had a nick or two?

A. Each blade of the wheel.

Q. The blade of what?
A. Of the propeller.

Q. A nick or two?
A. Yes.

MR. CUNNINGHAM:

Q. What about the bottom? Did you see any thing else?
A. I never noticed the shoe, or any thing, but all I noticed was the end of the blade on each propeller was shining from something.

THE COURT: Was what? Shiny?
A. Yes.

The internal indication of a tendency to exaggerate is obvious in this testimony.

Having in mind the principles set out in *Kennedy on Civil Salvage, supra,* at p. 12, as follows:

> Sir Christopher Robinson, in the course of his judgment in "*The Calypso*" ((1828) 2 Hagg. 209, 217), said of both military and civil salvage: "It will be found, I think, that both these forms of salvage resolve themselves into the equity of rewarding spontaneous services, rendered in the protection of the lives and property of others. This is a general principle of natural equity . . . Considering all salvage . . . to

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be founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle." In *"The Juliana"* ((1822) 2 Dods. 504, 521) Lord Stowell said that although the Court of Admiralty did not claim the character of a court of general equity, it was bound to determine the cases submitted to its cognisance upon equitable principles and according to the rules of natural justice. Lord Wright said, in *"The Beaverford" v. "The Kafiristan"* ([1938] A.C. 136, 147): "The maritime law of salvage is based on principles of equity."

* * *

Salvage, however, stands upon a broader basis than this. It is a mixed question of private right and public policy. The reward is assessed by the court neither as a compensation merely *pro opere et labore,* nor according to the measure of direct benefit conferred by the particular salvage service upon the shipowner and the cargo-owner, who are chargeable with the payment of the reward.

I would award as "liberal" but not "extravagant" in respect of salvage the amount of $1,300. I adopt the apportionment suggested by counsel for the plaintiffs, that is to say, three-quarters to the owners, one-third of the balance to the master of the *Leslie Ann,* and the balance then remaining to the mate, the engineer and the deckhand in equal shares.

Counsel may if they wish submit memoranda as to the award of costs, there being in the amended Statement of Claim an allegation of the tender of an amount of compensation by way of salvage.

I am indebted to both counsel for able and painstaking presentations of their respective cases.

* * *

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In this salvage action judgment was given for the plaintiffs, being the owners and crew of the salvor vessel, in the sum of $1,300, and the parties were requested to make written submissions as to costs, tender having been alleged.

The action was commenced on November 22, 1965.

On December 13, 1965, the defendants' solicitors wrote to the plaintiffs' solicitors offering to pay the plaintiffs the sum of $1,364 in full discharge of all claims for the services rendered by the plaintiffs. This letter contained the following statement:

This is double the daily rate for your clients' tug, and is offered not in the belief that the services were worth this amount but in the hope of avoiding unnecessary litigation costs.

On June 27, 1966, the defendants' solicitors again wrote the plaintiffs' solicitors increasing the offer to $1,500 and stating that the amount would be paid into Court if the offer was refused. This letter contained the following statement:

> This offer is not to be construed as an admission that the services rendered were in the nature of salvage or were worth as much as $1,500. It, and the payment into Court, are made in an effort to be as generous as possible to the Plaintiffs, and to avoid needless and uneconomical litigation.

On June 28th the statement of defence was filed and amended the 6th day of January, 1967. This latter admitted the basic facts and the plaintiffs' entitlement to compensation for the services rendered. The statement of defence contained the following statement:

> The Defendants have tendered to the Plaintiffs a sum which is more than ample to compensate them for their services even on a salvage basis.

On July 13, 1966, the defendants paid the sum of $1,500 into Court. This amount stands to the credit of this action.

The plaintiffs submit that as the plaintiffs were successful in establishing a salvage service in view of the defendants' admission in the statement of defence, the plaintiffs should be entitled to their costs.

The defendants concede that in view of the tender after the writ was issued and the statement of claim filed, the plaintiffs are entitled to costs up to and including the filing of the statement of claim but that the costs of this action thereafter should be awarded to the defendants. The contest in this action was substantially as to the quantum of the salvage award. In awarding the sum of $1,300 I stated:

> In all maritime operations a considerable element of danger exists and I cannot accept the almost terrifying picture of the danger to all concerned and to the vessels, painted by the plaintiffs. In my opinion the possibilities of danger to the *Leslie Ann* and its crew and to the *Dexter* and its crew and the barge *D.M. 60* have been exaggerated out of all reason.

The Rules of this Court as to tender are Rules 90, 91 and 92. While the provisions of these Rules were not followed

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exactly, I accept the course followed as a substantial compliance with the Rules. In future, possible difficulty may be avoided if there is strict adherence to the rules.

In support of his submission counsel for the plaintiffs quotes part of a judgment of Hill J. in *The "Creteforest"*[2]. But the part of the judgment of Hill J. quoted is to be read with the part of the judgment immediately preceding it and not quoted. This part is as follows:

> Here again the peculiar features of a salvage action and of consolidated actions in Admiralty must be considered.
>
> *The Lee* ((1889) 6 Asp. M.L.C. 395) shows that where the defendant has paid in one sum to answer several consolidated claims, he runs the risk that the judge may say that it was reasonable for the plaintiffs to go on to trial, even though the tender is upheld.

In my opinion the judgment in *The "Creteforest", supra,* is not applicable in this case because of the fact that the circumstances in this case are widely different from the circumstances in that case. I have the discretion as to costs contained in Rule 131 and Rule 135 reading as follows:

> 131. In general costs shall follow the event; but the Court may in any case make such order as to the costs as to it shall seem fit.
>
> 135. If a tender is rejected, but is afterwards accepted, or is held by the Court to be sufficient, the party rejecting the tender shall, unless the Court shall otherwise order, be condemned in the costs incurred after tender made.

This discretion is, of course, to be exercised judicially and I find that in view of my decision in the action and the fact of the tender, the plaintiffs should have their costs of this action up to and including the statement of claim, and the defendants all costs thereafter, and I so order.

[2] [1920] P. 111 at p. 115.

BETWEEN:

INTERPROVINCIAL PIPE LINE COMPANY ..... APPELLANT;

AND

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

Montreal 1967
Apr. 19-20
Ottawa
May 3

Income tax—Foreign tax credit—Interest on bonds in U.S.A.—Withholding tax paid in U.S.A.—U.S. bonds purchased from money borrowed by taxpayer—Interest paid on money borrowed—Calculation of foreign tax credit—Income Tax Act, ss. 11(1)(c), 41(1)(b)(i), 139(1a) and (1b), am. 1960, c. 43, s. 33(5)—Canada-U.S.A. Tax Convention, Art. XV.

In 1960 appellant, a company resident in Canada, received $2,421,165.80 interest on bonds of a United States company and paid interest of $2,363,966.79 on money borrowed to buy those bonds. The amount by which the interest received exceeded the interest paid, *viz* $57,199, was required to be taken into account in computing appellant's income for 1960 under Part I of the *Income Tax Act*, the tax attributable thereto being $28,599.50. Appellant paid the United States Government in 1960 a 15% withholding tax, *viz* $363,174.87, on the said bond interest and sought to deduct this sum as being the foreign tax credit on the tax otherwise payable by appellant under Part I of the *Income Tax Act* (which was in excess of $8,000,000).

Held, the foreign tax credit to which appellant was entitled was $28,599.50, being the amount by which its tax for 1960 under Part I of the *Income Tax Act* was increased by reason of its purchase of the bonds.

The interest paid on money borrowed to purchase the bonds was deductible from the interest received on those bonds under s. 11(1)(*c*) of the *Income Tax Act*, which was made applicable by s. 139(1*b*), enacted in 1960, to the calculation of the foreign tax credit allowed by s. 41(1)(*b*) in respect of the income from the U.S. bonds. Article XV of the *Canada-U.S.A. Tax Convention*, as changed in 1950, made applicable the foreign tax credit provision of each country's domestic law as it might be from time to time.

Interprovincial Pipe Line Co. v. M.N.R. [1959] S.C.R. 763, distinguished.

INCOME TAX appeal.

P. F. Vineberg, Q.C. and *L. Phillips, Q.C.* for appellant.

G. W. Ainslie and *Bruce Verchere* for respondent.

JACKETT P.:—These two appeals, which have been argued on a case stated by the parties under Rule 150, raise questions as to the amounts of the foreign tax credits to which the appellant is entitled for the 1960 and 1961 taxation

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years, respectively, in the computation of the income taxes payable by it under Part I of the *Income Tax Act* for those years.

There is, in effect, only one problem to be dealt with, and it is the same for each of the two taxation years.

While the facts are stated with considerable detail in the stated case, I am satisfied that they may, for the purpose of considering the legal question involved, be put in very general terms that are applicable to each of the taxation years in question.

The appellant was resident in Canada, had a business in Canada from which it had a profit for the year, and owned bonds issued by a company that carried on business in the United States (which company happened to be a wholly-owned subsidiary of the appellant) from which it received the contractual interest in the year. During the year, the company paid interest on bonds that it had issued in earlier years to raise money

(a) part of which was used for the purpose of earning income from its Canadian business, and

(b) part of which had been used to purchase the bonds of the United States company to which I have already referred.

The amount of interest received in the year from the United States company in respect of the United States bonds (in 1960 this amounted to $2,421,165.80) was slightly more than the interest it paid in the year on that part of its bonds the proceeds of which have been used to buy the United States bonds (in 1960 this amounted to $2,363,966.79).

Borrowing the money to acquire the United States bonds and acquisition of such bonds had two results on the appellant's tax position as it would have been had there been no provision for foreign tax credits in the Canadian law:

1. The appellant paid "income tax" in the year, as a "non-resident" of the United States, to the United States Government in an amount equal to 15 per cent of the gross amount of the interest received from the United States company. (For 1960 this was $363,174.87.)

2. In the computation of the appellant's income for the year under Part I of the *Income Tax Act*, it had to bring in the interest received from the United States bonds

on the revenue side ($2,421,165.80 for 1960), and it was entitled to deduct the interest paid on the money borrowed to buy those bonds ($2,363,966.79 for 1960) so that its income for the year was increased by the difference between those amounts ($57,199.01 for 1960) as a result of having acquired the United States bonds. This would have resulted in an additional tax for the year of about 50 per cent of the increase in the income for the year ($28,599.50 for 1960) if there had been no foreign tax credit.

It may therefore be seen, that the amount of tax so paid in the year to the United States Government on the interest received from the United States company is substantially greater than the amount by which the appellant's tax under Part I of the *Income Tax Act* for the year before any foreign tax credit is deducted exceeds the amount that such tax would have been if the appellant had never bought the United States bonds.

In these circumstances the question is whether the appellant is entitled to deduct from the tax otherwise payable by it under Part I of the *Income Tax Act*, as a foreign tax credit,

(a) the whole of the tax paid by it to the United States Government ($363,174.87 for 1960), or

(b) a portion of the income tax otherwise payable by it under Part I computed by reference to the relationship of the increase in its Part I income for the year arising from having acquired the United States bonds to the whole of its Part I income for the year ($27,840.76 for 1960).

Substantially the same question arose between the parties in respect of earlier taxation years and it was established by a decision of the Supreme Court of Canada[1] that the appellant was entitled, in respect of each of those years, to deduct the larger amount. There are differences between the provisions of the *Income Tax Act* as it applies to 1960 and 1961 and the provisions of that Act as it applied to those earlier years. I propose first to consider the question having regard only to the statutory provisions applicable to 1960

[1] [1959] S.C.R. 763.

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and 1961, and then to consider what application the decision of the Supreme Court of Canada has to the present state of the statutes.

While it is probably not, strictly speaking, necessary to do so, I find so much difficulty in bearing in mind the inter-relationships of the various aspects of the *Income Tax Act* that come into play, directly or indirectly, in forming an appreciation of the problem raised by this appeal that I propose to preface my examination of the section by which provision is made for foreign tax credits by a brief review of the general structure of the Act in so far as it seems to me to be relevant.

Part I of the *Income Tax Act* imposes an "income tax" on the "taxable income" of every person resident in Canada in a taxation year and upon the "taxable income earned in Canada" of every person who was employed in Canada or who carried on business in Canada in a taxation year (section 2).

The commencement point for determining the base on which the tax is imposed is, in each case, the taxpayer's "income for the year". [Where a person is resident in Canada, personal exemptions, business losses, etc., are deducted from "income for the year" to obtain his "taxable income" for the year (section 2(3)); and where he is a non-resident person, to obtain his "taxable income earned in Canada" for the year, the reasonably applicable part of personal exemptions, business losses, etc., are deducted from the part of his "income for the year" that may reasonably be attributed to what he did in Canada (section 31).]

This basic concept of "income for the year" is sometimes thought of as "world income". A taxpayer's "income for a . . . year" is his "income for the year from all sources inside or outside Canada". In addition to income from any other possible sources, it includes income for the year from the ordinary sources, i.e., businesses, property, and offices and employments (section 3). In so far as "income for the year" consists of income from businesses or property, it is computed on a profit basis (section 4). It is, however, a single amount for any one taxpayer for any one year.[2] All the

[2] Compare *Interprovincial Pipe Line Co. v. Minister of National Revenue*, [1959] S.C.R. 763, per Judson J. at page 768: "Sections 3 and 4 of the Act do not require a separate computation of income from each source for the taxpayer is subject to tax on income from all sources."

revenue items (whether they are brought in by virtue of business and commercial principles that have been brought into play by the "profit" concept or by virtue of special provisions such as section 6) must be brought in on one side; all the expense and other deductible items (whether they are brought in by virtue of such business or commercial principles or by virtue of special provisions such as section 11) must be brought in on the other side; and the deductible items must be set off against the revenue items. The net amount is the taxpayer's "income for the year".

By reason of the prominence of interest payments and interest receipts in this case, it should be noted at this point that

(a) section 6(1)(*b*) provides that, without restricting the generality of section 3, amounts received or receivable in the year as "interest" must be included in computing a taxpayer's income for the year, and

(b) section 11(1)(*c*) authorizes the deduction, in computing a taxpayer's income for a year, of an amount paid or payable in the year as "interest" on "borrowed money" used "for the purpose of earning income from a business or property".

While world income for the year, on a net basis, is thus the commencement point for determining the income tax for a year payable under Part I of the *Income Tax Act* to the Canadian Government by persons resident in Canada and by non-residents who are employed in Canada or carry on business in Canada, and all of such taxes are computed at the graduated rates set out in Part I, under Part III, persons who are not resident in Canada pay, *inter alia*, an "income tax" at a flat rate of 15 per cent on every "amount" that a person resident in Canada pays to him as "interest".

The result is that the Canadian Government levies (a) an income tax on every resident of Canada computed by reference to his world income, (b) an income tax on every non-resident computed by reference to income earned in Canada, and (c) an income tax on every non-resident computed by reference to certain revenue receipts from persons resident in Canada. Assuming, therefore, that a Canadian resident had income sources in Canada and also in a foreign country that had a tax scheme similar to the Canadian tax scheme, such Canadian resident would pay a tax on his

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world income to the Canadian Government and a tax to the foreign government on his income from sources in that country. This would, with some justification, be thought of as "double taxation" on the income derived from sources in the foreign country. The general purpose of the foreign tax credits provision (section 41), as I understand it, is to avoid any such double taxation by allowing to a person resident in Canada in respect of the income tax payable by him to the government of a foreign country where he has income sources a deduction from the tax otherwise payable to the Canadian Government on his world income.

In the light of that very brief outline of the background against which, as I understand it, section 41 must be considered, I turn to an examination of the provisions of that section in relation to the facts of this case. Section 41(1) (which is the only part of section 41 that must be considered), as amended by section 13 of chapter 43 of the Statutes of 1960, reads as follows:

> 41. (1) A taxpayer who was resident in Canada at any time in a taxation year may deduct from the tax for the year otherwise payable under this Part an amount equal to the lesser of
>
> (*a*) any income or profits tax paid by him to the government of a country other than Canada for the year (except any such tax or part thereof that may reasonably be regarded as having been paid by him in respect of dividends received from that country, by reason of which he is entitled to a deduction under subsection (1) of section 28 for the year in which they were received), or
>
> (*b*) that proportion of the tax for the year otherwise payable under this Part that
>
> (i) the taxpayer's income
>
> (A) for the year, if section 29 is not applicable, or
>
> (B) if section 29 is applicable, for the period or periods in the year referred to in paragraph (*a*) thereof,
>
> from sources in that country, minus amounts that are deductible under subsection (1) of section 28 by reason of dividends received from a corporation described in paragraph (*d*) of subsection (1) of section 28 that were included in computing his income for the year or such period or periods, as the case may be, from sources in that country,
>
> is of
>
> (ii) the taxpayer's income
>
> (A) for the year, if section 29 is not applicable, or
>
> (B) if section 29 is applicable, for the period or periods in the year referred to in paragraph (*a*) thereof,
>
> minus amounts that are deductible for the year or such period or periods, as the case may be, under section 28.

It was common ground, during the argument of these appeals, that, for the purposes of this case, section 41(1) may be considered as though certain irrelevant portions had been deleted so that it would read as follows:

> (1) A taxpayer who was resident in Canada ... in a taxation year may deduct from the tax for the year otherwise payable under this Part an amount equal to the lesser of
>
> '(a) any income or profits tax paid by him to the government of a country other than Canada for the year ...., or
>
> (b) that proportion of the tax for the year otherwise payable under this Part that
>
> (i) the taxpayer's income
>
> (A) for the year ...
>
> from sources in that country ...
>
> is of
>
> (ii) the taxpayer's income
>
> (A) for the year ...

It is common ground in this case that the 15 per cent tax paid by the appellant to the United States Government in the year is an "income...tax" paid by the appellant to that government for the year and is therefore an amount that falls within the language of paragraph (*a*) of section 41(1). (As already indicated, for 1960, it amounts to $363,174.87.)

There is no dispute as to the amount of the tax for the year "otherwise payable under this Part" by the appellant within the meaning of those words in paragraph (*b*) of section 41(1). (For 1960 this amounted to $8,115,929.95.)

It is also common ground that the amount of the appellant's "income for the year" as established under the various provisions of Part I before making the deductions permitted by Division C for the calculation of Taxable Income is the amount that is referred to in subparagraph (ii) of paragraph (*b*) of section 41(1). (For 1960 this amounted to $16,674,223.23.)

The problem that is raised by the appeal is what amount is indicated by the words "the taxpayer's income...for the year...from sources in that country" in subparagraph (i) of paragraph (*b*) of section 41(1).

There is no question that what is referred to is the amount of "the taxpayer's income for the year" from sources in the United States. The appellant says, however, that those words refer to the gross amount of the interest received in

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the year by the appellant from the United States company. The respondent says, on the other hand, that those words must be read with subsections (1a) and (1b) of section 139 of the Act and that, when so read, they refer to the amount of the interest so received in that year less the interest paid in the year that was deductible in computing income under Part I for the year to the extent that that interest was paid on monies that had been borrowed to acquire the United States bonds in respect of which the interest was so received in the year.

The relevant parts of subsections (1a) and (1b) of section 139 read as follows:

> (1a) For the purposes of this Act,
>
> (*a*) a taxpayer's income for a taxation year from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources, and was allowed no deductions in computing his income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source or those sources and except such part of any other deductions as may reasonably be regarded as applicable to that source or those sources;
>
> * * *
>
> (1b) In applying subsection (1a) for the purposes of sections 31 and 41, all deductions allowed in computing the income of a taxpayer for a taxation year for the purposes of Part I, except any deduction permitted by paragraph (*l*), (*la*), (*o*) or (*t*) of subsection (1) of section 11 or section 79B, shall be deemed to be applicable either wholly or in part to a particular source or to sources in a particular place.

Bearing in mind that the only income the appellant had in the year from sources in the United States was interest from the bonds of the United States company and that interest from bonds is income the source of which is "property",[3] the applicable part of subsection (1a), as I read it, is as follows:

> a taxpayer's income for a taxation year from ... property ... means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source ... and was allowed no deductions in computing his income for the taxation year except such deductions as may reasonably

[3] See *Interprovincial Pipe Line Co. v. Minister of National Revenue*, [1959] S.C.R. 763 at page 769.

> be regarded as wholly applicable to that source ... and except such part of any other deductions as may reasonably be regarded as applicable to that source ...;[4]

As interest on borrowed money is only deductible in computing world income by virtue of the special provision in section 11(1)(*c*), it would be doubtful whether it could be regarded as having any application to a particular source of income were it not for subsection (1b) *supra*, which specifically provides, *inter alia*, that, in applying subsection (1a) for the purposes of section 41, such a deduction shall be deemed to be applicable either wholly or in part to a particular source.

Having regard to the provisions of section 11(1)(*c*) which limit the deduction of interest to interest on borrowed money used for the purpose of earning income from "a business" or "property", and to the fact that the interest deduction that the respondent maintains should be set off against the interest receipt in this case is only deductible because it is interest on money that was borrowed to acquire the bonds which gave rise to the interest receipts, I cannot escape the conclusion that subsection (1a) of section 139, read with subsection (1b) thereof, defines the appellant's income from the United States bonds for a year, for the purposes of section 41, to be the amount that its world income would be for the purposes of Part I of the *Income Tax Act* if its only revenue receipts were the interest receipts from the United States bonds and its only deductions were the interest payments made on the monies borrowed to purchase those bonds.[5]

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[4] The result would be precisely the same, as I read the subsection, if one were to focus on the words "sources in a particular place" rather than "property" in subsection (1a). The sources in the particular place here would be the bonds (i e. property) in the United States. It is clear that the interest on the bonds is income the source of which is "property" (see Note #1 *supra*), and the amount under section 41(1)(*b*) will be nil unless that source is in the United States.

[5] Having to apply the requirement in subsection (1b) of section 139 that an interest deduction under section 11(1)(*c*) shall be deemed to be applicable either in whole or in part to a particular source, and having regard to the provisions of section 11(1)(*c*) under which interest is only deductible if paid on borrowed money used for the purpose of earning income from "a business" or "property", it would seem that the source to which a particular interest deduction must be deemed to be applicable is the "business" or the "property" in respect of which the borrowed money (on which it was paid) was used.

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This is the method that the respondent followed and, if the matter were a matter of first impression on a reading of the *Income Tax Act* alone, I would conclude that he was right.

The matter is not, however, that simple, because the subject of foreign tax credits is dealt with by tax conventions between Canada and the United States of America that have beer given statutory effect by statute.

On March 4, 1942, a Convention and Protocol was agreed upon by the two countries. The parts that may have some bearing on our problem appear to be the following:

CONVENTION

The Government of Canada and the Government of the United States of America, being desirous of further promoting the flow of commerce between the two countries, of avoiding double taxation and of preventing fiscal evasion in the case of income taxes, have decided to conclude a Convention and for that purpose have appointed as their Plenipotentiaries:

Mr. Leighton McCarthy, K.C., Envoy Extraordinary and Minister Plenipotentiary of Canada at Washington; and

Mr Sumner Welles, Acting Secretary of State of the United States of America; who, having communicated to one another their full powers found in good and due form, have agreed upon the following Articles:

ARTICLE I

An enterprise of one of the contracting States is not subject to taxation by the other contracting State in respect of its industrial and commercial profits except in respect of such profits allocable in accordance with the Articles of this Convention to its permanent establishment in the latter State.

No account shall be taken in determining the tax in one of the contracting States, of the mere purchase of merchandise effected therein by an enterprise of the other State.

ARTICLE II

For the purposes of this Convention, the term "industrial and commercial profits" shall not include income in the form of rentals and royalties, interest, dividends management charges, or gains derived from the sale or exchange of capital assets.

Subject to the provisions of this Convention such items of income shall be taxed separately or together with industrial and commercial profits in accordance with the laws of the contracting States.

* * *

ARTICLE XI

1. The rate of income tax imposed by one of the contracting States, in respect of income derived from sources therein, upon indi-

viduals residing in, or corporations organized under the laws of, the other contracting State, and not engaged in trade or business in the former State and having no office or place of business therein, shall not exceed 15 percent for each taxable year.

* * *

ARTICLE XV

In accordance with the provisions of Section 8 of the Income War Tax Act as in effect on the day of the entry into force of this Convention, Canada agrees to allow as a deduction from the Dominion income and excess profits taxes on any income which was derived from sources within the United States of America and was there taxed, the appropriate amount of such taxes paid to the United States of America.

In accordance with the provisions of Section 131 of the United States Internal Revenue Code as in effect on the day of the entry into force of this Convention, the United States of America agrees to allow as a deduction from the income and excess profits taxes imposed by the United States of America the appropriate amount of such taxes paid to Canada.

* * *

PROTOCOL

At the moment of signing the Convention for the avoidance of double taxation, and the establishment of rules of reciprocal administrative assistance in the case of income taxes, this day concluded between Canada and the United States of America, the undersigned plenipotentiaries have agreed upon the following provisions and definitions:

1. The taxes referred to in this Convention are:

(*a*) for the United States of America: the Federal income taxes, including surtaxes, and excess-profits taxes.

(*b*) for Canada: the Dominion income taxes, including surtaxes, and excess-profits taxes.

2. In the event of appreciable changes in the fiscal laws of either of the contracting States, the Governments of the two contracting States will consult together.

3. As used in this Convention:

(*a*) the terms "person", "individual" and "corporation", shall have the same meanings, respectively, as they have under the revenue laws of the taxing State or the State furnishing the information, as the case may be;

(*b*) the term "enterprise" includes every form of undertaking, whether carried on by an individual, partnership, corporation or any other entity;

* * *

Chapter 21 of the Statutes of 1943 has this Convention and Protocol in a Schedule and reads in part as follows:

2. The Convention and Protocol entered into between Canada and the United States of America, which are set out in the Schedule to this Act, are hereby approved and declared to have the force of law in Canada.

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3. In the event of any inconsistency between the provisions of this Act or of the said Convention and Protocol and the operation of any other law, the provisions of this Act and of the Convention and Protocol shall, to the extent of such inconsistency, prevail.

On June 12, 1950, a new agreement was entered into between the two nations reading in part as follows:

ARTICLE I.

The provisions of the Convention and Protocol between Canada and the United States of America, signed at Washington on March 4, 1942, are hereby modified and supplemented as follows:

* * *

(1) Article XV is amended as follows:

(A) By striking out of the first paragraph thereof, effective January 1, 1949, the following:

"In accordance with the provisions of Section 8 of the Income War Tax Act as in effect on the day of the entry into force of this Convention,"

and inserting in lieu thereof the following:

"1. As far as may be in accordance with the provisions of The Income Tax Act,"

(B) By striking out of the second paragraph thereof the following:

"In accordance with the provisions of Section 131 of the United States Internal Revenue Code as in effect on the day of the entry into force of this Convention,"

and inserting in lieu thereof the following:

"2. As far as may be in accordance with the provisions of the United States Internal Revenue Code,"

Section 1 of chapter 27 of the Statutes of 1950 reads as follows:

1. The Convention entered into between Canada and the United States of America, set out in Schedule A, is approved and declared to have the force of law in Canada, and shall be deemed to be included in and to form part of the Convention and Protocol set out in the Schedule to *The Canada-United States of America Tax Convention Act*, 1943.

It is common ground that the 15 per cent tax paid by the appellant to the United States Government is a Federal income tax within paragraph 1(*a*) of the Protocol to the 1942 Convention and therefore one of the taxes "paid to the United States of America" to which the first paragraph of Article XV of the Convention applies. As that Article was found in the 1942 Convention, it is clear that the deduction Canada agreed to allow at that time was in

accordance with the provisions of section 8 of the *Income War Tax Act* as it was on January 1, 1941, when it read in part as follows:

> 8. A taxpayer shall be entitled to deduct from the tax that would otherwise be payable by him under this Act,
>
> (*a*) the amount paid to Great Britain or any of its self-governing colonies or dependencies for income tax in respect of the income of the taxpayer derived from sources therein; and
>
> (*b*) the amount paid to any foreign country for income tax in respect of the income of the taxpayer derived from sources therein, if such foreign country in imposing such tax allows a similar credit to persons in receipt of income derived from sources within Canada.
>
> Provided that the Minister may in his discretion allow a taxpayer to deduct from the sum total of his income tax and excess profits tax the sum total of income tax and excess profits tax paid to Great Britain or to any of its self-governing dominions or dependencies or to any foreign country if such foreign country in imposing taxes in respect of income and excess profits allows a similar credit to persons in receipt of profits derived from sources within Canada.
>
> 2. Such deduction shall not exceed the same proportion of the tax otherwise payable under this Act or the sum total of the income tax and excess profits tax otherwise payable under this Act and *The Excess Profits Tax Act, 1940,* as provided for in the proviso to subsection one of this section, as that which the taxpayer's net profits from sources within such country and taxed therein bears to his entire net profits from all sources, without taking into account the exemptions provided by paragraphs (*c*), (*d*), (*e*), (*ee*) and (i) of subsection one of section five of this Act and by subsections two and three of the said section five.

It therefore follows that the words in Article XV as it was originally "the appropriate amount of such taxes paid to the United States of America" is the amount of such taxes determined in accordance with section 8 of the *Income War Tax Act* as set out above. Had the words substituted for "In accordance with the provisions of section 8 of the *Income War Tax Act* as in effect on the day of the entry into force of this Convention" been merely the words "... in accordance with the provisions of *The Income Tax Act*", it would have seemed clear enough that

(a) the reference was to the provision of the *Income Tax Act* providing for a foreign tax credit, whatever its number might happen to be, and

(b) in view of the deliberate dropping of the reference to the provision as of a certain date, the reference was to

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the appropriate provision of the *Income Tax Act* as it might be at the relevant time[6].

It is noteworthy that similar changes were made in the parallel provision in Article XV dealing with a United States foreign tax credit. In effect, having regard to the original form of the two parts of Article XV and the nature of the changes made in 1950, it seems clear that the parties were saying that, instead of mutual covenants to apply, to their respective interlocking tax systems, the foreign tax credit provision that had been worked out by the domestic law for all nations *as of a specified date,* they would mutually covenant to apply as between each other whatever foreign tax credit provision their respective domestic laws might *from time to time* adopt for all nations. This view of the provision seems to be reinforced by the addition, in 1950, of the words that were not previously there, namely, "As far as may be." While these words have no very evident precise effect, they seem to be allowing for the possibility that a time may arrive when there will be no provision of general application in the domestic law for a foreign tax credit, in which event there would be no obligation on the contracting power to allow one in respect of United States taxes.

If the above were the correct view of the effect of Article XV of the Tax Convention as amended in 1950 and as in force and applicable to the 1960 and 1961 taxation years, the Convention would not require any alteration in the appellant's rights as determined under section 41 of the *Income Tax Act* apart from the Convention; and the tentative conclusion that I have already reached would not be

[6] An argument was made that, if "the taxpayer's income ... from sources in that country" in section 41(1)(*b*) were interpreted, by virtue of subsection (1a) and subsection (1b) of section 139, as meaning the net amount, the result would be that the United States would have been contravening Article XI of the Tax Convention by charging a tax that was grossly in excess of 15 per cent of that net amount. I do not see anything in this argument. Article XI is clearly an agreement that the tax on non-residents will not exceed 15 per cent of the gross amount. Article XV, as I understand, is a covenant to allow in relation to the United States the tax credit provided by domestic law in relation to foreign countries generally. Canadian domestic law has chosen a figure worked out by a statutory formula (which has no significance in relation to Article XI) as such foreign tax credit in relation to foreign countries generally and that figure is therefore what the appellant is entitled to in relation to the United States by virtue of Article XV.

altered by the operation of the statute giving the Convention the force of law and making it prevail when inconsistent with the *Income Tax Act*.

I turn now to consider whether anything was decided in *Interprovincial Pipe Line Co. v. Minister of National Revenue*[7] that would bring me to a different conclusion than that which I have reached by a consideration of the statutes as a matter of first impression.

As already indicated, the facts giving rise to that case were for all practical purposes the same as those upon which I must decide these appeals and the question that had to be decided then was the same question that has to be decided now. However, there have been changes in the *Income Tax Act*, so that, in form at least, the questions of statutory interpretation that arise now are not the same as those that arose at that time.

In lieu of section 41 of the *Income Tax Act* as set out above, which is applicable to the 1960 and 1961 taxation years, section 38(1) of the 1948 *Income Tax Act*, which was applicable to some of the years in question[8] in the earlier case, reads as follows:

> 38. (1) A taxpayer who was resident in Canada at any time in a taxation year may deduct from the tax for the year otherwise payable under this Part an amount equal to the lesser of
>
> (*a*) the tax paid by him to the government of a country other than Canada on his income from sources therein for the year, or
>
> (*b*) that proportion of the tax for the year otherwise payable under this Part that
>
> (i) that part of the taxpayer's income
>
> (A) for the year, if section 28 is not applicable, or
>
> (B) if section 28 is applicable, for the period or periods in the year referred to in paragraph (*a*) thereof,
>
> from sources in that country that was not exempt from income tax in that country minus amounts that are deductible for the year or such period or periods, as the case may be, under paragraph (*d*) of subsection (1) of section 27,
>
> is of
>
> (ii) the taxpayer's income
>
> (A) for the year, if section 28 is not applicable, or
>
> (B) if section 28 is applicable, for the period or periods in the year referred to in paragraph (*a*) thereof,
>
> minus amounts that are deductible for the year or such period or periods, as the case may be, under section 27.

[7] [1959] S.C.R 763

[8] There is nothing in the wording of the section applicable for the other years that affects the matter. *Idem* at page 766.

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The other difference between the legislation applicable to 1960 and 1961 and that applicable to the earlier years is that subsections (1a) and (1b) of section 139 of the present Act, set out above as being applicable to the 1960 and 1961 taxation years, were not in the Act applicable to the earlier years, which did, however, have a provision which appeared in the 1948 *Income Tax Act* as follows:

> 127. (1) In this Act,
>
> (*av*) a taxpayer's income from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources of income and was entitled to no deductions except those related to that source or those sources; and

The reasons of four of the five judges for the judgment of the Supreme Court of Canada in 1959 were delivered by Judson J. As I appreciate his reasons for holding that the appellant was entitled, by virtue of section 38 of the 1948 *Income Tax Act*, to a foreign tax credit equal to the full amount of the 15 per cent tax paid to the United States Government, they are contained in that part of his judgment that reads as follows:

> The appellant is a Canadian company. It did pay a 15 per cent. withholding tax to the United States on income from sources therein. To deprive the appellant of the right to the tax deduction it is necessary to substitute for "on his income from sources therein" the words "on his profits from sources therein" and I do not think that s. 4 affords the statutory basis for such a substitution.
>
> First, s. 4 is expressly made subject to the other provisions of Part I of the Act. One of these, affecting the matter, is s. 6(*b*), which provides:
>
> > "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;"
>
> Section 6(*b*) imperatively requires that the whole of the interest from United States sources must be brought into account in the computation of income and on the other side of the account there is a deduction that must be allowed under s. 11(1)(*c*) for interest on "borrowed money used for the purpose of earning income from a business or property". This, in fact, is what has actually happened. The full interest receipt has been brought into account and the full interest payment has been claimed and allowed as a deduction without allocation, but, for the purpose of denying the appellant the right to the tax credit under s. 38(1), a subsidiary calculation has been

made within this framework for the purpose of showing that when the allocable expense is set against the United States interest receipt, there is no profit on this branch of the appellant's activity and, consequently, no right to a tax credit.

I can see no basis for any allocation of the appellant's borrowings to its investment in its subsidiary for the purpose of producing this result under s. 38(1). The appellant's borrowings and the interest paid thereon were related to the business as a whole and no part of the borrowings and the interest paid thereon can be segregated and attributed to the investment in the subsidiary. The interest paid by the appellant to its own bondholders was, under s. 11(1)(*c*), a deduction given to the appellant for the purpose of computing its income from all sources. Sections 3 and 4 of the Act do not require a separate computation of income from each source for the taxpayer is subject to tax on income from all sources. The deduction against income given by s. 11(1)(*c*) is attributable to all sources of income and there is no authority to break it up and relate various parts of the deduction to various sources. For this reason I do not regard the interest paid and claimed and allowed as a deduction, as being related to the source of the United States interest receipt in this case, and consequently, s. 139(1)(*az*), formerly s. 127(1)(*av*) of the 1948 *Income Tax Act*, does not, in my opinion, authorize the allocation which the Minister has made in this case.

Returning then to s. 38(1), my conclusion is that the appellant has paid a tax on income to the United States from sources therein and that its right to the foreign tax deduction cannot be destroyed by this unauthorized and artificial attribution of an offsetting expense which tends to show that there has been no profit from the source.

In the present appeal no problem arises under paragraph (*a*) of section 41(1), which refers to "any income... tax paid by him to the government of a country other than Canada". It is conceded that the 15 per cent tax paid on gross interest receipts to the United States Government falls within those words. In the earlier case, Judson J. only found it necessary to consider the effect of the corresponding paragraph of section 38(1) and did not find it necessary to deal with the effect of paragraph (*b*) of that subsection. However, the words in paragraph (*a*) of section 38(1) that had to be considered were "tax paid... to the government of a country other than Canada on his income from sources therein" which would seem to include, in substance, the same concept which gives difficulty here in section 41(1)(*b*)(i), namely, "the taxpayer's income . . . for the year . . . from sources in that country".

The difference, as I see it, between the problem dealt with by the Supreme Court of Canada in 1959 and that with which I have to deal is this: Interest from bonds is in itself income apart from some special statutory direc-

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tion. Even a definition of income as "profit" would not permit a setting off of interest on money borrowed to acquire the bonds because such interest is not deductible in computing profit in the absence of special statutory direction. (See *Bennett and White Construction Co. Ltd. v. Minister of National Revenue*[9].) The special direction in section 127(1)(*av*) did not authorize the setting off of such interest payments for the reasons given by Judson J. in the passage quoted above. Here subsection (1a) of section 139, when read with subsection (1b) thereof, specifically requires, in effect, that such interest be set off for the purpose of determining the taxpayer's income for the year from these United States bonds for the purposes of section 41.

For the above reasons, I conclude that there is nothing in the 1959 judgment of the Supreme Court of Canada that affects in any way the conclusion that I have already set out as to the effect of the *Income Tax Act* as applicable to the 1960 and 1961 taxation years.

The remaining question is whether the judgment of the Supreme Court of Canada constrains me to come to a different conclusion as to the effect of the legislation giving the Convention the force of law on the facts of this case for the 1960 and 1961 taxation years.

The material part of the reasons delivered by Judson J. reads as follows:

> I have no doubt that the 15 per cent withholding tax was properly payable under the laws of the United States and Art. XI(1) of the Canada-U.S. Reciprocal Tax Convention in respect of income derived from sources in the United States and that this withholding tax is a tax on income not profits. Article XI(1) reads as follows:
>
> > "(1) The rate of income tax imposed by one of the contracting States, in respect of income derived from sources therein, upon individuals residing in, or corporations organized under the laws of, the other contracting State, and not having a permanent establishment in the former State, shall not exceed fifteen per cent for each taxable year."
>
> Nevertheless, the judgment holds that the appellant's income from United States sources is nil notwithstanding the obvious fact of these large interest receipts. These are not industrial and commercial profits and, as such, allocable in accordance with Art. I of the Convention. Indeed, by Art. II, interest is expressly excluded from industrial and commercial profits and is left to be dealt with on an income, not a profits' basis by Art. XI(1) above quoted. I am therefore of the

[9] [1949] S.C.R. 287.

opinion that the denial of this foreign tax deduction is not only contrary to s. 38(1) of the Act but also offends Art. XV(1) of the Convention, which reads:

> "(1) As far as may be in accordance with the provisions of The Income Tax Act, Canada agrees to allow as a deduction from the Dominion income and excess profits taxes on any income which was derived from sources within the United States of America and was there taxed, the appropriate amount of such taxes paid to the United States of America"

On my reading of the Tax Convention, I should have also reached the conclusion that the denial of the foreign tax deduction for the earlier years as authorized by section 38(1) of the Act also offended Article XV(1) of the Convention. As indicated, however, as it seems to me, when the *Income Tax Act* expressly limits the foreign tax deduction in respect of taxes paid to foreign governments generally to an amount that is less than the full amount paid to the foreign government, it is only the lesser amount that the Canadian Government has bound itself, by Article XV(1), to allow in the case of taxes paid to the United States Government. It is only "the appropriate amount of such taxes paid to the United States of America" that it has agreed to allow as a deduction "As far as may be in accordance with . . . *The Income Tax Act*".

I have to admit that it is not at all clear to me that the Supreme Court of Canada has viewed Article XV(1) as I do. On the other hand, the problem that I have had in applying the provisions of Article XV was not before that Court and I do not find in its judgment any indication as to what effect would have been given to that provision in these circumstances. If I found in the judgment of the Supreme Court of Canada an indication as to how the Article should be applied in these circumstances, I would, of course, be relieved of any duty to do anything but apply it. As I do not find in that judgment any such indication, I must give the Article the application that, unaided by authority, I understand it to have. I accordingly conclude that the Convention and the legislation giving it the force of law do not change the result that I reach under the *Income Tax Act*.

Having regard to the terms of the stated case, which contains an agreement as to the judgment that is to be delivered depending on the conclusion reached by the Court, the appeals are dismissed with costs.

Montréal 1967 / Fév. 22-23 — Ottawa Mai 5

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT (APPELANT);

AND

INDUSTRIAL GLASS COMPANY LIMITED ..... RESPONDENT (INTIMÉE).

Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, articles 2(1)(3), 3, 4, sections 85B, 139(1)(e)—Actif immobilier non imposable suivant la loi—Objectif et intention de l'intimée: non la vente mais la location de terrains à longs termes, par baux emphytéotiques. Placements immobiliers et non pas des entreprises de commerce —Rétention, à titre de propriétaire incommutable de constructions érigées par locataires sur terrains loués, sans indemnité—Obtention de permis de mainmorte du Gouvernement de la Province de Québec—Appel rejeté.

La compagnie intimée a été incorporée par charte fédérale le 23 novembre 1946 sous l'empire de la *Loi des compagnies du Canada*. Elle était autorisée à fabriquer et vendre du verre pour fenêtres et vitrines. Alexis Nihon, industriel et financier, qui possédait presque toutes les actions de cette compagnie, en disposa dès 1949 au prix de plus de $3,000,000.

Le ministre du Revenu national, prétendant que l'intimée avait réalisé des profits résultant d'une entreprise ou d'une aventure de nature commerciale, au sens de l'article 139(1)(*e*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, ajouta à ses revenus pour les années fiscales 1955, 1956 et 1958 une somme de $1,936,956.74. La Commission d'appel de l'impôt annula cette majoration. De cette décision, le ministre entend se pourvoir devant cette Cour.

Il s'agit de classifier le remploi de ce capital investi, selon permis de mainmorte, de 1949 à 1957, dans l'achat de vastes étendues de terrains en la cité de Lachine et à Ville Saint-Laurent, en périphérie de Montréal. «Le domaine immobilier de l'intimée atteignit approximativement 50,270,515 pieds carrés».

Les lots en litige portent les numéros 478 et 479 du cadastre de la paroisse Saint-Laurent.

La ligne de conduite suivie par l'intimée depuis 1949 consiste à louer ses terrains à longs termes pour fins industrielles ou commerciales, d'ordinaire par bail emphytéotique, les locataires s'engageant, outre le loyer, à construire des bâtiments appropriés sur ces terrains. L'intimée a constamment refusé de vendre aucun de ces terrains, se conformant ainsi à son objectif déclaré.

Il a été prouvé qu'Alexis Nihon, propriétaire d'Industrial Glass, mit à exécution ces projets de ne louer qu'à long terme, augmentant ainsi son patrimoine par l'éventuelle rétention, sans indemnité aux locataires, des constructions érigées durant l'emphytéose.

Lors de l'acquisition par la compagnie des lots 478 et 479, en 1949 et 1950, il n'y avait que très peu d'immeubles commerciaux à Ville Saint-Laurent. Actuellement, cette localité est parsemée d'un nombre toujours croissant de bâtiments industriels.

L'intimée a cédé à titre gratuit pas moins de 1,496,039 pieds carrés pour faciliter le tracé de rues, l'ouverture d'un parc, le complément d'une avenue, puis, au prix nominal d'un dollar, 40,000 pieds carrés pour l'érection d'une synagogue. La récapitulation des dons immobiliers atteint le chiffre global de 1,550,000 pieds carrés.

Un règlement de zonage, à Ville Saint-Laurent, en date du 30 juin 1952, prohiba la vente de terrains à même les lots 478 et 479 pour fins industrielles et commerciales. Ce règlement empêcha l'intimée de louer à baux emphytéotiques ses propriétés foncières.

Une communication officielle et pressante (pièce R-15) du gérant de la Cité de Saint-Laurent démontre clairement que les seules ventes consenties, de 1949 à 1958, le furent en conséquence de pressions presque comminatoires de la part de l'autorité municipale,

Jugé, la Cour est d'avis, selon la preuve établie, que l'intimée, de 1949 à 1958 inclusivement, refusa de vendre ses terrains conformément à son intention de ne louer que par baux emphytéotiques.

2. Des quelque 50,000,000 de pieds carrés appartenant à l'intimée avant la première vente, le 6 mai 1955, la compagnie en possédait encore 48,493,440 le 30 juin 1964;

3. Une proportion de 8% du domaine initial a été loué à divers preneurs;

4. Une tranche de 12.3% de ses terrains a été cédée à titre gratuit, expropriée ou vendue;

5. Parties des lots 478 et 479 équivalent à 4.5% environ de tout l'actif immobilier de la compagnie, sont en majeure partie incluses dans cette fraction de 12 3%;

6. Au 30 juin 1964, les 4/5, soit 79 5% des propriétés de l'intimée «n'étaient ni vendues, ni louées et ne produisaient aucun revenu». «Fidèle à son objectif, l'intimée se réservait l'avenir, en se réservant son avoir»;

7. Industrial Glass ou, plus exactement, son propriétaire, Alexis Nihon, soutient, avec raison, que son intention «a toujours été celle de quelqu'un qui a fait un placement et non celle d'un commerçant»;

8. Du 1er septembre 1949 au 26 octobre 1959, et même au-delà, déduction faite des terrains loués (8%) ou cédés à titre gratuit (12.3%), l'intimée conservait 84% de ses biens immobiliers, n'ayant vendu, sous l'empire d'une certaine contrainte morale, qu'une parcelle approximative de 4%. Ces ventes ne participent en aucune façon à des activités ou affaires d'une nature commerciale;

9. L'appel est rejeté.

APPEL d'une décision de la Commission d'appel de l'impôt sur le revenu.

A. Garon and *P. F. Cumyn* for appellant (appelant).

R. H. E. Walker and *P. F. Vineberg, Q.C.,* for respondent (intimée).

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DUMOULIN J.:—Le 2 décembre 1965, la Commission d'appel de l'impôt déboutait le ministère du Revenu national du droit d'ajouter aux revenus déclarés par l'intimée les montants ci-dessous:

Pour l'année fiscale 1955	$ 105,028.99
Pour l'année fiscale 1956	1,339,913.52
Pour l'année fiscale 1958	492,014.23
au total	$1,936,956.74

Le ministre interjette appel de cette décision.

La question controversée réside tout entière dans la classification appropriée de cette somme considérable, que l'appelant dit être des profits (income) résultant d'une entreprise ou d'une aventure de nature commerciale, au sens de l'article 139(1)(*e*) de la *Loi de l'impôt sur le revenu* (S.R.C. 1952, c. 148), mais qui, selon l'intimée, résulterait uniquement de l'augmentation de valeur de certains lots, avantageusement situés, vendus dans des circonstances particulières, six et cinq ans après leur acquisition.

Industrial Glass Limited, tire son existence légale d'une charte, octroyée le 28 novembre 1946, sous l'empire de la *Loi des compagnies du Canada,* qui l'autorisait à fabriquer et à vendre du verre pour fenêtres et vitrines.

Un industriel et financier très important, Alexis Nihon, possédait presque toutes les actions de la compagnie dont il disposa, dès 1949, au prix de plus de $3,000,000. Le problème à solutionner découle du remploi de ce capital.

Entre 1949 et 1957, la compagnie, ayant obtenu, non sans difficulté, un permis de mainmorte (mortmain permit) de l'autorité provinciale, investit cet actif pécuniaire dans l'acquisition de vastes étendues de terrains en banlieue de Montréal, à Lachine et à Ville Saint-Laurent. Le domaine immobilier de l'intimée atteignit approximativement le chiffre de 50,270,515 pieds carrés, tel que rapporté au paragraphe 10 de l'admission des faits, convenue entre les parties, pièce A-3 de ce dossier.

Pour le besoin de cette cause, les achats et reventes de terres dans la paroisse de Saint-Laurent sont les seuls directement concernés. Il s'agit des lots 478 et 479 du cadastre de la paroisse susdite. Le 13 septembre 1949, la compagnie Industrial Glass acquérait des terrains d'une

contenance de 62.48 arpents prélevés à même le premier des deux lots et, le 15 août 1950, elle faisait l'achat d'une superficie de 51.13 arpents, distraite du 479 (paragraphes 6 et 7 des admissions de faits).

Témoin à l'audition, Alexis Nihon dit qu'il ignorait, lors des transactions, l'annexion de ces terrains, le 10 mars 1949, à la municipalité de Ville Saint-Laurent, détail assez insignifiant, puisque nul ne saurait reprocher à un capitaliste avisé des investissements immobiliers en des endroits susceptibles de progression. Je me demande, parfois, si une inconsciente «déformation de métier» n'inclinerait pas à considérer, avec un grain de suspicion, la recherche normale et même souhaitable de placements avantageux. Si cette impression avait quelque fondement, il serait opportun de revenir à une meilleure appréciation de la réalité et de la loi.

Aucune réglementation restrictive, communément appelée «zonage», ne gênait la libre disposition des lots 478 et 479 en 1949 et 1950 (admission conjointe, para. 6); ils demeuraient disponibles pour toutes affectations commerciales ou industrielles; mais, le 30 juin 1952, Ville Saint-Laurent, par son règlement numéro 239, interdisait l'utilisation de la majeure partie de ces deux terres pour toutes fins autres que celles de constructions résidentielles (admission conjointe, para. 12 et la pièce R-21).

Cette limitation décrétée par la mesure civique du 30 juin 1952 déjouait les projets à long terme dont monsieur Nihon nous fait part aux articles 6 et 7 de sa réponse à l'avis d'appel; ces procédures étant rédigées en anglais, je les reproduis textuellement:

> 6. The policy of the Respondent, to which it has consistently adhered since 1949, has been to lease its lands on a long term basis for industrial and commercial purposes, usually by emphyteutic lease, under which the lessees pay a land rent over the period and construct their own commercial or industrial buildings on the land.
>
> 7. All such acquisitions were made for the purposes of obtaining rental revenue through leasing of the properties. The Respondent has successfully implemented its policy and has thereby developed substantial rental revenues, and the Respondent has consistently refused to sell any of the property acquired by it, as being contrary to its said policy.

Ces propriétés, comprenant plus de cinquante millions de pieds carrés, furent payées aux vendeurs pratiquement au comptant, sans l'emprunt d'un dollar à la banque et sans une seule hypothèque. Il est de notoriété publique

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dans le milieu des affaires à Montréal qu'Alexis Nihon dispose de capitaux considérables de sorte qu'il peut rester indifférent à l'appât de gains vite réalisés. Du reste, la preuve en cette cause établit, nous le verrons tantôt, la mise à exécution de son dessein de locations à baux emphytéotiques, pratique fort ingénieuse qui assure à son auteur un rendement des plus lucratif et l'éventuelle rétention, à titre de propriétaire incommutable, sans aucune indemnité, des constructions érigées par les locataires durant l'emphytéose. Quand la compagnie intimée se porta acquéreur de partie des lots 478 et 479, en 1949 et 1950, déclare le témoin Nihon, il n'y avait pas d'immeubles commerciaux et très peu d'industries à Ville Saint-Laurent; mais, présentement, cette localité est parsemée d'un nombre toujours croissant de bâtiments industriels.

La pièce A-7, produite au cours de l'enquête, à son tableau «A», intitulé «Schedule of Land Purchases», retrace la réalisation de cette politique en sa phase initiale; les vingt-cinq achats de lots, échelonnés sur une période de temps allant du 1er septembre 1949 au 26 octobre 1956. Je noterai que cette dernière liste ne concorde pas entièrement avec la pièce A-3; la différence, peu significative d'ailleurs, consistant dans l'ajouté d'une acquisition de partie du 504, à Ville Saint-Laurent, le 21 octobre 1959, mais réduisant à 48,493,440 pieds carrés l'étendue superficiaire des terrains.

Prenant comme base admissible d'appréciation ce patrimoine terrien de 48,000,000 de pieds carrés, environ, pendant les années 1955, 1956 et 1958, examinons les baux emphytéotiques alors consentis par Industrial Glass, les cessions accordées, les ventes transigées et les circonstances qui ont pu provoquer l'acquiescement de l'intimée à ces mutations de propriété. Demandons-nous, ensuite, si, eu égard à la preuve, l'interprétation d'ensemble de l'appelant serait fondée, qui allègue, aux paragraphes 11 et 12 de l'avis d'appel (Notice of Appeal) que:

> 11. The Appellant submits that the Respondent acquired the areas of lands referred to in para. 3 and more particularly the area of land mentioned in para. 4 with a view to profit by turning them to account or trading in them.
>
> 12. The purchase by the Respondent of the lands mentioned in para. 4 and the subsequent sale of the said lands constituted a business within the meaning of para. (*e*) of s.s. (1) of section 139 of the Income

Tax Act and the profits therefrom are required by virtue of sec. 4 of the Income Tax Act, to be included in the Respondent's income for each of its 1955, 1956 and 1958 taxation years.

Le débat est donc clairement exposé, l'appelant soutenant que la constitution de cet actif immobilier et les quelques ventes signalées classent la compagnie dans la catégorie des entreprises de commerce, et, partant, imposables; l'intimée répliquant que son objectif n'est pas de vendre mais de louer à longues échéances, et insistant sur les pressions et menaces qui l'obligèrent à quelques ventes.

LES ACHATS:

Nous avons précisé ci-haut les dates auxquelles remonte l'acquisition par Industrial Glass de partie des lots 478 et 479, le 13 septembre 1949 pour le premier, le 15 août 1950 pour le second, d'une contenance, respectivement, de 62.48 arpents, au prix de $50,000, aussitôt acquitté, et de 51.13 arpents, au coût de $57,000, dont quittance entière sur signature de l'acte (voir les pièces A-3 et A-7).

LES CESSIONS À TITRE GRATUIT:

Le dépôt, au bureau d'enregistrement provincial, par l'autorité civique de Ville Saint-Laurent, le 30 novembre 1953, d'un plan de subdivision urbaine, affectant les numéros 478 et 479, induisit la compagnie intimée, dans un esprit de coopération, à céder à la municipalité, pour un dollar, le 13 décembre 1953, pas moins de 1,496,039 pieds carrés en superficie, afin de faciliter le tracé de rues et l'ouverture d'un parc. Autre cession, en pur don, à la ville, le 28 juin 1956, de 14,770 pieds carrés pour le complément d'une rue (pièce A-2).

Une troisième cession, 40,000 pieds carrés, au prix nominal d'un dollar, fut faite le 12 décembre 1954, à la Congrégation juive de Saint-Laurent, pour l'érection d'une synagogue (pièce A-2).

La récapitulation de dons immobiliers atteint un chiffre global de 1,550,000 pieds carrés.

LES VENTES:

Suivant la pièce A-2, onze ventes de terrains auraient été consenties par l'intimée entre le 6 mai 1955 et le 17 décembre 1957, englobant une étendue totale de 2,025,747 pieds carrés. Il importe de retenir que ces transactions

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eurent lieu plus de sept ans après l'achat des lots 478 et 479 (13 septembre 1949 et 15 août 1950). Si, véritablement, comme l'appelant le soutient, la compagnie exerçait le négoce des ventes d'immeubles, convenons qu'au rythme moyen de moins de deux ventes l'an, durant sept ans, l'entreprise s'avérait plutôt stagnante. Au paragraphe 35 de l'admission conjointe des faits (Statements of Facts Agreed upon by the Appellant and Respondent), il est reconnu que:

> 35. From the time of the sale of its business in 1949 referred to in paragraph 4 hereof, until June 30, 1958, Industrial Glass did not effect any sales or transfers of land other than those hereinabove referred to . . .

Par ailleurs, l'intimée déclare que l'interdiction portée au règlement de zonage (30 juin 1952, pièce R-21) de bâtir pour fins industrielles sur les lots 478 et 479 la privait de pouvoir louer à baux emphytéotiques ces mêmes propriétés. C'est ce qu'elle explique, ainsi qu'un autre facteur puissant, aux paragraphes 12 et 13 de sa réponse à l'avis d'appel; je cite:

> 12. After the zoning restriction was imposed, the Respondent attempted, without success over the next three years, to lease land in the restrictively zoned area. It became evident, however, that, although a commercial or industrial firm will take land on long-term lease for commercial or industrial purposes, the same factors do not apply in the case of residential use of property. There is no demand in Canada for the leasing of vacant land for the purpose of effecting residential construction thereon. Even to the present date (June 13, 1966) the Respondent has been unable to lease any of the land in Lots 478 and 479 which has been restrictively zoned for residential purposes.
>
> 13. By the year 1955, the restrictively zoned area was completely unleased and was producing no revenues since its acquisition, and by this time the City of St. Laurent was exerting considerable pressure on the Respondent to prevail upon the latter to dispose of the land in the said area in order to permit the development for residential purposes.

La complication relatée au paragraphe 12 se conçoit aisément; l'occupant domiciliaire a un intérêt primordial à la propriété entière du sol de sa demeure; il en va différemment de l'industrie pour de multiples raisons.

Les pressions exercées par le Conseil de la Cité de Saint-Laurent (para. 13) sont révélées avec une vigueur presque comminatoire dans une lettre officielle du gérant de la Cité, monsieur Lucien Toupin, c.a., datée le 27 juin 1955 (pièce R-15), écrite au président de la compagnie Indus-

trial Glass Limited. C'est là une véritable «mise en demeure» de vendre qui vaut d'être textuellement reproduite.

le 27 juin 1955

M. Alexis Nihon, Président,
Industrial Glass Company Limited,
6020 Côte-de-Liesse,
SAINT-LAURENT, P.Q.

Cher Monsieur,

Le Conseil de la Cité de Saint-Laurent, à sa réunion de comité tenue le 22 juin 1955, m'a prié de vous aviser qu'il regrettait infiniment que les terres, portant les numéros de cadastre 478 et 479 de la Paroisse de Saint-Laurent, ne soient pas encore construites, alors que les terrains situés sur les côtés est et ouest de ces deux fermes, le sont entièrement, depuis trois ans pour le côté est, et depuis plus d'un an pour le côté ouest.

Par ce fait, qui est dû à ce que vous ne vendez pas lesdits terrains, malgré les nombreux acheteurs qui sont prêts à les construire, non seulement vous nuisez au développement de la Cité de Saint-Laurent, mais encore vous êtes l'objet de nombreuses plaintes de la part des résidents de cette section de la Cité de Saint-Laurent, parce qu'il nous est impossible d'y installer les services d'améliorations locales qui amèneraient un meilleur drainage de ce district ainsi qu'une amélioration de l'approvisionnement d'eau, sans parler de l'installation des pavages qui élimineraient la poussière dont tout le monde se plaint.

Le Conseil qui connaît bien vos sentiments sur le développement de la Cité de Saint-Laurent est tout à fait surpris de votre attitude à ce sujet, qui est un manque de civisme à l'endroit des citoyens qui demeurent dans cette partie de la Cité de Saint-Laurent.

Bien à vous,
Le Gérant,

(Signature) Lucien Toupin
Lucien Toupin, C A.

Il est vrai que la première vente, transigée le 6 mai 1955, précède d'un mois et demi environ la 'mercuriale' du Conseil municipal, mais la preuve démontre, à l'évidence, l'antériorité du mécontentement de ce corps public, doublement alerté par le souci d'obtenir des revenus plus élevés et par les plaintes d'acheteurs éconduits (voir la pièce R-15).

A ce témoignage littéral du gérant de la Cité de Saint-Laurent s'ajoute celui de monsieur René Laberge, gérant de la Cité de Lachine, entendu à la requête de la compagnie (alors appelante) devant la Commission d'appel de l'impôt. Les dépositions prises à cette première enquête forment partie du présent appel sous la cote R-22. Les citations ci-dessous sont extraites des pages 67 et 68.

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Me Robert Walker, c.r., l'un des procureurs de Industrial Glass, interroge le gérant de la Cité de Lachine:

D. Monsieur Laberge, êtes-vous au courant du fait que Industrial Glass Company Limited est une compagnie qui est propriétaire d'une grande étendue de terrains, partie desquels est dans les limites de la Cité de Lachine?

R. Oui, monsieur.

D. Avez-vous eu occasion de temps à autre, dans vos fonctions, de parler et de renseigner les parties intéressées à trouver des terrains pour des fins de commerce?

R. Oui, monsieur, dans la partie nord de la Cité de Lachine, nous avons un grand territoire connu comme parc industriel et à plusieurs reprises nous avons eu des demandes pour des industries qui voulaient s'installer, et à plusieurs occasions nous avons suggéré le nom de monsieur Nihon qui était le propriétaire de plusieurs terrains dans ce quartier.

D. Quand vous parlez de monsieur Nihon, est-ce que vous parlez de sa compagnie?

R. Oui, Industrial Glass Company Limited.

D. Voulez-vous nous dire ce qu'a été le résultat avec ceux qui ont été référés à Industrial Glass Company Limited ou de plusieurs personnes que vous avez référées là?

R. La réponse prédominante était que monsieur Nihon, ou, par exemple, Industrial Glass Company Limited, ne vendait pas de terrains en aucune circonstance.

D. Vous savez qu'il y a actuellement quelques baux en existence?

R. Oui, monsieur.

Une autre corroboration de la ligne de conduite arrêtée par Industrial Glass de ne point vendre mais de louer ses terrains à baux emphytéotiques ressort de la déposition de monsieur Bernard Hogan, courtier en immeubles, de la Cité de Saint-Laurent; je cite aussi ce témoignage, transcrit aux pages 44 et 45 de la pièce R-22 (partie anglaise). Me Walker, c.r., questionne:

Q. Would you describe what your business is, sir?

A. I am a realtor and I sell real estate and I am also a developer.

Q. Is it correct to say you are the developer of the large development at the corner of Atwater and St. Catherine?

A. Yes.

Q. And this is not your only project—you have had others before?

A. Yes.

Q. Are you aware of the activities of Industrial Glass Company Limited in Montreal?

A. Yes.

Q. Do you know anything about its reputation insofar as the sale of its lands is concerned?

A. No land for sale.

Q. Have you actually had personal experience of that? Did you attempt to buy any of it?

A. I attempted to buy the Atwater spot many times but it just couldn't be done, so we had to enter into an emphyteutic lease.

Sur la foi de ce qui précède, l'assertion réitérée de l'intimée, quant à la politique d'affaires qu'elle entend appliquer et au but pratique qu'elle se propose d'atteindre: locations à long terme, semble bien difficile à révoquer en doute.

LES BAUX EMPHYTÉOTIQUES:

Une compagnie d'une espèce aussi exceptionnelle que celle-ci, propriétaire d'un actif immobilier de près de cinquante millions de pieds carrés, achetés au comptant, sans emprunt bancaire et sans hypothèque, peut se permettre de confier à un avenir prometteur le soin de la dédommager au centuple, peut-être, des années d'attente.

Je me hâte d'ajouter que cette remarque est conforme aux prévisions de l'intimée que la progression incessante de la région métropolitaine ne manquera pas d'amener, comme inévitable corollaire, l'acquiescement d'industriels en quête d'espace, aux conditions certes onéreuses des locations emphytéotiques.

Une feuille insérée, sans cote particulière, mais portant le numéro 8, à la liasse de pièces marquées R-1 à R-21, mentionne dix baux à longs termes conclus pendant la période du 10 septembre 1954 au 29 juin 1960. De ceux-ci, huit sont emphytéotiques, soit pour des termes allant de dix à soixante ans; des deux autres, l'un a une durée de cinq ans, l'autre de huit.

Cinq locataires ont construit à leurs propres frais les bâtiments qu'ils occupent; les autres constructions appartiennent à des organisations, telles Alexis Nihon & Cie., Ltée, et Golf Gardens Ltd., dont monsieur Nihon détient la grande majorité des actions.

AUTRES REMARQUES:

Le savant procureur du ministère a commenté deux paragraphes du procès-verbal d'une assemblée des directeurs de la compagnie Industrial Glass Limited, tenue le 29 août 1949 (voir le document numéroté 98 à la pièce R-1-R-21). Me Garon soumet que les extraits ci-après cités de ces minutes dénoteraient l'intention véritable de l'intimée

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d'acheter, pour revendre à brève échéance, dans un but purement spéculatif, des terrains à Côte-de-Liesse et à Côte Vertu. Voici les textes:

> MINUTES of a meeting of the directors of INDUSTRIAL GLASS COMPANY LIMITED, held at Montreal, at the office of Messrs. Walker, Martineau, Chauvin, Walker & Allison, 414 St. James Street West, at 11:00 o'clock in the morning, on the 29th of August, 1949.
>
> PRESENT: Messrs. Alexis Nihon
> John A. McMaster
> Jean Martineau
>
> being all the directors of the company.
>
> Mr. Alexis Nihon takes the chair and Mr. Jean Martineau acts as Secretary.
>
> The President states that the company has a large surplus and a considerable amount of undivided profits which are not immediately required and he suggests that part of this surplus and undivided profits be estimated to bring additional revenues to the company.
>
> The President explains that it is possible for the company to buy certain immovable properties on Côte de Liesse Road and on Côte Vertue Road, which could be resold at a fair profit within a short time because of the rapid developments and growth of the town and of the parish of St-Laurent.

Monsieur le bâtonnier Martineau, témoin à l'enquête, croit être le rédacteur de ce rapport d'assemblée. Il explique que la transformation soudaine d'une industrie de vitrerie commerciale en compagnie de placements immobiliers à long terme, avant l'obtention des autorisations administratives, pourrait compliquer la négociation des achats de terrains projetés.

«Nous avions des doutes», dit-il, «quant aux pouvoirs de la compagnie d'acquérir des immeubles pour une longue durée de possession. J'ai consulté à ce sujet l'un de mes associés, Me Frank Chauvin (maintenant décédé), et nous avons essayé de contourner la difficulté légale en rédigeant le procès-verbal du 29 août 1949, tout comme s'il s'agissait pour Industrial Glass d'un investissement à court terme». Il convient de rappeler qu'un premier permis «spécial» ou intérimaire de mainmorte ne fut accordé par l'autorité provinciale que le 5 juillet 1950, et le permis définitif pas avant le 21 août 1954 (voir les paragraphes 11 et 15 de l'admission conjointe des faits, «Statement of Facts Agreed upon by the Appellant and Respondent»).

Il va sans dire que Me Garon a convenu volontiers de l'absolue véracité de ce témoignage.

A mon sens, et sans faire acception, pour l'instant, des précisions apportées par M. le bâtonnier Martineau, c.r., le résultat pratique des opérations de la compagnie qui, de 1949 à 1958 inclusivement, refuse de vendre sinon sous le coup de menaces, dispose irréfutablement de cette objection. Supposé même que l'intimée ait eu l'intention manifestée au procès-verbal du 29 août 1949, pareille intention s'effacerait devant le fait matériel et constant d'une politique complètement différente. La loi fiscale ne retient pas une intention purement conjecturale que réfute la réalité. De cet incident, la Cour ne saurait retenir que la plausibilité des explications précitées.

Dans la dernière déposition entendue, celle de monsieur Jean-Louis Homet, cotiseur à l'impôt fédéral, je puise les renseignements suivants, reproduits substantiellement à la pièce A-7: des quelque cinquante millions de pieds carrés de sol appartenant à Industrial Glass, avant la première vente, le 6 mai 1955, la compagnie en possédait encore 48,493,440 pieds le 30 juin 1964. Une proportion de 8% du domaine initial est louée à divers preneurs, la compagnie Alexis Nihon Limitée y comprise; une tranche de 12.3% de ces terrains a été cédée à titre gratuit, expropriée (ce qui est une vente forcée), ou vendue. Les lots 478 et 479, qui équivalent à 4.5% environ de tout l'actif immobilier de la compagnie, sont en majeure partie inclus dans la fraction de 12.3% ci-haut mentionnée. Enfin, au 30 juin 1964, les quatre-cinquièmes, 79.5% exactement, des terres de l'intimée «n'étaient ni vendues, ni louées et ne produisaient aucun revenu». Fidèle à son objectif, Industrial Glass se réservait l'avenir, en se réservant son avoir.

Cette opinion, le savant membre de la Commission d'appel de l'impôt, Me Maurice Boisvert, c.r., la résume avec une remarquable clarté, à la page 17 de sa décision très élaborée, datée le 2 décembre 1965, à laquelle je souscris en tout point. Me Boisvert écrit:

> Je suis arrivé à la conclusion que l'appelante s'est déchargée du fardeau qui lui incombait de prouver l'erreur du Ministre en taxant des profits qui n'étaient rien d'autre qu'une augmentation d'un capital placé dans des propriétés immobilières. Son intention initiale n'a pas changé. Sa conduite, s'accordant en tout point avec son intention, a toujours été celle de quelqu'un qui a fait un placement et non celle d'un commerçant.

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CONCLUSION:

L'appelant a beaucoup épilogué sur «l'intention seconde» qui ressortirait des quelques ventes consenties par l'intimée et cite à l'appui de cette prétention, entre autres décisions, celle de *Regal Heights Limited v. Minister of National Revenue*[1]. Une différence radicale distingue cette cause de l'actuelle: dans le premier cas, la vente totale de l'actif, «lock, stock and barrel» selon l'expression anglaise, suivit l'échec de l'intention première de gagner la compagnie Simpson-Sears à construire un centre d'affaires sur les propriétés de Regal Heights Ltd. Or, en l'instance présente, la preuve établit que, pendant la période pertinente, et même au-delà, Industrial Glass conservait 84% de ses biens immobiliers, n'ayant vendu, sous l'empire d'une certaine contrainte morale, qu'une parcelle approximative de 4%.

Pour ces motifs, l'appel du ministre du Revenu national est rejeté. Le dossier de la cause sera référé au ministère concerné, si besoin est, pour effectuer la détaxe afférente à ce jugement. L'intimée aura droit de recouvrer les frais et dépens encourus.

[1] [1960] R C. de l'É. 194.

Montreal 1967

Apr. 12

May 11

BETWEEN:

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

AND

DUNCAN JOSEPH DESBARATS ..... RESPONDENT.

AND

BETWEEN:

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

AND

EDWARD WILLIAM DESBARATS ..... RESPONDENT.

Income tax—Partnership business—Bank loan to meet operating deficit—Sale of collateral by bank—Whether amount deductible in computing partnership profits—Income Tax Act, s. 12(1)(b).

On the dissolution of respondents' partnership on March 31st 1961 they owed $184,000 to a bank on loans made to meet operating losses of

the firm during several years. The bank realized $78,000 on the sale of bonds which the partners had put up as collateral for the loans. In reporting their incomes for 1961 the partners claimed deduction of the $78,000 received by the bank on the sale of the bonds.

Held, respondents were not entitled to the deduction. Not only had the deduction claimed been previously allowed them as operating losses in computing the partnership's income each year, but moreover respondents' loss on the sale of the bonds resulted from the supply of capital to the partnership business and not from the operations of the business and the deduction of such loss was therefore prohibited by s. 12(1)(*b*) of the *Income Tax Act. Bennett and White Construction Co. Ltd. v. M.N.R.* [1949] S.C.R. 287; *Watney & Co. v. Musgrave* (1880) 5 Ex. D. 241; and *Montreal Coke and Mfg. Co. v. M.N.R.* [1944] A.C. 126, applied.

Income Tax appeals.

A. Garon and *P. H. Guilbault* for appellant.

E. Colas for respondents.

NOËL J.:—These are appeals from the decision of the Tax Appeal Board[1] dated January 14, 1965, allowing the appeals of the respondents from assessments resulting in additional taxes for the year 1961 in the amount of $5,084.01 for Duncan Joseph Desbarats and in the amount of $4,303.37 for Edward William Desbarats.

The above amounts were added to the tax indebtedness of both the respondents when the Minister refused to allow Duncan Joseph Desbarats to deduct a loss of $32,998.24 and Edward William Desbarats to deduct a loss of $45,257.62 from their respective revenues which, in the case of Duncan Joseph Desbarats, resulted in a taxable income of $18,711.65 (instead of a declared net loss of $22,866.59) and in the case of Edward William Desbarats resulted in a taxable income of $16,717.67 (instead of a declared net loss of $45,939.95).

The parties, through counsel, agreed that the evidence adduced herein, verbal as well as documentary, would apply to both appeals.

The above losses of $32,998.24 and $45,257.62, totalling $78,255.86 arose in the following circumstances. Both of the respondents carried on business in partnership under the name of Desbarats Advertising Agency till March 31, 1961. Over a number of years, during which the partnership operated, the partners would guarantee bank loans made to

[1] 38 T.A.B.C. 25 and 38.

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the partnership and the financial statements of the advertising business show a liability to the Banque Canadienne Nationale for each year. The Desbarats Advertising Agency in its statement of profit and loss for the year ended December 31, 1960, showed a loss of $68,287.62. The partnership operated only three months in 1961 at a net profit of $39,712.97 and on March 31, its assets and liabilities were sold to a limited corporation called "Desbarats Rayment Advertising Ltd." as of March 31, 1961, and the partnership was dissolved. At the above date, the partnership owed to the Banque Canadienne Nationale the sum of $184,924.01 which the partners had guaranteed personally by endorsement and also by depositing a number of bonds owned by them. The partners were called upon by the bank to pay the loans they had guaranteed and the bonds were sold by the bank. A sum of $78,355.86 was realized therefrom and this amount was applied in satisfaction of the personal guarantee assumed by the partners and reduced the partnership debt to the bank from $184,-924.01 to $106,568.15. Edward William Desbarats' share was $45,257.62 and that of his brother Duncan was $32,-998.24. Desbarats Rayment Advertising Ltd. assumed payment of the balance owing to the bank of $106,568.15 and the Desbarats brothers remained liable for this amount under their endorsement to the bank. The business of the company was disastrous for both respondents when the company later went into bankruptcy and were unable to obtain reimbursement for their losses.

The partners claimed the above amounts of $45,257.62 and $32,998.24 as expenses or losses applicable against the income of the partnership for its three months of operations in 1961 and, as already mentioned, the Minister refused to allow such deductions on the basis that the sum of $78,255.86, which the partners were called upon to pay in 1961, was in satisfaction of a debt assumed by the partners and was a non-deductible capital expense within the meaning of subparagraph (*b*) of paragraph (1) of section 12 of the Act.

The position taken by the respondents is that the above amounts of $45,257.62 and $32,998.24 are really expenses applicable against the income of the respondents for the

year 1961, having served to pay for losses which occurred in the running day to day business of the partnership. The respondents further submitted that the appeals should be vacated for the additional reason that in the year 1961 the respondents had no income but a loss which they allege was in the amount of $36,509.91. This loss, however, is arrived at by taking an operating loss of $78,222.58 (which the respondents were, however, unable to substantiate at the hearing of these appeals) deducting therefrom an amount of $39,712.67 of profits for the first three months of the year 1961, and thus obtaining the above mentioned sum of $38,509.91 (and not $36,509.61 as alleged by the respondents).

The statement of profit and loss of the partnership for the year ended December 31, 1960, however, shows a net loss for the year of $68,287.62 and not $78,222.58, as submitted by the respondents. Furthermore, the above statement also discloses that drawings of the partners in a total amount of $51,271.06 for the year were deducted as operating expenses and if these amounts cannot be so deducted and must be re-added to the revenue for the year, the loss here would be $17,016.56 and not $68,287.62.

The respondents, therefore, would be entitled, under section 27(1)(*e*) of the Act, to offset their share of partnership loss of $17,016.56 against other business, investment, rental and salary income of the same year, i.e., 1960, and the balance would then remain available for carry over to other years. The respondents, however, cannot deduct such share as they have already done so. The documentary evidence discloses that Edward William Desbarats, in respect of his share of the partnership loss of $6,843.97, in computing his income for 1960, deducted $1,508.19 and for 1959 deducted the balance of this loss, $5,004.33. Duncan Joseph Desbarats in respect of his share of the partnership loss of $9,156.58 in computing his income for 1960, deducted $1,508.19 and for 1959 deducted the balance of this loss, $7,648.39.

The above deductions had not been established before the Tax Appeal Board where the sole issue was as to whether the respondents were entitled to deduct as an operating loss their share of the value of the bonds sold to

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reduce the amount of indebtedness of the partnership to the bank. The argument that the respondents had no income for the year 1961 as a result of the losses sustained in the partnership in 1960 had not been raised. It was on the basis of the loss appearing on the partnership's profit and loss statement for the year 1960 that Mr. Boisvert, without dealing with the question as to whether the loss sustained by the partners as a result of the bank realizing on the sale of their bonds was deductible as a loss or not, suggested that the assessments be returned and amended to take into account the business losses of the partnership and that if this was done, the respondents would end up with a loss of $36,509.91 (which, as already mentioned, should be $38,509.91) instead of a profit of $39,712.67 for the first three months of the year 1961.

He, therefore, did not deal with the question as to whether the loss sustained through the sale of the respondents' bonds was a capital loss or not and this appears from his statement at p. 36 of his decision:

> It seems to me that, in determining the profits and losses, these rules were followed. Under the circumstances I do not believe it necessary to discuss whether or not the payment, made to the bank by the appellant, represented a capital loss.

Having thus established that the respondents have exhausted the deductions they were entitled to under section 27(1)(*e*) of the Act in the event the partnership's loss is $17,016.56 and not $68,287.62, the sole matter now remaining is whether (1) the profit of the partnership was properly established by adding the drawings of the partners to the revenue of the partnership and not allowing them as operating expenses and (2) whether the respondents would be entitled to a further deduction for the loss sustained as a result of the sale of their bonds.

That the drawings of the partners in a partnership cannot be deducted as an operational expense cannot, in my view, be contested. This, indeed, follows from a reading of sections 6(1)(*c*) and 15(1) of the Act. Under section 6(1)(*c*) the profits of a partnership must all be included in the partners' income for a taxation year whether or not actually withdrawn or even capable of being withdrawn in the year as all the earnings of the partnership business are business income of the individual partners and not of the partner-

ship. The entire income of partners is then taxed in the hands of the partners as part of their income for the calendar year in which the fiscal period of the partnership ends according to their respective interests.

It therefore follows that the only loss in the year 1960 that can be offset against the respondents' income is $17,016.56 and not $68,287.62 and as such a deduction has already been effected, the respondents can obtain no further relief in this respect.

The only matter now remaining is whether the amounts of $45,257.62 and $32,998.24, the respective values of the bonds owned by the parties and deposited at the bank as collateral for the loans made to the partnership, which the partners lost as a result of their sale when called upon to make good the guarantee given to the bank, was a deductible loss within the meaning of subparagraphs (*a*) or (*b*) of paragraph (1) of section 12 of the Act.

In order to properly resolve the question, it is helpful to examine the manner in which the indebtedness of the partners to the bank arose. During the years 1958, 1959, 1960 and 1961 the partnership, and from March 31, 1961, the corporation Desbarats Rayment Advertising Limited, sustained an operating loss of $140,000 due to a number of factors which the respondents list as paragraphs 9 and 10 of their respective "Answer to notice of appeal of appellant" as follows:

> 9. ...due mainly to the fact that the gross billings were only half of what they had expected, that the overhead was increased by 100%, that nearly $110,000 of salaries were paid to the various gentlemen that were brought in at the time A. Colin Rayment joined the original partnership, and that there were delinquent receivable accounts in the amount of $125,000.00;
>
> 10. ...in order to meet this continually increasing deficit, which was occurring in the day to day running business of the partnership, the Respondent and his brother, Duncan Joseph Desbarats, obtained a loan from the Banque Canadienne Nationale, totalling $140,000.00 on December 31st, 1960, and guaranteed by endorsement of the Desbarats brothers and an additional guarantee of bonds held on deposit which were the personal property of the Respondent and his brother;

On April 1st, 1961, however, three months later, the guaranteed debt of the partnership to the bank had reached the sum of $184,924.01 and it was then that the Desbarats

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brothers had to consent to the sale of their bonds and the amount of their sale, e.g., $78,355.86 was then deducted from the debt of the partnership to the bank.

It therefore appears that the loans made by the bank to the partnership, which eventually added up to $184,924.01 were used by the partnership in its day to day business and was, over the years, charged off as operating expenses in arriving at the partners' income each year. It is clear that should the amounts of $45,267.62 and $32,998.24 now be allowed to be charged off, the respondents would be charging off the same expense twice and, of course, this they cannot do.

It however appears that even if they were not charging the expenses twice, the loss sustained by the sale of the bonds could not be charged off as an expense either under section 12(1)(*a*) or 12(1)(*b*) as the value of these bonds was lost in the process of supplying capital funds to the partnership business which was the means of carrying on the business of the partnership and such means must not be confused with the activities of the business itself. These bonds were indeed part of the capital structure of the partnership business and as stated by Rand J. in *Bennett and White Construction Company Limited v. M.N.R.*[2] at p. 293 when referring to premiums paid by the taxpayer, a construction company, to an individual guarantor of the company's bank loans for the purpose of obtaining necessary working capital (and referring to *Watney & Co. v. Musgrave*[3]):

> ...They (the premiums) furnish a credit apparatus to enable the business to be carried on, and although they affect the distributable earnings of the company, they do not affect the net return from the business.

In *Montreal Coke and Manufacturing Company v. M.N.R.*[4] an expenditure incurred in effecting conversion of bonds into new bonds issued at a lower rate was refused as non-deductible. It was held therein:

> ...that expenditure, to be deductible, must be directly related to the earning of income from the trade or business conducted; that the businesses of the appellants were not to engage in financial operations and expenditure incurred in relation to the financing of their businesses was not laid out for the purpose of earning income in their businesses within the statutory meaning and, accordingly, that under s. 6(*a*) of

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[2] [1949] S.C.R. 287.

[3] (1880) 5 Ex. D. 241.

[4] [1944] A.C. 126.

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the Income War Tax Act, 1927, that expenditure was not an allowable deduction. View of the courts below that the deductions claimed also fell to be disallowed as being payments "on account of capital" within s. 6(*b*) of the Act not dissented from.

The losses sustained in the present case are, in my view, clearly of a capital nature and their deduction is prohibited by section 12(1)(*b*) of the Act.

I would, therefore, allow the appeals with costs and restore the assessments appealed from.

Ottawa 1967

May 2-4

May 16

BETWEEN:

HOFFMANN-LA ROCHE LIMITED .....APPELLANT;

AND

DELMAR CHEMICALS LIMITED .....RESPONDENT.

Patents—Compulsory licence—Production of medicine—Confirmation of licence on appeal—Referral back of royalty—New scale of royalty fixed by Commissioner—Appeal—Whether rate manifestly wrong—Effect of prior appeal—Patent Act, s. 41(3).

On March 26th 1963 the Commissioner of Patents settled and issued to respondent a licence for the compulsory use of appellant's patented process in the production of the medicine chlordiazepoxide at a royalty of 12½% on the sales price of the bulk product effective from February 8th 1963, on which date he had made his written decision to grant a licence on specified terms. On an appeal from the Commissioner's decision this Court on July 23rd 1964 confirmed the licence but referred the royalty back to the Commissioner ([1965] 1 Ex. C.R. 611). On June 20th 1966 the Commissioner again fixed the royalty at the 12½% rate from February 8th 1963 to December 31st 1965 and thereafter at 15%.

Held, an appeal from the Commissioner's decision must be dismissed.

1. As the 15% rate fixed by the Commissioner from January 1st 1966 was the same rate and calculated on the same basis as the rate fixed by him and affirmed by the Supreme Court of Canada in the *Bell-Craig* case in respect of the same invention ([1966] S.C.R. 313) it could not be said on the material before this court (which in the main paralleled that in the *Bell-Craig* case) that such royalty was manifestly wrong. It is desirable that the same royalty be fixed for all licensees under the same patent. Nor did anything in the material before the court or in the nature of the case indicate that the royalty of 12½% for the earlier period was manifestly wrong. The appropriate royalty could not be determined with mathematical nicety; the Commissioner must have set the lower rate for the earlier period as an incentive to effective competition.

2. On the facts the licence was effective from February 8th 1963 and the judgment of this court of July 23rd 1964 confirming the licence but referring the royalty back to the Commissioner did not render the licence void *ab initio;* it remained valid subject to the payment of such royalty as might later be fixed by the Commissioner. *Hoffmann-*

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La Roche & Co. and Geigy v. Inter-Continental Pharmaceuticals [1965] R.P.C. 226; *Geigy S.A.'s Patent* [1966] R.P.C. 250; *Hoffmann-La Roche v. Delmar Chemicals* [1966] Ex. C.R. 713, distinguished.

APPEAL from Commissioner of Patents.

R. G. McClenahan for appellant.

Donald J. Wright, Q.C. for respondent.

THURLOW J.:—This is an appeal from a decision of the Commissioner of Patents made on June 20, 1966 by which he fixed the royalty payable by the respondent under a licence granted under s. 41(3) of the *Patent Act*[1]. The licence authorizes the respondent to use the invention of Canadian Patent No. 612,497, which relates to a substance known as chlordiazepoxide, for the purpose of the preparation or production of medicine but not otherwise and to sell the resulting product. The document as settled is dated March 26, 1963 but purports to require the payment of royalty on sales of the product made after February 6, 1963, the date of a written decision by the Commissioner to grant a licence with effect from that date. The royalty payable by the respondent was originally set at 12½ per cent on the respondent's net selling price to others of the active product in its crude form but on July 23, 1964 this Court, while confirming the decision of the Commissioner to grant the licence, allowed the appellant's appeal in respect of the royalty to be paid by the respondent and referred that question back to the Commissioner for consideration[2]. A further appeal from the decision to grant the licence was dismissed by the Supreme Court of Canada on April 9, 1965[3].

Proceedings to have royalty reconsidered began in August 1965 when the appellant's solicitors forwarded to the Commissioner and to the respondent's solicitors copies of a lengthy affidavit by Robert Hunter, a chartered accountant, which was represented in a letter which accompanied it as comprising the appellant's written royalty statement. At the same time the appellant requested an "opportunity of replying to the licensee's statement and of presenting oral evidence and/or oral argument at a hearing or at least the opportunity of cross-examining the licensee on the royalty issue". Some correspondence ensued which indicates that

[1] R.S.C. 1952, c. 203. [2] [1965] 1 Ex. C.R. 611.
[3] [1965] S.C.R. 575.

the Commissioner decided to defer dealing with the matter pending the judgment of the Supreme Court of Canada in the *Bell-Craig*[4] appeal, which also related to a licence under the same patent, and ultimately on January 27, 1966 the respondent's solicitors forwarded to the Commissioner a copy of the reasons for judgment of the Supreme Court in that case and a letter which set out their submissions as to what the royalty should be in this case and in the case of a licence under another patent held by the appellant relating to an intermediate substance used in making chlordiazepoxide and suggested that it would be helpful if the Commissioner could promptly deal with the matter. Thereafter without holding any hearing or obtaining any further written information or argument from either party the Commissioner on June 20, 1966 amended the licence so as in effect to confirm the royalty at 12½ per cent on the sale price of the bulk product from the time of the granting of the licence to the end of the year 1965 and to set a royalty of 15 per cent on the sale price of the bulk product thereafter. No reasons were given for this decision.

The present appeal was thereupon brought.

The grounds for the appeal as stated in the notice are that the Commissioner proceeded on a wrong principle or was manifestly wrong on the evidence in that:

1. he erred in directing that the new rate of royalty take effect with the half-yearly report due thirty days after June 30, 1966, thereby applying the new royalty as and from January 1, 1966;
2. he erred in providing that "previous half-yearly computations" and "previous payments shall not be affected" thereby implying
   (a) that the original royalty as fixed by the Commissioner of Patents and as set aside by this Court remained in effect from July 23, 1964 until December 31, 1965; and
   (b) that the licence granted to the Respondent dated March 26, 1963 remained in effect from July 23, 1964 until June 20, 1966;
3. he erred in fixing a royalty which on the evidence before him, is manifestly low.

[4] *Hoffmann-La Roche Limited v. Bell-Craig Pharmaceuticals Division of L. D. Craig Limited* [1966] S.C.R. 313.

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In the course of the hearing it was agreed by counsel that the material before the Court on this appeal should consist of the material in the record as certified and any additional material contained in the Commissioner's file or in the case on appeal to the Supreme Court.

It will be convenient to deal first with the submission that the royalty as fixed is manifestly low. It should be noted, at this point, that no complaint was put forward in the notice of appeal that the material before the Commissioner was inadequate to enable him intelligently to arrive at a royalty which would give due weight to all relevant considerations, and that, while counsel for the appellant pointed out that the respondent had adduced no evidence—as had been done in the *Bell-Craig* case, which, in his submission, differentiated that case from this—he also stated that from the point of view of the appellant, (on whom the duty rested of adducing material to support the royalty demanded—*vide* Rand J. in *Parke, Davis & Company v. Fine Chemicals*[5] at page 223) the material before the Commissioner was sufficient to arrive at a correct royalty. He contended, however, that the royalty as set by the Commissioner was manifestly too low since, on the basis of Mr. Hunter's affidavit, even without taking the costs of gaining and maintaining medical acceptance of the drug into account there would be no incentive to research if the appellant received less than $740 per kilo of the substance, and that a royalty of $2,958.67 per kilo was required to maintain research incentive which included the promotion and maintenance of such medical acceptance of the drug, whereas on the basis of 15 per cent of the respondent's selling price of about $450 per kilo for the crude material the royalty amounts to only about $67.50 per kilo. It was also said that it could be deduced from the sales figures in evidence that the Canadian market for the drug amounted to about 450 kilos per year, which suggests that if the licensee captured the whole market the total annual royalties would be in the vicinity of $30,000. This, however, would be an annual amount and would be for the Canadian market alone which it was suggested would amount to about 3 per cent of the world market open to the patentee and the other La Roche companies with which it is affili-

[5] [1959] S.C.R. 219.

ated. Projecting this over a seventeen year period indicates the possibility of royalties of about $500,000 from the Canadian market and suggests that on the same royalty basis the whole market might conceivably produce the not inconsiderable total of about $17,000,000 over the same seventeen year period.

Insofar as it does not consist of opinions and argumentation the information in the Hunter affidavit appears in the main to parallel that which Mr. Hunter gave orally in the *Bell-Craig* case[6]. Among other things it is stated that the annual research costs of the La Roche Companies for the preceding ten year period amounted to 16.30 per cent of annual sales by those companies of patented drugs, that a reasonable return (30 per cent before income taxes) on the capital employed in those research activities amounted to 9.78 per cent of annual sales, that the costs of promoting, establishing and maintaining acceptance of the drug by prescribing physicians amounted to 31.50 per cent of annual sales and that a similar reasonable return on the capital used for this purpose amounted to 7.56 per cent of annual sales. The total of these four items is 65.14 per cent which, on being applied to $4,542, which was said to be the La Roche average selling price per kilo of the drug in capsulated form, yields the figure of $2,958.67 per kilo already mentioned as the royalty required to maintain research incentive. It was also stated that the appellant's promotional efforts had brought about a widespread acceptance of the substance and that but for such efforts and expenditure chlordiazepoxide would have been and remained a laboratory curiosity. There was no evidence of what the research leading to the particular invention amounted to but a number of paragraphs of the affidavit were devoted to explaining the impracticability of endeavouring to make such a calculation and that such a calculation if made would be unrealistic and unreliable.

In reaching his conclusion the Commissioner also had before him the decision of the Supreme Court in the *Bell-Craig* case in which his own reasoning and finding had been preferred to that of this Court. In that case, as I read his decision, the Commissioner had rejected the appellant's

[6] See the description of the evidence put before the Commissioner in that case in [1965] 2 Ex. C.R. at pp. 285-286.

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calculation of royalty at $3,528.37 per kilo as being "based on the cost of the complete and sustained research programme undertaken by the patentee company, the overhead, return on capital invested, depreciation, sponsoring, advertising and keeping the physicians' interest in the drug, all figured out on the sales of the product when capsulated, sealed and labelled ready for patients consumption" which factors and calculations he regarded as irrelevant. He then proceeded:

> On the basis of past experience and upon considering the wide acceptance of the product, I will fix the royalty at 15% of the net selling price of the bulk active material made by the licensee and sold to others, or should the licensee process all of its production for sale as finished medicine ready for patients consumption, the royalty payments should be based on what would be a fair selling price of the bulk material to others.

This in my view expressed his decision and the basis for it.

In the Supreme Court after reviewing the Commissioner's reasons and those of the President of this Court Abbott J., for the Court said at page 319:

> As Martland J. pointed out in the *Parke, Davis* case, *supra,* at p. 228, the monopoly in a process patent for the production or preparation of food or medicine is considerably restricted in scope and the royalty allowed should be commensurate with the maintenance of research incentive and the importance of both process and substance. Such royalty should also be commensurate with the desirability of making food or medicine available to the public at the lowest possible price consistent with giving to *the inventor*—not the patentee —reward for the research leading to the invention.
>
> In my view the purpose of s. 41(3) is clear. Shortly stated it is this. No absolute monopoly can be obtained in a process for the production of food or medicine. On the contrary Parliament intended that, in the public interest, there should be competition in the production and marketing of such products produced by a patented process, in order that as the section states, they may be "available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention".
>
> The royalty payable by a licensee for using a patented process is one of his costs of production. That being so there is an obvious justification, in cases where a percentage royalty is decided upon, for using as a base, the sale price of the bulk material produced by the patented process, rather than a base which reflects a variety of packaging, distribution, promotional, sales and other like expenses. In my opinion on the evidence before him, the Commissioner was entitled to use the base which he did in establishing the royalty.
>
> As I have already stated, it is well established that the appellant could succeed on its appeal only if it were able to establish that the Commissioner acted on a wrong principle, or that on the evidence his decision was manifestly wrong. In my opinion, the appellant failed to discharge that burden, and the royalty as fixed by the Commissioner should not have been interfered with.

In the present case though the Commissioner gave no reasons for his finding I think it is apparent that he again rejected the research and promotional calculations offered by Mr. Hunter in his affidavit. To my mind it is not surprising that he should have done so as these calculations were not based on the cost of the research leading to the particular invention or on the cost of production of the substance plus a reasonable profit thereon. It is clear, moreover, that the effect of requiring payment of the royalty so calculated would be to stifle any effective competition by the respondent since the affidavit goes on to state that other producers such as the respondent and others who had applied for licences could not produce the substance as economically as the La Roche companies. It also seems clear that, since the invention of the process, which alone is the subject of the licencing, was complete when the usefulness and potentiality of the substance had been discovered, expenditures subsequently incurred in the promotion of the drug could not be regarded as part of the research leading to the invention. I would, moreover, infer that the Commissioner fixed the royalty on the basis of his experience and the wide acceptance of the product as he had done in the *Bell-Craig* case. Whether this can be said to have been his reasoning or not, it is a train of reasoning that, as I see it, was open to him on the basis of the judgment of the Supreme Court in the *Bell-Craig* case and as both the basis of calculation and the 15 per cent rate which he fixed for the period from January 1, 1966 are the same and are in respect of the same invention as in the *Bell-Craig* case it seems to me to follow that on the material before the Court the royalty so set cannot be said to be manifestly wrong. I may add that I should have thought anyway that in general it is desirable and proper in the interest of even competition for the Commissioner to award the same royalty in the case of all licensees under the same patent. Insofar as the Commissioner set the royalty at 15 per cent, therefore, I can see no valid reason for disturbing his finding.

The point is, however, taken that there was no basis in the evidence for making any distinction between the time prior to January 1, 1966 and that subsequent thereto and that the 12½ per cent royalty which the Commissioner confirmed in respect of the earlier period could not be justified.

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As I see it, however, the problem of setting a royalty in a situation such as this is not one that can be solved with mathematical nicety but must inevitably be determined to a great extent by the application of the principle of the "broad axe". As the Commissioner in fixing the royalty at 15 per cent on June 20, 1966, made that rate retroactive to January 1, 1966, but confirmed it at 12½ per cent for the earlier period, it is apparent that he must have addressed his mind to the question of what amount of royalty would be appropriate for that earlier period and he must have thought that for the first three years or thereabouts of the respondent's use of the invention a royalty of 12½ per cent would be adequate. In my opinion, there is nothing in the material before the Court or in the nature of the case which would require the royalty to be set at exactly the same rate throughout the duration of the licence, and it is not inconceivable that the Commissioner may have regarded it as desirable for the purpose of maintaining the respondent's interest in operating under the licence and providing effective competition that it should enjoy the lower rate for the earlier period, which was a starting up period and had already passed. In my view therefore it has not been shown that the Commissioner's estimate of 12½ per cent as an adequate royalty for the period prior to January 1, 1966, was manifestly wrong.

The other two grounds stated in the notice of appeal may be dealt with together since a single submission was made with respect to both. The point taken was that the effect of the judgment of this Court allowing the earlier appeal on the question of royalty was to set aside the Commissioner's decision thereon, that the effect of this in turn was to nullify the licence as well until the royalty was again fixed by the Commissioner on June 20, 1966, and that his setting of a royalty with respect to any period prior to that date was retrospective and therefore invalid.

In support of his contention that the effect of the judgment allowing the appeal was to set aside the Commissioner's original determination of the royalty counsel cited *Powley v. Whitehead*[7], *Sherk v. Evans*[8] and *Boal v. Weir*[9]

[7] (1859) 16 U.C.Q.B. 589.
[8] (1895) 22 O.A.R. 242.
[9] (1922) 22 O.W.N. 129.

but I do not find in any of these assistance in determining the effect of the judgment in question. Nor have I been able to find any case that does afford assistance on the point. The judgment as settled adjudged that the decision of the Commissioner to grant the licence should be affirmed and that on the question of royalty the appeal should be allowed and that that question should be referred back to the Commissioner for consideration. Nowhere did the order expressly purport to amend or set aside the licence or any provision of it. Nor was it determined that the royalty as fixed in the licence was wrong. In these circumstances I am inclined to view the effect of the judgment as being a confirmation of the licence as granted but subject to a direction to the Commissioner to reconsider the question of royalty and to make such changes therein as might be indicated after considering any material the parties might see fit to put before him. Any other interpretation would involve holding either that the licence itself to use the invention became invalid in spite of the affirmance of the decision to grant it or that it remained in effect with no requirement that the licensee pay anything therefor until the royalty was later settled. On the other hand the interpretation which I am inclined to adopt would maintain the efficacy of the licence to use the invention and require payment of royalty as well pending the review and reconsideration of the royalty directed by the Court. However, as this point is not free from doubt I shall also express my view of the effect of the judgment on the licence itself on the assumption that the judgment should be treated as having set aside the Commissioner's original fixation of the royalty.

On this basis the appellant's contention was that when the royalty became unsettled by the order of this Court the licence itself became void *ab initio* since there could be no licence until so fundamental a provision had been determined and fixed. On this point counsel cited *Hoffmann-La Roche & Co. and Geigy v. Inter-Continental Pharmaceuticals*[10], *Geigy S.A.'s Patent*[11] and *Hoffmann-La Roche v. Delmar Chemicals*[12] and he also relied on analogy to cases in which transactions purporting to be leases or contracts have been held to be incomplete and therefore not binding

[10] [1965] R.P.C. 226.
[11] [1966] R.P.C. 250.
[12] [1966] Ex. C.R. 713.

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on the parties because some material term remained unsettled and incapable of being settled save by agreement of the parties.

In my opinion neither of the two English cases which I have mentioned is in point. The relevant point decided in the earlier of these cases was that under the English provision comparable to section 41(3) the Comptroller had no power to grant a licence with retrospective effect. That may I think be taken to be the law under section 41(3) as well. In the later English case it was held on the basis of wording in the English section, which is not in section 41(3), that a licence under the English section is not effective until the Comptroller grants it "on such terms as he thinks fit" and that accordingly where material terms have never been settled the grant is not complete. This principle is not necessarily applicable in determining when a licence becomes effective under s. 41(3), where the language used is different, but in any event the question here is not when a licence came into effect but what effect an order of this Court, which unsettled a material term, had upon a licence which had been complete and in effect at an earlier stage. The case of *Hoffmann-La Roche v. Delmar Chemicals*[13] in this Court is also inapplicable for the same reason since there the problem was simply one of whether the stage had been reached when a decision to grant a licence had been made from which there was a right of appeal. I do not think, moreover, that the analogy to incomplete contracts or leases assists the appellant. On the contrary it seems to me that the present situation is more closely, though not by any means perfectly, analogous to one where parties have made a contract but in it have left a particular term to be settled by some third party or by some procedure by which the term can be rendered certain[14]. The analogy to this kind of case appears to me to lend support to the view that the licence to use the invention remained in effect but upon terms requiring payment of such royalty as the Commissioner should thereafter fix.

It may be well to recall at this point that the proceeding in which the judgment in question was rendered was an

[13] [1966] Ex. C.R. 713.

[14] *Vide Calvan Consolidated Oil & Gas Ltd. v. Manning* [1959] S.C.R. 253.

appeal under section 41(4) of the *Patent Act* from a decision of the Commissioner made on February 6, 1963 and that this proceeding was begun by a notice of appeal dated February 15, 1963 more than a month before the formal document dated March 23, 1963 and referred to as a licence was executed. The concluding paragraphs of the decision so appealed from read as follows:

> I therefore decide that no hearing is necessary in this case and that the petition should be granted.
>
> The applicant will have a non-exclusive licence to carry out the patented process in Canada and sell the resulting product for the sole purpose of the preparation or production of medicine but not otherwise. The licence is to be effective as of the date of this decision. The royalty shall be set at 12½% of the net selling price of the crude product before processing for patients consumption.
>
> The parties will have sixty days within which to submit to me an agreed draft of the licence for approval. If the parties fail to do so within the time set, I shall draft the licence upon my own terms.

In my view this on the face of it had all the elements of and constituted the grant of "a licence containing appropriate terms and providing for royalty or other consideration" as referred to by the President of this Court in *Hoffmann-La Roche v. Delmar Chemicals*[15]. It contemplates that a formal document evidencing the licence will be settled, leaves it to the parties to submit an agreed draft for approval and indicates that if they fail to do so the Commissioner himself will draft the licence upon his own terms, which presumably means that he will draft in his own language the terms which he has already expressed, that is to say, that the licence is not exclusive, that it is for the sole purpose of the preparation or production of medicine but not otherwise, that it is to be effective from February 6, 1963 and that the royalty is to be 12½ per cent of the net selling price of the crude product before processing for patients consumption[16]. As I see it nothing more was re-

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[15] [1966] Ex. C.R. 713 at p. 716. See also the judgment of the Lord Chief Justice Parker in *Geigy S.A.'s Patent* [1966] R.P.C. 250 at p. 264, lines 6-38.

[16] In fact, the formal document when subsequently settled contained a number of additional terms but how they came to be incorporated therein and what the rights of the parties are with respect to them are matters which are not before me in this appeal. For this reason as well as because two other proceedings purporting to be appeals from such terms or some of them are still pending, it would not be appropriate for me to comment on them.

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quired to authorize the use by the respondent of the invention from that date. Moreover, the appellant having appealed from this decision both to this Court and later to the Supreme Court of Canada is in my view in no position to challenge that a licence was in existence from February 6, 1963 and the respondent having failed on a motion to quash the appeal to this Court on the ground that it was premature is I think also precluded from taking such a position. This case therefore as I see it falls to be determined on the basis that there was a licence in existence from February 6, 1963 which remains operative to this day except insofar as it may have been arrested as a result of the appeal proceedings.

It would seem to follow from what I have said that the licence must have remained effective to authorize the respondent's use of the invention and to render such use lawful at least until the date of the judgment of this Court and that even the setting aside of the royalty or of the licence itself would not have rendered unlawful what had been done pursuant to the licence in the meantime. Had the Court adjudged that the royalty should be increased it might, however, have required the payment of royalty at the higher rate from February 6, 1963. By the same token had the Court adjudged that the royalty was too high, it might have required repayment to the licensee of the difference in respect of the period from February 6, 1963. In neither of these cases would the efficacy of the licence in the meantime have been open to serious challenge. Instead, however, of following either of these courses or of hearing evidence and then determining the matter, the course adopted by the Court—in view of the absence of evidentiary material in the record before it—was to refer the matter to the Commissioner to receive such material as might be offered by the parties and to redetermine what royalty would be appropriate. In my opinion this direction applied to the whole period both past and future during which the licence had been and would be in effect.

Moreover even assuming that the effect of allowing the appeal on the question of royalty and referring that matter back to the Commissioner for consideration was to set aside the Commissioner's determination of the royalty, in my opinion it is not to be presumed that the Court intended

more than its order states and the affirmance of the decision to grant the licence appears to me to be an indication that the licence itself to make use of the invention was not being interfered with but that it was to continue pending the consideration by the Commissioner and determination by him of a royalty that would meet the needs of the situation from the time when the licence was granted. I shall, therefore, hold that even if the effect of the judgment allowing the appeal on the question of royalty was to set aside the original fixation of royalty the licence itself to make use of the invention from February 6, 1963 was not affected but continued in effect at such royalty as the Commissioner might thereafter on consideration determine. Having reached this conclusion, I do not think there can be any serious challenge to the authority of the Commissioner after consideration either to confirm the original royalty with effect from February 6, 1963 to December 21, 1965 or to make the new rate at 15 per cent effective from January 1, 1966.

The appeal therefore fails and it will be dismissed with costs.

BETWEEN:

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada ..... PLAINTIFF;

AND

HENRI SYLVIO GAUTHIER and THÉRÈSE GAUTHIER ..... DEFENDANTS.

Ottawa
1967
May 15-17
May 18

Expropriation—Business property in commercial area taken by Crown—Compensation for business disturbance—Principles for determining.

In 1960 the Crown expropriated a parcel of land measuring 34½ feet by 69 feet in a commercially developed part of Ottawa. The owner carried on a wholesale tobacco and confectionery business in a building on the property and leased apartments on the upper floors at low rentals. The Court fixed the market value of the property at the time of expropriation at $48,000 and allowed an additional $4,000 for business disturbance, for which defendant had asked $13,485.

Held, the amount to be allowed for business disturbance in this case is the amount over and above the property's market value which a reasonably prudent business man carrying on the business which the

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owner carried on would have insisted upon receiving before selling the property, *viz* (a) the cost of acquiring equally suitable premises, (b) the cost of moving and re-establishing the business, (c) an amount to offset potential loss of business and increased costs during the transitional period, and (d) an amount to offset any apprehended depreciation in the profitability of the business from the change of location.

ACTION to determine compensation payable on expropriation of property.

Mrs. E. M. Thomas, Q.C. for appellant.

Gaston Carbonneau for defendants.

JACKETT P. (orally):—This is an action by the Attorney General of Canada to obtain a determination of the compensation payable in respect of a parcel of land that belonged to the defendant, Henri Sylvio Gauthier, and that was taken on June 20, 1962, under the *National Capital Act*[1] by the National Capital Commission for the purposes of that Act.

The parcel of land so taken is situate in the City of Ottawa on Sussex Street between George Street and York Street. It is about sixty-five feet north of George Street. It is rectangular, having a frontage on Sussex Street of 34½ feet and a depth of 69 feet and has therefore a total area of 2,380.5 square feet.[2]

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[1] Chapter 37 of the Statutes of Canada, 1958.

[2] Mr. Gauthier's paper title was a title to an area that was 34 feet by 66 feet. By virtue of the possession by Mr. Gauthier and his predecessors in title of the building, which was 34½ feet by 69 feet and therefore encroached on the adjoining premises, Mr. Gauthier had, immediately prior to the expropriation, a possessory title to the area covered by the building that was not included in the land to which he had a paper title. This area was not taken by the plan and description filed on June 20, 1962. Theoretically, Mr. Gauthier was left with a possessory title to a strip of land 66 feet by ½ foot and a strip of land 3 feet by 34½ feet. The taking of the area that was expropriated left these remnants no value to Mr. Gauthier. Mr. Gauthier is therefore, strictly speaking, entitled to the value to him of what was taken and the value of what was left to him as injurious affection. It was agreed that payment of compensation should be made conditional on Mr. Gauthier giving Her Majesty a quit claim deed of what was left to him and that compensation should be assessed as though the whole of his property had been expropriated, which is equal to that which I have said he is strictly speaking entitled to. I have therefore worded my reasons as though the whole of his property had been expropriated.

The evidence as to the neighbourhood in which the expropriated property was situated is reasonably accurately summarized by borrowing the following description from the report of one of the real estate witnesses:

> The subject property is located in a neighbourhood which is bounded by St. Patrick Street on the north, Dalhousie Street on the east, George Street on the south and Sussex Street on the west.
>
> The neighbourhood dates back aproximately 85 years and many of the buildings constructed in that period still remain. Some buildings have been torn down or demolished by fire and a limited number of new structures have taken their place. Some have been converted to parking lots to provide off street parking for Rideau Street one of the more dynamic commercial sections of the City of Ottawa.
>
> The By-Ward Market located to the east of the subject and the Rideau Street commercial section is considered to be the main contributing factor for the commercial overflow in this neighbourhood.
>
> The subject property fronts on Sussex Street which carries two way traffic to the City of Hull, numberous (*sic*) legations, Government buildings and the City Hall. This street is developed commercially on the east side within the neighbourhood and a row of temporary Government buildings occupy the west side. The east side has been static for some time due to the heavy traffic and parking restrictions.
>
> The best commercial establishments in the neighbourhood are located on George Street, York Street, Dalhousie Street and the By-Ward Market where on street parking is provided. These, however, are only secondary to the establishments on Rideau Street. In addition to the commercial which usually provides residential accommodation above ground floor level, some residential is to be found. Residential accommodation in the older structures is for the most part occupied by the lower income bracket.

There were, at the time of the expropriation, no legal restrictions on the use that could be made of property where the expropriated property was except that there appears to have been a requirement that an organization called the "Building Appearance Committee" approve external design and materials.

At the time of the expropriation there was on the property a building that had been erected about 1879. It was in part a three-storey structure but had only one storey in the rear. The upper floors were, at the time of the expropriation, used as small, low-rental apartments. The ground floor and basement were used by the defendant, Henri Sylvio Gauthier, for a business that he carried on under the name of Eastern Sales Company.

From 1940 to 1945, Mr. Gauthier occupied the premises in question for the purposes of his business as a tenant. In 1945, he purchased that property for the sum of $7,500.

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The business that Mr. Gauthier so carried on was that of a wholesale merchant who bought and sold tobacco (including cigarettes) and confectionery. His business was not, however, a typical wholesale business in that a substantial part—maybe 10 per cent—of his sales were made to persons who came to his premises in person and purchased goods that they carried away by hand. Another peculiarity of his business was that it involved frequent deliveries of goods to the premises when they were received from manufacturers and removal of such goods from the premises when they were taken away on the defendant's or customer's delivery trucks, but there was only one entrance, which was on Sussex street where parking was prohibited. This, however, as things worked out, was not disadvantageous because the parking of delivery vehicles during "on-loading" and "off-loading" was "tolerated" while all ordinary parking was prohibited, with the result that access to the premises in fact was better than it would have been on streets nearby where parking was "permitted". (There is a question in my mind as to whether this somewhat precarious state of affairs could have been relied on to continue indefinitely.)

The assessed value of the land for municipal taxes was

Land	$ 7,000
Building	13,200
Total	$20,200

The parties are agreed that the bare land market value of the expropriated property at the time of the expropriation was $10 a square foot, which makes a total of $23,805 for the 2,380.5 square foot area thereof. As it crystallized at trial, there is, however, a difference between the parties of $32,185. The parties disagreed as to the market value at the time of the expropriation of the expropriated property as improved by the building that was on it at that time. The plaintiff said that that value was $46,000 and the defendant said that it was $64,700, making a difference of $18,700. In addition, the defendant said that, by reason of business disurbance, the property had a value to him as an owner in possession at the time of the expropriation of $13,485 over and above its market value. The plaintiff said that there was no such special value to the defendant as an

owner in possession. These two sums of $18,700 and $13,485 make a total amount in dispute, as I have indicated, of $32,185.

So far as the market value of the property as improved is concerned, there is no sale of a comparable property that gives any clear and definite lead toward a conclusion as to the amount for which, in June 1962, a willing vendor would have sold to a willing purchaser both being influenced by such knowledge of the relevant factors as were known to the general public at that time. Some conclusion must, however, be reached on that question having regard to such information as is available.

One of the witnesses, Louis Titley, who is a real estate broker with long experience in Ottawa and in the particular part of Ottawa with which we are concerned, appears to have thought that a sale would not be comparable unless it was a sale "of property being sold against an owner occupier's interest". This of course confuses "market value" with value to the particular owner. Mr. Titley did not, therefore, put forth any sale as being comparable as far as market value is concerned. He did, however, express an opinion based on an "Income Approach to Value". Without analyzing his figures in detail, I note particularly that he formed an opinion that the business part of the building on the expropriated property had a fair rental value of $6,612 per annum and that a potential purchaser of this particular property would have been prepared to pay an amount over and above the value of the bare land in respect of the building on the basis that would be recoverable out of revenues from the property as improved by the building over a period of twenty years. (This period is apparently referred to as the "economic life" of the building.) Mr. Titley formed an opinion, based on his "Income Approach", that the market value of the land and building in June, 1962, was

Land	$23,100
Building	41,600
Total	$64,700

The principal witness on market value for the plaintiff was James A. Crawford, a real estate dealer who also had

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had a great deal of experience in Ottawa and the area in question. I was particularly impressed with Mr. Crawford's evidence in that he based his conclusions on his experience as to how persons contemplating the purchase of this class of property in that particular part of Ottawa came to their decisions as to what they would be prepared to pay for particular properties.

Recognizing that there were no comparable sales that gave an obvious indication as to market value of the land and building, Mr. Crawford nevertheless made an analysis of sales that have a reasonable degree of comparability. That analysis, in my opinion, is of very real assistance in that it gives some indication as to what has happened in the market. The result of that analysis was to bring Mr. Crawford to a figure of $20 per square foot for the expropriated property in June, 1962.

As I understand it, this is the amount that would be indicated for the expropriated property by the prices paid for the properties that were the subjects of the sales analyzed after making appropriate allowances, in the light of his long experience, for each of the significant differences—e.g. time, location, physical development—between the subjects of those sales and the expropriated property as and when expropriated. That figure of $20 per square foot would give a market value of $47,610 for the expropriated property at that time.[3]

Mr. Crawford himself did not regard the result so reached as being as good an indication of market value as that which he obtained on his estimate of value by the "Income Approach". The significant differences between his analysis on this approach and that of Mr. Titley were with reference to the question as to what constituted a fair annual rental for the business part of the premises, which he put at $5,400, and as to the period during which a potential purchaser would expect to recover the part of the purchase price paid for the building, i.e. the economic life of the building, which he put at ten years. These two differences were the principal factors which brought him,

[3] Mr. Crawford had understood that the area of the expropriated property was 2,244 square feet and that its value, on this approach, was therefore about $45,000.

on this approach, to a market value of $46,000 rather than the amount of $64,700 reached by Mr. Titley by an otherwise parallel line of reasoning.

It should be emphasized that Mr. Crawford's own view as a real estate man was that the amount of $46,000 is the best estimate that can be made of the market value of the expropriated property in June, 1962.

The east side of Sussex Street between George Street and St. Patrick Street was at the time of the expropriation predominantly commercial on the ground floor level and has been aptly described by at least one of the witnesses as having been "static" for some time. There is no indication in the evidence that there was any potentiality for property in this area, in the contemplation of those who might be regarded as constituting the market at that time, that would affect market value. In other words, the 1962 use was the highest and best use of the property in this area in so far as possible use was reflected in market demand. There is no suggestion that property in this area was being purchased for other uses of a higher and better character or that speculators considered purchasing such property at that time by reason of potentialities for higher and better uses. As already indicated, the area could be described as "static" and there is no evidence of a tendency for land or building prices in the area to be on the increase during any period of years immediately before or immediately after the date of the expropriation.

Market value of land with an old building on it is not something that can be computed mathematically. It must be recognized that, within broad limits, it must be estimated arbitrarily. After considering and weighing, as best I can, all the evidence, I decide that the market value of the expropriated land with the building on it, at the time of the expropriation, was $48,000. In doing so, I have studied with care Mr. Crawford's analysis of the most comparable sales and I have found his income approach a very useful aid. I prefer his income approach to that of Mr. Titley because I accept his judgment as to what is a reasonable rent for the part of the premises used for the business and as to the remaining economic life of the building from a possible purchaser's point of view as being sounder and more in accordance with the realities of the market place.

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The remaining question is: What amount, if any, should be allowed for what is commonly referred to as business disturbance? In my view, this question, in this case, resolves itself to this: What amount, if any, over and above the market value of the expropriated property, would a reasonably prudent business man in Mr. Gauthier's position (i.e. carrying on this particular business in these premises that belonged to him) have insisted upon receiving before he would have sold the property? Obviously, a person owning the property in which he is carrying on a business that he intends to carry on indefinitely will not, if he finds the property suitable for his business, sell that property unless he is offered an amount that will cover

(a) the amount of the cost of acquiring premises equally suitable for his business,

(b) the amount of the cost of transferring his business (including moving expenses and all costs incidental to re-establishing his business),

(c) an amount to offset potential loss of business and increased costs during the transitional period, and

(d) an amount to offset any apprehended depreciation in the profitability of his business as a result of a change in the location of his business.

In my view, one cannot determine mathematically any of these amounts as factors in determining the price that a business man owning his own premises would insist on before he would agree to sell. It is, nevertheless, necessary to determine as closely as possible what price would persuade a reasonably prudent man in that position to sell. The matter must be approached in a reasonable way and on the assumption that the former owner is not going to be unreasonable.

On all the evidence, I have come to the conclusion that a reasonable assessment of the amount for which a reasonably prudent business man in Mr. Gauthier's position would have thought that he could obtain equivalent premises (with equivalent rentable apartments) is the amount at which I have assessed the market value of the expropriated property, namely, $48,000, and that a generous, but not

excessive, estimate of the amount that such a man could reasonably have insisted upon to cover the other factors to which I have referred is $4,000.[4]

In making this assessment, I have had in mind the obvious expenses and losses involved in moving the business, but I have not accepted as having been established, that there were no suitable alternative premises in the By Ward Market area, and I have not found therefore that, in alternative premises, there would be higher permanent costs or permanent loss of customers. I recognize, however, that a reasonably prudent business man would have apprehensions along these lines although he would also recognize that he might be able to take advantage of a move to make his operation more efficient and to attract new customers. On the other hand, I have, I think rightly, had in mind that it was reasonable for Mr. Gauthier to feel, as he did, that, at his age in 1962, he preferred to live out the balance of his business life in the premises where he was and with the arrangements and goodwill that he had built up over the years and that it would therefore have been probable that a reasonably prudent man in his position might well have refused to move voluntarily for as low a price as a younger man would accept.

I therefore assess the compensation payable for the expropriation of the defendant's property at $52,000.

The parties are agreed that, on October 28, 1965, the defendant Henri Sylvio Gauthier was paid on account of such compensation the sum of $37,500 and that, prior to that date, the defendant is to be regarded as having continued in possession of the expropriated property but, on and after that date, the plaintiff is to be regarded as having been in possession. The defendant is therefore entitled to be paid the balance of $14,500, together with interest at the rate of 5 per cent per annum, on such amount from October 28, 1965 to this day. The defendant is also entitled to its costs of this action to be taxed.

[4] In my view, if the cost of acquiring equally suitable premises had been less than the market value of the expropriated property, the former owner would have been entitled to the amount arrived at by this approach or the market value, whichever is the greater.

Vancouver 1967

May 2-4

May 19

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

R.M. & R. LOG LTD. .....PLAINTIFF;

AND

TEXADA TOWING CO. LTD., M. MINNETTE & M. JOHNSON } DEFENDANTS.

Shipping—Negligence—Loss of boat in tow by charterer—Liability of charterer in contract and tort—Whether master owes duty of care to owner of boat.

Defendant company chartered plaintiff's 15.2 feet boomboat at $275 a month, to be returned in the same condition. While defendant company's tug was towing the boomboat in B.C. coastal waters by a tow line which ran between vertical leads to the boomboat's bow about 1 foot abaft the tug the boomboat began to sheer from side to side in calm water. The master noting that the tug's stern was under water ordered the helmsman to keep a steady course and he put the tug's engines at full ahead but the tug's stern continued to sink and the tug rolled over and sank with the tow. The master and helmsman were employees of defendant company, the master being responsible for navigation of the vessel and securing the tow line. Action was brought against defendant company, the master and the helmsman.

Held, defendant company was liable for loss of the boomboat both in contract and in tort. It was liable in contract, as the charter being that of a bare boat operated as a demise to defendant company, which was under a duty express as well as implied to return the boat in the condition in which it received it (*Outtrim v. Regem* [1948] 2 W.W.R. 38, referred to). It was liable in tort as a bailee (*Coggs v. Bernard* (1703) 2 Ld. Raym. 909) for the negligence of the master and helmsman. The doctrine of *res ipsa loquitur* applied (*The Jupiter* (No. 3) [1927] P. 122, 250; *Associated Portland Cement Mfrs v. Ashton* [1915] 2 K.B. 1, *Rex v. Canadian Tug Boat Co.* [1933] Ex. C.R. 104, referred to); but moreover there was actual evidence of faulty seamanship by both captain and helmsman.

The action must be dismissed against the helmsman but without costs. The only evidence of negligence against the helmsman consisted of admissions by the other defendants, and these were not evidence against him.

The action must also be dismissed against the master but without costs. He owed no duty of care to plaintiff but only to his employer.

(*Le Lievre v. Gould* [1893] 1 Q.B. 491; *Lister v. Romford Ice & Cold Storage Co.* [1957] A.C. 555; *Bagot v. Stevens Scanlan & Co.* [1964] 3 All E.R. 577; *Quinn v. Leathem* [1901] A.C. 495; *M'Alister (or Donoghue) v. Stevenson* [1932] A.C. 562; *Grant v. Australian Knitting Mills, Ltd.* [1936] A.C. 85; *Farr v. Butters Bros. & Co.* [1932] 2 K.B. 606; *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. (The Wagon Mound, No. 2* [1966] 2 All E.R. 709; *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] A.C. 465; *Winterbottom v. Wright* (1842) 10 M. & W. 109 (152 E.R. 402); *Guay v.*

Sun Publishing Co. [1953] 2 S.C.R. 216; *Dickson et al v. Reuter's Telegram Co.* (1877) 3 C.P.D. 1; *Sewell v. B.C. Towing & Transportation Co.* (1883) 9 S.C.R. 527; *Hayn v. Culliford* (1879) 4 C.P.D. 182; *Wilson v. Darling Island Stevedoring Co.* [1956] 1 Lloyd's Rep. 346 (Australia); *Scruttons v. Midland Silicones Ltd.* [1962] A.C. 446 (H.L.); *Yuille v. B. & B. Fisheries (Leigh), Ltd.* and Bates [1958] 2 Lloyd's Rep. 596; *The Anonity* [1961] 2 Lloyd's Rep. 117, distinguished.)

ACTION for damages.

J. R. Cunningham for plaintiff.

J. I. Bird, Q.C. for defendants Texada Towing Co. Ltd. and M. Johnson.

D. Brander Smith for defendant M. Minnette.

SHEPPARD D.J.:—The plaintiff, as owner, claims for the loss of the *Coast Prince* on a voyage from Vancouver to Blind Bay, B.C., founding in contract against Texada Towing Co. Ltd., the charterer, and in tort against Texada, the master Minnette and helmsman Johnson for alleged negligence causing the sinking. The facts follow.

The *Coast Prince* was a small ship (Ex. 5) of registered tonnage .81, of 15.2 feet length overall, and of breadth 8.6 feet (Ex. 3) with a steel hull, two hatches (Ex. 8), one with a cover not fastened, the other without cover, and a freeboard of $2\frac{1}{2}$ feet forward and 2 feet aft. She was known locally as a dozer or boomboat; that is one used in pushing floating logs into position, particularly in booming, sorting or loading.

On 31st October, 1966, the plaintiff, as owner, chartered the *Coast Prince* to the defendant Texada at $275.00 per month to be returned in the same condition as delivered, at the expiration of one month, but "probably until around Christmastime". Having been overhauled and being "perfectly sound" of hull, according to McMaster of the Texada Co., the *Coast Prince* was delivered to Texada on 31st October, 1966, at the Texada wharf at the foot of Dunlevy Street in the City of Vancouver.

On the 5th November, 1966, in the early hours, on instructions of Texada, the *Coast Prince,* then in the tow of the tug *Mainland Prince,* in the control of Texada and with a master and crew provided by Texada, set out on a voyage

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from Vancouver to Blind Bay, B.C. The *Mainland Prince* (Ex. 2) was a heavily powered tug with two diesel engines, each of 240 h.p., having a length of 39 feet overall, a beam of 12 feet to 13 feet and a draught of 7 feet. She carried as master Minnette, and a crew consisting of a mate and one Johnson, a deckhand, who acted as helmsman, all employees of Texada.

About 0700 hours Johnson turned out, made breakfast and took the wheel, and about 0900 hours the tug and tow pulled in behind Cape Cockburn. There Johnson pumped out the *Coast Prince* which had in the bilge about 2 feet of seawater that had come over the rail: he found her hull dry. The master, Minnette, and also Johnson, after inspection, found no water in the bilge of the *Mainland Prince*.

About 0920 the vessels left Cape Cockburn for Blind Bay, with the *Coast Prince* in tow. The towline ran from the winch aft of the wheelhouse on the *Mainland Prince* (Ex. 2) between two vertical leads and over a horizontal roller at her stern but was so short as to leave only about one foot between the stern of the tug and the bow of the tow.

At about 1000 hours off Strawberry Island, a distance of 1.2 miles from Cape Cockburn, both vessels suddenly sank in deep water at a point marked 44 fathoms on the chart (Ex. 4), but probably in deeper water. There was no sea, only a slight chop; with little wind and good weather, nevertheless the two vessels went down so suddenly that the master and Johnson, acting as helmsman, had not time to call the mate asleep in the forecastle, with the result that he was lost.

On the 7th November, 1966, at the office of Texada in Vancouver, Minnette was asked by Trevor Edwards about the sinking. Minnette said he did not know how it happened, that they were going along "fine" and all of a sudden she sank with no explanation, that he, Minnette, said to Johnson, then at the wheel, "Keep to a steady course or you will sink the dozer boat. There she goes now." That the *Coast Prince* then sank, that he, Minnette, then went out of the wheelhouse aft and saw the stern of the tug under water, ran back to the wheelhouse and told Johnson

to waken the mate, and he, Minnette, put the engines at full ahead to raise the stern but she sank.

Under a Note of Protest (Ex. A for identification) Minnette on behalf of Texada stated in effect that at about 0600 hours he relieved the mate on watch, made the usual routine inspection of the engine room and the tug while the deckhand took the wheel, and also:

> When vessel was abeam of Strawberry Island which was distant about ½ mile on the starboard side the Dozer Boat was sheering from side to side. Slowed engine down and proceeded aft to wait for Dozer Boat settling down and then saw that the stern of the tug was under water. Immediately made way back to wheelhouse and put engines full ahead in an endeavour to raise the stern.
>
> The vessel did not lift as anticipated but the stern continued to sink and the vessel rolled over with a corkscrew action on to her starboard side, and sank within two or three minutes. The deckhand took to the water and I escaped by climbing up the partition and through the wheelhouse port door, but the Mate was trapped in the forecastle and could not be released before the vessel sank.

After speeding up the engines the *Mainland Prince* heeled over to starboard, Johnson went out the starboard door of the wheelhouse into the water, the master out the port door. It is evident that the *Mainland Prince* having lost stability then fell over on her starboard beam and went down.

The plaintiff brought action for loss of the *Coast Prince* and joined as defendants Texada, Minnette the master and Johnson the deckhand.

The Texada Co. is liable in contract in that the charter being that of bare boat operates as a demise to Texada, and Texada was under a duty implied: *Outtrim v. Regem* [1948] 2 W.W.R. 38, per Sidney Smith J.A. at p. 46, and also expressed as admitted on discovery by its officer McMaster, to redeliver the *Coast Prince* in equally good condition as when received.

McMaster testified that the *Coast Prince* was examined and found to be sound. Under the charter Texada agreed to return her in that condition on expiry of one month but with the option to extend the time until Christmas of 1966 if so required by Texada. That option of extension was not exercised.

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The *Coast Prince* went down in deep water where Texada abandoned her. Hence Texada is in breach of the contract in failing to redeliver.

The Texada Co. was also liable in negligence as a bailee. Under the charter by demise it was under a duty of care: *Coggs v. Bernard* (1703) 2 Ld. Raym. 909 (92 E.R. 107). Texada is liable vicariously for the negligence of Minnette, the master, and of Johnson as helmsman; on discovery McMaster for Texada testified:

> MR. CUNNINGHAM:
>
> 157 Q. Does Texada have a practice of giving instructions to the skipper as to procedures followed in towing vessels?
>
> A. It is the duty of our dispatcher to tell the skipper what to do and where, it is also our policy, once the skipper is hired, as far as the navigation of the vessel, navigation etc., it is his responsibility.
>
> 158 Q. What about the responsibility for securing the tow line?
>
> A. That's up to the skipper.

1. The doctrine of *res ipsa loquitur* applies to presume negligence against Texada. Texada had possession and control as holding under a charter by demise: *The Jupiter* (No. 3) [1927] p. 122 at p. 131, affirmed at p. 250; *Associated Portland Cement Manufacturers (1910) Ltd. v. Ashton* [1915] 2 K.B. 1; *Carver's Carriage by Sea (British Shipping Laws)* para. 44.

   The vessel was lost suddenly in deep water in fair weather and within 1.2 miles of Cape Cockburn, where she had been safely towed from Vancouver. Under such circumstances that sinking would not have occurred without negligence. Hence Texada had control and the sinking would not ordinarily occur without negligence, therefore negligence is presumed against Texada: *Rex v. Canadian Tug Boat Co. Ltd.* [1933] Ex. C.R. 104 at pp. 114-16.

2. There is actual evidence that the loss of both vessels, particularly of the *Coast Prince* was due to negligence arising out of faulty seamanship:
   (a) in failing to prevent the towline escaping from between the leads, and

(b) in the master attempting to speed up the engines after seeing the tug *Mainland Prince* down by the stern.

(c) in the failure of the helmsman to keep a steady course.

The two vessels, the *Mainland Prince* with the *Coast Prince* in tow left Cape Cockburn with the towline leading aft from the winch on the tug *Mainland Prince* through two vertical leads at the stern (Ex. 7) with the tow approximately 1 foot astern. On such length of line the tow must follow directly in the track of the towing tug but subsequent events indicate that the towline had jumped out from between the leads. Immediately before the sinking the master told the helmsman to keep the tug on a steady course else he would sink her tow, and in the Protest Note (Ex. A) the master states that the tow was "sheering from side to side". Those manoeuvres, the danger of sinking from failing to hold a steady course, and the sheering from side to side would have been impossible if the line had continued through the leads so as to have held the *Coast Prince* about 1 foot from the stern of the *Mainland Prince*. On the other hand, if the towline jumped out of the leads, then the line would run from the winch aft of the wheelhouse on the tug (Ex. 2) to the bow of the *Coast Prince* and in such circumstances if a steady course were not steered, the *Coast Prince* could veer from side to side, and if allowed to get to one side would be in danger of being pulled over and sinking.

The order to steer a direct course and the veering of the tow indicate that the towline had escaped from between the leads. The freeboard of the *Mainland Prince* aft was approximately 10 inches to 11 inches and her bulwark below the leads was not high, probably 18 inches (Ex. 2), hence the vertical leads would commence at 28 or 29 inches from the water and extend upward for another 12 inches. The *Coast Prince* had a freeboard at the bow of 30 inches, therefore her bow would hold the towline above the bottom of the leads. In the normal case, a longer towline would fall

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astern of the towing tug into the water and through the water then up to the tow; in such circumstances there would be less danger of the line jumping from between the leads. However that was not this case. The towline led directly to the bow of the *Coast Prince* which bow was sufficiently high to lift the towline out of the leads if there were sufficient commotion. Also the *Coast Prince* was light, having been pumped out at Cape Cockburn and being a comparatively light vessel (Ex. 5), while the towing tug was heavily powered. However it may have occurred, the towline was out of the leads as seen by the subsequent events as described by the master. In this case the U-bolts should have been placed over the line to prevent this escape, but although on the tug, they were left unaffixed. That was the fault of the master (McMaster's Discovery Q. 158). The failure to keep a steady course was the fault of the helmsman Johnson.

At the trial there was reserved the question of admitting the Note of Protest (Ex. A). On the 3rd of May, 1967, counsel for the defendants, Texada and Minnette, elected not to call evidence. As a result Minnette was not called, either by Texada or on his own behalf. On the 4th of May, 1967, counsel for Texada and Minnette asked that the Note of Protest be put in evidence on the ground that in Question 321 counsel for the plaintiff had put in evidence portions of the Note of Protest, therefore the document having been referred to should be admitted in evidence. The proper time for this objection to have been taken was at the time Question 321 was tendered at the trial but the objection was not then taken and not until later and after it had been decided not to call Minnette, hence the objection might be taken to have been waived. However, as the Note of Protest did afford some evidence as to the manner in which the sinking had occurred and its admission in evidence did not destroy the fact that it was a self-serving statement and apparently tendered to avoid the necessity of Minnette having to submit to cross-examination, and within the adverse inferences permitted in *Barnes v. Union*

Steamships Limited [1954] 13 W.W.R. 72 at p. 75, therefore the Protest Note is admitted.

There was also an error in seamanship in the master's speeding up the engines when he had found the stern of the *Mainland Prince* pulled under water, evidently by the sunken *Coast Prince*. That putting the engines full ahead merely raised the bow and thereby decreased the buoyancy of the *Mainland Prince,* hence she fell over on her starboard beam and sank. It would have been better to have reduced speed or to have stopped. Texada is liable in negligence.

As against Johnson, the plaintiff's action is in negligence, but the evidence in proof of such negligence is not admissible against Johnson. The negligence is largely proven as follows:

1. From the examination for discovery of Minnette, but the answers of Minnette are not evidence against Johnson.

2. From the admissions on 7th November, 1966, by Minnette to Trevor Edwards at the Texada office. That evidence, while admissible against Texada, who produced Minnette for Edwards' information, nevertheless is not authorized by Johnson nor admissible against him.

3. The Note of Protest, while on behalf of Texada, is not authorized by Johnson nor evidence against him. Johnson testified that he was 17, having five weeks' experience, but said that he did not hear Minnette tell him to keep a steady course else he would sink her, and from the circumstances I am unable to find that he must have heard that direction, having regard to the excitement of the moment. On Johnson's evidence he kept a steady course as directed. There is therefore no evidence to the contrary and it is impossible to find him guilty of negligence.

As to Minnette, the liability of Texada is a vicarious liability for the negligence of Minnette. As stated by

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McMaster, an officer examined for Texada, "navigation, etc." was the master's responsibility and the securing of the towline was a matter for the master. Texada's liability in negligence is established by the statements of Minnette and those statements must prove Minnette equally liable, provided he is under a duty of care to the plaintiff. As stated in *Le Lievre v. Gould* [1893] 1 Q.B. 491 by Lord Esher, M.R. at p. 497:

> A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

Hence, the question is whether the circumstances do create any duty of care by Minnette to the plaintiff.

Under the circumstances the plaintiff has not made out a duty of care on the part of Minnette to the plaintiff. There is some difficulty in seeing a basis of duty of care from the master to the plaintiff. No doubt as an employee the master is under a duty of care to Texada, his employer: *Carver on Carriage by Sea* (1963 Ed.) para. 42; *Lister v. Romford Ice & Cold Storage Co. Ltd.* (H.L.) [1957] A.C. 555; *Bagot v. Stevens Scanlan & Co.* [1964] 3 All E.R. 577 at p. 581. Usually the plaintiff as owner could sue Texada as charterer by demise and Texada as employer could claim against the master as employee. But that succession of duties does not necessarily impose a like duty on the master to the plaintiff or other third person who may be shipper or owner.

In collisions between two vessels the owners of the vessels in proximity, and the masters and crews engaged in their navigation are under mutual duties of care. But this master seems outside the circumstances giving rise to such duty. The master is not bailee of the ship or cargo: *Carver* (1963 Ed.) para. 44; *The Jupiter* (No. 3), *supra*, at p. 131, affirmed p. 250; *Associated Portland Cement Manufacturers (1910) Ltd. v. Ashton, supra*, and therefore does not come within the principle of *Coggs v. Bernard, supra*, to impose a duty on the master in favour of the bailor owner. The principle of *respondeat superior* would apply to charge the owner, or the charterer by demise, but not the

master, with the negligence of members of the crew: *Carver* (1963 Ed.) para. 94.

The plaintiff has cited various general statements as permitting the inference of the duty of Minnette to the plaintiff but it is to be observed that such general statements "must be read as applicable to the particular facts proved or assumed to be proved"—"a case is only authority for what it actually decides": *Quinn v. Leathem* [1901] A.C. 495 at p. 506.

The plaintiff has cited *M'Alister (or Donoghue) v. Stevenson* [1932] A.C. 562, where Lord Atkin at p. 580 refers to the neighbour as follows:

> Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

That statement should be taken with reference to the facts there proved or assumed and therefore should be taken to apply to the circumstances creating the duty of a manufacturer to the ultimate consumer, namely, where goods are sent out in such form as to prevent reasonable intermediate examination: *Grant v. Australian Knitting Mills, Ltd.* [1936] A.C. 85. On the other hand, where a derrick had defective gears which were capable of inspection, then the principle did not apply to permit a workman not the buyer to recover from the manufacturer: *Farr v. Butters Brothers & Co.* [1932] 2 K.B. 606.

The plaintiff also contended that damage to the plaintiff was reasonably foreseeable and therefore the duty is to be presumed from Minnette to the plaintiff. However, *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (The Wagon Mound, No. 2)* [1966] 2 All E.R. 709 at p. 717, held that foreseeability is relevant to determining whether there is a breach of the duty or to measure the damages arising from the breach rather than to creating the duty.

It is also contended that *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, has somehow

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altered the law, that is, in holding that if A assumes a responsibility to B to tender to him deliberate advice, there could be a liability if the advice is negligently given. That statement of liability should be taken to apply only to the facts which were there proved or assumed, which are quite distinguishable from the case at bar.

Here the charter is by contract between the plaintiff as owner and Texada as charterer, and several cases have held that the duty is restricted to those parties to the contract and the obligation or benefit does not extend to any third person even to an employee. In *Winterbottom v. Wright* (1842) 10 M. & W. 109 (152 E.R. 402) the defendant had undertaken to supply a conveyance to the employer but that did not permit the plaintiff, an employee who operated the conveyance, to recover for injuries received from a defect. While that case has been qualified in *M'Alister (or Donoghue) v. Stevenson, supra,* that qualification must be confined to the facts of that qualifying case. In *Le Lievre v. Gould, supra,* a mortgagor engaged a surveyor to give certificates of the progress of the work, and on the faith of those certificates the plaintiff mortgagee advanced monies. It was held that he could not recover in the absence of deceit. That case has been qualified in the *Hedley Byrne* case but the qualification should be taken as limited to the facts of *Hedley Byrne,* and therefore as merely setting up an exception, particularly in view of *Guay v. Sun Publishing Co. Ltd.* [1953] 2 S.C.R. 216, holding that an action did not lie for negligent use of words. In *Dickson et al v. Reuter's Telegram Co. Ltd.* (1877) 3 C.P.D. 1, the addressee of a telegram brought action against the telegraph company for the incorrect transmitting of the message, but the Court held that the duty of reasonable care was owing, not to the addressee, but to the sender who was the contracting party. While Texada has assumed a duty to the plaintiff it does not follow that Minnette, an employee, is under a like duty to the plaintiff.

In cases over water carriage of goods, various judgments have imposed on third persons a like duty to that

assumed by the carrier by contract, but such like duty has been invariably imposed on an employer and not on an employee.

In *Sewell v. B.C. Towing & Transportation Co.* (1883) 9 S.C.R. 527, here cited by the plaintiff, the facts were that the plaintiff had engaged the towing company for a tow from Royal Roads to Nanaimo and thence to sea, and the towing company engaged a second company to assist in the towing, which service the second company undertook, but through negligence the tow was damaged and the Court held both companies liable on the ground that both were under a duty to the plaintiff to use reasonable care and skill in carrying out their undertaking and that duty applied to the second company, who had made no contract with the plaintiff. That is distinguishable. In the case at bar the master, Minnette, had undertaken no service for the plaintiff; the vessel was not being taken to Blind Bay for the plaintiff but for Texada. As stated in *Outtrim v. Regem, supra,* at p. 41 "The use which was to be made of the vessel during the term rested entirely with the charterers. The then owner had no voice whatever in it." Hence the master acted solely as servant of Texada and in performance of his duties as such servant.

Carver refers to *Hayn v. Culliford* (1879) 4 C.P.D. 182 as follows, "A new chapter in the law of tort had begun. In *Hayn v. Culliford* it was held that the shipowner was liable to the shippers for damage to their goods by the negligence of stevedores employed by him even though the bill of lading was issued by the charterer." *Carver, supra,* p. 80, para. 90. The extent of that "new chapter" is seen in the two cases immediately following.

In *Wilson v. Darling Island Stevedoring Company* [1956] 1 Lloyd's Rep. 346 (Australia) and in *Scruttons v. Midland Silicones Ltd.* [1962] A.C. 446 (H.L.) the shipper contracted with the carrier who employed stevedores to handle the cargo and they damaged the shipment by negligent handling. The plaintiffs (the shipper or subsequent holder of the bill of lading) recovered from the stevedores in tort, but the stevedores were denied the benefit of a

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clause limiting liability contained in the contract with the shipper, as the stevedores were not parties thereto nor was the limitation of liability held in trust for them. The duty of care and the liability therefrom was on the contracting stevedores, the employers, and not on the employees who were in fact negligent.

In *Yuille v. B. & B. Fisheries (Leigh), Ltd. and Bates* [1958] 2 Lloyd's Rep. 596, the plaintiff, as master, recovered against the employer company and Bates the managing director for personal injuries received by the plaintiff when his vessel, being towed by a sister ship, both owned by the defendant company, broke the tow rope, allowing the first vessel to go aground and injuring the plaintiff. The company was held negligent in supplying defective equipment and Bates the managing director as a joint tortfeasor. There is some difficulty in stating the effect of this judgment because Willmer L.J. in a subsequent judgment in *The Anonity* [1961] 2 Lloyd's Rep. 117 at p. 126 said:

> In support of this a decision of my own in *Yuille v. B. & B. Fisheries (Leigh), Ltd., and Bates (The Radiant),* [1958] 2 Lloyd's Rep. 596, was cited. That was, it is true, a case in which, on its own particular facts, I did come to the conclusion that a personal action lay against the managing director of a company on the same facts as actual fault or privity was found against the company. But I am certainly not prepared to accept that this must necessarily be so in all cases. It seems to me that the question whether an injured plaintiff could successfully bring a personal action against a member of a company, whose conduct is held to amount to actual fault or privity of the company within the Merchant Shipping Acts, must depend on whether, in the particular case, the relationship of "neighbours" in the eye of the law is established. I say nothing as to whether a personal action against the late Mr. Everard could have been sustained on the facts of the present case. I do not think that that question arises.

In any event it does not provide any basis for holding liable Minnette as master in the case at bar.

In *Carver's Carriage by Sea (British Shipping Laws* (1963 Ed.)), in dealing with the liability of the carrier's servant, the author has stated at para. 92:

> There is no direct authority as to the liability in tort for negligence of the master or crew of the vessel in respect of their failure to care for goods carried.

and in para. 93 he has stated:

> "It is to be observed," said Salmon J. in *Clayton v. Woodman* ((1961) 3 W.L.R. 987, 996), "that *Donoghue v. Stevenson* has frequently been applied, but only where the damage complained of was physical, that is, to persons *or property*." That is true as regards damage to persons: it is as yet untrue, it is submitted, as regards damage to property, but as the principle now appears to apply generally to financial loss it would be logical to apply it also to damage to property.

"The categories of negligence are never closed": *Donoghue v. Stevenson, supra,* at p. 619, therefore must continue. While they continue this Court should declare the law as it is, that is, whether the circumstances do give rise in law to a duty of care—but not as it might be extended. Hence it is sufficient to say that while the master, Minnette, was, in fact, negligent, he in law was under no duty of care to the plaintiff.

In conclusion, the plaintiff will have judgment against the defendant Texada for the value of the *Coast Prince* to be determined on reference, and interest and costs, and the action will be dismissed as against Minnette and Johnson without costs.

The negligence in fact of Minnette and Johnson has created a vicarious liability of Texada, and a loss of vessel to the plaintiff, but Johnson escapes liability because Minnette's statements are not evidence against Johnson, and Minnette escapes because there was no duty of care to the plaintiff. Under those circumstances the loss of the plaintiff or of Texada should not be increased by allowing either Minnette or Johnson their costs.

The able assistance by the learned Assessors should be gratefully acknowledged.

Montreal 1967 May 9 Ottawa May 19

BETWEEN:

GLENCO INVESTMENT CORPORATION APPELLANT;

AND

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

Income tax—Current expense or capital outlay—Installation of special wiring and plumbing for long-term tenant—Whether enduring benefit.

In December 1961 appellant bought for $525,000 a warehouse building in Montreal and in February 1962 negotiated a 10-year lease at a total rental of $500,000 to a company in the business of servicing, cleaning and flushing aircraft radiators. In order to meet the particular needs of the lessee appellant as a condition of obtaining the lease installed special electric wiring at a cost of $3,146, and a water inlet, drainage pipe, washroom and toilet facilities at a cost of $11,882.60.

Held, the installations were an enduring benefit and their cost therefore not a current expense but a capital outlay.

APPEAL from Tax Appeal Board.

David I. Fleming for appellant.

P. F. Cumyn and *J. R. London* for respondent.

DUMOULIN J.:—This is an appeal on behalf of Glenco Investment Corporation from a decision of the Tax Appeal Board, dated June 9, 1965, affirming the levy by the Minister of National Revenue of an additional $1,721.84 tax in connection with the above firm's income returns for the year 1962.

It may be said that the principal facts are not in dispute, the litigants having agreed to the correctness of the amounts expended for the installation of various fixtures in the appellant's warehouse (as it was at the start of 1962), bearing civic number 780, St. Remi Street, in the City of Montreal.

The Court, consequently, is confronted anew with the perennial discussion as to what constitutes "an outlay or expense . . . for the purpose of . . . producing income from property or a business of the taxpayer", therefore outside

the prohibition of section 12(1)(*a*) of the *Income Tax Act*; or, on the contrary, "an outlay... of capital, a payment on account of capital . . ." provided for in section 12(1)(*b*), within its prohibition and liable, accordingly, to taxation.

On or about December 13, 1961, the appellant purchased from Imperial Tobacco Limited this immoveable at a price of $525,000, the vendor agreeing to remain the tenant of the two upper floors. At the time, the building was mainly utilized for warehousing purposes.

Subsequent negotiations led to the conclusion, on February 7, 1962, with Heatex Limited, of a ten-year lease, May 1, 1962-April 30, 1972, at a total rental price of $500,000 (cf. Exhibit A-4). This company pursued the tasks of servicing, cleaning and flushing aircraft radiators, a business requiring considerable water supply and high-powered electricity.

The lessor covenanted in the deed of lease, Exhibit A-4 (clause 2, page 8) "to make available to the Lessee at Lessor's cost 220 and 550 volt wiring, providing 600 Amps at 550 Volt, and 600 Amps at 220 Volt, to a point at the rear of the building inside the premises"; the cost of such installation being $3,146. Clauses 6, 7 and 12 of the indenture next oblige the Lessor to install, "at its own cost", in the building, "an additional three inch water inlet . . .", "a six inches drainage pipe below the basement floor level . . ." plus the requisite surface connection points; and, also, to erect "washroom and toilet facilities in the basement and ground floor level for a total personnel of seventy-five (75) persons together with further facilities on the second floor for a personnel of forty (40) persons, in accordance with the City of Montreal Health Department authorities and the plan hereto annexed". Lastly a concrete sewer pit was installed; this and the plumbing work amounted to $11,882.60.

At trial, Ray Fleming, President of Glenco Corporation, testified that these fixtures and installations had to be agreed upon by the Lessor as an essential condition of the

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ten-year lease and were made, in addition to pre-existing facilities, for the particular needs of Heatex Limited.

I might now summarily dispose of an incident which may uselessly take up too many pages of the eventual transcript. One Alfred Louis Lépine, who describes himself as a realtor or real estate agent, exhibited, in Court, a document purporting to be a proposal from a firm by the style of St-Arnaud et Bergevin Limitée, offering Heatex Limited to sub-lease its premises, on condition that all alterations performed so far be undone and some partitioning walls torn down. This supposed offer, unaccepted as yet by Heatex Limited, unauthenticated by the would-be sub-lessees, and unsubmitted to the appellant's consent, as required by clause 8 of the original lease, bore the somewhat coincidental date of May 8, 1967, less than 24 hours before the appeal was heard. Due to these irregularities, the Court ruled that both the proffered document and the deponent's attempted evidence were inadmissible.

Under these conditions, Glenco Investment contends in paragraph 5 of its Notice of Appeal:

> 5. That the said expenditures were effected for the purpose of gaining income and do not in any manner enhance the value of the immoveable,

to which the Minister of National Revenue counters as follows, in paragraph 7 of the Reply:

> 7. The Respondent states that the said amounts of $3,146.00 and $11,882.60 were expended for the enduring benefit of the building as a vehicle for investment and in fact enhanced the value of the building, and the said amounts are therefore outlays on account of capital and not deductible in computing the Appellant's income for its 1962 taxation year.

Throughout the years, the interpretation of paragraphs 12(1)(*a*) and 12(1)(*b*) prompted a recourse to several tests in the hope of differentiating an income producing outlay from a strictly capital expenditure. Among these criteria, in keeping with the peculiarities of the cases, some are cumulative, others single in applicability. By itself a mere allegation of money spent "for the purpose of gaining or producing income from property or a business of the taxpayer" does not excuse from the prohibition decreed in s. 12(1)(*a*). As stated by Mr. Justice Cameron, late of

this Court, in *Thompson Construction (Chemong) Limited and the Minister of National Revenue*[1], an appeal dealing with the purchase price of a new diesel engine in a power shovel to avoid major repairs to the old one: "In a broad sense it may be said that the outlay for the new engine was an expense incurred for the purpose of earning the appellant's income. The same might be said of all outlays of capital for all types of buildings, machinery and the like, to be used in the business"; and the learned Judge, on page 104, formulates one of many qualifying norms: "But I think it is clear that if the outlay brings into existence a capital asset . . . such outlay will not be allowed as a deduction".

In *The Minister of National Revenue and Lumor Interests Limited*[2], wherein the installed cost of a new elevator in an office building was sought as a deduction in lieu of repairs to the existing one, the late Mr. Justice Fournier (of the Exchequer Court) reached a similar conclusion through a slightly different test, holding that:

> ... the outlays for the replacement of the old elevator by the new one and the rebuilding of the elevator shaft and other works connected therewith were not current expenses made in the ordinary course of the respondent's business operations to earn income within the meaning of s. 12(1)(*a*) of the *Income Tax Act*.
>
> 2. ... the outlays were not recurrent but were made or incurred to create a new asset and bring into existence an advantage of enduring benefit and were properly attributable to capital and not revenue.

We may at once note a common trait between the latter precedent and the suit at bar, namely, that the installation of high voltage and hygienic facilities, the cost of plumbing fixtures and water mains "were not current expenses made in the ordinary course of the appellant's business operations to earn income . . .", neither were they recurrent, having never before been incurred and never since.

The matter of *Minister of National Revenue and Vancouver Tugboat Company Limited*[3], dealt at some length with the factor of recurrence of certain operating expendi-

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[1] [1957] Ex. C.R. 96 at 102-104. [2] [1960] Ex. C.R. 161.
[3] [1957] Ex. C.R. 160 at 171.

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tures. In the latter case, Vancouver Tugboat Company operated along the Pacific coast of Canada. It placed, in 1951, a new engine in one of its tugboats at a total cost of $42,086.71 and claimed this amount as a deduction from income for that year. Reversing the decision of the Income Tax Appeal Board, Mr. Justice Thurlow, of this Court, allowed the Minister's appeal for several reasons, one of which is of particular interest, bearing as it does with the topic of recurring expenses. The learned Judge wrote:

> . . . While the expense of replacing engines is a recurring one in the sense that it recurs in respect to each tug once in five, eight, or ten years, I do not think the expenditure can be classed as one made to meet a continuous demand. There may be more or less continuous demand for repairs to the tug and to the engine in it, but there is no continuous demand for replacement of the engine any more than there is continuous demand for replacement of the hull as a whole. Moreover, in my opinion, the respondent's trade has gained an advantage by the expenditure, in that the expenditure has provided an engine which makes the tug more reliable, keeps it more constantly in service, and enables it to earn greater revenue and at the same time avoids the abnormal repairs formerly required. And such advantage is of an enduring nature in that the anticipated life of the new engine is ten years. No doubt there will be wear and tear each year beyond what is restored by repairs in the year and the advantage will ultimately be exhausted, but in my opinion that does not affect the nature of such advantage as capital. If any deduction from income is to be allowed in respect of such exhaustion, in my view, it must be by way of an allowance of the kind permitted under the exception to s. 12(1)(*b*).

For duty's sake there now remains the rather irksome task of "airing" a triology of *loci classici*; an inescapable obligation of this branch of the law, trapping the judicial writer in the dilemma of being plagued for exceptional oversight should he omit to quote them, or cursed for boredom if he does. I choose what appears to be the lesser risk.

In *Vallambrosa Rubber Co. Ltd. v. Farmer*[4], the Lord President, at page 536, stated the following test, relating to recurrent expenses:

> Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what

[4] (1910) 5 T.C. 529.

is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur every year.

A second touchstone is that of *British Insulated and Helsby Cables v. Atherton*[5] propounded by Lord Cave, L.C., and referring to the creating of a trade asset or advantage; I quote:

> But when an expenditure is made not only once and for all but with a view to bringing into existence an asset or advantage for the enduring benefit of the trade, I think that there is a very good reason in the absence of special circumstances leading to an opposite conclusion for treating such an expenditure as attributable not to revenue but to capital.

A third criterion purporting to distinguish between capital outlays and purely operating costs is formulated by Lord Sands in *re: Commissioners of Inland Revenue v. The Granite City Steamship Co. Ltd.*[6], wherein the British jurist says:

> Under the Income Tax legislation no allowance is permissible, in estimating annual profits, by way of deduction from annual income of capital outlay during the year of charge. As I had occasion to point out in the *Law Shipping Co., Ltd. v. Inland Revenue* (12 T.C. 621), 1924 S.C. 74, this is an arbitrary and artificial rule when the subject is a wasting one that exhausts the capital, so that, if the business is to continue, there will have to be a renewal of capital outlay in a few years. In such a case a portion of the capital outlay is consumed in each year in earning the annual income. But the Income Tax Acts take no account of this consideration. Broadly speaking, outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment.

The appellant's learned counsel argued that these oft described installations did not constitute an enduring benefit, "they were made", contended Mr. Fleming, "for the convenience of one particular tenant and may have to be removed for the convenience of some other".

In view of the uncontradicted facts: a ten-year lease, yielding a total rent of $500,000, it does seem hard to reconcile such an opinion with the contrary evidence of

[5] [1926] A.C. 205 at 213.

[6] (1927) 13 T.C. 1 at 14.

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Dumoulin J.

reality, as to the enduring and beneficial nature of those non-recurrent expenditures. Such facilities, assuredly, would cause no inconvenience to any class of commercial or industrial occupants, and would prove useful to most.

Appellant's president, Ray Fleming, replying to my question, readily agreed that maintenance costs of these installations "would not appreciably increase the building's operating budget".

I, therefore, must conclude conformably to the several precedents cited, that the improvements made at Heatex' request involved an outlay of capital.

The Court, moreover, is in complete agreement with the closing statement expressed by the learned member of the Tax Appeal Board, Mr. W. O. Davis; I quote:

> In the circumstances of the present appeal, there is no question of renewal or maintenance or repair to an existing capital asset. The expenses in question were laid out for the creation of a new capital asset in that they had the effect of changing the original warehouse, which was suitable for storage purposes only, into a modernized and well-equipped commercial building suitable for rental to tenants with a large number of personnel, and provided a benefit to the appellant which would endure at least for the life of the leases and any renewals thereof. Furthermore, many of the facilities provided, such as washrooms and separate electrical metering arrangements, would be of advantage in attracting new tenants if and when the present leases are finally terminated.

For the reasons above, the appeal will be dismissed and the respondent is entitled to recover all taxable costs.

Ottawa
1967
May 29-30

BETWEEN:

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

AND

MILUSKA CADA ..... RESPONDENT.

AND

BETWEEN:

ROGER NANTEL SÉGUIN ..... APPELLANT;

AND

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

Income tax—Purchase of property by two persons as tenants in common—Subsequent sale of property—Whether sale of partnership interest.

In May 1961 Séguin and one Palef acquired for $80,000 a property in Ottawa, each an undivided half interest, in contemplation of erecting a building thereon. Soon afterwards Séguin sold half his interest in the property to Cada at a profit of $7,500 and in October the whole property was sold for $140,000. In this court the only question was whether, with respect to the transaction between Séguin and Cada, Séguin had sold and Cada had purchased an interest in a property or an interest in a partnership, it being conceded that in the former case the gain of $7,500 which Séguin made on the transaction must be included in computing his income and deducted in computing Cada's income for 1961.

Held, there was no evidence that Séguin and Palef had formed a partnership to operate a business with respect to a building to be erected on the property, and accordingly Séguin had not sold Cada an interest in a partnership but in the property.

Quaere as to what the result would have been if in fact it had been a sale of an interest in a partnership?

INCOME TAX APPEALS.

Cyrille H. Goulet for appellant Séguin.

B. Shinder for respondent Cada.

L. R. Olsson for the Minister of National Revenue.

JACKETT P. (orally):—These two appeals were heard together on the same evidence; and I propose to give one set of reasons for my disposition of the appeals.

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The appeal in *Minister of National Revenue v. Cada* is an appeal by the Minister against a decision of the Tax Appeal Board allowing an appeal by the taxpayer from her assessment under Part I of the *Income Tax Act* for the 1961 taxation year. The appeal in *Séguin v. Minister of National Revenue* is an appeal by the taxpayer directly to this Court against his assessment under Part I of the *Income Tax Act* for the 1961 taxation year.

In so far as they are significant for the purposes of these appeals, the facts established by the evidence adduced in this Court are, for the most part, substantially those set out in the reasons given by the Tax Appeal Board in the *Cada* appeal, and I do not propose to re-state the facts at length in these reasons.

For the purpose of giving the reasons for my conclusions, it is sufficient to summarize the highlights of those facts as follows:

1. In May 1961 Séguin and one Palef bought a property in Ottawa for $80,000 on the basis that each should own an undivided one-half interest therein.

2. At the time of such purchase, Séguin and Palef contemplated erecting a building on the property. (One of the main issues in the appeal, if not the main issue, is whether, either at that time, or very shortly afterwards, a partnership was formed to carry on a business related to such property such as, for example, the business of operating a building to be erected on it.)

3. Shortly after Séguin and Palef bought the property, Séguin sold one-half of his interest to one Sirotek for $7,500, plus $250, being one-half of the amount already paid by Séguin on account of the property, and an assumption by Sirotek of one-half of Séguin's outstanding liability in respect of the purchase. (Sirotek says that he bought a one-quarter interest in the property while Séguin says he sold a one-quarter interest in the alleged partnership.)

4. Subsequently, the parties to the purchase paid, on closing of the purchase transaction, $4,862.61 for each one-quarter interest. The balance of the purchase price was covered by a mortgage.

5. In early October 1961, before plans, which were under discussion, were adopted for building on the property, the property was sold for $140,000.

6. At about the time of the re-sale, Sirotek advised Séguin that he had purchased the quarter interest as agent for his sister, the taxpayer Cada.

7. As a result of the sale of the property, Cada received as her share of the net proceeds of the sale of the property a sum of $17,934.92.

The sum of $7,500 paid by Sirotek to Séguin on the occasion of the purchase of half of Séguin's interest is the amount that is in dispute in both appeals.

In the *Cada* appeal, the Tax Appeal Board has held that Cada is taxable on the profit from her purchase of a quarter interest and the sale of the property. No appeal has been taken from that decision. The Board has further held that, in computing her profit, Cada is entitled to deduct from the amount of $17,934.92 received by her as her share of the net proceeds of the sale of the property, not only the sum of $250 (being the part of the down payment under the original purchase agreement attributable to her share in the purchase) and the sum of $4,862.61 (being what she had to pay on closing), but also $7,500, being the amount that she paid to Séguin for one-half his interest over and above the amounts that he had paid or would have had to pay for that half of his interest. The only point of the Minister's appeal in the *Cada* case is the attack on the correctness of the Board's decision that Cada was entitled so to deduct that sum of $7,500 in computing her taxable profit.

The only basis for such attack on the Board's decision is that what Cada bought was a one-quarter interest in a partnership and not a one-quarter interest in the property. There is not a scrap of evidence before me that Cada acquired anything that might be called an interest in a partnership. The evidence is clear that the only authority that she gave to her brother was to acquire an interest in the property on her behalf and that that is the only bargain that he, in fact, entered into on her behalf. Not only do Sirotek and Cada say this, but Séguin rejects any suggestion that he ever accepted Cada as a partner. Either

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she bought an interest in the property, in which event the Board's decision is correct, or she acquired nothing, in which event there is no basis for taxing her on anything in so far as this transaction is concerned.

The appeal in the *Cada* matter is dismissed with costs.

In the *Séguin* appeal, the question is whether Séguin is bound to take into his income, under Part I of the *Income Tax Act*, for the 1961 taxation year, the $7,500 he received from Sirotek over and above the cost to him of the interest that he sold at that time. If he was merely selling a quarter interest in the property, then, clearly, he is taxable on this amount of $7,500. It is conceded that the profit made by the group on the sale in October 1961 was properly taxed as a profit from a business within the extended meaning of that word to be found in section 139(1)(*e*) of the *Income Tax Act*. If that is so, a profit from a sale by Séguin of a part of his interest in the property must also be taken into income. There is no question as to the $7,500 being profit. Séguin says, however, that he did not sell, either to Sirotek or Cada, an interest in the property, but that he sold to Sirotek a half of his interest in the alleged partnership.

A "partnership" is defined by section 2 of the *Partnership Act*[1] to be "the relation that subsists between persons carrying on a business in common with a view of profit", and I take Séguin's contention to mean that, on his view of the matter, the property had become dedicated to a partnership of which the members were himself and Palef and that, by the transaction in question, Sirotek was admitted as a partner on a quarter interest basis and paid to Séguin $7,750 for a quarter interest in the partnership assets.

I express no opinion as to what the result would be if, in fact, there had been a sale by Séguin to Sirotek of a quarter interest in a partnership in the sense that I have outlined, because the evidence, as I appreciate it, does not establish that any such partnership had in fact arisen. If there had been such a partnership, I might have had to consider whether, having regard to other facts established before me to which I have not referred, the approach

[1] R.S.O. 1960, chapter 288.

adopted by the Supreme Court of Canada in *General Construction Co. Ltd. v. Minister of National Revenue*[2], has any application to the facts of this case.

I accept completely the evidence given by Séguin and Palef, which appeared to me to be given quite openly and frankly. I have no doubt that, if they had proceeded with their plans and erected a building and, after its completion, had operated it as an apartment building or an office building, at some point of time, they would have become associated in the operation of a business in such a way that there would have been a partnership. As, however, there was no explicit partnership agreement, either written or verbal, and as their operations in relation to this property never, in fact, reached the stage of carrying on a business in common, there is no evidence upon which I can find as a fact that there was a relationship between Séguin and Palef immediately before the sale to Sirotek that would fall within the statutory definition of "partnership". I listened carefully to the evidence of Séguin and Palef and, while there is no doubt that they had bound themselves, as it were "by a handshake", to embark on a project in relation to the property in question, I cannot find that the nature of the project had become sufficiently crystallized for that agreement to be a legally binding agreement or that events had progressed to the point that, according to what they had agreed with each other, properly understood, the time had arrived when there was an existing relationship of persons carrying on a business in common. If there was no partnership, there could not have been a disposition of an interest in a partnership and the transaction between Séguin and Sirotek, whether he was acting as principal or agent, must have been a sale of an undivided interest in the property. It follows, as I have already indicated, that the resulting profit to Séguin must be included in his income for the 1961 taxation year.

The *Séguin* appeal is dismissed with costs.

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2 [1959] S.C.R. 729.

Montreal 1967 / Apr. 14 / June 2

BETWEEN:

NATHAN COHEN .....APPELLANT;

AND

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

AND

BETWEEN:

HYMAN ZALKIND .....APPELLANT;

AND

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

Income tax—Capital cost allowances—Emphyteutic lease in Quebec—Transfer of lessee's rights in land and building—Leaseholder owner of building—Whether capital cost allowances for building or for leasehold interest—Income Tax Regulations, s. 1102(5)—Construction of.

In 1952 appellants acquired the lessee's rights under a 99 year emphyteutic lease of property in Montreal which had 58 years to run. The deed specifically transferred to appellants (1) the lessee's interest in the lease and (2) a building erected on the land. The original lease executed in 1910 required the lessee to demolish existing buildings on the land and erect a new building thereon, and a 10 storey building was erected in 1912. The original lease contained a number of clauses unusual for an emphyteutic lease, amongst them that the lessee might demolish the building provided he erected another, that on the lessee's failure to remedy defaults in payment of rent or taxes after notice all buildings, etc. should become the lessor's property, and that on the expiration of the lease the lessor should be entitled to purchase the building.

Held, having regard to the terms of the deed of transfer and the special clauses in the lease appellants became owners of the building erected on the leased land and as such were entitled to capital cost allowances in respect of the building under class 3 of Schedule B of the *Income Tax Regulations* and not, as contended by respondent, at a lower rate for leasehold interests under class 13.

While s 1102(5) of the *Income Tax Regulations* permits a Leaseholder who constructs a building on the leased land to claim capital cost allowances on the building under class 3 it does not follow that a leaseholder who acquires absolute ownership of a building on the leased land is disentitled to the normal capital cost allowances allowed the owner of a building under class 3.

INCOME TAX APPEAL.

Phillip F. Vineberg, Q.C. for appellants.

A. Garon and *P. F. Cumyn* for respondent.

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NOËL J.:—These are appeals from the decision of the Tax Appeal Board[1] whereby a building belonging to the appellants was held to be properly relegated for the purpose of capital cost allowances from class 3 as a building to class 13 as a leasehold interest with reference to the years 1956, 1957, 1958, 1959 and 1960.

The rights of the appellants as lessees under a 99 year emphyteutic lease were acquired from The Transportation Building Company at a time when the lease still had 58 years to run. The lease of the property fronting on St. James, Notre-Dame and St-François-Xavier Streets, in the City of Montreal, was transferred to the above corporation by the owners, the Ecclesiastics of the Seminary of St-Sulpice of Montreal, in the circumstances described in an agreed statement of facts signed by the solicitors for both parties and hereunder reproduced:

AGREED STATEMENT OF FACTS

1. On the 2nd of June, 1910, the Ecclesiastics of the Seminary of St. Sulpice of Montreal, owners of a property fronting on St. James, Notre-Dame and St. François Xavier Streets in the City of Montreal, entered into a deed of lease and agreement with respect to the aforesaid property with The Transportation Building Company, Limited; a copy of that deed is annexed hereto and produced by consent of the parties as Exhibit A-1.

2. In 1912, pursuant to clause VI of the aforementioned deed, the building now standing on the aforementioned property was constructed by the then lessee, The Transportation Building Company Limited.

3. On the 4th of July, 1952, The Transportation Building Company Limited, sold, conveyed, transferred and made over to Hyman Zalkind and to Nathan Cohen all its right, title and interest in and to the aforementioned Lease and Agreement and in and to the building referred to in paragraph 2 above; a copy of that deed of sale is annexed hereto and produced by consent of the parties as Exhibit A-2.

DATED at OTTAWA this 4th day of April 1967.

The sole issue in these appeals is whether the appellants can depreciate the building situated on the leased land on a basis of 5% under class 3 of Schedule B to the *Regulations* as a building, as the appellants contend, or on a basis of one-fortieth (1/40th) per annum pursuant to Regulation 1100(7) of the Act under class 13 as a leasehold interest, as contended by the respondent.

[1] 38 T.A.B.C. 417 and 420.

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In order to properly deal with this issue, it will be necessary to examine the various sections and regulations of the *Income Tax Act* which deal with capital cost allowances on buildings and on leasehold interests.

Capital cost allowances are granted under section 11(1)(*a*) of the *Income Tax Act*. This section states that a taxpayer is entitled to whatever is allowed under the *Regulations*. Section 1100(1) of the *Regulations* states that a taxpayer is allowed "in computing his income from a business or property...deductions for each taxation year equal to

> (*a*) such amounts as he may claim in respect of property of each of the following classes in Schedule B not exceeding in respect of property" (the rates for particular classes of property set down in the above section).

It therefore appears that the entire economy of the *Regulations* with respect to capital cost allowances is to categorize objects, place them in particular classes and then allow them particular rates. For instance, class 3 of Schedule B of the *Regulations* which covers

> Property not included in any other class that is
> (*a*) a building or other structure, including component parts such as electric wiring, plumbing, sprinkler systems, air-conditioning equipment, heating equipment, lighting fixtures, elevators and escalators.

allows amortization of such a building on the reducing balance method at a rate of 5%.

On the other hand, a special class of assets, class 13, is established under Schedule B of the *Regulations* which covers leasehold property. Capital cost allowance with regard to this property is computed on the basis that the yearly deduction allowable to the tenant is the lesser of (a) one-fifth ($\frac{1}{5}$th) of its cost or (b) the amount obtained by dividing the capital cost of the leasehold improvement by that number of years which the lease has to run not exceeding 40. Where a tenant has a lease with the option to renew, the term of the lease for the purpose of calculating the number of years over which the capital cost allowance is to be prorated is taken to be the original term of the lease together with the first renewal option. I should point out here that whereas in the case of the building in class 3, the amortization is effected by the reducing balance

method, the amortization of the capital cost here is by the straight line method applied to each item, i.e., to each lease.

Section 1102(2) states that a taxpayer is not entitled to capital cost allowance on land.

Section 1102(4) of the *Regulations* gives directions as to what is to be included in the capital cost of a leasehold interest when it states that:

> (4) For the purpose of paragraph (*b*) of subsection (1) of section 1100, capital cost includes an amount expended on an improvement or alteration to a leased property, other than an amount expended on
>
> (*a*) the construction of a building or other structure,
>
> (*b*) an addition to a building or other structure, or
>
> (*c*) alterations to buildings which substantially change the nature or character of the leased property.

The above appears to include in the cost of a leasehold interest only those amounts expended for improvement or alteration relative to small things (which, however, in some cases may run into thousands of dollars), such as walls, partitions, panelling, store fronts, etc., and excludes relatively large amounts expended on things such as the construction of a building, an addition thereto or an alteration which changes the nature or character of the leased property.

The taxpayer in the exclusion may still have a leasehold interest in those buildings but the section says that he will not be able to apply the faster straight line cost allowance of a leasehold interest to their cost and may only apply the slower reducing balance method of the rates applicable to a building.

I now come to section 1102(5) of the *Regulations* which states that

> (5) . . . reference in Schedule B to a property that is a building or other structure shall be deemed to include a reference to that part of the leasehold interest acquired by reason of the fact that the taxpayer has
>
> (*a*) erected a building or structure on leased land,
>
> (*b*) made an alteration to a leased building or structure, or
>
> (*c*) made alterations to a leased property which substantially change the nature of the property,
>
> unless the property is included in class 23 in Schedule B. (which deals with a leasehold interest or concession in respect of land granted under or pursuant to an agreement . . . for the 1967 World Exhibit . . .).

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The above Regulation which deals with buildings on leased properties, says that if the taxpayer puts up a building, or makes an alteration to a leased building or an alteration to a leased property which substantially changes the nature of the property, even though the interest of the taxpayer in the building is only a leasehold interest, he can amortize the cost of the building, or alteration thereto, only as class 3 property and not as class 13 property.

It is upon the above section that the respondent relies to relegate the appellant's building from class 3 as a building to class 13 as a leasehold interest on the basis that although under section 1102(5) of the *Regulations* the first holder of the lease who constructed or altered the building can amortize the building under class 3, his successor (and this is somewhat of an extraordinary result) cannot. It was on this reasoning that Mr. Fordham, Q.C., of the Tax Appeal Board held that the appellants herein could amortize the building as class 13 property only on the basis that unless a leaseholder is the person who erected the building standing on leased land, he cannot claim capital cost allowance under any class other than class 13. He then concluded that it was, therefore, not necessary "to make a minute inquiry into the precise position of the lessee named in an emphyteutic lease". I must say that the above section does seem to achieve the extraordinary result of permitting a leaseholder who is the constructor to amortize the building as class 3 property whereas, if he sold his right the day after he constructed the building, or if he died and his rights passed to his heirs, his successor or successors could only amortize the building as class 13 property under those rules which apply to one holding a leasehold interest.

This, however, in my view, does not end the matter as, although the above section seems to achieve the above described result in all cases where the interest of the taxpayer in the land and building is purely a leasehold interest, it would, in my view, not apply in the event that, while the taxpayer is the lessee of the land, his interest in the building is not that of a leaseholder but is that of an absolute owner. I would, indeed, think that section 1102(5) of the *Regulations* must be read with section 1102(4) and if this is done, it means only that generally speaking one does not include in the capital cost of a leasehold interest the cost of buildings or alterations put

up by the taxpayer. It does not mean, however, that in all cases where a taxpayer has a leasehold interest in land, his right to capital cost allowance on whatever building or construction is erected thereon will be governed by section 1102(5) of the *Regulations* and if not included in the categories therein mentioned will be automatically excluded and subject to the amortization rate which applies to leasehold interests, even if the taxpayer's interest in the building he purchased is that of a proprietor. It does not, in my view, do away with the general scheme which allows capital cost allowance on buildings owned by a taxpayer, and the above section, as drafted, cannot be interpreted to give it that effect.

It indeed appears clear to me that the very language of the section as well as paragraph (b) of class 13 of Schedule B which reads as follows:

Class 13

Property that is a leasehold interest except
(*a*) . . .
(*b*) that part of the leasehold interest that is included in another class by reason of subsection (5) of section 1102, . . .

indicate that the interest dealt with in the section must be a leasehold interest.

If this is the proper way to interpret these *Regulations*, it then becomes important to inquire into the precise position of the appellants under the lease and agreement between the Ecclesiastics of the Seminary of St-Sulpice of Montreal and The Transportation Building Company Limited, dated June 2nd, 1910, and produced as Exhibit A-1, as well as in regard to a few clauses of the deed of sale, dated July 4th, 1952, and produced as Exhibit A-2, whereby The Transportation Building Company Limited sold, conveyed, transferred and made over to the appellants all its rights, title and interest in the original lease and agreement and in the building constructed on the property.

I should, however, before doing this, point out that we are dealing here with an emphyteutic lease under the civil law of Quebec (art. 567 to 582 inclusive of the *Quebec Civil Code*) where, under art. 569 of the *Civil Code* an emphyteutic lessee enjoys "all the rights attached to the quality of a proprietor", under art. 570 C.C. he "may alien-

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ate, transfer and hypothecate the immoveable so leased", under art. 571 "the immoveables held under emphyteusis may be seized as real property, under execution against the lessee by his creditors . . ." and, finally, under art. 572 C.C. where "the lessee is entitled to bring a possessory action against all those who disturb him in his enjoyment and even against the lessor".

From the above it appears that the emphyteutic lessee in Quebec has not only a right *"in personam"* in the immoveable leased (as an ordinary lessee has) but a real right although this real right is a partial one only (*un droit réel demembré)*. This right does not, however, make him the owner of the land or give him complete ownership even of the plantations or constructions erected thereon. It will not, however, be necessary to determine here whether such an interest is proprietary or leasehold because, although clause IV of the lease states that the lease shall be an emphyteutic lease and that generally the emphyteutic lease rules will apply, it also says that such rules will apply only unless ". . . specifically derogated therefrom" and there have been some important derogations in this case.

An examination of the deed of lease and agreement between the Ecclesiastics of the Seminary of St-Sulpice of Montreal and The Transportation Building Company Limited as well as of the deed of sale to the appellants of the rights in the original lease and agreement and in the building constructed on the property reveals that some of the clauses of the deed of lease and agreement are standard emphyteutic clauses whereas others are not and are unusual.

I shall now consider only those clauses pertinent to the present case and which may be helpful in determining the nature of the rights the appellants purchased from The Transportation Building Company Limited.

Clause I of the lease (Exhibit A-1) indicates that when this lease was granted in 1910, there were buildings on the property. Clause II sets out its term for 99 years and mentions "the present lease of the said land" with no reference to the buildings. Clause III deals with the rental "for the said land" and indicates that the rent is a fixed amount for a number of years, a higher amount after that

and from 1933 onward, the amount of the rental is fixed periodically by a review of the value of the land. The greater the value of the land, the greater the rental. There is no indication in this lease that the owner of the land, the Seminary, is entitled to greater or lesser rent because of the value of the building erected on the land.

Under clause VI the lessee or his assigns are obliged to demolish the old buildings but the lessee is entitled to the materials of the old building. He must put up a new building at a cost of at least $500,000 which, of course, corresponds to the obligation of an emphyteutic lessee to make improvements on the land (*cf.* art. 577 C.C.). Under paragraph *d*) of the above clause, if the new building is destroyed by fire, the lessee must replace it in which event, however, it is stated that the lessee receives the insurance money required to replace it. Under paragraph *f*) of clause VI the lessee, if it so wants to, can demolish the building providing he erects another. I should point out here that this is exceptional in that an ordinary emphyteutic lessee has no right to destroy the immoveable.

Clause VII gives the lessee the right to issue bonds upon the security of the building and, of course, an emphyteutic lessee in Quebec can hypothecate the immoveables leased under art. 570 C.C. This, however, indicates that an emphyteusis in Quebec conveys a right *"in rem"* whereas an ordinary lessee would only have a right *"in personam"* and cannot form the subject of a fixed charge under a bond issue.

In clause VIII (second page) it is stated that in the case of non-payment of the rent or taxes, etc., after the defaults of the lessee have run their course and have not been rectified after the notices ". . . all buildings and improvements on the land shall become and be the property of the Seminary . . ." which, of course, indicates that until then, the Seminary is not the owner of the building. I should point out here that it is unusual to find this situation in an emphyteutic lease in Quebec as an emphyteote is not ordinarily the owner of the buildings erected on the land but merely has a partial real right (un droit réel demembré) in them. This, I should think, is an acknowledgement by the Seminary that the lessee or its assigns, the present appellants, are not lessees of the

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building but its owners as successors to The Transportation Building Company.

Clause X states that if during the lease the Seminary is made a party to any suit affecting the land (no mention is made of the building) then the company shall defend such suit and indemnify the Seminary against any damages resulting therefrom.

Clause XIII states (and this is a most important derogation from an emphyteutic lease) that "at the expiration of the present lease, the Seminary shall have the right to purchase the building then erected on the land".

Ordinarily, in an emphyteutic lease, the owner of the land usually gets the building (and this, of course, is one of the great advantages of such a lease) in accordance with art. 581 C.C. which states that "at the end of the lease... the lessee must give up... the property received from the lessor, as well as the buildings he obliged himself to construct, . . .".

The above clause also provides that in the event the Seminary does not wish to buy the building, the lessee can take it away or insist upon an extension of the lease.

In the event of expropriation, clause XV provides that the money corresponding to the value of the land goes to the Seminary but the money for the value of the building goes to the lessee.

Clause XVIII allows the Seminary to assign the lease or alienate the land but there is no right given to alienate the building.

An examination of Exhibit A-2, the deed of sale whereby The Transportation Building Company Limited sold, conveyed, transferred and made over to the appellants all its rights, title and interest in the original lease and agreement and in the building on the property, shows that there is nothing therein inconsistent with the lease. Furthermore, The Transportation Building Company, in the above deed, is called the vendor and Messrs. Cohen and Zalkind, the appellants, are referred to as the purchasers and the said deed transfers two distinct things:

> 1. All their right, title and interest in and to that certain Lease and Agreement between The Ecclesiastics of the Seminary of St. Sulpice of Montreal and the Transportation Building Company Limited . . .
> and

2. The ten storey stone and brick building erected on the above mentioned lot known as the "Transportation Building" . . .

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I should also mention that the above sale and transfer was made for the not inconsiderable amount of $1,072,000.

It therefore appears to me that whatever are the rights of an ordinary emphyteutic lessee in Quebec or whatever difficulties there may be in the common law provinces because ownership of the land carries with it whatever is built thereon, I cannot, on the documents as they stand herein, reach any other conclusion but that the appellants were the proprietors of the building erected on the land owned by the Seminary.

The lease indeed clearly asserts that the Seminary is not the owner in stating that after the defaults for non-payment of the rent, taxes, etc., have run out and the notices have not resulted in a rectification of same, the Seminary only then becomes the owner of the building. Furthermore, the right to purchase the building, which is given to the Seminary at the expiration of the lease is a further clear and complete assertion not only that the Seminary does not own the building at this stage, but that The Transportation Building and its successors do. This, of course, is not mere payment of compensation for its value, as provided for in art. 582 C.C. for improvements voluntarily made, but a real purchase of the building and may I reiterate a further clear assertion of proprietary interest in the building. Furthermore, the price is arrived at by way of a procedure of evaluation set down in the lease whereby experts are appointed to determine the value of the building which is paid to the lessee. The fact that the owner of the land does not obtain the buildings at the expiry of the lease (which is usually one of the advantages of an emphyteutic lease) unless he purchases the building, clearly shows, in my view, that the appellants here are not mere emphyteutic lessees with respect to the building erected on the land but seem to have something similar to what is called in Quebec a right of superficies (which appears to be unknown in the common law provinces) with respect thereto. Indeed, they have not merely a partial real right therein (*un droit réel demembré*) but are the veritable owners of the building.

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Having reached the conclusion that they have a right of proprietorship in this building and not a leasehold interest, they should and are entitled to depreciate their property as a building.

The appeals are, therefore, allowed. The appellants will be entitled to the costs to be taxed in the usual way in both appeals but as the latter were heard on the same evidence and at the same time, counsel for the appellants will be entitled to one set of counsel fees at trial only. The assessments for the taxation years of both appellants for the years 1956, 1957, 1958, 1959 and 1960 are therefore vacated and the matter referred back to the Minister for him to reassess the appellants on the basis that the building involved in these appeals is property of class 3 of Schedule B to the *Income Tax Regulations*.

Montreal 1967

June 13-14

Sept. 15

BETWEEN:

LOUIS REITMAN .....APPELLANT;

AND

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

Income tax—Capital cost allowances—Assignment of lease containing building erected by lessee—Lessee's covenant to deliver up building at end of term—Whether rate for buildings or leasehold interest—Income Tax Regs., s. 1102(4) and (5) Sch. B, Classes 3, 13.

The lessee of a 99 year lease of land in Ontario assigned the lease to appellant and his associates in 1960. The lease contained a covenant by the lessee to erect a building and to yield up the building at the end of the term, and the lessee did erect a building before assigning the lease. Appellant claimed capital cost allowances in respect of the building at the 5% rate allowed for buildings under class 3 of Schedule B to the *Income Tax Regulations*.

Held, appellant was only entitled to the 2½% rate for the leasehold interest allowed under class 13 since the requirements of s. 1102(4) and (5) of the *Income Tax Regulations* were not performed by appellant.

Cohen et al v. M.N.R. ante p. 110, distinguished.

INCOME TAX APPEAL.

P. F. Vineberg, Q.C. for appellant.

L. R. Olsson and *P. F. Cumyn* for respondent.

DUMOULIN J.:—This is an appeal from a decision rendered on June 18, 1965, by the Tax Appeal Board[1] affirming an assessment of $12,404.35 levied in respect of one Louis Reitman's income for taxation year 1960.

A most tangled skein of documentary transactions, some of which do not even properly relate in names or dates to preceding deeds allegedly referred to, painfully depicts the throes of financial agony that a speculative enterprise, Principal Investments Limited, vainly sought to overcome. After the usual convulsions of mortgages, leases, lease-backs, borrowings, this company was finally laid to its rest in the melancholy ledgers of receivership. Somewhat belatedly the Court is entrusted with the *post-mortem* task of analyzing the legal nature of such pecuniary antidotes as were fruitlessly administered to Principal Investments by, amongst others, the actual appellant.

Any attempt to recite at length the involved sequence of indentures and covenants that plague the case would be a waste of time and paper; I must for clarity's sake (if this be not too presumptuous an expectation), have recourse to the summarization of facts appearing in the Minister's Reply to the Notice of Appeal.

Before so doing, it should be said that Louis Reitman the appellant, in a "Declaration of Trust", dated at Montreal, December 22, 1960, agrees that "Carlingwood Properties Limited, a body corporate and politic, duly incorporated under the Corporation Act of the Province of Ontario..." acts as his nominee and for certain other persons; his own share in the alleged leasehold interest "in the said land and premises" being one-quarter of 45 percent ($\frac{1}{4}$ of 45%), (cf. Ex. A-12). Both parties admit this statement.

And now, the long but indispensable recital given under paragraph 5 of the previously mentioned Reply:

> 5. In assessing the Appellant for his 1960 taxation year he (the respondent) assumed *inter alia* that:
>
> (*a*) Carling Shopping Ltd., the owner of a certain parcel of land and premises in the City of Ottawa, leased it to Principal Investments Ltd. for a term of 99 years from the 1st day of July, A D. 1954 to the 30th day of June A.D. 2053, at a yearly rental of $16,500.00.

[1] 38 Tax A.B.C. 346.

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(*b*) there was a covenant in the said lease that Principal Investments Ltd. would erect a shopping centre on the said land and premises and the said lease also provided *inter alia* that

(i) the lessee would not demolish or remove any buildings or appurtenances in or upon the premises which would not increase the value thereof without the consent of the lessor;

(ii) the lessee would repair, maintain and keep in good and tenantable repair the buildings, structures and appurtenances from time to time on the demised premises;

(iii) at the end of the term the lessee would yield up to the lessor the demised premises together with all buildings erected thereon, and fixtures affixed thereto during the term of the lease. (*vide* ex. A-1, vol. 1, pp. 12-13, clauses 1-3-4)

(*c*) By about the end of 1956, Principal Investments Ltd. had erected a shopping centre known as Carlingwood Plaza Shopping Centre on the said land and premises.

(*d*) Principal Investments Ltd. granted and assigned to Carlingwood Properties Ltd. its interest in the lease referred to in subparagraph (*a*) hereof and Carlingwood Properties Ltd. (in which the appellant holds a ¼ of 45% share) agreed *inter alia* to pay the rent ($16,500 per annum) and perform the covenants of Principal Investments Ltd. under the head lease referred to in subparagraphs (*a*) and (*b*) hereof. (Ex. A-5, vol. 1, pp. 29 & ff.)

(*e*) Subsequently (Sept. 1, 1960) Carlingwood Properties Ltd. subleased the said lands and premises back to Principal Investments Ltd. for a term of 25 years from September 1st, 1960 to August 31st, 1985. (This is the lease-back already mentioned, and is Ex. A-2, vol. 1, pages 35 to 82.)

. . .

Despite this transfusion of financial blood, Principal Investments Ltd. failed to survive, so I was told, and, henceforth, disappears from the scene, leaving merely two antagonists confronting one another, the appellant and the respondent. The former's contention is accurately stated in the opening paragraph (para. 1) of "The Minister's Written Argument in Reply to the Appelant's Notes"; I quote:

1. It was the Appellant's contention at the hearing of this appeal, *inter alia,*

(*a*) that its interest in the building, material to this appeal, was that of an owner;

(*b*) that consequently it was entitled to treat that building as property included in Class 3 of Schedule B of the *Income Tax Regulations*;

(*c*) subsidiarily, that by virtue of sections 1102(4) and 1102(5) of the *Income Tax Regulations,* the aforementioned building was deemed to be property included in Class 3 of Schedule B.

Denying the appellant's interpretation of the facts and law, the respondent, in paragraph 2 of the same written argument, retorts as follows:

> 2. It was the Respondent's submission at the hearing of this appeal,
>
> (*a*) that the interest of the Appellant in the building was a leasehold interest;
>
> (*b*) that in common law whatever is affixed to land becomes part thereof for purposes of determining ownership, and that consequently the Appellant could not claim to be lessee of the land and owner of the building;
>
> (*c*) that the aforesaid interest was not property included in Class 3 of Schedule B of the *Income Tax Regulations* for the purpose of capital cost allowance;
>
> (*d*) that the Appellant's interest was property included in Class 13 of Schedule B, and that the Appellant was entitled to capital cost allowance thereon pursuant to section 11(1)(*a*) of the *Income Tax Act* and section 1100(1)(*b*) of the *Income Tax Regulations*.

If, as I hope, the essential factors of the debate now appear with sufficient clearness, the questions to be answered relate to, firstly, the nature of appellant's interest, ownership or leasehold, and, secondly, the class of amortization applicable. A subsidiary matter could be added to the two main points: the feasibility of granting an ownership classification on sublessees of a 99-year lease.

Easier cases, fortunately, are not lacking in our judicial annals, nor would it seem unbecoming flattery to claim for the legislator more than a few instances in which his paramount will was enshrouded in thinner mists.

Be that as it may, the law must be resorted to as it appears in the statute, the pertinent texts of which are hereunder reproduced, in accordance with the enabling section 11(1)(*a*), that allows the taxpayer to deduct from his income tax such part of the capital cost of property, "or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation".

Conformably to section 11(1)(*a*), regulation 1100(1)(*a*) contains a list of XV classes of capital cost deductions with their respective percentages.

Thereafter, instead of describing in simple terms and consecutive sections the deductions extended to ownership and leasehold interests, the *Income Tax Act* devises something in the nature of a criss-cross exercise, leaping from

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regulations to classifications and from the latter back again to the former, all the while avoiding to plainly express its intent.

Subparagraph (*b*) of Regulation 1100(1) provides the permissible deduction where:

> (*b*) . . . a taxpayer has property of class 13 in Schedule B which was acquired by him for the purpose of gaining or producing income, such amount as he may claim not exceeding, in respect of each item of the capital cost thereof to him, the lesser of
>
> (i) one-fifth of the capital cost thereof to him, or
>
> (ii) the amount of the year obtained by apportioning the capital cost thereof to him equally over the period of the lease unexpired at the time the cost was incurred, . . .

The remainder is irrelevant, but subparagraph (7) of 1100 specifies that:

> (7) Where under the terms of a lease the period of the lease unexpired at the time the costs were incurred is greater than 40 years, for the purpose of subparagraph (ii) of paragraph (*b*) of subsection (1), the period of the lease unexpired at the time the costs were incurred shall be deemed to be 40 years.

The opening line of subparagraph (*b*) of section 1100(1) alludes to class 13 in Schedule B, reading as follows:

> CLASS 13
>
> Property that is a leasehold interest except
>
> (*a*) . . .
>
> (*b*) that part of the leasehold interest that is included in another class by reason of subsection (5) of section 1102 . . .

wherein we see that:

> 1102. . . .
>
> (5) Where the taxpayer has a leasehold interest in a property, a reference in Schedule B to a property that is a building or other structure shall be deemed to include a reference to that part of the leasehold interest acquired by reason of the fact that the taxpayer has
>
> (*a*) erected a building or structure on leased land,
>
> (*b*) made an addition to a leased building or structure, or
>
> (*c*) made alterations to a leased property which substantially change the nature or character of the property.

Going backwards, we find at subsection 4 that the capital cost of a property being a leasehold interest also includes amounts expended on an "improvement or alteration" to the leased property other than those specifically mentioned in subparagraphs (*a*), (*b*) and (*c*) of subsection (5) just cited.

We have now singled out the requirements, four (4) in number, which by a fiction of the fiscal law extend to a purely leasehold title advantages similar to ownership status, namely an annual capital cost deduction of 5% foreseen by Class 3, over a possible maximum period of twenty years (5% × 20) as against forty in subsection (7) (1/40 per annum during 40 years).

Those conditions are prescribed, if I may be pardoned this repetition, in subparagraphs (*a*), (*b*) and (*c*) of subsection (5) of section 1102 and its preceding subparagraph (4), none of which, it should be stated right now, were accomplished by the appellant, Louis Reitman, who only participated in a monetary loan to the builders of Carlingwood Plaza Shopping Centre, the erstwhile Principal Investments Ltd.

Moreover, all of the several deeds and agreements of record entered into by Carlingwood Properties Limited, duly constituted nominees of Louis Reitman, are covenants of lease and declare nothing else than a leasehold interest. It could not be otherwise as the building itself was erected by Principal Investments Ltd. and terminated around the end of 1956. The first appearance of appellant's agents, Carlingwood Properties Ltd., occurred approximately four years later, on September 1, 1960 (cf. Ex. A-2).

So much then for the facts of the case vesting in the appellant an irrefutable leasehold interest.

There now remains to be determined whether a leasehold title, in the language of the *Income Tax Regulations* can, nevertheless, be treated as straight ownership for purposes of capital cost deductions under class 3.

The appellant's learned counsel filed exhaustive notes in which he takes the view that:

> . . . Determination of the (capital cost) allowance is stated (in the regulations) to be based upon the objective nature of the "property" and not on the subjective characteristics of the taxpayer seeking the deduction. In Schedule B of the regulations, detailing the different classes, the opening word of *every* single class of capital cost allowance is: *"Property"*. The usual phrase is: "Property that is . . . ". It's the property, the thing or the building, that falls into one class or another.

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On page 2, it is stated that:

> Section 1102(2) of the regulations makes it clear that the classes of property described in Schedule B "shall be deemed not to include the land upon which a property described therein was constructed or is situated". In effect, you look at the building without the land.

At page 2, third paragraph:

> In buying the rights of Principal Investments Ltd. for $3,000,000 Louis Reitman et al. did not expend this amount "on an improvement or alteration to a leased property" any more than they expended it on "the construction of a building or other structure".

From the above "starting point" appellant's Notes reach the following conclusion:

> It is common ground between both parties that the shopping centre properties erected by Principal Investments Ltd. on the leased land constituted Class 3 properties. Where we part company is in the allegation by the Respondent that the Class 3 properties in the hands of Principal Investments Ltd. when it transfers its right to Louis Reitman, et al, become in the hands of the acquirers Class 13 property.

I cannot adopt such assumptions for the obvious reasons that throughout the entire affair each and every legal obligation (even those of the builders, Principal Investments Ltd.), assumed by Louis Reitman and associates, were of a leasehold kind, as the exhibits produced convincingly prove. Also because, the key or general rule giving access to Class 3 consists in the ownership title, and leasehold interest may claim the same benefit as an exception solely if and when it complies with specific conditions stipulated in paragraphs (*a*), (*b*), (*c*) of subsection (4) and (*a*), (*b*), (*c*) of subsection (5) of section 1102. And we have read, a few lines past, appellant's admission of not being within the purview of these enabling exceptions. A builder, shouldering the burden and manifold risks of a construction, deserves, not unreasonably, a certain degree of fiscal abatement; one might conjecture that Class 3 was meant for such a purpose. Conversely, a lessee or tenant cannot lay claim, outside of the exception, to anything of this kind.

Another conjecture could account for the exclusion of the cost of the land upon which a property, described in Schedule B, "was constructed or is situated" as decreed in subsection (2) of regulation 1102. In urban centres, or their vicinity, land becomes the object of intense speculation and, in any case, vacant or "unbuilt" land usually is of little interest to assessors of all vintages.

Finally, a time-honoured maxim of fiscal law interpretation was laid down as long ago as 1869 by Lord Cairns in *re: Partington v. The Attorney-General*[2]; it is formulated thus:

> 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.

Directives of so stringent a nature, and of persisting application, leave small room indeed for the admissibility of the subtle but specious dissertation attempted in his Notes by appellant's learned counsel.

A last and significant aspect of this case must now be disposed of. On June 2 of the current year, Mr. Justice Noël of this Court handed down, in the matter of *Nathan Cohen et al. v. The Minister of National Revenue*[3], a decision with which the undersigned is in complete accord, taking into account the all-important fact that the latter suit was adjudged according to the Civil Code of the Province of Quebec, the pertinent *lex loci contractus,* whilst the actual one comes under the common law.

The circumstances of the Quebec case were, in brief, that in June, 1910, the Ecclesiastics of the Montreal St-Sulpice Seminary "entered into a deed of lease and agreement with respect (to certain property) with The Transportation Building Company Ltd." for a period of 99 years, the ultimate duration allowed by law to emphyteutic leases. The original lessees had obligated themselves to construct a large office building on the demised land and by 1912 this had been done. On the 4th of July, 1952, The Transportation Building Company "sold, conveyed, transferred and made over to Hyman Zalkind and to Nathan Cohen all its right, title and interest in and to the aforesaid Lease and Agreement and in and to the building..." erected, at a time when the 1910 emphyteutic covenant still had some 58 years to run.

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[2] [1869] L.R. IV H.L., 100 at 122.

[3] *ante* p. 110.

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The distinction between those two systems of law was earmarked by my learned brother Judge as giving rise to essential consequences, and a review of the relevant Civil Code provisions will readily prove it is so; for instance:

Art. 567 enacts that:

> Emphyteusis or emphyteutic lease is a contract by which the proprietor of an immoveable conveys it for a time to another, the lessee subjecting himself to make improvements, to pay the lessor an annual rent, and to such other charges as may be agreed upon.

Art. 568:

> The duration of emphyteusis cannot exceed ninety-nine years and must be for more than nine.

Art. 569:

> Emphyteusis carries with it alienation; so long as it lasts, the lessee enjoys all the rights attached to the quality of a proprietor. He alone can constitute it who has the free disposal of his property.

Art. 570:

> The lessee who is in the exercise of his rights, may alienate, transfer and hypothecate the immoveable so leased without prejudice to the rights of the lessor; . . .

Art. 571:

> Immoveables held under emphyteusis may be seized as real property, under execution against the lessee by his creditors who may bring them to sale with the formalities of a sheriff's sale.

Emphyteusis "carries with it" ownership full and complete of land and buildings in contradistinction to the common law, which the respondent's learned counsel, unchallenged on that score, repeatedly expounded at the hearing as "automatically vesting the landlord with the ownership of all buildings a lessee may have erected on the land during the life of the lease". In support of this averment reference was made to several passages of Anger and Hornberger's treatise *"The Law of Real Property"*,[4] from which I quote the undergoing one:

> The law of fixtures is based upon the old maxim *quidquid plantatur solo, solo cedit,* planted being used in the broad sense of attached, and soil including anything attached in turn to the soil so as to become part of it in the eyes of the law. The maxim has been freely translated as "whatever is fixed to the freehold of land becomes part of the freehold or inheritance" (per Lord Cairns L.C. in Bain v. Brand, 1876, 1 App. Cas. 762 at p. 767, H.L.)

[4] 1959 edition, at p. 454.

All this goes to show that Cohen and Zalkind, or their assigns, in their capacity of emphyteutic lessees, enjoyed during the life of their lease, i.e., 58 years, ownership of land and constructions conveyed by the deed of 1952, and were, therefore, eligible to claim capital cost allowance under Class 3 of our Act, when, on the other hand, Louis Reitman never was invested, either at common law or in virtue of the pertinent provisions, oft alluded to herein, of the *Income Tax Act*, with anything else than a simple leasehold title.

For the reasons aforesaid, the appeal is dismissed, the respondent being entitled to all taxable costs.

BETWEEN:

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada ..... PLAINTIFF;

AND

THE SINGER MANUFACTURING COMPANY, SINGER SEWING MACHINE COMPANY and SINGER COMPANY OF CANADA LIMITED DEFENDANTS.

Ottawa
1967
June 1-2

Customs duty—Dumping duty—Company ordering goods from U.S. manufacturer for delivery to Canada—Title to goods passes in U.S.A.—Customs Tariff, R.S.C. 1952, c. 60, s. 6(1), (4)—"Exporter", "Importer"—Not terms of art.

In 1959, in accordance with an arrangement between the Singer Co and Eureka Corp, the latter, on the instructions of the former's New York office, manufactured at its Illinois plant a number of vacuum cleaners which it shipped f.o.b. Bloomington, Ill. to the Singer Co's warehouse in St. Johns, Quebec. Title and risk of loss passed to the Singer Co at Bloomington and payment was later made by the Singer Co's New York office. On the ground that "the export or actual selling price" of the goods "to an importer in Canada" (within the meaning of the quoted words in s. 6(1) of the *Customs Tariff*, R.S.C. 1952, c. 60) was less than their value for duty the Crown claimed dumping duty, *viz* the difference between "the selling price of the goods for export" and their value for duty. The Singer Co, though the customs invoices filed by it with the Customs authorities stated that it had purchased the goods in Canada from

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Eureka Corp in the U.S.A., contended that as it took title to the goods in the U.S.A. and exported them to itself in Canada the provisions of s. 6 of the *Customs Tariff* did not apply. Section 6(4) of the Customs Tariff defines "export price" or "selling price" as "the exporter's price for the goods &c".

Held, s. 6(1) of the *Customs Tariff* applied to require the payment of dumping duty. While the language of s. 6 of the *Customs Tariff* postulates a sales contract between an exporter and an importer the words "exporter" and "importer" are not terms of art but are used in s. 6 in their commercial sense, and in that sense Eureka Corp in Illinois was the exporter and the Singer Co in St. Johns, Quebec was the importer of the vacuum cleaners regardless of whether or not the goods were sent under a contract which placed possession, legal title and risk in the purchaser at some point in the U.S.A.

ACTION by Crown for duties payable.

D. H. Aylen and *L. Leikin* for plaintiff.

K. Eaton for defendants.

JACKETT P. (orally):—This is an action by the Crown for customs duty, sales tax and special or dumping duty.

In the year 1959, certain vacuum cleaners purchased by The Singer Manufacturing Company (hereinafter referred to as "Singer Manufacturing") were shipped from Bloomington, Illinois, U.S.A., to St. Johns, Quebec. Upon the importation of such cleaners into Canada, Singer Manufacturing paid

customs duty	$100,711.20
sales tax	65,756.57.

Following an investigation, in 1960, the Customs and Excise Division of the Department of National Revenue took the position that the values for duty of such goods, as declared and accepted at the time of the importation of such goods, should be increased, and, in due course, the Tariff Board, by a Declaration dated March 23, 1962, fixed values for duties somewhat higher than those that had been so declared and accepted. Based on such higher values for duty, the Crown, by this action, claims judgment for

additional customs duty	$22,079.40
additional sales tax	14,411.10.

During the course of the hearing in this Court, counsel for the defendants conceded that the Crown is entitled to judgment for such amounts.

In addition, however, the Crown, by this action, claims $110,402.30 by virtue of section 6 of the *Customs Tariff*, R.S.C. 1952, chapter 60, which reads, in part, as follows:

> 6. (1) In the case of goods exported to Canada of a class or kind made or produced in Canada, if the export or actual selling price to an importer in Canada is less than the fair market value or the value for duty of the goods as determined under the provisions of the *Customs Act*, there shall, in addition to the duties otherwise established, be levied, collected and paid on such goods, on their importation into Canada, a special or dumping duty, equal to the difference between the said selling price of the goods for export and the said value for duty thereof; and such special or dumping duty shall be levied, collected and paid on such goods although not otherwise dutiable.
>
> * * *
>
> (4) In this section "export price" or "selling price" means the exporter's price for the goods, exclusive of all charges thereon after their shipment from the place whence exported direct to Canada.

It is conceded that the goods in question are "of a class or kind made or produced in Canada" and that, if duty is payable under section 6, the amount claimed by this action is correctly calculated.

The position taken on behalf of the defendants is that section 6 is not applicable to the importation in question because

(a) there was "no exporter's selling price" for the goods, and the section cannot apply in the absence of such a price,

(b) there was no "selling price to an importer in Canada" and the section cannot apply in the absence of such a price, and

(c) there was no "selling price of the goods for export", and the section cannot apply in the absence of such a price.

The case was tried on an agreed Statement of Facts, signed by counsel for the parties, to which the relevant documents were attached. This agreement with the attached documents constitutes all the evidence put before the Court on the trial of the action.

The facts upon which the decision of the question as to special or dumping duty depends may be summarized as follows:

1. Early in 1956, Singer Manufacturing, through its head office in New York, entered into an arrangement

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with Eureka-Williams Corporation (hereinafter called "Eureka") of Bloomington, Illinois, under which Eureka was to manufacture and sell electric vacuum cleaners to Singer Manufacturing. Under this arrangement the New York office of Singer Manufacturing from time to time placed advance orders with Eureka for quantities of vacuum cleaners to be manufactured and then shipped by Eureka in accordance with shipping instructions subsequently issued by the New York office of Singer Manufacturing. The selling prices in respect of particular orders were negotiated from time to time. The cleaners were sold f.o.b. common carrier at Bloomington, and title and risk of loss passed to Singer Manufacturing on delivery to the common carrier at that point. Separate customer invoices were sent by Eureka to the New York office of Singer Manufacturing as the basis for payment by that office to Eureka. In 1956 and 1957, all cleaners so sold by Eureka to Singer Manufacturing were shipped by Eureka to regional warehouses of Singer Manufacturing at various locations in the United States.

2. In the latter part of 1958, it was decided to introduce to the Canadian market some of the cleaners manufactured by Eureka under that arrangement; and it was agreed by the two companies that some of the cleaners would be shipped from the Eureka plant at Bloomington to Singer Manufacturing's warehouse at St. Johns, Quebec, pursuant to instructions similar to those previously given for shipment to warehouses in the United States.

3. The goods in question in this case were manufactured by Eureka, and shipped from Eureka's plant at Bloomington, under Bills of Lading naming Singer Manufacturing as consignee, to the latter company's warehouse in St. Johns, Quebec, pursuant to orders and shipping instructions originating in Singer Manufacturing's New York office, and were paid for by cheques sent from that office pursuant to customer's invoices sent by Eureka to that office, all in accordance with the above arrangement.

Without concerning myself too much about the details of the various documents that passed between the parties, I am satisfied that the above is a fair appraisal of the transactions in question.

On the above facts, as I understand it, the contention for the defendants is, in effect, that Singer Manufacturing acquired the cleaners by purchases made in the United States, took delivery of them and got title to them in the United States, and then exported them from the United States to itself in Canada. It is on that view of the facts that it is contended that there was *no* exporter's selling price, *no* selling price to an importer in Canada, and *no* selling price for export.

As indicated, I am of the view that the transactions may fairly be appraised as I have outlined them and that I am not inclined to place too much importance on the manner in which particular documents have been prepared. One class of document, however, which might be considered to have special significance in appraising the facts for customs purposes is the Customs Invoice (form M-A), the filing of which with the customs authorities is an essential part of passing goods through customs. The Customs Invoices used in respect of the importations under consideration, if they are to be taken as conclusive of the facts are represented by them, are almost completely destructive of the case for the defence as I understand it. Such Customs Invoices purport to be invoices of electric vacuum cleaners purchased by "Singer Manufacturing of St. Johns, Quebec, Canada" from "Eureka Williams Corp. of Bloomington, Illinois" to be shipped from Bloomington by rail freight, and purport to set out the "Selling price to the Purchaser in Canada". Furthermore, there are also deposited with the customs authorities declarations of an agent for Singer Manufacturing certifying as to the accuracy of such invoices. However inconsistent the statements in the Customs Invoices are with the position now taken on behalf of the defence, inasmuch as what is involved is really a question as to what is a correct appraisal of the facts from the point of view of the customs legislation rather than a representation or a misrepresentation as to basic facts, I should not be inclined to regard the Customs Invoices as being of conclusive significance. I propose, therefore, to consider the effect of section 6 of the *Customs Tariff* in relation to the facts as I have summarized them, paying no attention to the Customs Invoices.

Before discussing the facts, some consideration must be given to the meaning of section 6. In considering the mean-

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ing of section 6, I accept the submission of counsel for the defendants that, having regard to its penal character, it must be read restrictively and must not be taken to extend to anything not literally covered by the words employed. I cannot, on the other hand, find in the section any indication of a legislative purpose that would warrant reading into the section limitations on the literal meaning of the words used.

Section 6(1) provides, *inter alia*, that, in the case of goods exported to Canada of a class or kind made or produced in Canada, if

(*a*) "the export or actual selling price to an importer in Canada"

is less than

(*b*) "the value for duty of the goods...",

there shall be paid on such on their importation a special or dumping duty equal to the difference between

(*c*) "the said selling price of the goods for export",

and

(*d*) "the said value for duty thereof".

On this reading of the words of subsection (1), it seems clear that the words that I have shown as (*c*), "the said selling price of the goods for export", are a reference back to the words that I have shown as (*a*), "the export or actual selling price to an importer in Canada", and mean the same as those words whatever those words may mean.

By reference to subsection (4) we find that, in this section, "export price" or "selling price" means "the exporter's price for the goods ...". Applying this provision, as well as I can (and I realize that I have not found it possible to give any special significance to the word "actual" in subsection (1)), I have reached the conclusion that, by virtue of subsection (4), one can substitute for the words "the export or actual selling price to an importer in Canada", in subsection (1), the words "the exporter's price for the goods to an importer in Canada".

Having reached this conclusion as to the meaning of subsection (1), as I understand the case as put to me by the parties, if I conclude that there was, on the facts here,

an "exporter's price for the goods to an importer in Canada", it follows that duty is payable under section 6 in the amount claimed, and, if I conclude that there was no "exporter's price for the goods to an importer in Canada", it follows that no duty is payable under section 6.

No matter how I might, in the absence of subsection (4), have interpreted subsection (1), and particularly the words "export or *actual selling price to an importer in Canada*", counsel for the Crown agrees that subsection (4) makes it essential to the application of subsection (1) that there be an "exporter's price for the goods". It follows, I think, that duty can never be payable under section 6 where the person sending goods to Canada is also the person to whom the goods are sent, for, if the exporter and the importer are the same person there can be no sale contract between the exporter and importer and there can, therefore, be no "exporter's price for the goods to an importer in Canada".

The case for the defence here is based on that view of the effect of section 6. Its case is, in effect, that Singer Manufacturing got the goods in the United States and shipped them to itself in Canada. If I could satisfy myself that that were a correct appraisal of what happened, I would conclude that no duty was payable under section 6.

The words "exporter" and "importer" are not words of art in the law; they are words that gain the meaning that they have when used in a context such as that found here from the business or commercial world. It follows, therefore, in my view, that the matter must be approached from a business or commercial point of view. Regardless of whether it can be said, from a legal point of view, that Singer Manufacturing received possession of the goods when they were placed on board the railway at Bloomington, there is no question in my mind that, in the sense in which the words are used by business or commercial men, if a person carrying on business in Canada orders goods from a United States manufacturer to be sent to him at his place of business in Canada, the United States manufacturer is the exporter and the Canadian business man is the importer, regardless of whether or not the goods are sent under a contract of carriage which places possession, legal title and risk in the purchaser at some point in the United

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States. Not only do I think that that is the ordinary use of such terms when the person carrying on business in Canada is a Canadian who never leaves Canada and makes all the arrangements by mail; but I think a person carrying on business in Canada is none the less an importer into Canada (and his supplier is an exporter) even though he makes all arrangements in respect of the despatch of the goods by a United States manufacturer to his Canadian establishment through an office of his own in the United States. The essential feature in my view is that the exporter must be the person in the foreign country who sends the goods into Canada and the importer must be the person to whom they are sent in Canada. If the exporter sells the goods for a price to the importer, that price is the "exporter's price for the goods" to "an importer in Canada".

On this view of the matter, there is no doubt in my mind that the cleaners in question were exported to Canada by Eureka and imported into Canada by Singer Manufacturing.

I am of opinion, therefore, that each of the prices at which Eureka sold to Singer Manufacturing was therefore "the exporter's price for the goods" to "an importer in Canada", and that duty is payable on the importation of the goods in question under section 6 of the *Customs Tariff*.

While there are three defendants, having regard to paragraph 2 of the "Agreed Statement of Facts", which reads in part as follows,

> 2. In 1963 Singer Manufacturing and Singer Sewing both transferred substantially all of their Canadian assets and liabilities to Singer Company of Canada Limited, which was incorporated in 1962 under the laws of Quebec. . . .

it was agreed by counsel that any judgment for or against the defendants should be rendered for or against "Singer Company of Canada Limited" to the exclusion of the other defendants.

Subject to considering any submissions that counsel may now make, I propose to pronounce judgment in favour of the Crown against Singer Company of Canada Limited for the sum of $146,892.80, and costs.

Montreal
1967
May 10
June 7

BETWEEN:

MONART CORPORATION .....APPELLANT;

AND

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

Income tax—Office rental business (Quebec)—Lump sum received by lessor for consenting to cancellation of lease—Whether income a capital receipt—Nature of lessor's right in Quebec.

Appellant company was in the business of renting offices in a large office building which it owned in Montreal. In 1962 appellant received $75,000 for consenting to cancel two leases which had still six years to run in one case and one year in the other and which produced an annual rental of $110,041. The space remained vacant for three months and was then leased for ten years at an annual rental of $105,825.

Held, the $75,000 was chargeable to income tax under both secs. 3 and 4 of the *Income Tax Act* as being in lieu of future rent and also as being in the nature of profit from a property or business of appellant. *Harold F. Puder v. M.N.R.* [1963] C.T.C. 445, distinguished. *M.N.R. v. Farb Investments Ltd.* [1959] Ex. C.R. 113, considered.

The cancelled lease was not a capital asset of appellant: a lessor's right under a lease is a personal right and not a real right. (*Mignault: Traité de droit civil canadien,* tome 7; *Quebec Civil Code,* Art. 1612.)

INCOME TAX APPEAL.

Paul B. Cohen for appellant.

A. Garon and *P. H. Guilbault* for respondent.

DUMOULIN J.:—At all material times and until December 29, 1964, the appellant company was the proprietor of Northern Building, a large office renting edifice situated at 1600 Dorchester Boulevard West, Montreal, Quebec. For the 1962 fiscal year, a tax in the sum of $35,477.44 was levied by the respondent in respect of Monart's income, for reasons to appear below. This appeal is from the Minister's assessment.

In the regular course of its business, the company owning Northern Building had, as lessees of two floors, the sixteenth and seventeenth, Canadian Chemical & Cellulose Company Limited (hereafter shortened to Chemcell), with a ten-year lease (May 1, 1958, until April 30, 1968), at a rental of $97,095 per annum, later increased by supplementary agreement to $110,041. A copy of this lease is included in the transcript of documentary evidence, forming part of the official record. Under the caption of "Other

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Conditions", page 11, clause 1, the lessee is entitled to transfer its right or sublet any portion of the leased premises with the lessor's consent in writing, "which consent shall not unreasonably be withheld"; the lessee, of course, "to remain responsible for the obligations of the Lease including the payment of rental hereunder".

"Late in 1961, Appellant was advised that Chemcell would vacate the leased premises on May 1, 1962", states section 3 of the Notice of Appeal, "and that its obligations for the balance of the term of its lease would be assumed by Dorchester Commerce Realty Limited, owners of the new Canadian-Imperial Bank of Commerce Building which was under construction on Dorchester Boulevard".

Meanwhile certain developments had occurred which, among several others, are set forth in the parties' Agreed Statement of Facts, filed May 1, 1967, and from which I quote the undergoing:

> 16. ...the Appellant received from Dorchester Commerce a letter dated November 1st, 1961, in which the latter made a further offer to pay the sum of $75,000 (two previous offers of, respectively, $50,000 and $55,000 had been refused) if the Appellant would consent to the cancellation of both of the aforementioned leases.

(With the approval of Chemcell, the appellant, on December 19, 1958, leased to Pigott Construction Company Ltd., "a portion of the sixteenth floor, comprising approximately 3,912 square feet in the Northern Building".)

These compensatory terms proving acceptable to the lessor, owner of Northern Building, a Memorandum of Agreement was entered into on April 27, 1962, between Monart Corporation, Dorchester Commerce Realty Ltd., Chemcell and Pigott Construction Company, in virtue whereof "Dorchester Commerce undertook to pay to the Appellant not later than April 30th, 1962, the sum of $75,000.00 in consideration of the termination of both the Chemcell and Pigott leases, effective April 30th, 1962 or on such subsequent date not later than May 6th, 1962 on which the leased premises were actually vacated by the said lessees" (cf. Agreed Statement of Facts, para. 19).

It was further stipulated (para. 20), in order to prevent the loss of any fraction of the rental price, that "...Chemcell and Pigott remained liable for rent for the time they occupied their respective premises beyond April 30th, 1962 but not later than May 6th, 1962, calculated on a *pro rata* basis" (emphasis in text).

On April 30, 1962, Monart Corporation duly received from Dorchester Commerce the sum of $75,000 (para. 21), "in full and final settlement of all claims of the Appellant against Chemcell and Pigott by reason of the termination of their respective leases on or before May 6th, 1962" (para. 18). When thus terminated, "the Chemcell and Pigott leases had approximately 6 years and one year to run. respectively" (para. 22), but with the express reservation that "the premises occupied by Pigott in the Northern Building would have reverted on April 30th, 1963 to Chemcell under the latter's lease with the Appellant until the expiry thereof, on April 30th, 1968" (para. 23).

Subjectively viewed, as of April 27, 1962, date of the cancellation indenture, the situation consequent thereto effectively meant that, in consideration of a $75,000 lump payment, the lessor gave up its right to six annual rentals of $110,041 each, a gross total receipt of $660,246. Objectively, on the other hand, the property owner could let anew those vacated premises, assuming, however, the adverse chances of delays, lower rents and, possibly also, less desirable tenants. Under such conditions, how, then, should this heavy "forfeit" be looked upon in the eyes of our fiscal law? In paragraphs 4 and 5 of its Notice of Appeal, Monart Corporation explains that, in the event of a continuation of the sub-lease by Dorchester Commerce Realty Limited, a competitor,

> 4. Appellant had reason to fear that the premises would either remain vacant or substantially vacant for the balance of the term of the lease or that the premises would be sub-let to small tenants, of any class of business, on short-term leases at inferior rentals inasmuch as any first-class tenants for larger quarters would inevitably be directed by Dorchester Commerce Realty Limited to its own building project.
>
> 5. The Appellant was accordingly faced with the prospect of suffering a substantial diminution in the real value of its building as a fixed asset, as well as in the realizable market value of the building as a capital asset.

With, also added, these concluding enunciations of fact and propositions of law outlined in paragraphs 6 and 9 of the Notice of Appeal:

> 6. Upon receipt of an unsolicited offer from Dorchester Commerce Realty Limited, Appellant accepted $75,000.00 in lieu of damages both for the relinquishment of a capital asset (the lease) as well as for the protection of its existing capital assets.

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9. The aggregate of the Appellant's rights in respect of the unexpired term of the lease constituted "property" within the meaning of section 139(1)(*ag*) of the Income Tax Act, and were thus rights of a capital nature.

Previously, the appellant had stated that the compensation received did not constitute additional rental or other income or profit from a business or property within the meaning of sections 3(*a*), 3(*b*) and 4 of the Act, "nor an amount received in substitution for, or in lieu of, such income or profits".

It could go without saying that a diametrically opposite view of the matter was taken by respondent, submitting in his Reply, that the amount of $75,000 "was received ... from Dorchester Commerce Realty Limited as rent or in lieu of rent in respect of the leasing of certain premises in the Northern Building ... and is income from property by virtue of Sections 3 and 4 of the Income Tax Act", and, again, that the amount received by the appellant "is in the nature of profit derived from a property or a business of the Appellant within the purview of Section 4 of the *Income Tax Act*" (paragraphs 10 and 11 of the Reply).

Before dealing with the pertinent law, certain facts should be clarified. Arthur Rudnikoff, President of Monart Corporation in 1962, testified at the trial. After stressing those several fears and apprehensions he entertained as the lessor's chief executive upon cancellation of Chemcell's lease, a practical repetition of paragraphs 4 and 5 of the Notice of Appeal, the deponent ended his testimony by asserting "that, after Chemcell (and Pigott) vacated (their) locals, this space was unoccupied during three months, from May 6 until mid-July; no rent being derived by Northern Building (i.e. Monart Corporation) during that period".

Regarding a loss of rentals for slightly less than three months, there can be no doubt, which is not at all the case as regards Mr. Rudnikoff's other misgivings; of this, ample proof is forthcoming. In the file of documentary evidence, starting on page 51, appears an indenture of lease, dated May 23, 1962, between Monart Corporation and the Bell Telephone Company of Canada (already an occupier of office space in Northern Building) whereby, and I now revert to paragraph 24 of the Agreed Statement of Facts:

24. ...of the total area of 25,892 square feet (about one-tenth of Northern Building's entire footage) previously occupied by Chem-

cell and Pigott under their respective leases, ... the Appellant leased approximately 24,900 square feet to the Bell Telephone Company of Canada, as follows:

(a) approximately 21,471 square feet ... by Indenture of Lease dated May 23rd, 1962, for a term of 10 years commencing May 1st, 1962, and terminating April 30th, 1972, at an annual rental of $91,251.75; and

(b) approximately 3,429 square feet ... (previously occupied by Pigott) ... for a similar term of 10 years commencing May 1st, 1962, and terminating April 30th, 1972, at an annual rental of $14,573.25.

In the copy of this indenture (cf. file of documentary evidence, page 53), it is agreed that "rental will commence to accrue and be applicable in respect of the premises only from and including the 26th day of July, Nineteen hundred and sixty-two ...". Rudnikoff having testified that the premises, after renovations and repairs, were occupied by the Bell Telephone Company on or about mid-July, 1962, a three-month loss of rent by appellant does not appear exaggerated.

The pecuniary consequences of the latter lease, at an annual rent of $105,825 (i.e. $91,251.75 plus $14,573.25) as against a former yield of $110,041, meant a yearly revenue shrinkage of $4,216 which, repeated during the six remaining years Chemcell's occupation would otherwise have continued, amounted to $25,296. To this income reduction should be joined three months' loss of rent which, computed in accordance with Chemcell's monthly rate of $9,170 ($110,041 ÷ 12), points to a further deficit of $27,510.

That the compensating payment of $75,000 was intended in appellant's mind to take care of such contingencies seems hard to deny and, furthermore, there is of record Rudnikoff's admission to this effect at pages 34 and 35 of his Examination on Discovery, referred to at the hearing by respondent's counsel; quotation:

Page 34:

Mr. GARON, for the Minister:

Q. But, on what basis was this amount of $75,000 computed?

A. We knew that we would have to lose a certain amount of rent because we had no tenant at that particular moment, and we figured how long will it take. And we knew the rent also was approximately $110,000 a year, round figures. Well, during the time when the tenant does move, and we have a certain amount of renovation to do. That would take maybe several months to put into shape again, and we had no tenant at that particular moment, so we just hoped and we took the chance.

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Page 35:

Q. And what was your idea about the amount of rent that you would lose in terms of months?

A. We had figured we would lose between six to nine months ...

At page 61, the deponent asserts: "Yes, it took from three to five months to rent the premises ... this was a normal period under the circumstances".

We saw that on May 23, 1962, new tenants, the Bell Telephone Co. were found for the vacated space, a fortunate result Rudnikoff could, presumably, not foresee when, on April 27, same year, Chemcell's lease was cancelled. The irrebuttable fact remains, however, that this $75,000 indemnity was closely aligned with a possible rental loss of some six to nine months.

Appellant's counsel, both in his written proceedings and plea at trial, insisted that the relinquished lease was a capital asset; "that the aggregate of the Appellant's rights in respect of the unexpired term of the lease constituted 'property' within the meaning of section 139(1)(*ag*) of the Income Tax Act, and were thus rights of a capital nature". Such a proposition of law cannot, I believe, be readily countenanced. The personal nature of a lease *erga* the lessee suffers no doubt in civil law and I was proffered no reason to hold its legal classification differed *erga* the lessor. Albeit commenting more particularly upon article 1612 of the *Civil Code,* Mignault[1] expressly refers to this matter, setting a tenant's right well within the personal category; the authoritative commentator therefore writes (page 255):

> Il faut remarquer que ce n'est là qu'une application de l'article 1065, *car le droit du locataire n'étant que personnel et mobilier, l'action du locataire ne peut avoir un caractère de réalité.*

(Italics mine throughout.)

Next, on page 359, we read:

> et lorsque je dis que le locataire a droit à la possession si son bail a été précédemment enregistré, *je ne veux pas reconnaître qu'il y ait un droit réel, un jus in re* ...

The Court is strongly of the opinion that a deed of lease is not a capital asset or a real right but merely a personal one.

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[1] Mignault: *Traité de droit civil canadien,* tome 7.

Appellant's learned counsel attached special insistence, as an applicable precedent, to the case of *Harold F. Puder v. Minister of National Revenue*[2], the salient facts of which are thus summarized by Mr. Justice Thurlow: "The issue in the appeal is the liability of the appellant for income tax in respect of a sum of $4,161.15 received by him (the mortgagee) in addition to the principal sum on the release before maturity of a mortgage which he held". This mortgage, with many years to go before its terminal date, nevertheless provided for an option of repayment after three years of the balance of principal and interest to date together with a bonus of 3 months' interest.

When the mortgage had run but 15 months (instead of 36) "the mortgagor on arranging a sale of the ... property requested a release of the mortgage". This was acceded to on condition that he should pay "the unearned interest for that portion of the three year period remaining as a bonus, plus a further bonus of three months interest", amounting to $4,161.15 and $516.99 respectively.

To the learned judge, the above prepayments appeared:

> to have been simply a sum received in respect of the relinquishment by the appellant of his right to insist on payment of the mortgage according to its tenor which, in my opinion, was not a right of an income nature ... Moreover, I do not think that the fact that the appellant exacted the amount in question as a condition of giving up his right can affect the amount with an income quality or serve to characterize it as anything more than an amount received in exchange for a right of a capital nature *by one not engaged in a business of making investments for the purpose of securing amounts of that kind.*

For the present requirements, I need retain only the italicized observation *that Harold F. Puder was not engaged in the business of mortgage investments,* while the actual appellant is a corporation whose "raison d'être", and sole pursuit, consist in *the business* of renting office accommodation; an essential difference due to which the aforementioned precedent does not apply.

The case of *The Minister of National Revenue v. Farb Investments Limited*[3], decided by Mr. Justice Cameron, formerly of our Court, and relied upon by respondent's able counsel, bears much closer resemblance to the instant suit. Since the material factors in *re Farb Investments* are

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[2] [1963] C.T.C. 445.

[3] [1959] Ex. C.R. 113 at 117 and 118.

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rather involved, being a repetition of those lease-juggling acts, between an oil company and one of its thinly masked service station owners and clients or, more exactly, quasi-agents, I had better cite them at length:

> The respondent company in March 1954 leased its property to F who operated thereon two businesses, one a service station, the other a car wash. The lease was for five years at a monthly rental of $1,200 and payment of all taxes, as well as insurance premiums on the buildings on the lot. Subsequently an agreement was entered into by the respondent F. and Imperial Oil Ltd. whereby F surrendered his lease to the respondent who thereupon leased the service station to the oil company for a five-year term at an annual rental of $6,000 and the latter thereupon sublet the property to F for the full term less one day at the same rental, the respondent consenting. Pursuant to the agreement, and upon the surrender of the lease by F to the respondent and its acceptance thereof, the oil company paid the respondent $17,000 "as a consideration for such acceptance of surrender". At the same time a new lease for a five-year term was granted by the respondent to F of that part of the property on which he had carried on his car wash business, at a monthly rental of $700 and payment of taxes and insurance premiums thereon.
>
> In re-assessing the respondent for its 1956 taxation year the Minister added $17,000 to its declared income, describing that item as "surrender of lease". The respondent's appeal from the assessment was allowed by the Income Tax Appeal Board and the Minister appealed from its decision.

I now turn to Mr. Justice Cameron's textual pronouncement at page 117:

> By the terms of the lease made by the respondent to Saul Farb on March 1, 1954 (Exhibit 2), the lessee was required to pay a monthly rental of $1,200 for the whole of the property, and, in addition
>
> (*b*) the full amount of all taxes, local improvement rates and building insurance premiums charged against the said lessor in respect of the said demised premises or the buildings standing thereon.
>
> By the terms of the lease from the respondent to Imperial Oil dated November 1, 1954, however, the oil company was required only to pay the agreed cash rental of $6,000 per year and was not required to pay either the taxes on the service station or the building insurance premiums, which taxes and premiums consequently fell to be paid for the full term of five years by the respondent. In the sublease from Imperial Oil and Saul Farb, the latter was again not required to pay such taxes or insurance premiums. However, by the terms of the new lease from the respondent to Saul Farb, on the car wash portion of the property, the lessee was required to pay such taxes and insurance premiums.
>
> As a result of such changes, the respondent, which had previously not been liable for payment of taxes and building insurance premiums on the service station, was now obligated to pay them. There is no evidence before me as to what these would amount to over a period of five years, but there can be no question that they would be very substantial. The minute book of the respondent shows that the

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

Now it cannot be assumed that the respondent would voluntarily and without consideration forego the indemnification which it had previously had in regard to taxes and insurance premiums on the service station. I think there is a clear inference from the terms of the documents that the payment of $17,000 was closely related to the surrender of that right, more particularly as no evidence was given in explanation of why that right was surrendered.

For the reasons preceding, the eminent jurist held that:

In the absence of any explanation, I must infer that the agreed amount of cash to be paid, namely $17,000, either in whole or in some unascertained part, took the place of the right which was surrendered by the respondent. That being so, it was merely receiving in advance the amount of taxes and insurance premiums for a period of five years.

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

The appeal was consequently allowed by Mr. Justice Cameron.

The logical divergence is slight between "an additional payment of rent beyond the stipulated annual sum of $6,000" in view of future taxes and insurance premiums on commercial premises, and a compensation of $75,000 in lieu of eventual loss of rents also in connection with commercially exploited premises.

I believe the points at issue in the cause were correctly set down by Mr. Guilbault, one of the respondent's attorneys, who submitted that:

...in the present case, it is our contention that:

Firstly, the amount received by the Appellant was paid to it for damages suffered or to be suffered as the result of the premature termination of the lease, and that the termination can be considered as a normal incident in the activities of a landlord renting properties.

Secondly, that the rights or benefits surrendered by the Appellant do not represent a loss of an enduring asset, and that its structure (namely, Monart Corporation's mode of conducting business) was so fashioned as to absorb the shock (bearing upon only one tenth of its rentable space) as one of the normal incidents to be looked for, and ... it must be noted that in the lease there was a clause where a lessee could leave the premises, and it was stated by Mr. Rudnikoff that he could not oppose to that. This is one of the things that the corporation had looked for.

Thirdly, that the compensation received (is in substitution for) future profits surrendered. (cf. Argument for Respondent—Partial Transcript, pages 3 and 4.)

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Irrefutable evidence indicates that Monart Corporation, owner of an extensive office-renting property, as said above, was uniquely engaged in carrying on the business inherent to these pursuits and, inasmuch, cannot escape the purview of sections 3, 4 and 139, subsections (1)(*e*), (1)(*ac*), (1)(*ag*) and (1)(*av*) of the *Income Tax Act*, all of them so well known texts it would be superfluous to quote them. I must therefore conclude that the respondent's assessment of the appellant's income for the 1962 taxation year was levied according to law, since the sum of $75,000 paid to appellant by Dorchester Commerce Realty Company was in lieu of future rent in respect of the demised premises in Northern Building, and was also in the nature of profit derived from a property or a business of the appellant.

Consequently this appeal is dismissed and the respondent entitled to his costs after taxation.

Québec 1967

23 mai

Ottawa 14 juin

ENTRE:

LE MINISTRE DU REVENU NATIONAL ..APPELANT;

ET

WILBROD BHÉRER .....INTIMÉ.

Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, articles 3, 5(1)(b) et 11(9)(a)(b)(c), 139(1)(ab)(e)—Allocation annuelle—Président d'une commission scolaire—Frais de représentation et de déplacement sous l'autorité d'une législation provinciale.

L'intimé, un avocat, tout en pratiquant activement sa profession, durant les années 1958, 1959, détenait une charge publique, celle de président de la Commission des écoles catholiques de Québec. Sous l'autorité d'une législation provinciale, il recevait une allocation annuelle de $2,000.00 pour frais de représentation et de déplacement. Le Ministre ajouta au revenu déclaré de l'intimé les montants d'allocation reçus pour les années en question qu'il cotisa pour fins d'impôt. L'intimé s'objecta à cette cotisation devant la Commission d'appel d'impôt sur le revenu prétendant que ces montants avaient été exclusivement dépensés pour représentation et frais de voyage. La Commission d'appel de l'impôt sur le revenu lui donna raison en décidant que le Ministre ne pouvait pas ajouter ces montants pour cotisation. Par conséquent, les revenus de l'intimé, à titre de président de la Commission scolaire n'étaient pas imposables.

Le Ministre excipe de cette décision devant cette Cour, en invoquant que ces montants étaient imposables suivant les dispositions de l'article 5(1)(*b*) de la *Loi de l'impôt sur le revenu.*

Jugé: L'appel est accueilli; la décision de la Commission d'appel de l'impôt est infirmée, et jugement retournant les cotisations des deux années au Ministre aux fins d'une recotisation;

2° les allocations reçues par l'intimé pour dépenses dans les années 1958, 1959, doivent faire partie des revenus imposables de l'intimé pour chacune de ces années respectivement;

3° ces montants représentent une partie de son traitement à titre de frais de représentations et de déplacement et sont des montants reçus en partie «comme allocation pour frais personnels» et en partie «à titre d'allocation pour . . . autres fins» suivant les dispositions de l'article 5(1)(*b*);

4° ces montants doivent être ajoutés au traitement de la charge occupée par l'intimé pour déterminer le revenu de sa charge;

5° la Cour, en outre, ordonne qu'en vertu de l'article 11(9), un montant de plus de $1,000, devra être déduit dans le calcul du revenu imposable de l'intimé pour chacune des années 1958 et 1959;

6° la Cour accepte le témoignage de l'intimé à l'effet qu'il a dépensé plus de $1,000 dans chacune des deux années «pour frais de voyage et de représentation»;

7° les frais de cet appel sont contre l'appelant.

APPEL d'une décision de la Commission d'appel de l'impôt sur le revenu.

A. Garon et *P. Cumyn* pour l'appelant.

Wilbrod Bhérer, c.r. pour lui-même, intimé.

JACKETT P.:—Par cet appel, l'appelant excipe d'une décision de la Commission d'appel de l'impôt en date du 18 décembre 1962, maintenant l'appel de l'intimé, relativement aux cotisations pour les années d'imposition 1958 et 1959 de l'intimé, en vertu de la Partie I de la *Loi de l'impôt sur le revenu,* ch. 148, S.R.C. 1952.

La première question qui se pose ici est celle de savoir si l'appelant a eu raison d'ajouter, par ces cotisations, au revenu déclaré par l'intimé pour chacune de ces années d'imposition, un montant que l'intimé a reçu chaque année, à titre de président de la Commission des écoles catholiques de Québec, pour frais de représentation et de déplacement, sous l'autorité de l'article 3 du chapitre 108 des *Statuts de la province de Québec* de 1955 qui se lit en partie comme suit:

> 3. Nonobstant toute disposition législative inconciliable, le traitement du président de la Commission des écoles catholiques de Québec sera de cinq mille dollars par année, dont trois mille dollars à titre de salaire et deux mille dollars à titre de frais de représentation et de déplacement; . . .

L'intimé a reçu à titre de frais de représentation et de déplacement, sous l'autorité de cet article, $1,890 pour l'année 1958 et $2,000 pour l'année 1959.

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Selon l'article 3 de la *Loi de l'impôt sur le revenu*, le revenu d'un contribuable pour une année d'imposition, aux fins de la Partie I de ce statut, est son revenu pour l'année de toutes provenances et comprend le revenu pour l'année provenant d'entreprises et de charges. Aux termes de l'article 139(1)(*e*), le mot «entreprise», dans ce statut, «comprend une profession», et selon l'article 139(1)(*ab*), le mot «charge» signifie «le poste d'un particulier lui donnant droit à un traitement ou rémunération déterminée ou constatable» et l'expression «fonctionnaire» signifie «une personne détenant une telle charge».

L'intimé est membre d'une étude légale et pratique activement la profession d'avocat depuis au-delà de trente ans. Depuis le mois de janvier 1958, il est président de la Commission des écoles catholiques de Québec.

A mon avis, les montants que l'intimé a reçus en vertu de l'article 3 du chapitre 108 des *Statuts de la province de Québec* de 1955 ne sont pas des revenus de sa profession d'avocat et s'ils ne forment pas partie de son revenu à titre de président de la Commission des écoles catholiques de Québec, ils ne font aucunement partie de ses revenus.

Selon l'appelant, aux revenus de l'intimé pour les années 1958 et 1959 doivent être ajoutés les montants de $1,890 et $2,000 respectivement, en vertu de l'article 5(1) de la *Loi de l'impôt sur le revenu* qui se lit comme suit:

> 5. Le revenu provenant, pour une année d'imposition, d'une charge ou d'un emploi est le traitement, salaire et autre rémunération, y compris les gratifications, que le contribuable a touchés dans l'année, plus
>
> (*a*) la valeur de pension, logement et autres prestations de quelque nature que ce soit (sauf les prestations que lui procurent les contributions de son employeur à un fonds ou plan enregistré de pension, d'assurance collective, de service médical ou de prestation de chômage supplémentaire, ou sous le régime d'un tel fonds ou plan) qu'il reçoit ou dont il jouit dans l'année à l'égard, dans le cours ou en vertu de sa charge ou de son emploi; et
>
> (*b*) tous montants qu'il a reçus dans l'année à titre d'allocation pour frais personnels ou de subsistance ou à titre d'allocation pour toutes autres fins sauf
>
> (i) les allocations pour frais de voyage, frais personnels ou frais de subsistance, expressément établies dans une loi du Parlement du Canada,
>
> (ii) les allocations de déplacements et les allocations aux épouses de mobilisés reçues en vertu de règlements de service à titre de membre des forces navales, des forces de l'armée ou des forces aériennes du Canada,

(iii) les allocations de représentation ou autres allocations spéciales reçues à l'égard d'une période d'absence du Canada, à titre

(A) d'ambassadeur, de ministre, de haut commissaire, de fonctionnaire ou de préposé du Canada ou de membre des forces navales, des forces de l'armée ou des forces aériennes du Canada, ou

(B) d'agent général, de fonctionnaire ou de préposé d'une province,

(iv) les allocations de représentation ou autres allocations spéciales reçues par un agent général d'une province relativement à une période pendant laquelle il était à Ottawa en qualité d'agent général de la province,

(v) les allocations raisonnables pour frais de voyage reçues de son employeur par un employé en ce qui concerne une période de temps pendant laquelle il était employé relativement à la vente de biens ou à la négociation de contrats pour son employeur,

(vi) les allocations raisonnables reçues par un ministre du culte ou un membre du clergé desservant un diocèse, une paroisse ou une congrégation, ou en ayant la charge, pour les frais de transport que comporte l'accomplissement des fonctions de sa charge ou emploi, ou

(vii) les allocations (ne dépassant pas des montants raisonnables) pour frais de voyage qu'un fonctionnaire ou employé (autre qu'une personne employée relativement à la vente de biens ou à la négociation de contrats pour son employeur) a reçues de son employeur, si elles étaient calculées en fonction du temps véritablement passé par le fonctionnaire ou employé à voyager à l'extérieur

(A) de la municipalité où était situé l'établissement de l'employeur dans lequel le fonctionnaire ou l'employé travaillait ordinairement ou auquel il adressait ordinairement ses rapports, et

(B) de la région métropolitaine, s'il en est, où était situé cet établissement

dans l'accomplissement des fonctions de sa charge ou de son emploi;

moins les déductions permises par les alinéas *i*), *q*) et *qa*) du paragraphe (1) de l'article 11 et par les paragraphes (5) à (11), inclusivement, de l'article 11, mais sans autre déduction de quelque nature que ce soit.

Pour la solution du présent litige, l'article précité doit être lu avec l'article 11(9), qui se lit comme suit:

(9) Lorsqu'un fonctionnaire ou employé, dans une année d'imposition,

(*a*) était ordinairement tenu d'exercer les fonctions de son emploi ailleurs qu'au lieu d'affaires de son employeur ou à différents endroits,

(*b*) était tenu, aux termes de son contrat d'emploi, d'acquitter les frais de voyage que lui occasionnait l'accomplissement des fonctions de sa charge ou de son emploi, et

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(c) ne touchait pas une allocation pour frais de voyage non comprise, en raison du sous-alinéa (v), (vi) ou (vii), de l'alinéa b) de l'article 5, dans le calcul de son revenu, et n'a pas réclamé de déduction pour l'année aux termes du paragraphe (5), (6) ou (7)

il peut être déduit, dans le calcul de son revenu provenant de sa charge ou de son emploi pour l'année, nonobstant les alinéas a) et h) du paragraphe (1) de l'article 12, les montants qu'il a dépensés pendant l'année pour fins de voyage dans le cours de son emploi.

La première question à décider est si l'appelant a eu tort quand il a augmenté les revenus de l'intimé pour les années 1958 et 1959 de $1,890 et $2,000 respectivement sous l'autorité de l'alinéa (*b*) de l'article 5 de la *Loi de l'impôt sur le revenu*. La Commission d'appel de l'impôt décida qu'on ne pouvait ajouter ces montants aux revenus de l'intimé. L'appelant soutient que cette décision est erronée et que ces montants doivent faire partie du revenu imposable de l'intimé.

La décision de la Commission, telle que je la conçois, se réclame du principe suivant lequel la cause de *Samson v. le Ministre du Revenu national*[1] fut décidée par cette cour. Dans cette cause la question en jeu était en principe la même que celle qui doit être décidée dans la présente cause, mais avec cette distinction qu'elle fut décidée cependant d'après la *Loi de l'impôt de guerre sur le revenu* qui ne comportait pas de disposition semblable à l'article 5(1) de la *Loi de l'impôt sur le revenu*. En effet, après la décision dans la cause de *Samson*, un nouveau paragraphe fut ajouté à l'article 3 de la *Loi de l'impôt de guerre sur le revenu*, au chapitre 14 des *Statuts du Canada* 1943, qui se lit comme suit:

(4) Tout payement fait à une personne concernant quelque fonction, charge ou emploi, à titre d'allocations sur une base journalière ou autre base périodique, d'allocations ou frais de subsistance, ou autrement (sauf les allocations de voyage ou autres expressément fixées par et dans une loi du Parlement du Canada et les frais de voyage payés à un membre des forces navales, militaires ou aériennes du Canada dans les armées actives canadiennes) constitue un salaire de cette personne et est imposable comme revenu aux fins de la présente loi; cependant, les allocations de subsistance payées à des personnes servant hors du Canada mais maintenant un établissement domestique d'un seul tenant au Canada et étant, soit des employés du Gouvernement canadien, soit des membres des forces navales, militaires ou aériennes du Canada dans les armées actives canadiennes, ne sont pas réputées constituer un revenu imposable, jusqu'à concurrence d'un montant que le ministre peut déterminer à sa discrétion.

[1] [1943] R.C. de l'É. 17.

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Ce paragraphe, exprimé différemment, fut subséquemment incorporé dans l'article 5(1) de la *Loi de l'impôt sur le revenu, (supra)*, par l'alinéa (*b*) de ce paragraphe. Il m'est donc impossible de partager l'opinion de la Commission d'appel de l'impôt à l'effet que le principe appliqué par cette cour dans la cause de *Samson* peut être appliqué ici. Il faut en effet appliquer ici les mots de l'article 5 selon leur sens ordinaire.

L'article 5 énonce que le revenu provenant, pour une année d'imposition, d'une charge, est le traitement, salaire et autre rémunération que le contribuable a touchés dans l'année «plus», *inter alia*, «tous montants qu'il a reçus dans l'année à titre d'allocation pour frais personnels ou de subsistance ou à titre d'allocation pour toutes autres fins» sauf certaines exceptions qui ne s'appliquent pas ici. A mon avis, les montants qui nous concernent ici, ayant été reçus par l'intimé comme une partie de son traitement à titre de frais de représentation et de déplacement, sont des «montants» que l'intimé a reçus en partie comme «allocation pour frais personnels» et en partie «à titre d'allocation pour ... autres fins», dans le sens des mots exprimés dans l'alinéa (*b*) et, par conséquent, ils doivent être ajoutés au traitement de sa charge pour déterminer le revenu de sa charge, tel que requis par l'article 5(1).

Ce n'est pas là, cependant, la fin du présent appel, car les mots qui terminent l'article 5(1) indiquent qu'il faut soustraire de la somme obtenue (en ajoutant les montants reçus dans l'année) *inter alia* une déduction permise en vertu du paragraphe 9 de l'article 11.

A ce propos, il est intéressant de noter qu'au paragraphe 8[2] de l'avis d'appel, l'appelant admet qu'en vertu de l'article 11(9) l'intimé a droit de réclamer en déduction de son revenu pour chaque année la somme de $700. Cela veut donc dire que l'appelant admet que toutes les conditions exigées par les alinéas (*a*), (*b*) et (*c*) de l'article 11(9) ont été satisfaites. Il ne reste plus qu'à déterminer «les montants» que l'intimé «a dépensés pendant l'année pour

[2] Au début de l'audition de la présente cause, l'appelant demanda la permission d'amender son avis d'appel en retranchant ce paragraphe. Cette demande fut faite sans que l'intimé en fût notifié. Après avoir considéré toutes les circonstances, cette demande fut rejetée.

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fins de voyage dans le cours de son emploi». La Commission d'appel de l'impôt s'est prononcée comme suit à ce sujet:

> L'appelant a prouvé sans avoir été contredit qu'il avait bel et bien dépensé les montants qu'il a reçus au cours des années 1958 et 1959 et qu'il les a dépensés à titre de représentation et de déplacement dans l'exécution de ses devoirs de président de la Commission et qu'il ne lui est resté rien en propre à même ces montants.

Il ne me reste qu'à déterminer, suivant la preuve présentée devant cette cour, le ou les montants dépensés par l'intimé comme frais de déplacement.

L'intimé comparut personnellement et témoigna que lorsqu'on lui demanda d'accepter la charge de président de la Commission des écoles catholiques de Québec, il aurait préféré être tout simplement remboursé des dépenses encourues dans l'exercice des devoirs de sa charge mais on lui fit savoir que le moyen prévu à l'article 3 du chapitre 108 des *Statuts de Québec* convenait mieux à l'administration des affaires de la Commission et ce fut ce moyen qui prévalut. Comme il n'avait aucune obligation de rendre compte de ses dépenses et, ne réalisant pas qu'il pût être imposé pour des montants reçus comme dépenses encourues dans l'exercice de ses fonctions publiques, l'intimé ne garda aucun compte des argents ainsi dépensés. Évidemment, en ce moment, soit huit à neuf ans après que ces montants furent dépensés, l'intimé ne prétend même pas qu'il puisse se rappeler, d'une façon détaillée quelconque, les argents ainsi dépensés.

L'intimé déclara cependant sous serment qu'il avait dépensé plus de $2,000 dans chacune des deux années en «frais de représentation et de déplacement» et que de ce montant, dans chacune de ces années, il avait dépensé plus de $1,000 «pour frais de voyage dans le cours de son emploi». Tenant compte du fait qu'un contribuable qui en appelle avec succès à la Commission d'appel de l'impôt et qui ensuite est entraîné par le moyen d'un appel devant cette cour, ne peut contrôler que difficilement, s'il le peut, le cours des procédures, je suis prêt à croire que l'intimé n'a été pour rien dans le long délai qui s'est écoulé entre le moment où les argents furent dépensés et le moment où il réalisa qu'il était utile à la détermination de ses obligations fiscales fédérales qu'il en témoigne devant cette cour. Dans les circonstances, j'accepte le témoignage de l'intimé à l'effet qu'il a dépensé plus de $1,000 dans chacune des deux

années «pour frais de voyage dans le cours de son emploi» et je devrais ajouter que c'est en raison de ces mêmes circonstances que je n'ai pas permis au procureur du Ministre de presser l'intimé de questions quant aux détails de ces dépenses.

Ce que je viens de dire me paraît suffisant pour les fins du jugement que je dois rendre, qui maintiendra le présent appel, infirmera la décision de la Commission d'appel de l'impôt, lui substituera un jugement retournant les cotisations des deux années à l'appelant aux fins d'une recotisation basée sur le fait que les allocations pour dépenses pour l'année 1958 de $1,890 et les allocations pour dépenses de l'année 1959 de $2,000 doivent faire partie des revenus imposables de l'intimé pour chacune de ces années respectivement, et aussi qu'un montant de plus de $1,000 devra être déduit dans le calcul du revenu imposable de l'intimé pour chacune de ces années en vertu de l'article 11(9) de la *Loi de l'impôt sur le revenu*. Étant donné les circonstances de cette cause, mon jugement comportera aussi que l'appelant devra payer à l'intimé les frais de l'appel devant cette cour, que je fixerai par le jugement à $400 à moins que l'intimé ne choisisse de les faire fixer après taxation.

Bien qu'il me semble que j'aie dit tout ce qu'il fallait pour expliquer le jugement que j'ai l'intention de rendre, je veux ajouter quelques mots relativement aux dispositions de droit strict qui s'appliquent aux faits de la présente cause.

Ces faits peuvent être mis en relief assez brièvement comme suit:

L'intimé, durant les années en question, détenait une charge publique sous l'autorité d'une législation provinciale suivant laquelle il recevait une allocation annuelle de $2,000 pour «frais de représentation et de déplacement». Durant chacune de ces années, au cours de l'exercice de ses devoirs publics, il dépensa plus que le montant de $2,000 reçu

a) en frais réels de dépenses de voyage faits dans l'exercice de ces devoirs, et

b) en «frais de représentation».

Il n'est pas inutile de souligner en passant que, quant à l'intimé, «frais de représentation» ne signifie pas réceptions de convives à des restaurants dispendieux. Tels frais, en effet, selon lui, comportent des dépenses encourues par le

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président, au nom de la Commission, dans l'exercice des activités de la Commission conformément aux coutumes et pratiques reconnues dans la communauté. Les principales classes de ces dépenses furent en effet pour:

a) des prix donnés à des moments appropriés au nom de la Commission à des élèves, et

b) des marques de sympathies à l'occasion de la mort ou de la maladie d'un membre du personnel de la Commission ou de sa famille.

L'on pourrait fort bien se demander si l'on était dans la situation de l'intimé, comment il se peut que des argents perçus d'un gouvernement pour être dépensés à des fins publiques de la sorte et qui en fait ont été ainsi dépensés, puissent être imposés par un autre gouvernement comme s'ils avaient été reçus pour l'usage personnel du récipiendaire.

Quand la *Loi de l'impôt sur le revenu* fut décrétée pour la première fois en 1948, par le chapitre 52 des Statuts de 1948, il y avait deux aspects de l'article 5[3] qui, manifeste-

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[3] L'article 5 tel que décrété par le chapitre 52 de 1948 se lit comme suit:

5. Le revenu provenant, pour une année d'imposition, d'une charge ou d'un emploi est le traitement, salaire et autre rémunération, y compris les gratifications, que le contribuable a touchés dans l'année, plus

a) la valeur de pension, logement, et autres prestations (sauf les prestations que lui procurent les contributions de son employeur à ou relativement à un fonds ou système de pension de retraite, un système d'assurance collective ou un système de service médical agréés) qu'il reçoit ou dont il jouit dans l'année à l'égard, dans le cours ou en vertu de sa charge ou de son emploi, et

b) tous montants qu'il a reçus dans l'année à titre d'allocation pour frais personnels ou de subsistance ou à titre d'allocation pour toutes autres fins sauf

(i) les allocations de déplacement ou autres établies expressément dans une loi du Parlement du Canada,

(ii) les allocations de déplacement et les allocations aux épouses de mobilisés reçues en vertu de règlements de service à titre de membre des forces navales, militaires ou aériennes du Canada, ou

(iii) les allocations de représentation ou autres allocations spéciales reçues à l'égard d'une période d'absence du Canada, à titre

(A) d'ambassadeur, de ministre, de haut commissaire, de fonctionnaire ou de préposé du Canada ou de membre des forces navales, militaires ou aériennes du Canada, ou

(B) d'agent général, de fonctionnaire ou de préposé d'une province,

moins les déductions permises par les alinéas *g*) et *j*) du paragraphe premier de l'article onze et par les paragraphes sept et huit dudit article, mais sans aucune autre déduction de quelque nature que ce soit.

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ment, étaient inéquitables en ce qu'ils prévoyaient expressément la possibilité qu'un officier ou employé soit imposé sur un montant qui excède les gains nets qu'il perçoit de son emploi. Ces deux aspects étaient que

a) sauf quelques rares exceptions, un officier ou employé devait inclure dans son revenu toutes «allocations» (ceci était prévu par l'équivalent de 1948 de l'article 5(1)(*b*) que j'ai dû appliquer dans le présent appel), et

b) sauf quelques rares exceptions aussi, aucune déduction quelconque n'était permise dans la supputation du revenu provenant d'une charge ou d'un emploi.

J'ai toujours compris que l'on trouvait une justification à ces aspects apparemment inéquitables de la *Loi de l'impôt sur le revenu* dans les difficultés administratives que l'on trouve à appliquer une loi qui frappe d'un impôt le profit net réel du revenu d'un officier ou employé provenant de sa charge ou de son emploi. De plus, quant à ces aspects de la loi, je me rappelle avoir entendu dire que, pourvu que les employeurs tiennent compte de ces particularités de notre loi quand les conditions d'une entente avec un officier ou employé étaient arrêtées ou fixées, il ne se verrait pas frappé d'un impôt sur les montants qu'il ne pouvait utiliser pour ses fins personnelles.

Les nombreuses concessions législatives faites aux officiers ou employés affectés par l'état de la loi de 1948 et qui furent passées depuis cette date, témoignent au moins du fait que la forme restrictive que la loi avait adoptée à ce moment entraînait des résultats inéquitables.

J'ai voulu ajouter ces commentaires à cette partie de la *Loi de l'impôt sur le revenu* parce qu'il me semblait que lorsque survient un cas comme celui de l'intimé où cette cour décide que l'application stricte de la loi aurait comme résultat d'imposer à un contribuable un impôt sur un montant reçu par lui et qu'il a ensuite déboursé dans le cours de l'exercice de ses devoirs, la situation doit être mise en lumière d'une façon particulière afin que les autorités puissent considérer en toute connaissance de cause la question de savoir si une rémission devrait être accordée en vertu de l'article 22 de la *Loi sur l'administration financière*, S.R.C. 1952, chapitre 116.

Fredericton 1967 June 15-17

BETWEEN:

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada ..... PLAINTIFF;

AND

ALVIN C. DEWITT ..... DEFENDANT.

Crown—Injuries to soldiers—Collision with horses on highway—Whether escape of horses from pasture negligence.

Two members of the Armed Forces driving in a car on a country road in New Brunswick at night suffered injuries when the car struck two of defendant's horses which, while not of a jumping breed or known to jump a fence, had jumped the fence around their pasture though it had successfully served to keep horses inside for some 16 years and the pasture was supervised by a tenant of defendant.

Held, dismissing the action, defendant did not fail to take reasonable care to prevent his horses from straying on the highway *Fleming v. Atkinson* [1959] S.C.R. 513, applied.

ACTION for damages.

H. A. Newman for plaintiff.

James D. Harper for defendant.

THURLOW J.:—In this action the Crown seeks to recover damages resulting from loss of the services of Private William Totten and Private Lorway A. York, both members of the Armed Forces who were injured at or near Rear Maugerville in the Province of New Brunswick in the early hours of July 5, 1963, when a 1962 Comet Sedan owned and operated by Totten and in which York was a passenger collided on Highway No. 10 with two mares owned by the defendant. The action is based on alleged negligence on the part of the defendant in failing to take reasonable care to prevent his horses from straying on the highway. The amount of the damages sustained by the Crown as a result of the collision has been agreed at the sum of $1,453.22.

The highway in question runs between Fredericton and Minto, a distance of about 28 miles. It had been repaved in 1962 and at the point where the collision occurred it had a two-lane paved surface 22½ feet wide and 5 foot shoulders on either side giving it a total surface width of some 32 feet. There were very few buildings along this road and traffic on it was variously characterized as "light" with a

"fair" number of cars passing over it each day, and again as "quite a bit" and as including trucks. A considerable portion of the land fronting on this highway is an unfenced game preserve, the habitat of moose and bear and other game animals common in the province. Between this game preserve and the locality of the collision is a distance of 3½ miles wooded on both sides of the road until the defendant's pasture is reached. At the point where the collision occurred and for some 600 yards therefrom in the direction of Minto the road was straight and flat with nothing to interfere with a driver's view. The night was clear and the surface of the road was dry when the collision occurred.

The defendant's horses (four in all) had been pastured for about 6 weeks in a rectangular field of some 25 acres bounded on three sides by forest and on the remaining side by the highway where it had a frontage of from 16 to 18 chains. The pasture was surrounded by a three-strand barbed wire fence for most of its perimeter but had a four-strand barbed wire fence at one corner separating from the enclosure a small parcel of the defendant's land adjoining the highway on which a dwelling house stood. There were no other buildings on the defendant's land. The fence was from 3½ to 4 feet high. It had been repaired each spring, including that of 1963, and had been maintained in repair during the pasturing seasons. In it were 3 gates. The first of these was a large truck gate on the highway side which was fastened when closed by a knotted and wired chain about a foot from the top and another about a foot from the bottom. The next was a permanently closed gate in a portion of the fence separating the pasture from the yard of the dwelling house. This gate was 4 feet high and in addition had a strand of barbed wire 6 to 8 inches above it put there for the purpose of keeping the horses from rubbing against the gate. The third gate was a small one in the other portion of the fence separating the pasture from the dwelling house yard. It was used to gain access to a spring in the pasture which provided water for the dwelling. This gate was secured in the daytime by a leather strap fastened to the post and looped over a metal projection of the gate. At night a wire was added passing around the post and through the gate. A man named Thomas Corrier and his family occupied the dwelling house, rent free, under an arrangement by which he was to keep an eye

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on the horses. What was expected of him was that he report any injury a horse might sustain in the pasture, prevent molestation of the horses and either repair any damage to the fence (if of a very minor character) or report it to the defendant. The defendant himself lived at St. Mary's 7 miles from the pasture and visited it at irregular intervals sometimes more than once in a week and sometimes less frequently. He had owned the pasture for 16 years and in that time no horse had to his knowledge ever gotten loose and strayed on the highway from it.

One of the two horses involved in the collision was a two-year old mare which the defendant had intended to train for sulky racing. The other was a brood mare which the defendant had owned for 8 years. Neither horse had been kept in this pasture before the spring of 1963. Though capable of jumping about 4 feet neither horse was known to have any predisposition to jump fences and none of the four horses in the pasture was of a breed used for jumping. These horses had not previously been on the highway except when led from the van which brought them there to the pasture gate. It is I think to be inferred that in the time they had been in the pasture they would have become accustomed to the ordinary noises of traffic on the highway.

On the evening of July 4, 1963 Corrier, who had been living in the dwelling for more than a year went to a drive-in theatre and returned between 12.30 and 1.00 a.m. Before going he checked the small gate to see that it was secured and wired and after returning from the theatre he went to bed. He was awakened by his wife at 2.25 a.m. and on going outside the house saw two of the horses near the door of the house and the other two on the culvert of the driveway leading from the highway to the house. He went at once to the small gate, had some difficulty in removing the wire fastening, opened the gate and drove the two horses which he had seen near the door back into the pasture. But he did not have time to go after the other two when a car which he had seen at a distance of 600 yards in the direction of Minto approached and the horses started running in the direction of Fredericton. Corrier heard them galloping on the shoulder of the road then on the pavement and then he heard the sound of an impact. The car came to a stop, according to Corrier, some 200 yards beyond the

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driveway and on its proper side of the pavement which was the opposite side from that on which the pasture lay. Both horses were killed, both Totten who was the driver of the car and York his passenger were injured and Totten's car was damaged. An inspection of the fence the following morning revealed no break in or damage to it or to the gates save that the strand of wire above the permanently closed gate was broken. One of the horses not involved in the collision had a cut in a hind leg.

I should say at this point that I observed nothing about the demeanour of Corrier which would lead me to discredit his testimony that the small gate was closed and fastened when he found the horses outside the enclosure immediately prior to the accident. Though invited by counsel for the Crown to find that the gate had been open and that the horses strayed out of the pasture I see on the evidence no valid reason for so holding. On the contrary I think the evidence points to the conclusion that the horses for some unknown reason jumped the fence not improbably through having been scared by some unusual noise or event. In this connection I discount and disregard the defendant's suggestion that a bear in the neighbourhood might have caused them to jump the fence not because a bear might not frighten them but because there is no evidence of a bear having been in the neighbourhood that night.

As I see it the first question to be determined is whether the defendant failed in his duty to users of the highway to take reasonable care to prevent his horses from straying on the highway. To my mind this is a case of escaping animals as distinguished from a case such as *Fleming v. Atkinson*[1] where the cattle were allowed to stray on the highway to feed but in the light of the principle which appears to me to have been established by that judgment the distinction is merely one of fact, the problem remaining the same, that is to say, the application of the ordinary rules of negligence to a different set of facts. The duty of reasonable care which an owner of property owes to users of a highway to prevent domestic animals not known to be dangerous from straying on to the highway, as propounded by Judson J. in *Fleming v. Atkinson,* is not in my opinion an absolute duty to keep them off the highway at the

[1] [1959] S.C.R. 513

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owner's peril. What appears to me to be required is the exercise of reasonable care to prevent them straying where their presence may create danger to users of the highway. What is reasonable care will depend on all the circumstances including particularly the nature of the highway and the amount and nature of the traffic on it.

Here the highway was a newly repaved road carrying automobile and truck traffic through largely wooded country between a small mining town and the City of Fredericton. This traffic was not heavy in volume but it was fast moving and this to my mind demanded of the defendant a high standard of care to keep his horses from straying on it.

In my view, however, he met the required standard. The fence around his pasture had successfully served to keep horses in it for some sixteen years. None of the four horses pastured there on the occasion in question was of a jumping breed or had been known to jump a fence. In addition the defendant had a man living in the dwelling as a tenant whose function was to keep an eye on these horses, no doubt principally for the protection of the horses but nevertheless serving, as the events of the night proved, to ensure that if the horses should get out of the pasture they would be speedily returned to it. As I see it only the fortuitously sudden and rapid arrival on the scene of the Totten car intervened to prevent Corrier from returning the other two horses to the pasture immediately after the first two had been driven into it. In short, in my view, the defendant had taken reasonable care to keep his horses off the highway by providing what had served for a long time as an adequate fence for that purpose. He had moreover no reason to expect that the horses would jump the fence but at the same time he had present on the scene a man, who as events proved, would serve not only to keep him advised of the need for repairs to his fence as such need arose, but would act to get his horses back in their pasture when by an unexpected mischance they jumped the fence and got out.

Viewing the matter as I think a jury would and as I think it should be viewed I am unable to reach the conclusion that in the circumstances the defendant failed to take

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reasonable care to prevent his horses from straying on the highway and I therefore conclude that he was not guilty of the negligence alleged against him.

It follows from this finding that the action must fail but I should not part with the case without expressing my view of the evidence of Totten as to how the collision occurred.

Totten and York who were both stationed at Camp Gagetown had attended a dance at Minto and were returning to Camp Gagetown *via* Fredericton when the accident occurred. Totten had had a pint of beer between 6.30 and 7.15 in the evening before leaving Camp Gagetown, he had had a quart of beer at a legion hall in Minto somewhat before 9.30, when he went to the dance, and he had had a pint of beer about a half hour after arriving at the dance. The collision occurred at about 2.30 a.m. the following morning. An attempt was made to show that Totten had had more liquor during the course of the evening and that his ability to drive was impaired at the time of the collision but this was not substantiated and both the attempt to establish it and the method by which such attempt was made in my view were entirely unwarranted. I am satisfied that Totten's ability to drive was not impaired by alcohol.

Totten's account of how the collision occurred was that as he was driving towards Frederiction at 50 to 60 miles per hour he noticed two brown objects at a distance of 400 to 600 feet ahead, one on either side of the road, that on the left being a little nearer than the other, that he thereupon looked at York, who was on the front seat, and observed that he was asleep, that he then looked up again and when he did he saw four eyes like headlights reflecting the light of his car's headlights. He was unable to estimate how far these eyes were away from him at that moment but he immediately applied his brakes and at the time grabbed York by the hair and pulled York's head down to his lap as a precaution. Totten was also unable to say how far ahead the objects were when he first realized they were horses but he said that when still a good hundred feet ahead they bolted from the shoulders to the centre of the highway and that the last impression he had of them before the impact was of two rumps. He had kept his brakes on from the time when he observed the four eyes but was unable to

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avoid the collision. In the impact his head struck something probably the windshield, which broke and he sustained cuts and was unable to see because of glass in his eyes. Totten also said that when he first observed the brown objects at a distance of 400 to 600 feet ahead he neither braked nor took his foot from the accelerator, that the objects did not look like trees and were too big to be persons and that they were not moving, that they might have been cars but did not look like cars, he had never seen anything like them before but that the highway was open and they were off it (which I take to mean they were off the pavement) and he was proceeding through, that there was no reason why he should stop and that it did not occur to him to slow down. He said further that if he had known what they were he would have slowed down and could have stopped without hitting either of them.

Private Totten's evidence was given in a manner which I regard as exemplary. He stood erect throughout a lengthy examination and cross-examination and gave his answers promptly and with apparent candour. He impressed me as one who was honestly endeavouring to recall and describe details of an event which occurred nearly four years ago and which happened quickly and caused him injuries which in my view would not be likely to improve his ability to describe what happened. He was closely and rigourously cross-examined but was in my opinion not shaken on any important point. I therefore regard his evidence as worthy of belief but subject to the caution that I think he is mistaken on some points. In particular I think he is mistaken in thinking that he saw brown objects on both sides of the pavement and I prefer on this point the evidence of Corrier that both horses were on the same side of the road as the car approached. This seems to me to be more consistent with the car having struck both horses in their rear and stayed throughout on its own side of the highway.

On either view of the matter, however, it appears to me that Totten was negligent when he saw these objects some 400 to 600 feet ahead in not slowing down until he had ascertained what they were and in taking his eyes off the road ahead and looking at York for 2 to 3 seconds at that juncture when it was important for him to keep his eyes on the road because of the possible hazard which these unidentified and strange objects, which had not been there

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when he passed that way the previous evening, presented. Had he slowed down and kept his eyes on the road and on the objects he would not have approached them so quickly and he could have seen earlier the magnitude of the hazard which they presented. The chances of scaring the horses as well would probably have been lessened. It is also clear on his own statement that had he slowed down he could have avoided hitting either of them. I find therefore that he was negligent in these respects and that such negligence was the cause of the collision.

The presence of the horses on the highway was in my opinion a contributing cause of the collision because Totten did not in fact know that the objects were horses, which might react as they did, until it was too late for him to avoid colliding with them. However, as I have reached the conclusion that their presence on the highway was not due to negligence on the part of the defendant the fact that their presence was in the circumstances a contributing cause of the collision has no effect on the result of the action.

There will therefore be judgment for the defendant with costs.

Ottawa 1967 June 20

BETWEEN:

HOME JUICE COMPANY .....APPLICANT;

AND

ORANGE MAISON LIMITED .....RESPONDENT.

Trade marks—Practice—Proceedings to strike out entry—Trade Marks Act, s. 58(3)—Exchequer Court Rule 36—Affidavits—Objections to relevancy and admissibility—When to be disposed of.

Objections to the relevancy or admissibility of affidavits filed in trade mark proceedings governed by Exchequer Court Rule 36 should not be dealt with before the hearing except at least in two cases (1) where special leave is sought under the Rule to admit evidence which is obviously inadmissible and (2) where necessary to permit the hearing to proceed in an orderly manner.

APPLICATION.

Christopher Robinson, Q.C. for applicant.

Gordon F. Henderson, Q.C. for respondent.

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JACKETT P. (orally):—This is an application by the applicants for an order that the respondent may not put before this Court for the hearing and determination of these proceedings a certain affidavit that has been filed on the ground that it contains irrelevant and inadmissible evidence.

The proceedings were instituted by notice of motion for an order striking out the registration made by the respondent in the Trade Mark Register of the trade mark "Orange Maison".

By virtue of section 58(3) of the *Trade Marks Act*, proceedings of this kind are to be heard and determined summarily on evidence adduced by affidavit unless otherwise directed, and it has been ordered that this application is to be heard on June 27 next.

Paragraph (6) of Rule 36 of the Rules of this Court provides for the respondent filing within a specified time "any affidavits which he proposes to put before the Court for the hearing and determination of the proceedings". Paragraph (3) of the same rule contains a similar provision with reference to the affidavits which the applicant proposes to "put before" the Court.

On May 25 last, I granted an application by the applicant to use, on the hearing, a copy of material filed by the respondent in the Trade Marks office in connection with another trade mark application on the view that it constituted an admissible form of evidence, but I expressly left the question of "relevancy, etc." to be decided at the hearing.

After the time for filing its affidavits had expired, the respondent applied *inter alia* for leave to file "expert evidence with respect to the meaning of the words Orange Maison". I rejected this application on the ground that, as I understand the rules of evidence, such evidence was clearly not admissible. As I understand the law, while the meaning of words having a special meaning in a particular trade, science, industry, or other particular element of society may be the subject matter of evidence in connection with a contention that the words have been used in a statute, contract or other context in that particular meaning, the meaning of words when used in the ordinary way as part of one of the official languages is a matter for the

Court with such aids to interpretation as are available to it and cannot be the subject matter of opinion evidence. Otherwise, the Court could be inundated with expert testimony on every question of interpretation that arises. I therefore dismissed the application to adduce such expert evidence.

The applicant, thereupon, proceeded with the present motion, which is designed to force the respondent to withdraw an affidavit filed under Rule 36(6) and to substitute an affidavit omitting certain portions of the present affidavit that, as the applicant argues with some force, are irrelevant to the issues before the Court and are therefore inadmissible.

I am faced with the fact that I have given leave for one piece of evidence to be used subject to consideration of its relevancy at the hearing and that I have refused leave to file other testimony at this point on the ground that it is inadmissible.

Affidavits may be filed within the time limited without special leave or after the time limited with leave.

If leave is sought and it then appears to the Court that the subject matter of the request for leave is clearly inadmissible then, in my view, it would not be a proper exercise of judicial discretion to grant the leave. It was on this view that I dismissed the application for the expert evidence affidavit.

Where the affidavits are filed in time, questions of relevancy or admissibility, like questions of cogency, should ordinarily be left to be dealt with on the hearing of the application. On this view, I dismiss the present application.

I am not to be taken as saying that there might not be such an abusive filing of irrelevant affidavits or other filing of material before the hearing as would call for an application in advance of the hearing to have the Court exercise a proper judicial discretion to put the matter in proper shape for the hearing.

What Rule 36 contemplates is the filing in advance of the hearing of the affidavits that the respective parties "propose" to "put before the Court" for the hearing. In my view, in the ordinary course of events each of the respective parties, having complied with this condition precedent

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to using such affidavits as evidence, should tender at the hearing such of the affidavits that he has previously filed as he then decides to make part of his case at the hearing. At that time, the opposing party can make all proper objections to their being admitted and the Court can, after hearing anything that the parties may have to say, admit each affidavit, in whole or in part, or reject it. As a practical matter, the most efficient and economical way of deciding such questions is by having them so raised and decided at the hearing and, as a practical exercise of judicial discretion, the parties should not be permitted to raise them before the hearing. The two exceptions to that general rule that I contemplate at the moment are

(a) where a party has to obtain leave to admit evidence and it is obvious, in the view of the Court, that it is inadmissible, and

(b) where the Court can be convinced that, as a practical matter, the admissibility of the affidavits filed by one of the parties should be considered some time before the hearing so that the hearing can proceed in an orderly manner.

It is understood between the Court and counsel that the fact that I dismissed the application for leave to file an expert evidence affidavit will be placed on the record at the hearing, so that, in the event of an appeal from the determination of these proceedings, the respondent may make that fact a subject matter of an application for a new hearing, if he is so advised.

As this is the first time that the point has arisen, the costs will be costs in the cause.

Ottawa
1967
June 21-22

BETWEEN:

MARFLO DRILLING COMPANY LIMITED (formerly MARFLO OILS LIMITED) ..... APPELLANT;

AND

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

Income tax—Company's principal business oil production—Leases acquired in 1960 and 1961 and sold in 1963—Sale price included in income for 1963—Whether cost deductible in any year—Income Tax Act, s. 83A(5a) and (5b), am. 1962, c. 8, s. 19.

Appellant company, whose principal business was the production of petroleum and natural gas, acquired two petroleum and natural gas leases in 1960 and 1961 and sold them on October 15th 1963 for $57,700. Appellant conceded that this sum was required to be included in computing its income for 1963 by s. 83A(5b) of the *Income Tax Act* as amended by S. of C. 1962, c. 8, s. 19 but contended that it was entitled to a deduction for some taxation year in respect of the cost or value of the two leases.

Held, appellant was not entitled to a deduction for any year in respect of the cost or value of the two leases.

INCOME TAX APPEAL.

Maurice A. Régnier for appellant.

D. G. H. Bowman and *J. M. Halley* for respondent.

JACKETT P. (orally):—This is an appeal directly to this Court from the assessment of the appellant for the taxation year 1963 under Part I of the *Income Tax Act.*

Pursuant to Rule 150 of the Rules of Court, the parties to the appeal stated questions of law arising in the appeal in the form of a special case for the opinion of the Court.

Before referring to the facts stated by the special case, it is helpful to recall that Part I of the *Income Tax Act* imposes an income tax upon the taxable income for each taxation year of every person resident in Canada (section 2), that a person's taxable income for a taxation year is his "income" minus certain specified deductions (section 3) and that "income" for a year, in so far as a person who has no income source for the year other than a business is concerned, is "the profit . . . for the year" from the business. It is also helpful to have it in mind that the "profit" from a business for a year is, generally speaking, the revenues of

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the business for the year minus the costs, other than capital costs, of earning those revenues. Generally speaking, therefore, the cost of acquiring the capital assets employed in a business operation and expenses related to a period before the business operation was commenced are not deductible in computing the annual profits from a business except to the extent that there exists special provision in the statute authorizing such a deduction.

Applying such principles to the case of a corporation whose business consists in the production of petroleum and natural gas, it would not, generally speaking, be possible to deduct drilling and exploration costs as a cost of earning the revenues from its business of producing petroleum and natural gas in the absence of express authority for such a deduction. Such authority had been granted from time to time on a term basis by provisions that were not inserted in the *Income Tax Act*. In 1955 these provisions were made a permanent feature of the *Income Tax Act* when section 22 of chapter 54 of the Statutes of 1955 added a new section 83A to the statute. Section 83A, as then enacted, read in part as follows:

> (3) A corporation whose principal business is
>
> (*a*) production, refining or marketing of petroleum, petroleum products or natural gas, or exploring or drilling for petroleum or natural gas,
>
> ...
>
> may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> (*c*) the aggregate of such of
>
> (i) the drilling and exploration expenses, including all general geological and geophysical expenses, incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada, and
>
> (ii) the prospecting, exploration and development expenses incurred by it in searching for minerals in Canada,
>
> as were incurred after the calendar year 1952 and before the end of the taxation year, to the extent that they were not deductible in computing income for a previous taxation year, or
>
> (*d*) of that aggregate, an amount equal to its income for the taxation year
>
> (i) if no deduction were allowed under paragraph (*b*) of subsection (1) of section 11, and
>
> (ii) if no deduction were allowed under this subsection,
>
> minus the deductions allowed for the year by subsection (1) or (2) of this section and by section 28.
>
> ...

(5) In computing a deduction under subsection (1), (3) or (4), 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 per acre.

• • •

Whether or not subsection (3) of section 83A would otherwise have permitted a deduction of a lump sum paid for "a right, licence or privilege to explore for, drill for or take petroleum or natural gas" as being "drilling" or "exploration" expenses, the effect of subsection (5) was to exclude from subsection (3) deductions any amount paid for such a "right..." other than the annual payments referred to therein. See *Western Leaseholds Ltd. v. Minister of National Revenue*.[1]

Section 19 of chapter 8 of the Statutes of Canada of 1962 made certain changes in section 83A (to which changes that do not concern us in this case had been made in the meantime). So far as is relevant, the 1962 amendment reads as follows:

(3) All that portion of paragraph (*c*) of subsection (3) of section 83A of the said Act following subparagraph (ii) thereof is repealed and the following substituted therefor:

"as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year, or"

(4) All that portion of paragraph (*d*) of subsection (3) of section 83A of the said Act following subparagraph (ii) thereof is repealed and the following substituted therefor:

"minus the deductions allowed for the year by subsections (1), (2), (8a) and (8d) of this section and by section 28."

(5) Section 83A of the said Act is further amended by adding thereto, immediately after subsection (3a) thereof, the following subsections:

"(3b) A corporation whose principal business is

(*a*) production, refining or marketing of petroleum, petroleum products or natural gas, or exploring or drilling for petroleum or natural gas,

• • •

may deduct, in computing its income under this Part for a taxation year, the lesser of

(*f*) the aggregate of such of

(i) the drilling and exploration expenses, including all general geological and geophysical expenses, incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada, and

[1] 61 DTC 1309.

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(ii) the prospecting, exploration and development expenses incurred by it in searching for minerals in Canada,

as were incurred after April 10, 1962, and before the end of the taxation year, to the extent that they were not deductible in computing income for a previous taxation year, or

(g) of that aggregate, an amount equal to its income for the taxation year

(i) if no deduction were allowed under paragraph (b) of subsection (1) of section 11, and

(ii) if no deduction were allowed under this section,

minus the deductions allowed for the year by subsections (1), (2), (3), (4), (4a), (8), (8a) and (8d) of this section and by section 28.

. . .

(7) Subsection (5) of section 83A of the said Act is repealed and the following substituted therefor:

. . .

(5) In computing a deduction under subsection (1), (2) or (4), 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, acquired before April 11, 1962, other than an annual payment not exceeding $1 per acre.

(5a) Where an association, partnership or syndicate described in subsection (4) or a corporation or individual has, after April 10, 1962, acquired under an agreement or other contract or arrangement a right, licence or privilege to explore for, drill for or take in Canada petroleum, natural gas or other related hydrocarbons (except coal) under which agreement, contract or arrangement there was not acquired any other right to, over or in respect of the land in respect of which such right, licence or privilege was so acquired except the right to enter upon, use and occupy so much of the land as may be necessary for the purpose of exploiting such rights, licence or privilege, an amount paid in respect of the acquisition thereof shall, for the purpose of subsections (3b), (3d), (4a), (4b) and (4c), be deemed to be a drilling or exploration expense on or in respect of exploring or drilling for petroleum or natural gas in Canada incurred at the time of such payment.

(5b) Where a right, licence or privilege to explore for, drill for or take in Canada petroleum, natural gas or other related hydrocarbons (except coal) is disposed of by a corporation described in subsection (3b) or an association, partnership or syndicate described in subsection (4) after April 10, 1962, any amount received by the corporation, association, partnership or syndicate as consideration for the disposition thereof shall be included in computing its income for its fiscal period in which the amount was received unless the corporation, association, partnership or syndicate

(a) acquired such right, licence or privilege by inheritance or bequest, or

(b) acquired such right, licence or privilege before April 11, 1962 and disposed of it before November 9, 1962.

. . .

(15) Subsections (1) to (12) and subsection (14) are applicable to the 1962 and subsequent taxation years, and subsection (13) is applicable in the case of any taxation year ending after April 10, 1962.

It is the 1962 amendment to section 83A that gives rise to the only problem that now remains to be decided in this appeal.

The stated case shows that the appellant's principal business at all material times was the production of petroleum and natural gas, that, in 1960 and 1961, the appellant acquired two petroleum and natural gas leases, and that on October 15, 1963, the appellants sold such leases and received therefor $57,700, which amount was the consideration for the disposition of "a right, licence or privilege to explore for, drill for or take in Canada petroleum, natural gas or other related hydrocarbons (except coal)".

It is common ground that these leases were capital assets of the appellant's business and that subsection (5b) of section 83A of the *Income Tax Act,* as amended in 1962, required the amount of $57,700 to be included in computing the appellant's income for the 1963 taxation year as being the proceeds of rights of the kind described in that subsection. It is also common ground that there is no provision in section 83A that permits the appellant to deduct, in computing its income for any taxation year, any amount in respect of the cost of acquisition of such leases or in respect of their value.

The respondent's position is that, while subsection (5b) of section 83A required the $57,700 received for the leases to be included in computing the appellant's income for 1963, the appellant is not entitled to any deduction in computing its income for any year in respect of the cost or value of such leases. The appellant contends that it is entitled to some such deduction.

While other questions were raised by the pleadings and the stated case, as a result of the position taken by the appellant at the hearing, the only questions remaining to be decided are whether the appellant is entitled to make some such deduction as those to which I have referred, and, if so, what deduction is it permitted to make and in respect of what taxation year is it permitted to make it.

While I quite appreciate that the reason that the appellant brought the appeal is that the result of the assessment, and of the position taken by the respondent, is that the appellant is required to pay a tax called an "income tax" on an amount that is not only the proceeds of a capital

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transaction, but is the gross amount of the proceeds of that transaction and not merely the profit from it. The result is so harsh that it is not unnatural that the appellant should strive for some means of avoiding it.

Nevertheless, I do not consider that the appeal is fairly arguable once these difficult statutory provisions are comprehended sufficiently to understand what Parliament did in 1962 in so far as it is relevant to the problems raised by the appeal.

Prior to the 1962 amendment, an oil producing company could include in the computation of the exploration and other expenses the deduction of which was permitted by section 83A annual payments not exceeding $1 per acre paid for a "right, licence or privilege to explore for, drill for or take petroleum or natural gas" (hereinafter called petroleum or natural gas "rights") but could not deduct anything in respect of any lump sum paid for any such rights (section 83A(5)).

The 1962 amendments removed this restriction for the future (section 83A(5a)) and made it possible to deduct any amount paid in respect of the acquisition of petroleum *or* natural gas rights in the computation of the exploration and other expenses the deduction of which was permitted by section 83A. The result of this was to reduce the amount of the income otherwise subject to income tax by the amounts so paid for capital assets. (Such a deduction bears some analogy to the section 11(1)(*a*) deduction allowed for capital cost.) Parliament apparently was of the view that it was only logical that, if the cost of such capital assets was to be deductible in computing income, the proceeds of the disposition of such assets, when sold, should be added back to income. (This would have some analogy to the recapture of capital cost allowance.) Accordingly, at the same time, it was provided that, where petroleum or natural gas rights are sold, "any amount received as consideration for the disposition" is to be included in computing income (section 83A(5b)).

So far as the future was concerned, therefore, the scheme adopted by subsection (5a) and subsection (5b) of section 83A is, in its broad outline, easily understood and lends itself to a rational justification.

The problem arises in connection with the treatment provided in respect of petroleum or natural gas rights acquired before, and disposed of after, April 10, 1962, the cut-off date adopted for the new scheme.

The right to deduct the full "amount paid in respect of the acquisition" of petroleum or natural gas rights in lieu of the "annual payment not exceeding $1 per acre" was made effective in respect of acquisitions after April 10, 1962. (Compare new subsection (5) and subsection (5a) with subsection (5) as it was before the 1962 amendment.) The obligation of bringing into income amounts received as consideration for the disposition of petroleum or natural gas rights was imposed in respect of dispositions after April 10, 1962, unless (*inter alia*) such right was both (a) acquired on or before that date, and (b) disposed of before November 9, 1962.

Harsh as it might appear in the light of the facts of this case, the Parliamentary intention appears to me to be too clear for argument that

(a) where acquisitions took place on or before April 10, 1962, the $1 per acre deduction was to be the only one permitted, and, where acquisitions took place after that day, the right to deduct cost was to be unlimited,

(b) the proceeds of sale of all such rights acquired after April 10, 1962, are to be included in computing income, and

(c) the proceeds of sale of all such rights acquired on or before April 10, 1962, are to be included in computing income unless disposed of in the period between April 10, 1962 and November 9, 1962, or unless they fall within paragraph (*a*) of subsection (5b) of section 83A.

In other words, it seems clear that Parliament decided that it would allow costs of these rights as exploration expenses and would, at the same time, tax proceeds of the disposition of such rights. It also seems clear that in order to meet the point of view that proceeds of disposition should not be taxed where the rights were acquired at a time when costs were not so allowed, a period of almost seven

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months was provided during which such rights could be disposed of without giving rise to taxation of the proceeds of disposition.

Having regard to my view of the statutory scheme adopted in 1962 as just expressed, it follows that the questions of law set out in subparagraphs (*a*) to (*f*) inclusive of paragraph 8 of the stated case are answered in the negative. The remaining questions do not require to be answered.

Out of respect for the argument of counsel for the appellant, I should say that he put forward a submission to the effect that, when Parliament required an amount of a capital nature to be included in computing income, Parliament must have been impliedly treating it as income from a source (in this case the source being the disposition of the capital asset) and, in accordance with general principles, the cost of earning the amounts that are impliedly deemed to be revenues from that source must be set off against such revenues. Had the matter been one where Parliament had simply required that an amount of a capital nature be included in computing income, I should have felt constrained to give the submission, which was put forward very persuasively indeed, very careful consideration. As, however, in my view, there can be no doubt, upon a reading of the 1962 amendments, that the Parliamentary intention was that, in the case of a disposition after November 9, 1962 of petroleum or natural gas rights that had been acquired on or before April 10, 1962, the proceeds of disposition should be included in computing income and that there should be no deduction of any lump sum paid for them, in my view this is not a case in which it can be implied that there was a Parliamentary intention that related costs are deductible.

I propose now to deliver judgment as indicated above. I also propose to deliver judgment that the appeal be dismissed with costs.

I shall, however, defer delivering the latter judgment for one week to provide an opportunity for the parties to make any submission they may wish to make in writing or to seek an opportunity for verbal submissions.

Montreal 1967 Apr. 11 Ottawa June 23

BETWEEN:

N. M. PATERSON & SONS LIMITED (*Defendant*) ..... APPELLANT;

AND

ROBIN HOOD FLOUR MILLS, LIMITED (*Plaintiff*) ..... RESPONDENT.

Shipping—Damage to cargo—Second engineer turning on wrong valve—Whether shipowner liable—Water Carriage of Goods Act, R.S.C. 1952 c. 291, arts. III, r. 1, IV, rr. 1, 2(a).

Defendant carried a cargo of wheat for plaintiff from Kingston to Montreal in its ship. Following discharge of part of the cargo in Montreal the ship's second engineer, who was in charge of the engine-room at the time, was instructed to put 20 to 25 inches of water in the ballast tanks of No. 2 hold to trim the vessel to allow the balance of the cargo to be discharged. The second engineer turned on the wrong valve with the result that the water entered No. 2 cargo hold and damaged wheat stored there. Defendant denied liability under Art. IV, r. 2(a) of the Schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, contending that the loss was due to error in management of the ship. The second engineer, who held a certificate of qualification issued by the Government of Canada, was engaged at the commencement of the voyage without inquiry as to his previous experience or his familiarity with the type of machinery and piping in defendant's ship, which were in some respects peculiar to that ship; he was not given any instruction as to the ship's peculiar arrangement for flooding the hold, and there was no plan of the engine-room piping system on board.

Held, affirming the judgment of Smith D.J.A. ([1967] 1 Ex. C.R. 431), defendant was liable for the damaged wheat.

Per Thurlow J.: By reason of the second engineer's lack of knowledge and the absence of a plan of the engine-room piping the ship was not properly manned and equipped and was therefore unseaworthy from the commencement of the voyage, and this was the cause of the loss. The evidence supported this conclusion and in the absence of opposing evidence no question arose as to onus of proof of unseaworthiness. In engaging the second engineer solely on the basis of his certificate and without further inquiry as to his experience and competence and instructing him as to those peculiar features of the ship so as to permit him to discharge his duties and to avoid damage to the ship and cargo defendant did not exercise due diligence to secure that the ship was properly manned and equipped as required by Art. IV, r. 1 to be relieved of liability. *Maxine Footwear Co. v. Can. Gov't. Merchant Marine Ltd.* [1959] A.C. 589, referred to.

Per Noël J.: The evidence established that the ship was unseaworthy or was not properly manned and it was therefore incumbent that defendant prove it had exercised due diligence to make the ship seaworthy. (*Maxine Footwear Co. v. Can. Gov't. Merchant Marine Ltd.* [1959] A.C. 589, applied.) The engagement of the second engineer on the sole

*PRESENT: Thurlow, Noël and Gibson JJ.

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strength of his certificate and the failure to provide a plan of the piping did not necessarily constitute such a want of due diligence but failure to instruct the second engineer when he was engaged of the ship's peculiar arrangement for flooding the hold did constitute such a lack of due diligence. Further the damage occurred in trimming the ship to permit the discharge of cargo and was therefore due to negligence in the care and custody of cargo, for which defendant was not entitled to immunity. *Instituto Cubano de Estabilizacion Del Azucar v. Star Line Shipping Co.* [1958] A.M.C. 166; *The Ship "Phryné"* [1965] D.M.F. 408 (Cour de Cassation), applied.

Per Gibson J.: Because the ship was old and her valve arrangements unusual, reliance upon the second engineer's certificate without inquiring as to his qualifications and instructing him about the valve arrangements before the voyage began constituted failure to exercise due diligence, thereby rendering the ship unseaworthy and defendant consequently liable for the loss; but in view of the finding of unseaworthiness the fact that the failure of due diligence concurred with an act of negligent navigation or mismanagement of the ship, *viz* opening a wrong valve, did not result in relieving the shipowner of responsibility for the damage.

APPEAL from judgment of Smith, D.J.A.

Trevor H. Bishop for appellant.

William Tetley for respondent.

THURLOW J.:—This is an appeal from a judgment of Mr. Justice A. I. Smith, District Judge in Admiralty of the Montreal Admiralty District, holding the appellant liable for damage caused by the wetting of a portion of a cargo of wheat belonging to the respondent and carried in the appellant's ship *Farrandoc* on a voyage from Kingston, Ontario, to Montreal, Quebec, pursuant to a memorandum bill of lading incorporating and subject to the provisions of the *Water Carriage of Goods Act*[1].

The wheat was loaded on the *Farrandoc* at Kingston on November 26, 1962, and a portion of it, stowed in Number 2 hold, was found to be wetted when it was being unloaded in Montreal on the morning of November 28, 1962. The learned trial judge found that the wetting was caused by the second engineer, a man named Humble, having opened a valve which admitted sea water into a coffer dam situate between the engine room and Number 2 cargo hold, whence the water, by an open drain, gained access to and flooded Number 2 hold. Shortly before this Humble had

[1] R.S.C. 1952, c. 291.

been ordered to pump 20-25 inches of water into the ballast tanks below Number 2 hold, the purpose of this being, according to the testimony of the first officer, who initiated the order, to weigh down the ship as a measure of security.

On these facts the defence put forward was that the loss was due to an error of management of the ship for the consequences of which the appellant was absolved by Article IV, Rule 2(a) of the Schedule to the Act. The learned trial judge, however, held that this defence was not available to the shipowner until he had established either that the vessel was seaworthy or that he had exercised due diligence to make her seaworthy for the voyage and to secure that she was properly manned, equipped and supplied and he went on to find as follows:

> In the present case the Court is of the opinion that there was failure on the part of the Defendant to exercise due diligence to make the *Farrandoc* seaworthy for the said voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the Second Engineer before engaging him and did not equip the vessel with, and make available to ship's personnel, a plan of the engine-room piping system.
>
> The Court finds moreover, that the unseaworthiness of the *Farrandoc* in the respects above mentioned was a cause of the damage complained of.
>
> The Defendant, having failed to establish that it exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied, must be held responsible for the consequent loss and damage sustained by the Plaintiff.

On the appeal to this Court counsel for the appellant made four main submissions which may be summarized as follows:

1. That the learned trial judge misdirected himself as to the onus of proof of unseaworthiness;
2. that the *Farrandoc* was not in fact unseaworthy as the learned trial judge impliedly found;
3. that even if the *Farrandoc* was unseaworthy in the respects mentioned by the learned trial judge such unseaworthiness did not cause the loss here in question; and
4. that even if such unseaworthiness did cause the loss the exercise of due diligence by the appellant to make the *Farrandoc* seaworthy and to secure that she was properly manned and equipped had been proven.

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The *Farrandoc* had arrived in Montreal on November 27 and had discharged part of the cargo between 9:00 and 11:50 that evening. Discharging was resumed at 7:00 the following morning and the order to pump water into the Number 2 bottom tanks was given at 7:10. This order was conveyed to Humble by the wheelsman whose name was Harvey. Humble was on duty alone in the engine room at the time. Some three minutes after conveying the order to Humble, Harvey sounded the Number 2 bottom tanks to see if water had entered them but found them still dry. He reported this to Humble. Five minutes later Harvey sounded again and again found the tanks to be dry. He reported this as well to Humble. The record does not show what, if anything, Humble did on receiving either report. The fact that water had gotten into Number 2 cargo hold was discovered by a stevedore and was reported at 7:45 to the first officer who thereupon gave an order to stop the pump. This however was some thirty-five minutes after the order was first given to pump water into the Number 2 bottom tanks and by this time some 4,266 bushels of the wheat in the Number 2 hold had been wetted. There is no evidence that any water ever did find its way into the Number 2 bottom tanks.

The *Farrandoc* was said to have been built in 1925. She is used in carrying bulk cargo, including grain. She has a gross tonnage of 1,865 tons, is some 257 feet long and some 42 feet wide and is diesel electric powered. The drain from her Number 2 cargo hold into the coffer dam had not been plugged before the loading of the cargo and it was not fitted with a non-return valve to prevent water in the coffer dam from gaining access to the hold. Nor was there either any blank flange in the pipe leading to the coffer dam or any locking device on the coffer dam valve itself. Any one or more of such devices might have served either to prevent the erroneous opening of the valve or to prevent such an error resulting in water being admitted to the cargo hold.

The valve in question had a brass plate on its spindle marked "*coffer dam*" and was situated near an auxiliary diesel engine on the starboard side of the engine room. Some twelve feet from the valve was a manifold of four valves, two leading to each of the fore and aft ballast tanks known as Number 1 and Number 2 on the starboard side

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of the ship. Each of these valves as well was appropriately marked with and identified by a brass plate on the spindle and above the wheel by which the valve was operated. A similar manifold of four valves for the ballast tanks on the port side of the ship was located on the port side of the engine room. There was no plan of the engine room piping either in the engine room or elsewhere on the ship.

Humble had joined the ship for the first time and had been taken on as second engineer at Kingston on November 26, 1962. He held at the time what was referred to as "a Third Class Combined Engineer's Certificate No. C-421" issued by the Government of Canada and had previously served in turbo electric vessels but had never previously served in a ship of the *Farrandoc* type. He had not been instructed with respect to the valves or piping arrangements and in particular he had not been told that on opening this coffer dam valve water could be pumped into the coffer dam and that from there it could gain access to Number 2 hold by an open drain. He was not even aware that there was a coffer dam in the ship. Nor was there any plan available to him from which he might have instructed himself even on so short a voyage. Some one he believed to have been the third engineer had showed him around the engine room when he joined the ship but no one had told him of the purpose which the coffer dam valve served. There is evidence that the chief engineer had, however, told him "a few safety rules" and of some things he was not to do and that if there was anything he was not sure of and wanted to know he should come to the chief engineer who would tell him.

Though Humble was called as a witness the record contains no explanation of how he came to open the coffer dam valve or of what, if anything, he did afterwards by way of precaution to ascertain what the effect of opening it had been.

For my part I have found it difficult to believe that in the circumstances described Humble could have been responsible for opening the coffer dam valve. For that reason, coupled with the glib manner in which the fact that he did so was indicated by the evidence, I have had and still have doubt both that the second engineer did open the valve and thus cause the damage or that the cause of the damage has been established. In that event, as

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I see it, the appellant would be liable on the basis of the breach of its obligation under Article III, Rule 2, which is to be inferred from the fact of the wheat having become wetted and its failure to prove that the cause of the loss was one for which it was not responsible under the rules[2]. The evidence though sketchy is, however, sufficient in my opinion to support the learned trial judge's finding and the finding has not been challenged. It cannot therefore be set aside and the case thus falls to be decided on the basis that Humble did in fact open the coffer dam valve and thus cause the loss.

On the other hand accepting this as established makes it necessary to consider what inference is to be drawn as to how it occurred. There is no evidence that it was due to inadvertence and nothing in the evidence suggests that it was an act of inadvertence. On the contrary it seems probable that the act was deliberate but due to Humble's inexperience in such a ship and to his lack of knowledge both of the engine room piping and of the fact, which was a peculiarity of the ship, that the opening of that valve could result in water being admitted to Number 2 hold. To my mind therefore the evidence leads to the inference that Humble did not have sufficient knowledge to be in charge of the engine room on such a ship and that in that respect the ship was not properly manned. With this is I think to be considered the additional fact that there was no plan of the engine room piping available to Humble from which he might have instructed himself. The ship as I see it was therefore unseaworthy in this respect and unfit for the proper carriage and preservation of her cargo. This was the situation at the beginning of the voyage and it remained the situation at the time when the damage was incurred. While the learned trial judge did not expressly state a finding to that effect such a finding appears to me to be implicit in what he did say and is in any event the conclusion to which I think the evidence points.

Turning now to the four submissions put forward on behalf of the appellant as there was evidence before the learned trial judge upon which he might conclude that Humble was not competent to be in charge of the engine

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[2] *Vide* Wright J. in *Gosse Millard v. Canadian Government Merchant Marine* (1927) 2 K.B. 432 at 434-35 *seq.* and Scrutton L.J. in *Silver v. Ocean Steamship Company Ltd.* (1929) D.L.R. 74 at 77.

room on such a ship and that there was no plan of the engine room piping available for his use and that in these respects the *Farrandoc* was not properly manned and equipped and was to that extent unseaworthy, and as there was no evidence to the contrary, as I see it, nothing turned on the onus of proof and no question of misdirection (if what the learned trial judge said can be so regarded—as to which I express no opinion) arises.

In this connection particular emphasis was directed to the passage in the reasons of the learned trial judge when he said:

> It is well established however, that before such a defence becomes available to the shipowners the latter must have established either that the vessel was seaworthy or that it (the shipowners) exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied. Unless, therefore, the Defendant has discharged this burden of proof the immunity provided by the said article of the *Water Carriage of Goods Act* does not apply in the Defendant's favour.

While as a matter of first impression this might be taken to indicate that the learned trial judge was of the opinion that in a case of this kind the onus of proof on the issue of seaworthiness is on the shipowner I do not think that that is what it imports. The meaning is I think to be gathered from the nature of the case with which the learned judge was dealing and in particular from the next succeeding paragraph in which he said:

> The question therefore which the Court is required to determine is that of whether the Defendant was successful in proving it had exercised due diligence to make a ship seaworthy and to secure that the ship was properly manned, equipped and supplied for the voyage.

It appears to me that the learned trial judge was not at this stage discussing the question of seaworthiness and that in the context what the impugned paragraph means is simply that there were two ways of discharging the onus of proof of the exercise of due diligence, (1) to prove that the ship was in fact seaworthy—which would necessarily destroy any case based on unseaworthiness and render proof of the exercise of due diligence unnecessary—or (2) to prove the exercise of due diligence.

The second submission in my view is concluded against the appellant by the finding, which, as already mentioned, is, I think, implicit in the learned trial judge's reasons and which to my mind is not merely sustainable on the evi-

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dence but is the conclusion I myself would reach on it, that the *Farrandoc* was unseaworthy in not being properly manned and equipped in the respects mentioned.

With respect to the third question it is I think apparent that this unseaworthiness was a cause of the respondent's loss and this I think is what the learned trial judge was referring to and meant when he said that "the unseaworthiness of the *Farrandoc* in the respects above-mentioned was the cause of the damage complained of". The respects so referred to were, as I read the learned judge's reasons, (1) that the second engineer was not competent in that he did not know the engine room piping system and the peculiarities of the ship and (2) that there was no plan of the engine room piping system available to the ship's personnel from which the engineer might have instructed himself.

This brings me to the fourth question which appears to me to raise the most important point in the appeal. Section 3 of the *Water Carriage of Goods Act* relieves the carrier of any implied absolute undertaking to provide a seaworthy ship. In place of any such undertaking Article III, Rule 1, provides that:

> 1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,
>
> (*a*) make the ship seaworthy;
>
> (*b*) properly man, equip, and supply the ship;
>
> (*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Next Rule 2 of Article III provides:

> 2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

One of the provisions of Article IV to which the obligation imposed by Rule 2 is expressly made subject is Article IV, Rule 1 which provides:

> 1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

> Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

The result of these provisions is that the carrier is liable for loss or damage to cargo caused by unseaworthiness or improper manning or equipping of the ship only if he has failed to exercise due diligence to make the ship seaworthy and to secure that she was properly manned and equipped and such failure has been a cause of the loss or damage. But the onus is upon him to satisfy the Court that due diligence was exercised. With respect to the duty to exercise due diligence imposed by Article III, Rule 1, Lord Somervell of Harrow said in *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.*[3]:

> Logically, the first submission on behalf of the respondents was that in cases of fire article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under article IV, rule 2(*b*). If this were right there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.
>
> In their Lordships' opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.

I have already quoted the finding of the learned trial judge that the appellant had failed to exercise due diligence to make the ship seaworthy for the voyage in that the appellant had not taken sufficient care to assure itself of the experience, competence and reliability of the second engineer and did not equip the vessel with and make available to the ship's personnel a plan of the engine room piping system. In reaching this conclusion the learned trial judge referred to the apparent fact that Humble had been engaged solely on the basis of his holding a second engineer's certificate and that no evidence had been given that any enquiry had been made as to his previous experience or record or whether he was familiar with the type of engine room machinery and piping on board the *Farrandoc*. After citing a passage from the judgment of

[3] [1959] A.C. 589 at page 602.

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Hewson J. in *The Makedonia*[4] which dealt with the inadequacy of enquiries to discover the record and competence of a chief engineer and the duty of the shipowner to exercise proper care in the appointment of both the chief and the second engineer Smith D.J.A. expressed himself as being of like opinion concerning the engagement of Humble as second engineer on the *Farrandoc*. The learned judge was, therefore, unsatisfied that the necessary steps had been taken or that the necessary enquiries had been made to discover the record and competence of Humble or that the appellant had otherwise exercised proper care in his appointment.

The evidence leaves me as well unsatisfied that due diligence was exercised. It was agreed by counsel that Humble in fact held a certificate. But the person who engaged him was not called and there is no evidence of any enquiry having been made either of Humble or of anyone else to ascertain the extent of his knowledge or experience or suitability for the post. What the rule requires is that the carrier see that the ship is properly manned and equipped so far as the exercise of due diligence can serve to secure it. To my mind a person taking reasonable care for his own ship or cargo or seeking to discharge this obligation even when told that the person to be employed in a position involving responsibility held a qualifying certificate would scarcely fail to make further enquiries as to his ability and experience. Even after making such enquiries he would, in my opinion, enquire how far the man's experience fitted him for service in the particular ship and take steps to see that the man was adequately instructed with respect to any features of the particular ship with which it was necessary for him to be familiar to properly discharge the duties of his position and to avoid damage to the ship and its cargo. Here it was not established that any such enquiries were made or that any sufficient steps were taken to ensure that Humble would be adequately instructed. In my opinion therefore no ground has been shown for disturbing the learned trial judge's finding.

The appeal accordingly fails and should be dismissed with costs.

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[4] [1962] Lloyd's Rep. 316.

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NOËL J.:—This is an appeal from the decision of Smith J., District Judge in Admiralty of the Quebec Admiralty District, maintaining plaintiff's action and condemning the defendant, N. M. Paterson & Sons Limited to pay the plaintiff the sum of $8,777.29 with interest and costs for damage caused by wetting to 4,266 bushels of its shipment of wheat carried from Kingston, Ontario, to Montreal on board the defendant's vessel the *Farrandoc*. The wheat was loaded on board the vessel at Kingston, Ontario, on November 26, 1962, and the damaged wheat stowed in No. 2 hold was found to be wetted when unloading in Montreal on November 28, 1962.

The learned trial judge found that the damage to the wheat was caused by the second engineer of the *Farrandoc*, Richard Humble, who on the morning of November 28, when the ship was in the process of discharging its cargo in Montreal, opened by mistake the wrong valve with the result that water, instead of entering the ballast tanks, went into the coffer-dam located between the engine room and No. 2 hold and from the coffer-dam gained entry through an open drain to No. 2 hold where the damaged wheat was located.

The evidence disclosed, and the learned trial judge held, that Humble's opening of the wrong valve happened in the following circumstances. At 0710 hours on November 28, 1962, the first officer of the *Farrandoc*, Gignac, instructed the wheelman, Harvey, to order the engineers to put 20 to 25 inches of water in the double-bottom tank of No. 2 hold. Harvey immediately conveyed these instructions to second engineer Humble who, at the time, was in charge of the engine room. After waiting approximately three minutes, Harvey sounded No. 2 bottom tanks to verify that water had entered but found that they were still dry. He reported this to the second engineer and understood that the matter was being attended to. However, about five minutes later, when Harvey again sounded the said tanks, he found them to be still dry and immediately reported this to the second engineer who apparently went to check the situation.

At approximately 0730 hours the presence of water on the forward tank top No. 2 hold was noted and discharging from that hold was discontinued.

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The evidence also discloses that the instructions given by the master of the ship, Gignac, to put water in the double-bottom tank of No. 2 hold was for the purpose of trimming the vessel after some of the cargo had been discharged and also, it may be inferred, for the purpose of allowing the balance of the cargo to be properly discharged.

The learned trial judge then held that the defendant had failed to exercise due diligence to make the *Farrandoc* seaworthy for the voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the second engineer before engaging him and did not equip the vessel with and make available to the ship's personnel, a plan of the engine room piping system.

The defence relied on the fact that the damage herein was caused or brought about by an error in the navigation or management of the ship for which it could not be held responsible by virtue of art. IV, paragraph 2(a) of the *Water Carriage of Goods Act*, 1952 R.S.C., chapter 291, which provides that:

ARTICLE IV

. . .

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

Before mentioning the manner in which the learned trial judge dealt with the immunity provided by the above article, it may be useful to describe shortly the changes effected by the adherence of Canada to the Hague Rules with respect to the responsibilities and liabilities of the carrier by means of the adoption of the *Water Carriage of Goods Act* which has changed the liability of a shipowner at common law in several respects. Lord Justice Denning in *Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.*[5] summed up the purpose of the Act as follows:

> . . . Shipowners used to insert clauses in bills of lading exempting themselves from all liability, no matter how much they or their servants were at fault. The purpose of the Hague Rules, speaking broadly, was to prevent shipowners from availing themselves of all these wide exceptions and to render them liable for want of due diligence to make the ship seaworthy and other matters:

[5] [1957] 2 Q.B. 233 at 266, reversed [1959] A.C. 133.

It appears that in shipping contracts, under the *Water Carriage of Goods Act* there is no longer an absolute duty upon the owner of the vessel to provide a seaworthy ship and although he is still bound by certain statutory obligations to the shipper, he will have a defence to an action for their breach if he can prove due diligence in providing a seaworthy ship before and at the beginning of the voyage. As a matter of fact, the main point of difference between liability under the statute and at common law is that under the *Water Carriage of Goods Act* the shipowner's liabilities are not as onerous but they cannot be contracted out of. This appears from a reading of both sections (1) and (8) of art. III of the *Water Carriage of Goods Act.* Article III(1) of the Act reads as follows:

ARTICLE III

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy;

(*b*) properly man, equip and supply the ship;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

The learned trial judge stated that it was well established that before a defence becomes available to a shipowner under art. IV(2)(*a*) of the *Water Carriage of Goods Act,* the latter must have established either that the vessel was seaworthy or that the shipowner exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied as required under art. III(1)(*a*) and (*b*) of the Act and that, otherwise, he cannot avail himself of the immunity provided by art. IV(2)(*a*) and (*b*) of the said Act.

He then, after examining the manner in which the second engineer was engaged (in that no proper or any measures had been taken before engaging him, to enquire into his competence, reliability or familiarity with the vessel's engine room, piping and machinery), and the lack of plans in the engine room of the vessel, concluded that the defendant had not succeeded in establishing that it had exercised due diligence to make the ship seaworthy and to

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insure that the ship was properly manned, equipped and supplied for the voyage and, therefore, it could not avail itself of the immunity provided under art. IV(2)(*a*) for "an act, neglect, or default" in the navigation or management of the ship.

The submission of the appellant herein appears to be as follows: (1) the plaintiff had the burden of establishing the unseaworthiness of the vessel herein and did not discharge such burden and, therefore, there was no necessity for the defendant to establish that its vessel was seaworthy or that it had exercised due diligence to make it seaworthy and, in any event, (2) it had exercised due diligence and the trial judge was wrong in relying on the evidence he did rely on to conclude that the defendant had not established that it had shown due diligence to make the ship seaworthy and to insure that it was properly manned, equipped and supplied for the voyage.

It may be useful here to set down the manner and the order in which I believe the burden of proof should be discharged in a common law action as distinct from a statutory action (with particular regard to the decision of the Privy Council in *Maxine Footwear Company, Ltd. and Morin v. Canadian Government Merchant Marine, Ltd.*[6] of which I will say more later) in the case of a claim for loss or damage to cargo shipped on a vessel. The cargo owner must, firstly, prove damage or loss to his cargo and as the primary obligation of the owner of the vessel is to deliver to destination the goods of the plaintiff in like good order and condition as when shipped, once damage or loss of the goods so shipped is established, the owner of the vessel becomes *prima facie* liable to the cargo owner for the damages. This liability is, however, subject to any exception clause contained in the bill of lading such as that the loss or damage arises or results from an "act, neglect or default . . . in the navigation or in the management of the ship". If the shipowner establishes the cause of the damage or loss and that he falls within the conditions of the above exception, the owner of the cargo, in order to succeed, must then prove some other breach of the contract of carriage to which the exception clause provides no defence such as the unseaworthiness of the vessel for instance and then the

[6] [1959] Lloyd's Rep. 105 at 113.

owner of the ship may establish, that notwithstanding such unseaworthiness, he is still protected by the exception clause because (1) unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage) and damage to the cargo must have been caused thereby and that such unseaworthiness occurred after the commencement of the voyage or it did not cause the loss or damage.

From the above it appears that it is for the cargo owner to establish the damage to its goods, and in the event the shipowner establishes that he is entitled to an immunity provided for in the bill of lading, it should then become incumbent upon the cargo owner to establish affirmatively (a) that the ship was unseaworthy and (b) that that unseaworthiness caused the damage unless the shipowner has already proven unseaworthiness in order to establish that he falls within the conditions of the exception he is claiming.

It appears from the second sentence in art. IV(1) of the *Water Carriage of Goods Act* that even in a statutory action no different onus is cast on the shipowner. In the event the shipowner has not proven unseaworthiness in the process of establishing that he falls within an exception, it is indeed only after proof has been given by the other party that the damage has resulted from unseaworthiness that the shipowner must establish due diligence. The above sentence reads as follows:

> Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

This appears also to be the decision of the Supreme Court of Canada in *Western Canada Steamship Co. Ltd. v. Canadian Commercial Corporation et al.*[7] although this case is not on all fours with the present case as it deals with a general average contribution claim by the carrier against the cargo owner. Ritchie J. states at p. 641 as follows:

> It seems to me that the distinction between the statutory burden of proof imposed by art. IV, Rule 1 and the burden which falls on a party to a collision who is required to rely upon "inevitable accident" by way of defence is that in the latter case the issue to be determined

[7] [1960] S.C.R. 632.

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is confined to "the cause" of the collision whereas in the former "unseaworthiness" must have already been determined to be a "cause" of the loss before any burden is cast upon the carrier at all.

When, as in the present case, unseaworthiness has been shown to be the cause, the burden then arising under art. IV is limited to that of "proving the exercise of due diligence to make the ship seaworthy before and at the beginning of the voyage". Notwithstanding the views expressed by Davey J.A., this language does not, in my view, serve to shift to the carrier the onus of proving either the cause of the loss or the cause of unseaworthiness and should not be treated as going so far "as to make him prove all the circumstances which explain an obscure situation" such as the one here disclosed (see *Dominion Tankers Limited v. Shell Petroleum Company of Canada Limited* ([1939] Ex. C.R. 192 at 203; [1939] 3 D.L.R. 646; 50 C.R.T.C. 191) per Maclean J.).

The Privy Council in 1959 decided that art. III(1) of the *Water Carriage of Goods Act* (which deals with the carrier's obligation to exercise due diligence to make the ship seaworthy, properly man it and make the holds fit and safe for the reception carriage and preservation of the goods) was an overriding obligation in *Maxine Footwear Company, Ltd. and Morin v. Canadian Government Merchant Marine Ltd. (supra)* where Lord Somervell of Harrow stated at p. 113:

> In their Lordships' opinion the point fails. Article III, Rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. IV cannot be relied on. This is the natural construction apart from the opening words of Art. IV, Rule 2. The fact that that Rule is made subject to the provision of Art. IV and Rule 1 is not so conditioned makes the point clear beyond argument.

Now that the exercise of due diligence is an overriding obligation in the sense that once unseaworthiness at the material time is proven as having caused the damage the carrier or shipowner cannot avail himself of the exception, unless he fulfils the above obligation, cannot be contested. That the carrier or shipowner must establish unseaworthiness (within its extended meaning under section III of the *Water Carriage of Goods Act*) and then that the lack of proper manning of the vessel was not due to lack of diligence on his part as a condition precedent to his right to avail himself of the immunities of art. IV, (unless he must do so in order to establish that he falls within the conditions of the exception he is claiming) is however, not so clear although I do feel as a practical matter that rigid adherence to the rule that ordinarily the person relying on unseaworthiness, i.e., the charterer or cargo-owner, must

prove it, would often exempt the shipowner from liability as the facts of such unseaworthiness are nearly always within his sole knowledge. It is not, however, necessary to determine this matter here because, although the evidence herein with regard to what took place is not as complete or satisfactory as it could have been, it was sufficient to establish that the ship was unseaworthy or was not properly manned and it therefore became incumbent upon the defendant to establish that it had exercised due diligence to make it seaworthy for the voyage. I should add that in most cases, the shipowner in the process of establishing, as he must do, the cause of the damage or loss and that he falls within the exception which gives him immunity (on the basis that one who claims an exception or exemption must also establish that he falls within its conditions) will, particularly in the case of an error of navigation or an error in the management of the ship at the same time establish facts which disclose that his ship was unseaworthy (within its extensive meaning under section III of the *Water Carriage of Goods Act*) and this appears to be what happened in the present case.

I now come to the second attack made by the appellant herein in that it did exercise due diligence and that the trial judge was wrong in relying on the evidence he did rely on to conclude that the defendant had not established that it had shown due diligence to make the ship seaworthy and to insure that it was properly manned, equipped and supplied for the voyage.

I should state at the outset that insofar as the evidence was not dependent on findings of credibility, this Court in appeal can draw inferences and arrive at conclusions differing from those of the trial judge if such a course of action appears to be justified and required.

It is with this in mind that I now turn to the facts relied on by the trial judge in holding that the defendant had failed to exercise due diligence to make the vessel seaworthy for the voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the second engineer before engaging him and did not equip the vessel with, and make available to the ship's personnel, a plan of the engine room piping system.

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Before, however, going into this matter, it may be useful to point out here that the valve opened by Humble had a brass plate "on the end of the spindle underneath the nut that holds the wheel on it" marked coffer-dam and was situated near a diesel engine on the starboard side of the engine room used for generating auxiliary electrical power for the ship. A manifold of four valves, two leading to each of the fore and aft ballast tanks known as No. 1 and No. 2 on the starboard side of the ship, was situated some twelve feet from the coffer-dam valve. The above valves were those Humble should have opened and were also marked and identified by a brass plate on the spindle above the wheel by which the valve was operated. Furthermore, there was no plan of the engine room piping available on board the vessel. That Humble did open this valve which was clearly marked coffer-dam indicates, I believe, that he was totally ignorant of its purpose and location and of its connection with the cargo hold and that is why and how the mistake was made.

Failure in the appointment of second engineer Humble was found by the trial judge in that there was no evidence to show that any inquiry was made as to this man's previous experience or record, nor as he added, does it appear that he was questioned as to whether or not he was familiar with the type of engine room machinery and piping on board the *Farrandoc* which, as pointed out by the trial judge, were in some respects peculiar to that ship or at least not generally met with.

Indeed, Stanley E. Moore, the chief engineer on the *Farrandoc,* at the time of the damage, stated at p. 70 of the transcript that "there are not many other ships that have the peculiar arrangement of flooding the hold through a coffer-dam" and this is probably the peculiarity referred to by the trial judge.

The evidence discloses that Humble, who was 38 years of age, had joined the ship for the first time when he had been taken on as second engineer at Kingston, on November 26th, the day the vessel left for Montreal. He was signed off the vessel on December 4, 1962, at Fort Waller. Charles Thomas Beaupré, the defendant's marine superintendent, explained that Humble was sent to the vessel in accordance with the contract the defendant had at the time with the Officers' Union who when requested, sent a

properly qualified man to the vessel. Beaupré further stated that Humble, sent over by the Union, was given no tests as he had a qualification certificate and was properly qualified by the Government of Canada.

He added that the engineer normally instructs a new man in the different phases of the equipment. As far as the instructions to Humble are concerned, they were, however, restricted to Moore's answer as follows at p. 46 of the transcript:

> Well, we went around and looked at different things but if you tell a man too much, you get him mixed up. He told him ". . . just a few rules, what to look for" . . . and "if he wasn't sure of anything, he would come up and I would tell him".

Humble at the time of his engagement by the defendant held "a third class combined engineer's certificate No. C-421" issued by the Government of Canada and had previously served in turbo-electric vessels but had never previously served on a ship such as the *Farrandoc*. Had the decision of the trial judge that the defendant was liable herein because it had not established due diligence in accepting Humble on the sole strength of his certificate, without questioning him as to his past experience and had that been the sole basis on which a lack of due diligence could be predicated, I would have had considerable difficulty in reaching such a conclusion. I believe that it is reasonable to accept such officers bearing certificates from a public body, particularly when such certificates are issued only after a proper examination and after the candidate establishes by satisfactory evidence his "sobriety, experience, ability and general good conduct on board ship", and is "subject to suspension or cancellation" in the event of misconduct as appears from section 131 of the *Canada Shipping Act*, R.S.C. 1952, vol. 1, chapter 29, which reads as follows:

> 131. (1) The Minister may grant to an applicant for a certificate as master or mate who is duly reported by the examiners to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience, ability and general good conduct on board ship, such a certificate of competency as the case requires.
>
> (2) The Minister may, upon the like report of examiners, approved by the Chairman, grant to an applicant therefor a certificate of competency as an engineer; the examiner shall transmit his report of the examination of such an applicant, with the evidence of his sobriety, experience, ability and general good conduct on board ship, to the

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Chairman, who shall thereafter communicate his approval or disapproval of such report to the Minister; the certificate shall specify the grade for which the applicant is qualified and be a certificate for life; it is, however, subject to suspension or cancellation pursuant to the provisions of this Act.

I would think that Humble, being 38 years of age, and holding the above certificate from a public body could be engaged without any question on the strength of his certificate and although I would see no harm in questioning him further with regard to his past experience or conduct, I do not think that the fact he was not questioned, would, in the particular circumstances of the present case, constitute a want of due diligence on the part of the owner of the vessel or even that any questioning or investigating would have disclosed anything useful in determining whether he would be adequate to fulfill the not too exacting duties of a second engineer on board the vessel.

I should also add that I do have considerable difficulty also in arriving at the conclusion that the lack of a plan of the piping on the vessel could also be considered as a lack of due diligence which would lead to a finding of unseaworthiness because had plans been available, in view of the manner in which Humble was instructed upon his arrival on the ship, it is doubtful that he would have seen them and had he examined them, it is doubtful he would have appreciated the location, nature or purpose of the coffer-dam if the latter were not explained to him.

This, however, does not mean that the appellant herein has discharged the burden of establishing due diligence at the beginning of the voyage to make its ship seaworthy because, in my view, it appears to me from a reading of the evidence that the only valve in the engine room of the *Farrandoc* which a new man should have been told about, was the one which operated the "coffer-dam". This, indeed, was the only one which, if opened, could damage the cargo. The others all operated ballast tanks. There was further reason to tell him about this because, as already mentioned and admitted by Moore, the chief engineer of the vessel, the vessel had a peculiar arrangement of flooding the hold through the coffer-dam and he had never been on a vessel of this type before. The evidence discloses that he did not know the piping arrangements and that he was not even aware that there was a coffer-dam. He thought the third

engineer had showed him around the engine room when he joined the ship but no one had told him about the coffer-dam.

The chief engineer had merely told him "a few safety rules" and some things he was not to do and suggested that if there was anything he was not sure of and wanted to know, he should ask him.

The question here is whether the lack of proper instructions should go back to a time prior to the voyage when the second engineer's services were retained or should be considered merely as having not been given when the master gave instructions to fill the ballast tanks in Montreal when the ship was unloading the cargo.

If the lack of instructions goes back to a time prior to the voyage, it then can be held that the ship was not properly or efficiently manned at that time and the defendant could not avail itself of the immunity provided by art. IV(2)(*a*) of the Act. On the other hand, if the lack of instructions should be considered within the period immediately prior to the instructions to fill the ballast tanks in Montreal after the voyage, then such an error could be one of management and the defendant would be protected by the clause.

The point is a fine one, but one which may have, depending upon how it will be decided, serious consequences for the parties.

Although I do so with some hesitation, I would think that the lack of instructions here goes back to the time of the engagement of the second engineer when he was shown the engine room prior to the departure of the vessel in Kingston even if he could have been instructed later or immediately prior to the opening of the valve which flooded the No. 2 hold. It was at the time of his engagement that he was ignorant of the coffer-dam and its valve and inefficient and he remained so during the whole voyage up to the very instant when he opened up the wrong valve.

It indeed seems to me that a due regard to the safety of the ship and cargo would have required that every member of the crew (and particularly Humble who was responsible for the engine room) likely to use this coffer-dam valve, should, before the voyage had commenced, have been fully instructed as to its proper use and fully informed as to the

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danger to be avoided, as the best equipped ship may become unseaworthy if her crew or those in charge of her appliances are unacquainted with their purpose and proper use.

It therefore follows that this ship equipped as she was, with Humble the second engineer in charge of the engine room, ignorant as he was of the existence of the cofferdam, was in fact improperly manned and the defendant has failed to show that due diligence was exercised to man her properly.

Having thus failed, it follows that the defendant cannot avail itself of the immunity of art. IV(2)(*a*) of the *Water Carriage of Goods Act*.

There is another issue with which I should deal and which was raised by the respondent in argument in that the damage to the cargo was not the result of an error in management of the vessel but was due to negligence in the care and custody of the cargo. If the damage was the result of negligence in the care and custody of the cargo, the vessel owner would have no immunity and would be liable for the resulting damages.

The distinction between the two causes cannot always be found with legal precision. However, it would seem that it can be generally said that when there is fault in the manipulation of equipment in connection with the ship mainly, and only incidentally in connection with the cargo, the fault is then an error in management; where, however, the manipulation of the ship's equipment is primarily for the cargo and only incidentally connected with the ship, then the fault is an error in the care and custody of the cargo.

The facts here reveal that although the filling of the ballast tanks ordered by the master was for the purpose of trimming the vessel, it was done during the discharge of the cargo and for the purpose of allowing the balance of the cargo to be discharged at dock. Furthermore, three minutes after Humble had turned on the wrong valve, he was told by Harvey that no water was going into the ballast tanks and he was again informed of this five minutes later. Notwithstanding these admonitions, no corrective action was then taken by Humble to either check

the coffer-dam or to close its valve and thus prevent the water from rising sufficiently in the coffer-dam to reach and damage the cargo in the hold. It may, therefore, be said here that Humble's mistakes and omissions were errors made in the care and the custody of the cargo for which, of course, there would be no defence.

In a very similar situation in *Instituto Cubano de Estabilization Del Azucar v. Star Line Shipping Co. Inc.*[8] where molasses carried on board ship from Cuba to Louisiana was damaged by water entering from a ballasted tank into the hold where the molasses was stored, because of the mistake made by a member of the crew in ballasting, it was held that:

> . . . The unsealed cargo valve (ultimate cause of the loss) was an error in care and custody of the cargo outweighing error in management in improper ballasting. Vessel held liable for loss.

There is also the decision of the French Cour de Cassation of March 11, 1965, in the case of the ship *Phryné*[9] when wine was damaged through faulty ballasting of the ship and where it was held that the damage was caused by a *"faute commerciale"* (which corresponds somewhat to error in care and custody of the cargo) rather than by a *"faute nautique"* (or error in management of the ship).

The headnote of the above decision reads as follows:

> I.—Au cas d'avarie au vin transporté par mer en vrac, par l'introduction d'eau dans une cuve contenant du vin au cours d'opérations de ballastage du navire, au cours du déchargement, la faute imputable au transporteur maritime réside, non dans la manœuvre elle-même, mais dans l'erreur commise dans son exécution. Dans ces conditions, bien que l'opération en elle-même soit nautique, la faute commise est commerciale lorsque l'opération en soi a été correctement exécutée, mais qu'il a été par erreur introduit, sans vérification préalable, de l'eau de mer non dans une citerne vide mais une partie du navire destinée à la cargaison de vin.

It therefore follows that whether the error committed by Humble, the ship's second engineer, is one of management or one of care and custody of the cargo, the appellant cannot, in any event, succeed and I would dismiss the appeal with costs.

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[8] [1958] A.M.C. 166.

[9] (1965) D.M.F. 408—Cour de Cassation (Phryné, 11 mars 1965).

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GIBSON J.:—The facts are set out in the Judgments of Noël J. and Thurlow J. and need not be repeated.

I should like, however, to say three things:

Firstly, that in relation to every issue in respect to which the plaintiff and the defendant had the burden to adduce evidence, each respectively did so in a most unsatisfactory manner, making the most flimsy proof.

Secondly, that in some cases, it may be exercising due diligence, within the meaning of the Hague Rules, to prove that a ship's officer, such as the second engineer in this case, was chosen solely on the basis that he held a duly accredited certificate issued by the Department of Transport, Canada, without making any further investigation of his qualifications or without giving him any specific instructions about the features of a particular ship; but that in other cases, this may not be sufficient, and in such cases more detailed investigations as to qualifications and also specific instructions may have to be made and given —each case depending on its facts; and that in reference to the facts of this case, the former was insufficient, in that the *Farrandoc* was an old ship with rather unusual valve arrangements about which it was probable that this new second engineer would not know; and from this it follows therefore that the neglect of the ship's owners or representatives to enquire more fully into this new ship's officer's qualifications and to adequately instruct him about the valve arrangements at the material time before the voyage began, constituted failure to exercise due diligence, thereby rendering this ship unseaworthy.

Thirdly, that this failure to exercise due diligence concurred with an act of negligent navigation in causing the loss (that is the damage to the grain), namely, the error in opening a valve which admitted sea water in the cofferdam situated between the engine room and no. 2 cargo hold from which the water by an open drain gained access to and flooded no. 2 hold; but in consequence of the finding of unseaworthiness proof of this excepted peril of bad seamanship (or mismanagement of the ship) does not result in avoiding responsibility for the damage to the cargo.

In my opinion, the appeal should be dismissed with costs.

Ottawa
1967
June 6-7
June 23

BETWEEN:

N. M. PATERSON & SONS LIMITED (*Defendant*) ..... APPELLANT;

AND

CARGILL GRAIN COMPANY LIMITED and SCREATON GRAIN LIMITED (*Plaintiffs*) ..... RESPONDENTS.

AND

BETWEEN:

N. M. PATERSON & SONS LIMITED (*Defendant*) ..... APPELLANT;

AND

SMITH VINCENT & CO. LIMITED (*Plaintiff*) ..... RESPONDENT.

Shipping—Damage to cargo—Liability of shipowner—Defence of perils of the sea—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV, r. 2(c)—Negligence of shipowner—Onus of proof.

On December 2nd 1966 defendant's ship with a cargo of grain left Kingston for Goderich. She encountered strong winds the following day, which were to be expected at the time of year, and the water at times went over the hatches. She arrived at Goderich on December 5th to remain for the winter. On December 27th melting snow was observed on No. 7 hatch cover and investigation disclosed that the grain beneath had suffered damage from wetting. The cargo owner sued the shipowner for damages and recovered judgment at trial ([1966] Ex. C.R. 22). Defendant appealed, relying solely on the defence that the damage resulted from perils of the sea, for which it was relieved of liability by Art. IV, r. 2(c) of the Schedule to the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291. Defendant contended that the evidence as to the size and shape of the damaged grain raised an inference that water had gained access to the grain from the deck during the voyage through an aperture in the hatch coaming. The aperture had, however, been sealed with oakum before the hatch was covered and the oakum was still in place when the hatch was opened on December 27th. There was no evidence negativing the possibility of the water having come from sources within the hold, e.g. possibly from a burst pipe.

Held, dismissing the appeal, the evidence did not establish that water gained access by the aperture in question or that the damage arose from a peril of the sea. Even if water did enter by the aperture during the voyage the inference was that it did so because the aperture was inadequately covered, i.e. by reason of negligence, for which the shipowner was responsible, and not from perils of the sea, *viz* dangers from weather which could not be foreseen or guarded

*CORAM: Thurlow, Noël and Gibson JJ.

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against, and such inference of negligence was not rebutted by the shipowner. *C. N. Steamships v. Bayliss* [1937] S.C.R. 261; *Keystone Transports Ltd. v. Dominion Steel & Coal Corp. Ltd.* [1942] S.C.R. 495; *Paterson Steamships, Ltd. v. Can. Co-op. Wheat Producers, Ltd.* [1934] A.C. 538; *Albacora S.R.L. v. Wescott & Laurance Line, Ltd.* [1966] Lloyd's Rep., discussed.

APPEAL from judgment of Wells D.J.A.

John J. Mahoney, Q.C. for appellant.

A. S. Hyndman for respondents.

The judgment of the Court was delivered by

THURLOW J.:—This is an appeal from a judgment[1] of Mr. Justice Wells, the District Judge in Admiralty of the Ontario Admiralty District holding the appellant responsible for damage to a cargo of wheat and barley carried in its ship, the *Ontadoc,* on a voyage from Fort William to Goderich and there kept in winter storage until discharged several weeks after the ship's arrival.

The cargo was loaded on December 2nd, 1960, holds 2 and 4 of the ship being filled with wheat and holds 1 and 3 with barley, and the ship proceeded on her voyage that evening. She encountered no exceptional weather or hazard for that season of the year and after an ordinary passage arrived in Goderich on the morning of December 5th. As the ship was to remain there for the winter the crew was paid off and a shipkeeper took charge. No protest was noted. There had, however, been an occasion on December 3rd when what was recorded in the log as being a "strong" south-south-west and south-west wind had been encountered and when water had come over the starboard side in the vicinity of number 3 hold. The Master placed the force of the wind at 20-25 miles per hour and he described the water as being at times as much as a foot deep on the deck and as having at times gone over the hatches. The mate on the other hand referred to it as a little slop having come aboard.

On December 27th the shipkeeper observed that snow on the top of number 7 hatch, which was one of three hatches covering number 3 hold, was melting and this led to the opening of the hatch and the discovery that water had at some stage gotten into the barley below it causing the

[1] [1966] Ex. C.R. 22.

barley to heat to the point where a portion of it had become charred and had produced noxious gases which had contaminated and damaged the grain in all the holds. A protest referring to the occasion when water came over the side was then noted.

In defending these actions, which are founded on breach of the contract evidenced by the bills of lading for the carriage and storage of the goods, "and/or of its (the defendants) duty in the premises implied by law" the appellant pleaded several of the immunities provided by Article IV of the Schedule to the *Water Carriage of Goods Act*[2]; but on the appeal to this Court the only one relied on was that provided by Article IV, Rule 2(c) in respect of loss by perils of the sea. With respect to this defence the learned trial judge had found it impossible to say on the evidence when or how the water gained access to number 3 hold and he had therefore concluded that the defence had not been established.

In reaching this conclusion he said:

> In my opinion there is a certain element of exaggeration in describing what occurred when the wind strengthened around 1:00 o'clock p.m. on December 3rd. The evidence of the ship's officers does not convince me of its accuracy.
>
> A great deal of the defendant's evidence was devoted to showing the care that had been taken by the defendants in loading the ship. There is no doubt however that the water at some stage got into the grain under hatch cover No. 7. My difficulty is that I am not certain when it got in or how it got in.

Later he also said:

> . . . The goods having been damaged by a state of affairs, which was discovered slightly over three weeks after the conclusion of the voyage on the 6th December; the defendants have not in my opinion proved that the damage to the grain occurred by the incursion of water on the voyage down. The ship remained at storage for three weeks and a day after that before the real state of affairs was apparent. The water may have gotten in while the ship was in Goderich, it is in my opinion on the evidence impossible to say. It may have been from a peril of the sea, it may have been from some fault in the covering of the hatches during or after the voyage, I do not know. Water however, unquestionably did get in at some time.

The learned judge also expressed a suspicion that the word "strong" and a ditto mark beneath it might have been written into the log book at some time after the discovery of the damage. On the hearing of the appeal counsel for the appellant asked leave to adduce evidence to

[2] R.S.C. 1952, c. 291.

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dispel any such suspicion but the Court considering the lack of cross-examination on this point of the witness who made the entries and the statement of counsel for the respondents that it was not part of his case to contend that the word "strong" and the ditto mark were made at a different time from the rest of the entry was satisfied that each of the entries as a whole must be taken to have been made at one time and to have been made when it purports to have been made. The appellant's application was thereupon withdrawn.

It was not suggested by the learned trial judge nor by counsel that the water may have gotten into the hold before the hatch was closed at Fort William and there is no evidence of any occurrence at Fort William which could account for water getting into the hold. Similarly there is no evidence of any occurrence while the ship was tied up at Goderich after the voyage which could account for water getting into the hold. In this connection it seems unlikely that rain water could have seeped in and caused the damage. In this situation the appellant's case was that the shape and size of the pillar of damaged barley under No. 7 hatch indicated that a comparatively small quantity of water was involved in causing the damage and that the water got into the barley at the top and seeped down through it, that this pillar was near one of four small apertures in the hatch coaming provided to accommodate the hatch supporting bars and that in the circumstances it should be inferred that the water had gained access by this particular aperture when there was water on the deck during the course of the voyage. Against this inference however must be weighed the evidence of the sealing of these apertures with oakum and grease before the hatch coverings, consisting of both tarpaper and tarpaulin, were put over them and fastened down and of the inspection thereof made by the mate, together with the evidence of the oakum pad over the aperture, through which the water is supposed to have entered, being in its place when the hatch was opened on December 27th. There is also the absence of evidence of anyone having detected the pungent odour before the hatch was opened. To my mind these facts are scarcely consistent with the water having entered by the aperture in question.

Nor is there evidence which negatives the possibility of the water having come from sources within the hold. There is, for example, no evidence that there was no ship's piping passing through the hold at the material point which could have been the source of the water and which might have burst during the voyage or, if not properly drained, might have frozen and burst at Goderich after the ship was tied up. Taken as a whole therefore on a balance of probabilities the evidence leaves me unsatisfied that the water gained access by the aperture in question or that the damage arose from a peril of the sea.

In view of this conclusion it is unnecessary to consider what the result might be if it were determined that the damage arose as a result of water entering by that aperture during the course of the voyage but as opinions on the effect of the evidence on this point may differ and as the matter was argued by counsel at length and with great care I should add my view with respect to it.

On this point the material facts as I see them are that the presence of the opening was well known as was also the need to have it caulked in order to prevent water washing over the deck from getting into the hold, that there was nothing out of the ordinary about water washing over the deck of such a ship in weather conditions of the kind to be expected at the particular season and that no extraordinary weather was encountered on the voyage. There is also the fact that the type of caulking applied to seal these apertures was apparently sufficient in the case of all the other such apertures during this voyage, including the other aperture on the same side of hatch number 7. On these facts an inference appears to me to arise that the caulking of the particular aperture was inadequately or insufficiently carried out and that if it had been adequately and sufficiently carried out there ought to have been no leaking through the aperture. This is therefore not a case of the ship having encountered dangers from weather which could not be foreseen or which could not have been guarded against. On the contrary the situation may be compared in these respects with the much more severe conditions described in *Canadian National Steamships v. Bayliss*[3] where Duff C.J. in delivering the judgment of the court said at page 263:

[3] [1957] S.C.R. 261.

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Counsel for the appellant accepted the definition of "perils of the sea" given in the last edition of Scrutton on Charter Parties (p. 261) as follows:

> Any damage to the goods carried, by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure.

His main contention was that the appellants having established at the trial a *prima facie* case of loss by a peril of the sea within this definition, the burden of proving negligence consequently rested on the respondent on the authority of *The Glendarroch* (1894) Prov. 226. At the trial the defence raised under this head was that the heavy seas that were encountered after leaving Hamilton and before the discovery of the loss and damage on the following morning were of such a character as to bring the damage within the words quoted above, that is to say,

> damage caused by . . . storms . . . or other perils peculiar to the sea or to a ship at sea which could not be foreseen and guarded against by the ship owner or his servants as necessary or probable incidents of the adventure.

The issue raised by this defence was, of course, an issue of fact and *it was incumbent upon the appellants to acquit themselves of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.* The trial judge and the Court of King's Bench have unanimously held that this issue must be decided against the appellants on the ground that, upon the evidence, the proper conclusion is that the dangers arising from such weather as the ship encountered could be guarded against and that they ought to have been foreseen. There is no satisfactory reason for impeaching these concurrent findings of fact and they must, therefore, stand. They constitute a complete answer to the contention that the appellants have brought themselves within the exception "perils of the sea".

(italics added)

The *Bayliss* case arose on the provisions of the Barbados *Carriage of Goods by Sea Act,* 1926 which incorporated the Hague Rules[4] as does the present Canadian *Water Carriage of Goods Act.* The effect of this case appears to me to be that in the case of a claim on a bill of lading for damage to cargo the onus upon a shipowner seeking immunity under Rule 2(c) of Article IV is to show that the loss occurred by a peril (of the sea) of a kind which could not have been foreseen and guarded against by the exercise of reasonable care.[5]

The definition quoted by the Court in the *Bayliss* case appears at page 224 of *Scrutton on Charterparties and*

[4] *British Shipping Laws,* Vol. 3, p. 1630.

[5] See also *Colonial Steamships Ltd. v. The Kurth Malting Co. et al.* [1954] S.C.R. 275.

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Bills of Lading, 17th Edition where reference is made to a footnote which states as follows:

> (*t*) Collected from the judgments in *Thames and Mersey Insurance Co. v. Hamilton* (1887) 12 App. Cas. 484; *The Xantho, ibid.* 503; *Hamilton v. Pandorf, ibid.* 518. But though the phrase "perils of the sea" has the same meaning in both classes of document, it does not follow that in all cases where the goods owner can succeed against the cargo underwriters for a loss by perils of the sea the shipowner would be able to sustain a defence of "perils of the sea", since the shipowner may be precluded from relying upon the defence on proof that the perils of the sea were brought into operation by negligence (*The Glendarroch* [1894] P. 226) or (possibly) that unseaworthiness was a contributory cause: *Smith, Hogg v. Black Sea & Baltic* [1940] A.C. 997 and n. (r), p. 91, *ante.* Rule 7 in Sched. I to the *Marine Insurance Act,* 1906, provides as follows: "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." Loss or damage by the incursion of sea-water when a ship is intentionally scuttled by her crew does not constitute loss by "perils of the sea" under a policy of marine insurance: *Samuel v. Dumas* [1924] A.C. 431. See also *The Christel Vinnen* [1924] P. 208 (C.A.).

In *Canada Rice Mills, Ltd. v. Union Marine et al.*[6], a case which arose on a policy of insurance against perils of the sea and thus did not involve any question of negligence, Lord Wright, however, defined the meaning of perils of the sea somewhat more broadly when he said at page 68:

> Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent seawater coming into the hold, and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of sea water which, but for the covering of the ventilators, would have come into

[6] [1941] A.C. 55.

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them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators.

This exposition of the meaning of the expression "perils of the sea" was adopted by the Supreme Court of Canada in *Keystone Transports Ltd. v. Dominion Steel & Coal Corporation Ltd.*[7], a bill of lading case, where Taschereau J. (as he then was) speaking for the majority of the Court said at page 505:

> From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence.
>
> . . .
>
> I believe that the appellant has succeeded, and the trial judge has so found, in establishing that there has been a peril of the sea. There is even more than a mere *"prima facie* case". It was then upon the respondent to disprove it, by proving negligence causing the loss—in this, it has totally failed.

As applied to a claim on a bill of lading, where negligence is material, as opposed to a claim on a policy of insurance where negligence is not material Lord Wright's exposition of what is meant by the expression "perils of the sea" in the *Canada Rice Mills Ltd.* (*supra*) case must, I think, be read against the background of his own description of the two aspects of a shipowner's responsibility to a cargo owner under the common law to be found in *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*[8] at page 544:

> It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal, to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer, that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognized that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These

[7] [1942] S.C.R. 495.

[8] [1934] A.C. 538.

have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.

In the concise words of Willes J. (in *Notara v. Henderson* (1872) L.R. 7 Q.B. 225, 235): "the exception in the bill of lading . . . only exempts him (the shipowner) from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care . . ." Willes J. is there referring to what may be called the specific excepted perils. The position is thus summed up by Lord Sumner in *F. C. Bradley & Sons, Ld. v. Federal Steam Navigation Co., Ld.* ((1927) 27 Ll. L. Rep. 395, 396): "The bill of lading described the goods as 'shipped in apparent good order and condition' . . ., it was common ground that the ship had to deliver what she received as she received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

But negligence and unseaworthiness of the carrying vessel might generally, by British law, be excepted by express words; in such a case, though the exception of perils of the sea (to take an instance) might not per se for the reasons stated on the facts, avail the carrier, yet he could rely on the exception of negligence or of unseaworthiness, as the case might be, when negligence or unseaworthiness had caused or contributed to the loss. One important object of the Acts under consideration was to limit the use of these general exceptive clauses.

The aspects of a shipowner's duty with respect to unseaworthiness and negligence referred to by Lord Wright appear to me to resemble the responsibility of a person undertaking for reward to do something requiring the supply of adequate equipment for the purpose or the exercise of a particular kind of skill. Where it is the breach of the responsibility to provide such equipment or to exercise such skill that is relied on as a basis of liability for loss or damage the onus of establishing such breach is no doubt on the person alleging the breach. But when for the purpose of defeating a cargo owner's claim based on the breach of the shipowner's obligation under Article III, Rule 2, to properly and carefully carry and care for the cargo, which is to be inferred from its delivery in a damaged condition, the shipowner, in leading evidence to show that the loss was caused by perils of the sea, incidentally establishes, whether directly or inferentially, that the cause of the loss was one that could have been guarded against by the

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exercise of reasonable care there is, in my opinion, no need of anything further from the cargo owner to discharge the onus of proving a *prima facie* case that the loss was caused by negligence on the part of those for whose acts or defaults the shipowner is responsible. The effect in such a case will therefore be the same as that achieved by what may I think be regarded as the more direct approach used in the *Bayliss (supra)* case since it will be for the shipowner to rebut if he can the *prima facie* case so established. On the facts of the present case, in my opinion, the same result is reached whether the matter is considered by applying the test of the *Bayliss (supra)* case or by applying the reasoning of Taschereau J. in the *Keystone (supra)* case or that of Lord Pearson in *Albacora S.R.L. v. Wescott & Laurance Line, Ltd.*[9] when he said at page 64:

> . . . There is no express provision, and in my opinion there is no implied provision in the Hague Rules that the shipowner is debarred as a matter of law from relying on an exception unless he proves absence of negligence on his part. But he does have to prove that the damage was caused by an excepted peril or excepted cause, and in order to do that he may in a particular case have to give evidence excluding causation by his negligence.

The exception relied on in the *Albacora (supra)* case was that provided by Article IV, Rule 2(m) in respect of loss by inherent vice of the cargo but the principle expressed appears to be of general application. As applied to a claim for immunity under Article IV Rule 2(c) in respect of loss by perils of the sea it seems to me to follow from the general principle that if the evidence led to prove the exception shows a *prima facie* case of negligence on the part of the shipowner or those for whom he is responsible he will fail unless he gives evidence excluding causation by such negligence. On the other hand if the evidence led to prove the exception does not show a *prima facie* case of negligence the cargo owner will fail if he does not prove it. The *Keystone (supra)* case appears to me to have been one of the latter class.

In contrast with the situation in that case the evidence adduced by the appellant in the present case, in my view, gave rise to an inference of negligence for which it was responsible and as this was not rebutted the appellant was properly held liable for the loss.

In my opinion the appeal should be dismissed with costs.

[9] [1966] 2 Lloyd's Rep. 53.

BETWEEN:

HOFFMANN-LA ROCHE LIMITED .....APPELLANT;

AND

DELMAR CHEMICALS LIMITED .....RESPONDENT.

Ottawa
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Patents—Compulsory licence—Patent Act, s. 41—Provision for payment of royalties before date of licence—Provision for payment of royalties into court pending appeal—Whether provisions valid.

Held, a provision in a licence by the Commissioner of Patents under s. 41 of the *Patent Act* for payment of royalties on sales during the period between his decision to grant the licence and the actual grant of the licence must be struck out and also a provision that during the pendency of any appeals by the licencee from the Commissioner's decision royalties should be paid into court and the patentee's rights to inspect the licencee's records suspended.

APPEAL from Commissioner of Patents.

R. Graham McClenahan and *C. R. Carson* for appellant.

Donald J. Wright, Q.C. for respondent.

JACKETT P. (orally):—This is an appeal by the patentee from a decision of the Commissioner of Patents granting a licence under section 41 of the *Patent Act.*

During the course of argument, I intimated to counsel for the appellant my reasons for rejecting all his attacks on the Commissioner's decision except two, and I understood him to agree with me that no good purpose would be served by my endeavouring to set such reasons out in reasons for judgment.

I heard counsel for the respondent with regard to the other two attacks by the appellant on the Commissioner's decision and I have decided that the terms of that decision are contrary to principle or manifestly wrong in two respects.

Paragraph numbered four in the licence provides that the royalties payable pursuant to the licence are to be paid on sales made by the licencee during the period between the Commissioner's decision to grant the licence and the actual grant of the licence. As I am of opinion that a licence cannot be made retroactive, and as this licence does not purport to be retroactive, I am of opinion that it was wrong in principle to make the royalty payable in respect of a period prior to the effective date of the licence. The

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respondent resists the attack on paragraph 4, even though that clause has the result of increasing the amount of royalty payable by it. I gather from argument of its counsel that it is contemplated that the licence with paragraph 4 in it may be of some use to it in infringement proceedings. That is not a valid reason for retaining a clause that is contrary to principle.

The other attack is on paragraph 14, which provides that, during the pendency of any appeals from the Commissioner's decision or from the licence, the royalty monies are to be paid into Court and the patentee's right to inspect the licencee's records is to be suspended. I accept the argument of the appellant that it is manifestly wrong that these two conditions should apply except when the validity of the licence has been attacked by the patentee. I have therefore decided to limit the application of paragraph 14 to the pendency of any appeal by the patentee from the granting of the licence.

As the appellant has failed on a substantial part of its appeal, it will pay to the respondent three-quarters of the respondent's costs of the appeal.

Ottawa 1967

June 27

June 29

BETWEEN:

FRED W. MEARS HEEL COMPANY INC. and MEARS DOMINION LIMITED ..... PLAINTIFFS;

AND

ESSEX PRODUCTS INC., and FERNANDO M. RONCI ..... DEFENDANTS.

Patents—Conflict proceedings—Pleadings—Statement in defence—Counterclaim—Defence claiming all claims in conflict—Whether filed out of time—Patent Act, s. 45(8)—Exchequer Court R. 31.

The Commissioner of Patents awarded four of seven claims in conflict to one applicant and the other three to a second applicant. The first applicant then commenced proceedings claiming all the claims in conflict. After expiration of the time fixed by the Commissioner under s. 45(8) of the *Patent Act* for commencement of the proceedings the second applicant filed a defence and counterclaimed for all the claims in conflict. Subsequently another plaintiff was added to the proceedings and defendant filed an amended defence, again claiming all the claims in conflict. Plaintiffs applied to strike out the claims for relief in the counterclaim and amended defence as being filed out of time.

Held, the application must be dismissed. Proceedings under s. 45(8) are for the determination of the respective rights of the several applicants, i.e. in this case not merely the rights of the plaintiffs as against the defendant but the rights of the defendant as against the plaintiffs as well, and hence it was both proper and necessary that the statement in defence referred to in Exchequer Court Rule 31 contain a statement of the relief claimed in addition to the claims awarded by the Commissioner.

APPLICATION.

David W. Scott for plaintiffs.

C. R. Carson for defendants.

THURLOW J.:—In this case by a decision under section 45(7) of the *Patent Act*[1] the Commissioner awarded four of seven claims in conflict to the first-named plaintiff and the other three claims to the defendant, Essex Products Inc. That plaintiff thereafter brought this action by which it claimed a declaration that it was entitled to all the claims in conflict. Some time afterwards, when the time limited by the Commissioner pursuant to section 45(8) for the commencement of the proceedings contemplated by that subsection had expired, the defendant, Essex, (which is hereafter referred to as the "defendant")[2] filed a defence and a counterclaim asking for a declaration that the defendant was entitled to all the claims in conflict. Later when the second plaintiff was added leave was granted to make certain amendments to the allegations in the statement of claim and when these had been made the defendant Essex filed an amended defence (without any formal counterclaim) which ended with a claim for a declaration that it was entitled to all the claims in conflict. Application is now made by the plaintiffs to strike out the defendant's claim for relief on the ground that whether put forward by the counterclaim or by the prayer at the end of the defence it is a proceeding commenced after expiry of the time limited therefor by the Commissioner.[3]

The first six paragraphs of section 45 of the *Patent Act* define when conflict in pending applications for patents

[1] R.S.C. 1952, c. 203.

[2] The defendant, Ronci, is no longer involved in the action, judgment having been given against him by consent.

[3] *Vide Philco Corporation v. RCA Victor Corporation* (1966) 33 Fox P.C. 120.

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exists and prescribe a procedure to be followed to put the Commissioner in a position to resolve it. Paragraphs (7) and (8) then provide as follows:

> (7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision, a copy of each affidavit shall be transmitted to the several applicants.
>
> (8) The Claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either
>
> (*a*) that there is in fact no conflict between the claims in question,
>
> (*b*) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,
>
> (*c*) that a patent or patents, including substitute claims approved by the Court may issue to one or more of the applicants, or
>
> (*d*) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

The effect of section 45(8) is to require the Commissioner to deal with the conflicting applications for patents in accordance with his decision unless a proceeding is commenced in this Court by one of the applicants within the time limited therefor in which event action on the applications is suspended until "in such action" certain matters have been determined. The proceeding which will effect this suspension, however, must be one "for the determination of their respective rights". Such a proceeding is therefore one which is to result in a determination not merely of the rights asserted by the applicant who commences it as against the other applicants but of the "respective" rights of the several applicants *inter se* in respect of the subject matter of the conflict. As I see it this is a special kind of proceeding for the determination of the whole subject matter of the conflict and there is neither necessity nor authority for additional proceedings to be brought by other applicants.

With respect to proceedings under section 45(8) Rule 31 of the Rules of this Court provides:

> In any proceeding taken in the Court pursuant to subsec. 4 of sec. 22 of The Patent Act, as enacted by 22-23 Geo. V, c. 21, sec. 1, the

> applicant shall file with the Registrar of the Court a statement of his claim, and an office copy thereof shall be served upon the Commissioner and upon any other applicant and such applicant shall, within twenty-eight days after the service upon him of such statement of claim, file a statement in defence. Subsequent pleadings, if any, shall follow the general practice of the Court with respect to such pleadings.

It will be observed that what the applicant commencing the proceeding is required by this Rule to do is to file "a statement of his claim" and that what the other applicants are required to do is to file "a statement in defence". In each case what is thus required is I think a statement of the facts upon which the applicant relies, with, in the case of the defending applicant, an indication of the extent to which he admits or contests the allegations made by the applicant who commences the proceeding and, in each case, a statement of the determination of the matter to which the applicant regards himself as being entitled. In the normal method of drafting statements of claim such a statement is, in the case of the applicant who commences the proceeding, found in a claim for declaratory relief which follows the allegations put forward to show his right thereto but since the proceeding contemplated by section 45(8) is one for the determination of the "respective rights" of the several applicants such a statement, in my view, is appropriate as well in the statement in defence to be filed by the other applicants.

In the present case the first-named plaintiff by its statement of claim alleged the notification by the Commissioner of the existence of conflict and it claimed declarations in the plaintiff's favour with respect to all of the claims in conflict. This in my opinion is to be taken to be a proceeding of the kind contemplated by section 45(8) for the determination of the rights of all the applicants in all the claims in conflict and its commencement had the legal effect of suspending the proceedings before the Commissioner until the respective rights of the several parties in the subject matter of the conflict were determined in it by this Court. By its statement in defence the defendant might have conceded the whole or any part of the plaintiff's assertion of its rights or it might have denied, as it did, the right of the plaintiff to any or all of the claims in conflict. But as the determination to be made in the proceeding on the issues so raised was not merely that of the

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rights of the plaintiffs as against the defendant but of the rights of the defendant against the plaintiffs, as well, I can see no basis whatever, in principle or otherwise, for an objection to the defendant having set out at the end of its defence a statement of the determination to which it claims to be entitled. On the contrary it appears to me not only to have been correct to include it but that the statement in defence would have been deficient without it.

The application therefore fails and will be dismissed with costs.

Chicoutimi 1967

20 juin

Ottawa 30 juin

ENTRE:

CÔTÉ BOIVIN AUTO (JONQUIÈRE) LTÉE ..... APPELANTE;

ET

LE MINISTRE DU REVENU NATIONAL ....INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, articles 39(4) et 46(4)—Appel—Compagnies associées—Nouvelle cotisation en qualité de cies associées—Compénétration de deux firmes commerciales—Validité de la re-cotisation par le Ministre—Appel débouté.

La compagnie appelante, Côté Boivin Auto (Jonquière) Ltée, conteste au Ministre le droit de procéder à de nouvelles cotisations pour les années 1961, 1962, 1963 et 1964 sous prétexte qu'elle n'était pas associée à la Cie Boivin Auto Service Inc., au sens du paragraphe 4 de l'article 39 du S.R.C. 1952, c. 148. Cependant, à l'audition le 20 juin 1967, l'appelante renonça à soutenir la séparation juridique des deux compagnies précitées. Par contre, l'appelante prétendait que le Ministre était lié par sa déclaration du 20 septembre 1963. En effet, il avait déclaré et admis que l'appelante n'était pas associée à la Cie Côté Boivin Auto Service Inc. de Chicoutimi (Qué.). En outre, l'appelante soutenait que le Ministre avait omis de lui adresser un nouvel avis de cotisation.

Dans une lettre du 12 janvier 1967, adressée à l'appelante, le Ministre déclare accorder à la compagnie, pour l'exercice 1961, «l'avantage du taux minimum».

Seules restent litigieuses les cotisations des années 1962, 1963 et 1964, au sujet desquelles des avis de nouvelles cotisations furent adressés à l'appelante le 19 avril 1966.

Le désistement de l'appelante, du moyen de droit de la fusion sociale des deux compagnies, réduisait le débat à la prétention précitée que la décision ministérielle du 20 septembre 1963 en était une *ne varietur*, irréformable, donc irrévocable.

Subsidiairement, l'appelante invoquait qu'elle avait souffert un préjudice de droit conjectural et croyait qu'elle était justifiée, vu la décision

ministérielle, de se considérer non associée à la Cie Côté Boivin Auto Service (Chicoutimi) Inc. Et, après cette décision, elle soumettait qu'aucun changement de structure juridique n'avait été effectué.

L'article 46 de la *Loi fiscale*, au paragraphe 4 et aux sous-alinéas (*a*) (ii) et (*b*) ne concorde pas avec l'opinion de l'appelante à l'effet que la première décision prise par le Ministre, le 20 septembre 1963, interdirait toute revision ou reconsidération ultérieure de sa part après avoir obtenu plus ample information.

Jugé, l'appel est débouté;

2. L'article 46, paragraphe 4, justifie le Ministre de procéder à de nouvelles cotisations ou d'en établir de supplémentaires. C'est ce qu'il a fait pour les années 1962, 1963 et 1964 dans les délais prescrits par le statut;

3. Le Ministre dispose de la faculté indéniable de cotiser, d'annuler, de varier, à la hausse comme à la baisse, d'émettre dans les délais fixés par le statut, de nouvelles cotisations, «selon que les circonstances l'exigent».

4. Le Ministre s'est prévalu de ce droit, sans que l'appelante puisse lui opposer, même comme fin de non-recevoir les dommages hypothétiques qu'elle aurait pu éprouver à cause des avis contradictoires du 20 septembre 1963 et du 19 avril 1966;

5. Le recours approprié en pareil cas ne pouvait être autre que celui de la pétition de droit.

APPEL d'une nouvelle cotisation du Ministre.

Richard Dufour pour l'appelante.

P. F. Cumyn pour l'intimé.

LE JUGE DUMOULIN:—La compagnie appelante, Côté Boivin Auto (Jonquière) Limitée, allègue, au paragraphe 19 de l'exposé des faits, que: «Les cotisations additionnelles pour les années 1961, 1962, 1963 et 1964 sont erronées et illégales pour une somme de $26,018.72...». Cette opposition résultait de ce que l'appelante prétendait n'être pas associée à la compagnie Côté Boivin Auto Service Incorporée, 80, rue Racine est, Chicoutimi (Québec) «au sens du paragraphe 4 de l'article 39 de la Loi invoquée (S.R.C. 1952, c. 148)» et, conséquemment, que l'indice de l'impôt, à son égard, devrait être réparti au taux de onze pour cent (11%) au lieu de quarante (40%)—paragraphe 6 de l'exposé des faits.

L'intimé, repoussant cette interprétation, les parties s'entendirent pour exposer à la Cour les questions de droit au moyen d'un mémoire spécial, selon que prévu à la règle 150.

Au début de l'audition, à Chicoutimi, le 20 juin 1967, le savant procureur de l'appelante renonça à soutenir la séparation juridique des deux compagnies précitées: Côté Boivin Auto (Jonquière) Ltée, et Côté Boivin Auto Service

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(Chicoutimi) Inc., sage décision, car la liste des actionnaires au 31 décembre des années 1961, 1962, 1963 et 1964, jointe au dossier de la cause, semble bien établir, irréfutablement, l'intime compénétration de ces deux firmes commerciales.

Au paragraphe 15 de l'exposé des faits, l'appelante soutient que:

> 15°—L'intimé est lié par sa décision du 20 septembre 1963.

Or, quelle est cette décision?, dans quelles circonstances fut-elle rendue?, à quelles modifications et complications subséquentes donna-t-elle ouverture?; autant d'incidents dont dépendra l'issue du procès.

Nous venons de voir que le débat porte sur les déclarations d'impôt de l'appelante pour les années d'imposition 1961 à 1964, inclusivement, soumises par Côté Boivin Auto (Jonquière) Ltée, comme n'ayant aucun lien de droit avec Côté Boivin Auto Service (Chicoutimi) Inc. Le ministère du Revenu national insistant sur l'association des deux compagnies, Côté Boivin Auto Service (Chicoutimi) Inc. produisit, le 19 avril 1963, un avis d'opposition (voir Annexe «A», page 41 du dossier pour le Juge) «parce qu'on la considérait associée à Côté Boivin Auto (Jonquière) Ltée, pour l'année 1961 . . . », et reçut, le 20 septembre 1963, «un nouvel avis de cotisation la déclarant «Compagnie non associée de Côté Boivin Auto (Jonquière) Ltée, selon décision de la section des appels»» (voir photostat du document, Annexe B, p. 42 du dossier pour le Juge). La formule réglementaire, aussi datée le 20 septembre 1963, portant la signature de Me Maurice Paquin, c.r., directeur de l'impôt à Québec, était annexée à l'avis de nouvelle cotisation. Cette pièce est ainsi libellée (A-5, p. 32 dossier pour le Juge):

> Date: 20 sept. 1963
>
> Sujet: Avis d'opposition pour l'année 1961
>
> Votre cotisation pour l'année susindiquée, ayant fait l'objet d'un nouvel examen, est en voie de redressement en conformité du document ci-inclus.
>
> Comme ce redressement a pour effet d'admettre votre opposition en tout point, notification vous en est adressée aux termes de l'article 58(3) de la Loi de l'impôt sur le revenu.
>
> (Signée)
> M. Paquin, c r.
> Directeur de l'impôt

Le dossier pour le Juge, page 16, couvre l'omission, possiblement plus apparente que réelle, d'un pareil avis de non-association de la part de l'appelante, en lui accordant le bénéfice, dans les termes ci-après reproduits, de la recotisation du 20 septembre 1963 (A-5). Il est admis que la date est le 12 janvier 1967; la suscription se lit:

> Côté Boivin Auto (Jonquière) Ltée
> 580 rue St-Dominique,
> Jonquière, P.Q.
>
> Revenu net déclaré et cotisé $15,557 57
>
> NOTE: A cause de la décision prise pour l'année 1961 lors de la cotisation du 20 septembre 1963 dans le cas de Côté Boivin Auto Services Inc., une compagnie associée et pour faire suite aux représentations de la Cie le calcul de l'impôt a été refait en donnant à la compagnie l'avantage du taux minimum.

Précisons de suite que seules restent litigieuses les cotisations des années 1962, 1963 et 1964, au sujet desquelles des avis de Nouvelle Cotisation furent adressés à l'appelante, le 19 avril 1966, en qualité, on le sait, de compagnie associée (voir les photocopies cotées M-3, M-4 et M-5).

En fonction de ces faits, le désistement de l'appelante, du moyen de droit de la fusion sociale des deux compagnies, sœurs siamoises, c'est le cas de le dire, réduisait le débat à la prétention précitée que la décision ministérielle du 20 septembre 1963 en était une *ne varietur* et irréformable. On invoquait, subsidiairement, un préjudice de droit, conjectural, mais non pas illusoire; je cite à cet effet le paragraphe 13 (page 19) de l'exposé des faits:

> 13°— ... l'appelante, devant la décision de la section des appels de l'intimé était bien fondée de compter qu'elle n'était pas associée avec la compagnie Côté Boivin Auto Service Inc., de sorte qu'après cette décision aucun changement de structure juridique des deux corporations n'a été effectué et les actionnaires des deux corporations dont il s'agit étaient bien fondés de croire que les deux corporations dont il s'agit n'étaient pas associées.

L'article 46 de la loi fiscale, au paragraphe (4) et aux sous-alinéas (*a*) (ii) *partim* et (*b*) ne concorde guère avec l'opinion de l'appelante que la première décision prise par l'intimé le 20 septembre 1963 interdirait toute revision ou

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reconsidération ultérieure de sa part, après plus ample information. Le statut, aux endroits ci-haut mentionnés, édicte que:

> 46. (4) Le Ministre peut, *à toute époque,* répartir des impôts, intérêts ou pénalités aux termes de la présente Partie, ou donner avis par écrit, à toute personne qui a produit une déclaration de revenu pour une année d'imposition, qu'aucun impôt n'est payable pour l'année d'imposition, et peut (je souligne)
>
> *a*) . . .
>
> (ii) . . . à compter de l'expédition par la poste d'un avis de première cotisation . . .
>
> *b*) dans un délai de 4 ans à compter du jour mentionné au sous-alinéa (ii) . . .
>
> procéder à de nouvelles cotisations ou en établir de supplémentaires, ou répartir des impôts, intérêts ou pénalités aux termes de la présente Partie, selon que les circonstances l'exigent.

Monsieur le Juge Charles Cameron, naguère de cette Cour, ayant à prononcer sur ce même point, dans l'affaire *The Minister of National Revenue and British American Motors Toronto Limited*[1], écrivait que:

> The provisions of s. 42(4) of the *Income Tax Act* (loi de 1948, c. 52, revisée en 1952, c. 148), empowering the Minister to reassess or make additional assessments in certain cases within six years (aujourd'hui, 4 ans) from the day of the original assessment, would seem to be a fair indication that a previous assessment is not in all cases final and conclusive, but may be reconsidered in the light of subsequent evidence.

Je signale aussi à l'attention des parties une expression analogue d'opinion dans l'instance *Coleman C. Abrahams v. M.N.R.*[2], jugée par le Président de cette Cour, l'honorable Wilbur Jackett; je cite:

> I can find no principle of interpretation that restricts the clear effect of subsection (4) of section 46, which expressly authorizes the Minister, within the four-year period defined by paragraph (*b*) to "reassess", "as the circumstances require". When read with section 31(1) (*e*) of the *Interpretation Act,* R S C. 1952, chapter 158, which provides *inter alia* that, in every Act, unless a contrary intention appears, "if a power is conferred . . . the power may be exercised . . . from time to time as occasion requires", I am of opinion that the power conferred by section 46(4) may be exercised from time to time as circumstances may require. If this were not so, the Minister would not be able to make a second or third re-assessment for the purpose of reducing a taxpayer's liability when circumstances reveal that the taxpayer has been overtaxed. Furthermore, the power is the same in the case of a re-assessment made within the four-year period contemplated by paragraph (*b*) of section 46(4) as it is in the case of "fraud" or

[1] [1953] Ex. C.R. 153 at 156. [2] 66 DTC 5451 at 5452.

"waiver" covered by paragraph (*a*) of that subsection and it would seem clear that the scheme of the Act calls for as many re-assessments as the circumstances require in such cases.

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DUMOULIN J

Il ne fait pas de doute, je crois, en présence de textes de loi aussi explicites, que le Ministre du Revenu national dispose de la faculté indéniable de cotiser, d'annuler, de varier à la hausse comme à la baisse, enfin, d'émettre dans les limites de temps fixées par le statut, de nouvelles cotisations «selon que les circonstances l'exigent».

C'est précisément de ce droit que l'intimé s'est prévalu en l'occurrence, sans que l'on puisse lui opposer même, comme fin de non-recevoir, les dommages hypothétiques qui auraient pu résulter pour l'appelante des avis contradictoires du 20 septembre 1963 (A-5) et du 19 avril 1966. Au reste, le recours approprié en pareil cas ne pourrait être autre que celui de la pétition de droit, si . . . recours il y avait.

Quant au délai de 4 ans, imparti au Ministre pour rectification ou recotisation, le nouvel avis du 19 avril 1966, portant sur les rapports de revenus pour les exercices fiscaux terminés les 31 décembre 1962, 1963, 1964, ne l'a pas enfreint puisque sa limite ultime expirerait le 31 décembre 1966, à supposer, chose impossible en réalité, que le rapport de l'année échue le 31 décembre 1962 eut été expédié ce jour même par la poste.

Par tous ces motifs, l'appelante doit être déboutée de son appel des cotisations additionnelles pour les années 1962, 1963 et 1964; la cotisation additionnelle de 1961 ayant été rescindée par l'intimé selon la lettre du 12 janvier 1967.

L'intimé aura droit de recouvrer les frais et dépens après taxation.

Toronto 1967
May 9-12, 18-20, 23-26
Ottawa July 12

BETWEEN:

WILLIAM KERR .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT;

AND

ALLIED BUILDING SERVICES (1962) LTD. ..... THIRD PARTY.

Crown—Suppliant slipping on floor of airport terminal in occupation of Crown—Whether floor in dangerous condition—Evidence purely conjectural.

Suppliant was walking in an area of the Toronto International Airport in the occupation of the Crown when he slipped and fell on the tiled floor and suffered injuries. He claimed damages from the Crown on the ground that the floor was in a dangerous condition in that the tile on which he slipped was highly over-polished compared to the surrounding tiles or, alternatively, that such tile contained a spot of grease or similar slippery substance. The evidence to establish the Crown's liability consisted of suppliant's testimony that after his fall he observed that the tile on which he fell was shinier than the neighbouring tiles, and the testimony of witnesses that when suppliant was helped to his feet after the accident his coat was covered with a white flour-like substance and there was a brown mark on the floor where he fell.

Held, dismissing the action, this was not a case of *res ipsa loquitur*, and on the evidence it was a matter of pure conjecture that the floor was in a dangerous condition by reason of one tile being more highly polished that the others or that there was a spot of grease or similar substance thereon. *Meredith v. The Queen* [1955] Ex. C.R. 156, referred to.

PETITION OF RIGHT.

Paul R. Jewell, for suppliant.

N. A. Chalmers, for respondent.

C. F. McKeon, Q.C., for third party.

CATTANACH J.:—By his Petition of Right the suppliant seeks to recover damages from the Crown for personal injuries and losses sustained by him as the result of a fall on the morning of January 12, 1964 on the floor of the Toronto International Airport at Malton, Ontario, being premises owned and occupied by Her Majesty. The suppliant had entered the premises for the purpose of paying for passage on an aircraft owned and operated by Air Canada

bound for Jamaica, British West Indies, pursuant to a prior reservation and arrangement and for the purpose of boarding the aircraft so destined.

In paragraph 2 of the Respondent's Statement of Defence to the Petition of Right it is admitted that the Toronto International Airport is owned by Her Majesty, represented by the Minister of Transport. However, during the trial, the respondent introduced in evidence a lease dated November 5, 1965 effective January 12, 1964 with Air Canada whereby the respondent, as lessor, rented certain space in the building, hereinafter referred to as the Aeroquay, to Air Canada, as lessee, for use by it in connection with the operation of its airline. The area so leased included ticket counter space on the departure level, where the suppliant conducted his business with Air Canada, but did not include the general concourse area, the circular perimeter area with departure holding rooms adjacent thereto, hereinafter called the ring concourse, nor the western connecting link between the general concourse and the ring concourse, in which connecting link the suppliant suffered his fall. This link remained under the occupation and control of the respondent.

The suppliant, who was sixty years of age at the time of the accident, described his occupation as being primarily that of a contractor engaged in specialty work. During the war years his principal business was that of laying gypsum roofs and the construction of radial chimneys. He appears to have abandoned these particular enterprises and concentrated on the installation of acoustical ceilings. Still later he became less active in this type of work due to a purchase of two carloads of material subject to a tax which was subsequently removed and rendered his prices uncompetitive. His contracting business became limited to smaller acoustical ceiling jobs and repairs to larger buildings. He undertook his last job in 1961.

His wife operated a custom retail furniture store which she has now abandoned except for occasional advice and the procurement of furniture on behalf of persons who may enlist her services.

The suppliant also acquired revenue producing real property and bought, sold and developed lands as opportunity presented itself.

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While no evidence was adduced as to the suppliant's income in the years immediately preceding his accident, I think it is fair to assume that the bulk of his income came from investments and from revenue producing properties and that his contruction business had been practically abandoned.

The suppliant had been particularly active in community affairs and in municipal politics. He was a member of a service club, the Shriners and the Toronto Board of Trade. He served on the Parks Board and the Board of Education and for six years he was an elected member of the Council of Etobicoke. He unsuccessfully ran for the office of Reeve and was re-elected as councillor in 1961 for a two year term.

He did not stand for re-election in 1963 because in 1961 he had started the construction of a ten room resort hotel at Montego Bay in Jamaica, British West Indies which project required his undivided attention. He acted as his own general contractor in this construction. He would lay out plans for construction, engage local sub-trades and employ local labour, all of which required his constant personal supervision.

The purpose of the suppliant's trip to Jamaica on January 12, 1964 was to press forward the completion of the hotel to be in readiness for full operation about the end of June 1964. The project consisted of three buildings, the first of which was a cottage occupied by the suppliant and his family and which had been completed at that time. The second building was designed as sleeping accommodation for guests and was substantially completed, although lacking in furniture. The third building which required much more work to ready it for occupancy, was to supply further sleeping accommodation and was to house a dining room and bar. In addition to work already completed with respect to filling in the grounds, the suppliant contemplated further like work. The hotel was owned by the suppliant as sole proprietor although he entertained more ambitious plans for the development of the site by additional financing. However, these plans were uncertain and no steps were taken to bring them to fruition. The suppliant enjoyed certain tax concessions, in accordance with the laws of Jamaica for a period of fifteen years, designed to

encourage the tourist industry in that area. I think it is fair to conclude that the suppliant's Jamaican hotel project constituted his principal business interest from approximately 1961 forward.

The suppliant left his home for the airport at approximately 8:45 on the morning of January 12, 1964. He was driven to the airport by his wife in her car. Mrs. Kerr did not accompany her husband on the flight to Jamaica but joined him later, leaving on January 15, 1964 because she had to attend to certain domestic responsibilities. The day was cold and clear with little snow on the ground. At his home, where he entered his wife's car, the ground was bare of snow. The entrance to the airport, where they arrived some twenty-five minutes later, was in a covered area and was also dry and free from snow. The suppliant was wearing a blue silk suit, a blue cashmere overcoat and brown leather brogue shoes. The suppliant did not wear goloshes or rubbers because he would have no need for them in Jamaica and because the snow conditions in Toronto, on that day, did not dictate their use. Because of the cold the heater in Mrs. Kerr's car was in operation during the journey to the airport. I have no doubt that upon his arrival at the Aeroquay the soles of the suppliant's shoes were dry.

The shoes the suppliant was wearing merit description. They had been purchased by the suppliant in 1957 from a well-known retailer in Toronto and had been repaired by that retailer in August 1963 by the replacement of the full sole and leather heels. The suppliant described them as being in good condition. The shoes in question were manufactured of fine quality leather to the retailer's design and specifications. The soles were of leather and of exceptional thickness measuring between 5/8 and 3/4 of an inch and comparatively inflexible. The heels were also made exclusively of leather.

Upon their arrival at the Aeroquay, the suppliant entered the general concourse on the departure level and went directly to the Air Canada ticket area which is located at the westerly end of the bank of ticketing areas and the station to which he went was the most westerly stand in the Air Canada area. Meanwhile Mrs. Kerr parked her automobile.

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The suppliant paid for his ticket, changed the classification of his ticket to an open return trip which was good for one year and checked his baggage except a brief case which he carried. A minor altercation occurred between the suppliant and an Air Canada employee about the weight of the suppliant's brief case. The brief case weighed twenty-one pounds, being one pound overweight for which excess the employee insisted upon charging. The suppliant considered this additional charge as picayune but paid the charge and promptly dismissed the matter from his mind. He was then directed to the appropriate holding room located off the ring concourse. The suppliant was joined by his wife at the ticket counter as he was giving his cheque for his ticket and together they made their way to the holding room.

To do so the suppliant walked directly from the ticket counter to the western link. The western link is one of two links joining the general concourse of the departure level to the ring concourse. The floors in all three areas are of the same level and constructed of the identical terrazzo material; that is the floor of the link is not on an incline. The link is sixteen feet wide and approximately seventy-two feet in length. The north and south sides of the link are completely enclosed by glass looking into open decorative court yards on either side and exposed to natural daylight. On the northern side of the link is an escalator which descends to the arrival level one storey below. The ceiling of the link is completely illuminated by lights installed beneath the structural ceiling and the lighting is enclosed in solid translucent plastic. These lights are turned on throughout the entire day and were lighted on January 12, 1964, the day in question.

As the suppliant and his wife had walked at a slow pace approximately twenty feet into the western link and at its approximate centre the suppliant's right foot slipped forward from beneath him and he fell heavily to the floor. He landed in a seated position striking his back on the floor slightly above his buttocks then fell flat on his back striking his head on the floor. Immediately upon landing on the floor from his fall the suppliant's legs and arms appear to have been extended into the air at least his right leg was and the arm with which he was carrying his brief case. He then came to rest on the broad of his back in a prone position diagonal to the link with his feet towards the ring con-

course and his head towards the general concourse. The brief case put suppliant's thumb out of joint and the fall to the floor dazed him.

The suppliant, in his evidence, stated that he was walking along and the next thing he knew he was on the floor, that he had slipped and that his right foot went from under him.

At the time of his fall, Mrs. Kerr and the suppliant had just been passed by a young man going through the link. A Commissionaire, Erferd Bailey, was standing about five feet into the ring concourse looking into the link. He saw Mr. and Mrs. Kerr approaching and described their pace as slow and leisurely. Because of their pace he did not think that they were going to board an aircraft. He saw the suppliant fall. Mrs. Kerr, Mr. Bailey and the suppliant's accounts of his fall substantially coincide and are as I have described it above.

Mr. Bailey and Mrs. Kerr immediately offered their assistance to the suppliant as did the young passerby who did not testify. He asked them to permit him to remain lying on the floor momentarily until he recovered from his dazed condition or perhaps Mrs. Kerr advised him to do so. Both Mrs. Kerr and Mr. Bailey described the suppliant's face as white and ashen. When the suppliant had recovered sufficiently from his shock he was assisted to his feet by Mrs. Kerr and the Commissionaire.

Mrs. Kerr, with natural wifely solicitude, brushed off her husband's coat with one hand while supporting him with her other hand. She described her husband's coat as being covered with white which she elaborated upon as being a white flour-like substance. The Commissionaire did not notice this substance on the suppliant's coat, nor Mrs. Kerr's action in brushing it off.

The suppliant was then taken to the departure room where particulars were taken from him by a Royal Canadian Mounted Police Constable. His thumb had become swollen and pained him so that he was unable to extract his wallet containing his identification from his hip pocket. Mrs. Kerr did so and furnished particulars to the Constable.

Mr. Bailey, the Commissionaire suggested that the suppliant might see a doctor, who was on duty in the Aeroquay, for medical assistance but that proffered aid was

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refused by the suppliant who said be would consult his own physician at his destination if he felt he needed to do so.

After particulars of the incident had been taken, the suppliant was still suffering from the consequences of his fall and wished to remove himself from the many people about the departure room. He, therefore, walked back along the ring concourse to the entrance to the west link and from that point looked into the west link towards the general concourse. He identified the tile or square of terrazzo upon which he had fallen, to his own satisfaction, and observed that that particular square seemed shinier to him than those bordering upon it.

During cross-examination, when faced with the suggestion that it would be difficult for him to pick out the particular tile upon which he had slipped from a distance of approximately fifty-four feet, the suppliant explained that when he was assisted to his feet after his fall he noticed that the tile upon which he had slipped had a different sheen from the others and that such circumstance was confirmed by his second look into the link from the ring concourse when he saw one square shinier than the others. He had not noticed it on entering the west link, nor did he notice any foreign substance on the floor at that time, presumably because he did not direct his attention to the floor. From his observation of the floor he formed the opinion that this particular tile had been more highly polished than those surrounding it. He hazarded the guess, from his experience in the construction industry, that this particular tile was being used to test various types of sealer or finish in a heavily trafficked area. Upon arising from the floor he did not notice any scuff marks. However, he did testify that the shinier tile was approximately 24 to 30 inches by 3 feet, 6 inches to four feet. In fact the tiles in the general concourse, the connecting link and the ring concourse are all of terrazzo and laid out in exact squares measuring 30 inches by 30 inches. Each square is separated by a thin metal strip. Conceivably, therefore, the suppliant may have had in mind that two adjacent squares were shinier than those surrounding them.

The evidence does not establish the precise time of the suppliant's fall. He estimated the fall at about 9:00 o'clock

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and that his flight took off at 9:15 a.m. On the other hand, the Commissionaire places the time of the fall at 9:50 a.m. The suppliant could not locate his ticket so that the time of takeoff could be ascertained. Bearing in mind that the suppliant had left his home at 8:45 a.m. and allowed twenty to twenty-five minutes for the trip to the airport and that the airline usually requires passengers to check in about one hour before the scheduled takeoff times for international flights and approximately ten minutes were taken up at the ticket counter, I would conclude that the fall took place well after 9:00 o'clock and more approximate to the time of 9:50 a.m.

The suppliant did board the aircraft for Jamaica. He was suffering from severe headache and pain in his back. He was revived somewhat by the cold fresh air on the tarmac and made his way up the boarding steps with some difficulty but without assistance. En route he was given pills by the stewardess to relieve his headache.

I propose to postpone a detailed recital of the suppliant's injuries and physical condition until I deal with the assessment of damages.

After having arranged for a statement to be taken by the police constable and offering aid to the suppliant, the Commissionaire, Bailey, returned to the spot where the suppliant had fallen. He placed that point at three tiles, or seven feet, six inches, from the head of the escalator and observed a brown mark where the suppliant had fallen. The Commissioner's observation can best be reviewed by the following transcript from his evidence:

Q. I see. Now, did you return to the spot where he fell?
A. Yes, sir.
Q. And what did you observe there?
A. I found a brown spot just exactly where he fell. It looked like a scuff mark off his shoe.
Q. Would you describe this brown spot that you found?
A. Yes. It was a dark brown spot about an inch wide, about two or three inches long.

HIS LORDSHIP: What was that again?

THE WITNESS: It was a brown spot; a dark brown spot, sir, about an inch and a half wide to two to three inches long. It looked like brown shoe polish to me.

HIS LORDSHIP: What colour were Mr Kerr's shoes?

THE WITNESS: Brown, sir. Brogues.

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MR. JEWELL:

Q. Did you notice that at the time?
A. Yes, sir.
Q. Now, did you make any arrangements to remove this spot?
A. No, sir.
Q. You say that it was...

MR. CHALMERS: I am sorry, my lord. What was the answer?

THE WITNESS: Pardon, sir?

MR. JEWELL: His answer was "no".

MR. CHALMERS: Thank you.

MR. JEWELL:

Q. Now, you say that the spot was approximately one inch...

HIS LORDSHIP: An inch and a half.

MR. JEWELL: An inch and a half wide and three or four inches long.

HIS LORDSHIP: Two to three.

MR. JEWELL:

Q. Oh, did you say two to three?
A. Yes, sir.
Q. Approximately how thick was the spot?
A. Well, I couldn't tell how thick it is, sir.
Q. You didn't measure it?
A. No.

HIS LORDSHIP: Now, what do you mean "how thick"?

MR. JEWELL: Well, how thick (indicating). In other words we have got the length of it...

HIS LORDSHIP: Yes.

MR. JEWELL: ... we have got the wideness of it. What was its density?

MR. CHALMERS: Vertical height is what my friend wants.

MR. JEWELL: Vertical height.

HIS LORDSHIP: It is pretty difficult.

THE WITNESS: Absolutely.

MR. JEWELL: All right.

HIS LORDSHIP: Of course the witness did say that it looked like a scuff mark.

MR. JEWELL: Yes. He also said, I think, my lord, it looked like shoe polish.

HIS LORDSHIP: Yes, that is right.

MR. JEWELL: And that is why I wanted to get the thickness of it, my lord.

Q. So you can't give us the thickness?
A. No, sir.

HIS LORDSHIP: Well, it certainly isn't an inch or a half inch or a quarter of an inch?

THE WITNESS: No, sir.

HIS LORDSHIP: It was a scuff mark?

MR. JEWELL:

Q. Did you examine this mark in any detail?
A. No, sir.

Counsel for the suppliant tendered the evidence of Mr. D. E. Manson, a shoe salesman employed by the retailer from whom the suppliant had purchased the shoes he wore on January 12, 1964. The shoes then worn by the suppliant were later stolen in Jamaica. Mr. Manson took a new pair of the same model from stock and conducted a series of experiments. I permitted the results of such experiments to be introduced in evidence, subject to objection by counsel and to my admonition that while, in my view, the evidence might be admissible its probative value appeared to be negligible. I based that observation on the circumstances that the witness was in no way qualified as an expert to conduct such tests and the experiments were not made under the identical or conditions similar to those prevailing at the time of the accident here involved. Mr. Manson, by placing his hand in the right new shoe and bringing it into contact with a slab of terrazzo, similar in composition to that in the floor of the Aeroquay, concluded that the mark described by the witness, Bailey, was not made by the suppliant's shoe. It was obvious to me that Mr. Manson could not duplicate the manner in which the suppliant fell, either in position or weight applied, nor was the condition of the suppliant's shoe duplicated. He applied a shoe cream carried in the retailer's stock to the shoe which was immediately absorbed by the leather. The suppliant customarily had his shoes shined at a shoe shine parlour and there was no evidence that the type of cream was similar to that used in shoe shine parlours. However, by placing a quantity of shoe cream on the terrazzo slab and forcing the heel of the shoe over the cream Mr. Manson succeeded in making a mark of the approximate size and appearance described by the witness Bailey. It would seem to me that the size of the mark is dependent upon the amount of the shoe cream placed on the tile. From the conclusions reached by Mr. Manson from the experiments he had conducted, counsel for the suppliant submitted that I should infer that the suppliant's fall was caused by him stepping upon a small quantity of substance similar to shoe cream, that I should infer the presence of such substance on the floor of the Aeroquay, and that such substance caused his right foot to slip from beneath him resulting in the fall which gives rise to the present Petition of Right.

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The allegations of negligence on the part of the respondent, upon which the suppliant relies as giving rise to liability, are set out in the Petition of Right as amended by order of the President, dated April 27, 1967, as follows:

> . . .
>
> 5. The aforesaid fall and resulting injuries were caused by a dangerous condition of the floor tile of which Kerr prior to the fall was unaware and the servants of the Crown were or ought to have been aware, namely:
>
> The tile upon which Kerr slipped and fell was highly over-polished whereas the surrounding tiles upon which Kerr had been proceeding prior to the fall were relatively unpolished.
>
> In the alternative the tile of the floor on which the suppliant slipped and fell contained a spot of grease or similar slippery substance.

January 12, 1964 was the opening day of the new Aeroquay at Toronto International Airport which had been built, at considerable expense, to replace the outmoded and inadequate facilities previously in use. The Aeroquay was modern in design to afford the utmost convenience and efficiency to air passengers and traffic and to operating air lines. Naturally the prime contractor, sub-contractors and personnel responsible for the operation of the Aeroquay made every effort to have the building in condition for the reception of the public and for operation in time for the deadline date. At one minute past midnight of January 11, 1964 the building was opened and began operation.

The supervising architect, Ivar Kalamar, gave his preliminary certificate under date of January 15, 1964. He explained that the preliminary certificate justifies a take-over and that the building so certified was substantially completed and was ready for occupancy and operation. Appended to the architect's preliminary certificate was a list of defects and deficiencies, which, while numerous, were of a minor nature. The purpose of giving a preliminary certificate, subject to listed deficiencies, which is the usual procedure, is to ensure that the contractor remains responsible for their correction and that payment is not to be made until the deficiencies or defects have been corrected. The architect also explained that while his certificate was signed on January 15, 1964, the list of deficiencies appended were as at January 6, 1964 and that it took from that date until January 15, 1964 to type the document on which date it was signed. He testified that between

January 6 and January 12 a great many of the deficiencies were corrected and others were corrected after that date. However, he did acknowledge that there was work to be completed on the apron level, which is outside the building, and on the parking floors and that certain rearrangements had to be made in the staff rooms and in the mechanical area but these areas were far removed from the public areas on the departure level which were complete subject to the deficiencies he had listed. The architect's final certificate was given on November 9, 1966 when all deficiencies had been corrected.

Mr. Kalamar testified that terrazzo flooring was the safest type for use in public buildings and that fact accounted for its extensive use in such buildings. He also testified that the floors on the departure level had been poured, ground twice and that two coats of sealer had been applied by August 25, 1963. He further testified that he concurred in the application of two coats of sealer and neither saw nor instructed the use of wax. He also testified that no tile or square was used for test purposes in the west link or elsewhere.

This witness had occasion to be in the west link at 2:00 a.m. on January 12, 1964. The west link was then well lighted, people were walking through the link, the escalator was running and he further testified that the floor of the west link was clean, that the floor was not slippery, but firm to his step (he was wearing shoes with leather soles and rubber heels) and that there was no variation whatsoever between the tiles on that floor which were all of the same sheen and texture.

The only deficiency listed in the appendix to the architect's preliminary certificate relating to the west link is item 163 on page 18 reading as follows:

> Complete luminous ceiling. Repair spray fire proofing. Adjust expansion joint cover. Adjust radiator covers. Touch up black enamel mullions. Complete escalator. Complete all signs.

The architect's complaint about the luminous ceiling was that the fittings in the grid system should be trimmed to permit proper butting. When the lights were installed, which was prior to the installation of the translucent plastic, bits of the asbestos fireproofing which had been sprayed on the ceiling to a thickness of three-quarters to

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two inches had been knocked loose. This would depreciate the fire rating. These defects were repaired about March, 1964. Mr. Kalamar testified that it was impossible for any of the asbestos material to fall to the floor of the west link on January 12, 1964 because the luminous ceiling was a solid one and not of the egg crate or open design as used in the general concourse. The defects in covers of the heating units and window frames would not affect the condition of the floor. The escalator was operating on January 12, 1964 and had been ready for operation about two months earlier. The defect to be corrected was with respect to laminated panels under the escalator which were visible from the lower floor. This was done in late 1964.

Some trouble was experienced with pitting in the terrazzo floor but this did not occur until April, 1964 well subsequent to the date of the accident here involved.

Remo Gasparini, the subcontractor for the installation of the terrazzo flooring and ceramic tiling throughout the Aeroquay, testified that the terrazzo flooring had been completed and sealed in accordance with the terms of his contract in August, 1963. On January 12, 1964 there were still deficiencies to be corrected, such as a spot of cement, a cracked tile, a hole in a wall, a hairline crack in the terrazzo or an open crack and the like. A hairline crack would be filled with grout but if the crack were an open one the entire square would be chipped out to the cement base, new topping poured, ground and resealed. He stated that he was at the Aeroquay from Monday to Friday of the week preceding Sunday, January 12, 1964 to ensure that the public areas were cleaned up and in readiness for the opening on that date. He said that any deficiencies in the areas to which the public would have access on that date had been remedied. Two tiles at the entrance to the escalator were replaced prior to August, 1963 but after that date no replacement or resealing was done in the floor of the west link and the deficiencies did not apply to the west link.

The terrazzo topping was described as being composed of marble chips bound together by grout. It was poured, then levelled. After it was set it was ground by machine with coarse carborundum plugs. Two days were allowed to elapse and the floor was then again ground with finer plugs. A coat of sealer was then applied. The purpose of the

sealer is to be absorbed by the porous composition of the terrazzo to prevent the penetration of stains. It was on the recommendation of this witness that the architect authorized a departure from the specifications to the application of two coats of sealer as opposed to one coat of sealer and two coats of wax. The sealer used was an approved brand of the solvent type. This witness expressed the view that a finished floor would have the same sheen throughout its area and that if one tile had been replaced and resealed it might be darker or lighter than the surrounding tiles but that it would not be shinier. He also swore that no experiments were conducted with any tile in the floor of the west link, and that no wax had been applied to that floor by his firm or anyone else. When he left the building on the Friday prior to the Sunday when the accident happened, the floor in the west link was in the same condition as the terrazzo floor throughout the general concourse. It was, in his words, just normal terrazzo floor, clean to the eye and no more slippery than elsewhere.

The respondent entered into a contract dated December 24, 1963 with Allied Building Services (1962) Ltd., the third party herein and hereinafter so referred to, for a term of two years beginning January 6, 1964 whereby the third party undertook to carry out cleaning services in the new Air Terminal Building Complex, at the Toronto International Airport, which complex includes the Aeroquay.

The specifications appended to the contract require that the third party shall have staff on duty twenty-four hours a day, seven days a week, but during the hours from 1:00 a.m. to 6:00 a.m. when traffic is substantially lower, the number of staff is reduced, which period of lesser activity is to be compensated by special situations, such as inclement weather and heavier traffic when more numerous staff is required by the greater frequency of the services required.

The floors in the heavy traffic area of the Aeroquay, which include the general concourse, the west link and the ring concourse, are required to be dust-mopped every eight hours, damp-mopped and buffed every four hours, scrubbed or deep cleaned twice weekly and emergency cleaning is to be performed as required.

Evidence was given by Edgar Collins, who was the successful candidate in a Civil Service competition for the

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position of Supervisor Cleaner, Department of Transport at Toronto upon his retirement from his service as an Armament Officer and Station Warrant Officer, Warrant Officer First Class, in the Royal Canadian Air Force. He began his duties at the old facilities at the Toronto Airport on November 18, 1963 and his duties at the new Aeroquay began on January 6, 1964.

He described the operation of dust-mopping as going over the floor area by cleaners with a long-handled brush upon the cotton strands of which a small quantity of a commercial preparation known as Misto is atomized. This product is sprayed on the brushes at the beginning of the operation and one application is adequate for the entire operation. I would assume that the use of this product serves as a method of dust control. He testified that the product contained an oil base but that the quantity applied to the brushes was so minute that it did not leave an oil film on the floor, and if there had been an over application and any oil adhered to the floor it would do so uniformly and be immediately absorbed in the grout.

He described damp-mopping and buffing as a "two pail —two mop" process. To a pail of clear water a small amount of a neutral liquid cleaner, free from alcohols, acid, salts or other strong ingredients, is added. This solution is applied to an area of the floor, the second mop is then immersed in a second pail filled with clear water, wrung dry in a mechanical device and the floor is then dryed or buffed. He added that sometime subsequent to January 12, 1964 this manual method of damp-mopping had been replaced by a machine method.

Prior to January 12, 1964 Mr. Collins was constantly inspecting to ensure that the building was clean, free of debris and obstructions and in good repair to be in readiness for the opening day.

From 7:00 a.m. until midnight on January 11, he spent ninety per cent of his time in the public areas of the departure and arrival levels. During that time he was in the west link many times and invariably found it to be clean, free from obstruction and soil. The floor was even textured and of an even low level lustre throughout and afforded a firm and even footing and did not differ from

the floor in other areas. Throughout his stay on the premises he observed the employees of the third party performing their duties.

Mr. Collins acknowledged that some construction work was continuing, but indicated that this was being done in areas removed from the west link and the general concourse. There was some work being done in the concessions area, in the mechanical area on a lower level, in the open court yards to which the public did not have access, and in the north-eastern quarter of the departure level. The workmen arrived at, and carried their equipment to those places from the lower level and in doing so had no occasion or reason to pass through the west link, which would be an inconvenient route for them. In this Mr. Collins was confirmed by Mr. Kalamar, the architect and Mr. Gasparini, the terrazzo subcontractor.

On January 12, 1964 Mr. Collins arrived at the Aeroquay at 6:45 a.m. It was apparent to him that the employees of the third party had scrubbed the floors between midnight of January 11 and his arrival on the morning of January 12. He made five inspections of the west link that morning, the first at 7:15 which was a double inspection, once going out on his tour and the second upon his return approximately twenty minutes later. He did a second double inspection in company with Mr. Naud, his immediate superior, the beginning of which he placed at between 9:00 and 9:10 a.m. He described this inspection as a detailed and exhaustive one. At that time he found the west link clean, free of soil and debris. The floor of the west link was of even texture and lustre. He did not see one tile shinier than the surrounding tiles. If he had seen one tile in such condition he would have brought that fact to the attention of the third party for immediate correction or to the attention of one of the fourteen Department of Transport employees under his direct control for emergency cleaning. In his view it would be impossible for one tile to be more highly polished than those surrounding it, because the floors were not polished, no wax had been applied to them, no resealing had been done and no tile was being used for testing purposes.

Because of the well lighted condition of the west link, he stated he could readily see any foreign substance on the

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floor such as a wad of gum, chocolate bar or ice-cream remnants which he would have had removed forthwith. He testified he saw no such things on his trip through the west link shortly after 9:00 a.m. nor upon his return trip some twenty minutes later. He was directing his attention to the floor particularly and was looking for such things as was his superior who accompanied him.

He did not keep a log book or record of his inspections because he had been instructed not to do so by his superiors for thirty days in order that the third party might have an opportunity to "groove in".

There was no damp-mopping or dust-mopping conducted in the west link between 7:00 a.m. and 10:00 a.m. on January 12, 1964.

Emergency cleaning was the responsibility of the third party and the Department of Transport staff. It was the responsibility of commissionaires on duty, Air Canada employees, the police constables, the departmental management and supervising staff to report any unusual condition which came to their notice and it would be remedied within three or four minutes.

I am satisfied that it was after Mr. Collins' inspections of the west link between 9:00 a.m. and 9:10 a.m. and twenty minutes thereafter that the suppliant fell there.

The mark described by the witness Bailey, after the suppliant's fall was not seen by the suppliant, Mrs. Kerr, Bailey nor Collins prior to his fall, nor was it seen by either Mr. or Mrs. Kerr after his fall.

The Crown's liability is created by section 3(1)(*b*) of the *Crown Liability Act*[1] which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> . . .
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

As a prelude to a consideration of the inferences to be drawn from the evidence adduced and recited in detail above, it should be recalled that the onus is on the suppliant to show that the respondent was negligent and that

[1] S. of C. 1952-53, c. 30.

negligence was the cause of the suppliant's injury. It is not enough for the suppliant to say that he came, he fell, he was injured and therefore he has a claim. Many slips happen without negligence and accordingly the doctrine of *res ipsa loquitur* does not apply.

The negligence of which the suppliant complains is as set out in paragraph 5 of his Petition of Right, which is quoted above. It is, in summary, that the floor upon which the suppliant fell was in a dangerous condition in that

(1) the particular tile upon which the suppliant fell was more highly polished than the others, or

(2) that tile contained a spot of grease or similar slippery substance.

Dealing with the first of the particulars of negligence above, there is no preponderance of evidence that the suppliant fell on account of a slippery condition of the floor. The evidence goes no further than that he fell. In his evidence the suppliant has said that he was walking along and the next thing he knew he was on the floor. Mrs. Kerr and Commissionaire Bailey also testified to the suddenness of the suppliant's fall and for no explicable reason at that moment. Naturally when the suppliant recovered he began to speculate as to the reason for his fall. He recalled that his right foot slipped forward from beneath him. In this he is confirmed by Mrs. Kerr and Bailey. He next sought the reason for his right foot slipping. Upon arising he observed that the tile upon which he had fallen appeared shinier than the others and because of that higher gloss he concluded it had been more highly polished than the surrounding tiles and therefore more slippery. He also hazarded the guess that the particular tile may have been replaced or was being used to test various finishes. These latter two suppositions are definitely rebutted by the evidence of the architect, Mr. Kalamar, the terrazzo subcontractor, Mr. Gasparini and Collins, the cleaning supervisor. These same three witnesses also rebut the supposition that the particular tile had been highly polished. The floor had received two coats of sealer some four months previously, no tile had been replaced and no tile had been resealed. No wax had been applied. The cleaning processes were scrubbing, damp-mopping and dust-mopping. None of these processes

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were polishing processes and it is inconceivable to me, therefore how one particular tile could have been shinier than the others for any of those reasons.

It was suggested in argument that the use of the oil based dust control product might result in a thin film of oil being upon the floor. I do not think that this is possible having regard to the infinitesimal amount used, because, if an excess amount were applied to a brush, it would be spread uniformly over the entire surface and would not result in one tile being shinier than the others and because if there had been an excessive application of this product any excess which may have adhered to the floor would be quickly absorbed. Further this application was done at the beginning of the dust-mopping operation and no further applications were made during the process thereof. If my recollection of the evidence serves me correctly, the applications of this dust control substance took place in a central storeroom for cleaning equipment located on a lower level of the Aeroquay.

Mrs. Kerr testified that after assisting her husband to his feet she brushed a white flour like substance from his blue cashmere overcoat. I accept Mrs. Kerr's testimony in this respect without question. But I do question that the substance was asbestos from the fire-proofing in the ceiling or plaster dropped by workmen passing through the west link. Mr. Kalamar testified that fire-proofing could not fall to the floor because of the installation of the luminous plaster ceiling and its construction. I also conclude from the testimony of Collins, Kalamar and Gasparini that it would be most irrational for workmen to pass through the western link with their equipment and supplies when a much more convenient route was available to them to the areas far removed from the west link where any work was then currently in progress. Further any debris such as asbestos or plaster would have been noticed by Collins on his inspections and he did not notice anything of this nature. Accordingly, I can only conclude that the substance on the suppliant's coat which was removed by Mrs. Kerr was dust from the floor. The evidence established that the west link is a very heavy traffic area and that the flow of traffic was very heavy on that morning. In addition to normal dust tracked upon a floor by the passing of many feet, it is likely that grout of the terrazzo may have

been disturbed by the traffic. Neither the suppliant nor Mrs. Kerr noticed anything unusual upon entering the west link. It is reasonable to infer, therefore, that there was a thin uniform film of dust on the floor. The only thing this evidence establishes with certainty is that the floor had not been damp-mopped or dust-mopped for some time prior to the suppliant's fall.

It is conceivable that as a result of the suppliant's fall the floor was cleared of surface dust by it adhering to the suppliant's coat where his coat came into contact with the floor which would result in that area appearing shinier to him.

Still later the suppliant returned to the west link and from the ring concourse looked into the west link. He testified that he then observed one tile, which he identified as the tile upon which he had fallen and that that tile was shinier than the tiles bordering upon it. The distance from which the suppliant made this observation was approximately fifty feet. The suppliant incorrectly estimated the dimensions of the tile he so identified. He was reasonably accurate in one dimension but since the tiles are exact squares he may have identified two adjacent as being those upon which he fell as I have mentioned before. He did state that the higher sheen extended to precise boundaries of the tile which would negative any conjecture that the shinier appearance was caused by the removal of dust by his clothing in the fall. That the shine extended to the precise border does lend credence to the guess that a particular tile or possibly two adjacent tiles were used for testing purposes or had been replaced but I have mentioned before such a conjecture has been effectively rebutted by conclusive evidence to the contrary.

The west link was brightly lighted both from the illuminated ceiling and from natural daylight on either side. I have no doubt that the suppliant honestly thought he observed a tile or two adjacent tiles that were shinier than the others and hence slippery but the reflection of light upon such surfaces has been known to create strange illusions.

Therefore the only evidence I am left with is that of the suppliant's observations, in the circumstances I have outlined, that one or two adjacent tiles appeared shinier to

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him than the surrounding tiles and accordingly relatively slippier. It is also a matter of conjecture that because one tile might be shinier than another that it is necessarily more slippery.

After carefully considering the evidence I am not satisfied that one tile was highly overpolished and that the surrounding tiles were relatively unpolished but rather that the preponderance of evidence is to the contrary.

The establishment of the suppliant's alternative allegation of negligence that there was a spot of grease or similar substance on which the suppliant slipped is dependent on the evidence of Commissionaire Bailey, Mr. Manson and conjectures which flow therefrom. Bailey, when he returned to the place where the suppliant fell, saw a mark on the floor between an inch and an inch and a half in width and two to three inches long. He stated it was brown in colour and "it looked like a scuff mark off his shoe". He added that "it looked like brown shoe polish" to him.

Neither the suppliant nor Mrs. Kerr saw such a mark upon entering the west link, nor did either of them observe that mark immediately after the suppliant's fall. The suppliant did not see it on his second view from the ring concourse. Mr. Collins did not see it on his double inspection of the west link which I have found to have been immediately prior to the suppliant's fall. Neither did Mr. Collins see a spot of grease or similar substance although he stated he could and would have seen a wad of chewing gum. This was the sort of thing for which he was looking and which it was his duty to see. It is abundantly clear to me that the mark was not there before the suppliant fell.

The next question is, therefore, what caused the mark. The implication inherent in Bailey's evidence is that it came from the suppliant's shoe at some stage in the course of his fall.

Mr. Manson's evidence, as I mentioned when I summarized and commented upon it above, was designed to show that the mark could not have been made by the suppliant's shoe. Assuming that premise, it is then suggested that the mark must have been made by the suppliant slipping on some greasy substance which was present on the floor, the presence of which the respondent ought to have known or that it constituted a concealed danger. A great deal of

evidence was introduced as to work in progress designed to account for the likelihood of a workman dropping a spot of grease from his equipment or supplies.

However, I do not accept the premise that the mark could not have been made by the suppliant's shoe. I reject the evidence of Mr. Manson for the reason that the experiments conducted by him were not made under identical or conditions sufficiently similar to those prevailing in the suppliant's fall.

In *Meredith v. The Queen*[2] Fournier J. in commenting upon a suppliant's onus to establishing negligence on the part of the Crown or its servants in the scope of their duties, said at page 159:

> The onus of proof of these facts rests upon the suppliants and no presumption or assumption can displace this statutory obligation. Suppositions, speculations, conjectures, are not sufficient to discharge the duty which lies with the suppliants to establish the above matters; and, if they do not discharge this obligation, their claim fails.

That the mark was not made by the suppliant's shoe, that there was a spot of grease, that grease may have been dropped by a workman, is fraught with supposition, speculation and conjecture. I am, therefore, left far out in the field of conjecture rather than in that of reasonable inference.

It is my view that the suppliant has not proved, by a preponderance of evidence, that there was a spot of grease or similar substance on which he slipped and fell.

While it is most unfortunate that the suppliant suffered this mishap, I can find nothing in the evidence to justify me in finding that the accident was the result of the respondent's negligence. It has not been proven by a preponderance of evidence that the floor was in a dangerous condition by reason of one tile being more highly polished than the others, or the presence of a spot of grease or similar substance. The facts are more consistent with the suppliant having fallen by accident at a place where there was no default by the respondent.

With particular reference to the possibility of a spot of grease being present on the floor of the west link and to a much lesser extent to the possibility of one tile being more highly polished than the others, counsel for the suppliant

[2] [1955] Ex. C.R. 156.

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submitted that the system of inspection instituted by the respondent to discover and correct any unusual dangers was inadequate bearing in mind the number of deficiencies remaining to be corrected and the likelihood of workmen leaving debris about or dropping greasy substances on the floor.

This presupposes the relationship between the respondent and suppliant to be that of invitor and invitee. The standard of care of an invitor to an invitee is that the invitor shall use reasonable care to protect the invitee from unusual dangers of which he knows or ought to know, as contrasted with the responsibility of a licensor not to expose a licensee to a concealed danger or trap. The law imposes a duty on an invitor to ascertain and eliminate perils that might be disclosed by a reasonable inspection.

There was an issue as to whether the relationship between the suppliant and the respondent was that of invitor and invitee or licensor and licensee, but, because of the view I take of the matter, it is not necessary for me to decide that issue. I have already found that it has not been proven that there was either an unusual danger or a concealed danger.

Furthermore I am of the opinion that the respondent's system of inspection was reasonable bearing the existing circumstances in mind. The work still to be done was minor in nature and for the greater part far removed from the public areas. It was the subcontractor's responsibility to remove debris when a job was finished. If he did not do so, the prime contractor would do so at the subcontractor's expense. The respondent engaged an independent contractor, the third party herein, to clean the premises in accordance with reasonable specifications founded on experience. These circumstances do not absolve the respondent from responsibility, but there has been superimposed upon the responsibilities of the independent contractors a system of inspection as described and conducted by the witness Collins. Various persons on duty throughout the premises such as the commissionaires, the police constables, Air Canada personnel, the cleaning supervisor, Collins, and Department of Transport personnel, were instructed to report any debris or foreign matter on the floors that came to their attention to an emergency service by telephone. On receiving such a report the emergency cleaning service conducted

by the third party would be directed to the spot by telephone or public address system and the situation would be corrected within four minutes of the report being received. In addition there were fourteen persons under the direct control of Collins to perform these emergency cleaning services.

Therefore, as I have intimated, the system of inspection instituted by the respondent was a reasonable one and the standard of care taken by the respondent meets the higher standard of care of an invitor to an invitee.

As I have been unable to find negligence on the part of the respondent, it follows that the suppliant is not entitled to the relief sought by his Petition of Right herein and the respondent is entitled to costs.

Having regard to the findings I have made, I do not have to form an opinion under section 4(5) of the *Crown Liability Act*[3].

The suppliant pleaded both the lack of prejudice and the injustice contemplated by subsection (5).

It is conceded that a notice in compliance with subsection (4) was not given. However, Commissionaire Bailey, was aware of the incident as was a police constable on duty who took particulars. I would assume that the duties of these respective persons would require them to report the incident to their superiors although there was no evidence that they did so.

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[3] 4 . . .

(4) No proceedings lie against the Crown by virtue of paragraph (*b*) of subsection (1) of section 3 unless, within seven days after the claim arose, notice in writing of the claim and of the injury complained of

(*a*) has been served upon a responsible official of the department or agency administering the property or the employee of the department or agency in control or charge of the property, and

(*b*) a copy of the notice has been sent by registered mail to the Deputy Attorney General of Canada.

(5) In the case of the death of the person injured, failure to give the notice required by subsection (4) is not a bar to the proceedings, and, except where the injury was caused by snow or ice, failure to give or insufficiency of the notice is not a bar to the proceedings if the court or judge before whom the proceedings are taken is of opinion that the Crown in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the proceedings would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established.

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The suppliant wrote a letter dated February 12, 1964 addressed to the Manager of the Malton International Airport outlining the particulars of the incident in some detail. He identified the date of the accident, that Bailey was a witness to his fall and that particulars had been taken by an R.C.M.P. constable. He described the injuries he sustained which he thought were minor at the time but stated that they had increased in severity. He assumed that the Airport carried insurance protection against such incidents and requested to be supplied with claim forms. He attributed the cause of his fall to "a highly slippery portion of the terrazzo floor".

Counsel for the respondent conceded that there was no prejudice and that there would be an injustice with respect to the allegation in the Petition of Right that one tile was highly over-polished, but expressed reservations whether the lack of prejudice would apply to the second allegation of negligence, that is, the presence of a grease spot, which allegation was pleaded by way of amendment pursuant to an order dated April 27, 1967.

If it were incumbent upon me to express an opinion, I would be of the view that the letter of February 12, 1964 was sufficiently broad in its terms to cause the respondent to investigate the incident thoroughly and since there is admittedly no prejudice with respect to the first allegation of negligence, it would follow that there was no prejudice with respect to the second and it would be an injustice if the suppliant were not permitted to rely on that allegation.

A further matter arose during the course of the trial. The suppliant served a notice to admit facts dated November 8, 1966 upon the respondent in general terms. Had the respondent admitted the facts in such notice it would constitute an admission that the suppliant's Petition of Right was well founded. The respondent did not admit such facts and I certify that the respondent's refusal to admit was reasonable in accordance with Rule 147.

On the suppliant bringing his Petition of Right against the respondent for damages for injuries alleged to have resulted from his fall at The Toronto International Airport, the respondent issued a third party notice claiming to be indemnified by the third party, Allied Building Services

(1962) Ltd., to the extent of any sum which the suppliant may be adjudged entitled to recover from the respondent.

The ground upon which the respondent claimed to be so indemnified is that by contract in writing dated December 24, 1963 for a term of two years commencing on January 6, 1964 the third party undertook to perform cleaning and related services including the care and maintenance of the floors in the public areas in the Aeroquay and that it was a term of that contract that the third party would indemnify the respondent against any claim occasioned by any default of the third party in connection with the cleaning of the floors of the Aeroquay.

Paragraph fifteen of that contract reads as follows:

> 15. That the Contractor shall at all times indemnify and save harmless Her Majesty from and against all claims, demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to any action taken or things done or maintained by the Contractor under and/or pursuant to any of the provisions of this contract set out and contained, or otherwise howsoever, in connection with the said works.

(The word "contractor" where it appears in the quoted paragraph above may be read as "third party").

The respondent, in the Statement of Claim against the third party alleges that "if a tile was over-polished as alleged in the Petition of Right, it was over-polished by the Third Party in the performance" of cleaning and related services including the care and maintenance of the flood tiles and "if a floor tile contained a spot of grease or similar slippery substance as alleged in the Petition of Right, its containing the said spot was attributable to the manner in which the said services were performed by the Third Party".

In its Statement of Defence the third party pleads there was no breach of its contract and expressly pleaded that it did no polishing in the hall where the suppliant fell. This latter pleading was confirmed by the evidence adduced and there was no evidence whatsoever that the third party was not performing the cleaning services undertaken by it in strict compliance with the express terms of its contract.

It follows from the foregoing and from the fact that I have found the respondent not liable to the suppliant that

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the action against the third party must be dismissed. The third party is to recover the costs of the third party proceedings from the respondent.

In the circumstances of the present case, I do not think that the respondent should recover the costs of the third party proceedings against the suppliant.

Notwithstanding that my decision is adverse to the suppliant on the merits, I propose to deal with the amount of the damages sustained by the suppliant.

All medical witnesses were agreed that the suppliant suffered from peripheral neuritis that the prospect of death was imminent at one time and that the extent of the suppliant's recovery has been remarkable. There was no dispute that the likelihood of the suppliant making a complete recovery is remote.

However, there was a dispute and a direct conflict of medical testimony as to whether the peripheral neuritis from which the suppliant suffers was caused by the suppliant's fall rather than by physical conditions which existed prior to the fall or occurred after the fall.

Two highly qualified neurologists gave diametrically opposite opinions. Dr. H. J. M. Barnett, who attended the suppliant in the critical stages of his illness, was called by the suppliant and testified that in his opinion there was a possible and probable relationship between the suppliant's fall and the onset of his illness. In Dr. Barnett's opinion the most common cause of peripheral neuritis, being of a nutritional nature, was eliminated. On the other hand, Dr. J. L. Silverside who was called by the respondent, expressed the opinion that the results of tests conducted in the Toronto General Hospital do not favour an explanation of peripheral neuritis being caused other than by a cause of a nutritional nature. In Dr. Silverside's opinion there is no evidence that classical peripheral neuritis (which the suppliant suffered) has ever been related to body trauma.

The merits of these conflicting opinions must be judged in the light of the reasons given to support them. The reasons so given are a matter of record. There is no question whatsoever as to the credibility of either of the medical witnesses, nor does their demeanour in the witness box afford any assistance in assessing the weight of their opinions. Having regard to my assessment of the merits of the

supporting reasons, I would be inclined to accept Dr. Silverside's opinion that there is no evidence that peripheral neuritis is caused by trauma.

It has been agreed among counsel that the medical expenses incurred by the suppliant total $11,797.38. It was also agreed among counsel that should it be found that the suppliant's fall was not the cause of the peripheral neuritis, the item of special damages relating to medical expenses should be the total of those expenses incurred to February 14, 1964 and that in assessing general damages I might have resort to life expectancy tables.

With reference to special damages the suppliant claims an amount of $25,000 as loss of profits in business. This particular item is predicated upon the suppliant, by reason of his illness, being unable to supervise the completion of the resort hotel which was his principal remaining business project and being unable to hire competent help to do so on his behalf. It was estimated that the completion and opening of the hotel was delayed one year. However, in the case of a self-employed person whose earnings fluctuate it is impossible to determine loss of earnings by a simple calculation. Further it should be borne in mind that the suppliant's hotel business had not begun. Therefore, I propose to take this matter into account in assessing damages for the loss of prospective earnings generally.

The suppliant had expended in excess of $100,000 upon the construction of this hotel. A chartered accountant estimated, from the records available to him, that for the first complete year after the hotel opened there was an excess of $2,000 in receipts over expenditures. If interest on financing were taken into account there would have been a loss.

When the suppliant fell he suffered a sprained thumb and a compression fracture of the fourth lumbar vertebrae with wedge deformity and osteoarthritic change in the articulation of the fourth and third vertebrae. I am satisfied on the evidence that this fracture was caused by the fall. It is disclosed in an X-ray taken sometime after the fall and is not disclosed in an X-ray taken sometime prior thereto. No injury intervened to account for the fracture. This fracture has mended and there are no residual ill effects.

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On the assumption that the peripheral neuritis was not caused by the suppliant's fall, I would assess the suppliant's general damages at $4,500 plus special damages being the total of the medical expenses incurred to February 14, 1964.

On the assumption that the suppliant's fall caused peripheral neuritis the special damages are agreed to be $11,797.38.

Prior to January 12, 1964, at which time the suppliant was sixty years of age, he was a prosperous business man extremely active in community affairs. He enjoyed a happy home life and partook of the amenities of life.

When he fell at the airport on January 12, 1964 he suffered back pains and his left hand and arm were sore. Nevertheless he took the plane to Jamaica and en route he suffered from headache.

Upon arrival in Jamaica he felt odd. He lacked appetite, he was irritable. He suffered pain in his back and pains in both legs. He could neither sit down with comfort nor sleep. Shortly thereafter he experienced pain in his mid-abdomen and pains in his extremities.

He consulted Dr. Walter of Coral Gables Osteopathic Medical Clinic in Miami, Florida in February 1964. Dr. Walter prescribed and administered therapy and medication. He recognized that the suppliant was seriously ill and advised his immediate return to Toronto.

He returned to Toronto at the beginning of March 1964 and was immediately admitted to the Toronto General Hospital as an emergency patient at the urgent request of his family physician. In hospital he came under the care of Dr. Barnett. He was confined to that institution from March until June when he was sent to St. Johns Convalescent Hospital. He returned to the Toronto General at the beginning of July and was there confined for that month.

On his initial admission to the Toronto General Hospital his legs buckled and he was unable to walk. He became completely paralysed. He was unable to recognize his family.

Later he improved. He was able to move about in a walker device, then on crutches, then with the use of canes and still later unassisted but with great difficulty.

Dr. Barnett testified that he is no longer alert, and that he has undergone an intellectual change due to a reaction to drugs which caused a minor change in brain tissue. He suffered headache, discomfort from light. He lost a great amount of weight and still looks chronically ill.

He suffered loss of position and vibration sense and became sexually impotent. He will not recover his potency.

He suffered an inability to void which has now improved.

Peripheral neuritis affects the fibres that control sweating and skin temperature. This affliction causes the suppliant distress. He wears gloves, heavy socks and underwear at all times. He is perpetually cold regardless of the outside temperature.

From a strong man he has now become physically frail and looks a decade older than his age.

The minor brain damage resulting from drugs has not led to any permanent disability, his loss of appetite is due to tension and an emotional condition and will improve when that condition is removed.

His extra sensory condition, which has persisted for three years, may improve but will continue in some element on a permanent basis.

He tires readily and is restricted in a physical way.

There is no specific weakness in his thought process.

The suppliant's emotional condition is much altered and affects his judgment. He suffers a chronic anxiety state which affects his physical well being.

He has changed from an aggressive business man into a neurotic individual.

There is a twenty-five percent chance of his chronic anxiety reaction improving.

These are all residual effects of peripheral neuritis and it is agreed by the medical witnesses that recovery is uncertain.

His sexual impotency will continue but that potency would have ended with advancing years in any event. His extra sensory condition will continue but there may be some improvement in his ability to walk and in use of his hands. There is no question that he will suffer some permanent disabilities.

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On the other hand, the suppliant was sixty years old at the time of the accident. He had his gall bladder removed, he suffers from an enlarged liver, he has undergone a gastrectomy and suffers from a pancreatic ailment. His age and previous physical condition are factors I must consider in assessing damages as well as the fact that he had virtually retired from his other business enterprises and had embarked upon the building of a small resort hotel in the nature of a retirement project although he did entertain more ambitious plans for its development if financing and other circumstances permitted.

There is no doubt the suppliant underwent a long period of pain, suffering and shock. He has suffered serious loss in the amenities of life. His previous happy family life has deteriorated to one of strain without any fault on the members of his family who have struggled to have that relationship returned to its normal and formerly happy state. It would follow naturally that his life expectancy has been reduced slightly and the suppliant has suffered and will continue to suffer inconvenience and discomfort. His ability to run the resort hotel as a profitable venture has been impaired.

Bearing all such factors in mind I have arrived at the sum of $45,000 as the pecuniary sum which will make good to the suppliant, as far as money can do, the loss which he would have suffered as the result of his injury, if the peripheral neuritis were the result of his injury.

Accordingly, on the assumption that the peripheral neuritis was caused by the suppliant's fall, I would assess the general damages as $45,000 to which should be added the agreed medical expenses of $11,797.38 as special damages.

BETWEEN:

LOU'S SERVICE (SAULT) LIMITED .....APPELLANT;

AND

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

Sault Ste. Marie 1967
June 21
Ottawa July 14

Income tax—Controlled company—Preference shares acquiring voting rights if dividends passed—Arrangement by shareholders not to pay dividends—Whether voting rights thereby nullified—Income Tax Act, s. 39.

Three brothers (who with M were the sole shareholders of appellant company) advanced appellant company $30,000 to purchase a service station and received as security preference shares in the company which were non-voting unless dividends were not paid for two consecutive years. By an agreement between the three brothers and M the $30,000 was to be repaid without interest as soon as practicable and before dividends were paid on common shares, M was to be paid a salary and bonus to manage the service station, and profits were to be shared equally by M on the one hand and the brothers on the other. Dividends were not paid on the preference shares for two consecutive years, and in 1961 and 1962 (in which years appellant's common stock was held half by M and half by the three brothers) appellant was assessed as an "associated company" under s. 39 of the *Income Tax Act* as being a company controlled by the three brothers (who also controlled other companies).

Held, a contract between M and the three brothers that the three brothers would not exercise their voting rights on the preference shares was not implied by the terms of the arrangement between them and appellant was therefore controlled by the three brothers.

Buckerfield's Ltd. et al. v. M.N.R. [1965] 1 Ex. C.R. 299; *M.N.R. v. Dworkin Furs (Pembroke) Ltd. et al.* [1967] S.C.R. 223; 67 DTC 5035, applied.

INCOME TAX APPEAL.

P. M. Sedgewick, Q.C. for appellant.

L. R. Olsson for respondent.

CATTANACH J.:—This is an appeal from a decision of the Tax Appeal Board dated November 30, 1964[1] whereby the taxpayer's appeal against its assessments to income tax for its 1961 and 1962 taxation years were dismissed.

The appellant is a joint stock company incorporated pursuant to the laws of the Province of Ontario by Letters Patent dated August 18, 1958.

The issue for determination is whether the appellant was "controlled" by the Hollingsworth brothers during the

[1] (1964) 37 Tax A.B.C. 113.

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relevant taxation years. It is admitted that the three Hollingsworth brothers were a group of persons who, during the material time, controlled other corporations among which was, Soo Mill and Lumber Company Limited, a company dealing in building supplies. Subsection (1) of section 39 of the *Income Tax Act* provides that the tax payable by a corporation under Part I of the *Income Tax Act* is 18 per cent of the first $35,000 taxable income and 47 per cent of the amount by which the income subject to tax exceeds $35,000.

Subsections (2) and (3) of section 39 provide that when two or more corporations are "associated" with each other, the aggregate of the amount of their incomes taxable at 18 per cent is not to exceed $35,000.

Subsection (4) of section 39 provides, in part, that one corporation is associated with another in a taxation year if at any time in the year both of the corporations were controlled by the same person or group of persons.

In assessing the appellant as he did in the two taxation years in question, the Minister did so on the assumption that the appellant was associated with another corporation by virtue of subsection (4) of section 39 because both corporations (that is the appellant and another corporation) were controlled by the same group of persons, namely, the three Hollingsworth brothers.

In *Buckerfield's Limited et al v. The Minister of National Revenue*[2], the President of this Court held that the word "controlled" as used in subsection (4) of section 39 means *de jure* control and not *de facto* control. He said at pages 302-03:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act,* the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election

[2] [1965] 1 Ex. C.R. 299.

of the Board of Directors. See *British American Tobacco Co. v. I.R.C.* ([1943] 1 A.E.R. 13) where Viscount Simon L.C., at page 15, says:

> The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.

See also *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* ([1947] A.C. 109) per Lord Green M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act*.

The foregoing statement was cited with approval and confirmed by the Supreme Court of Canada in *M.N.R. v. Dworkin Furs (Pembroke) Ltd. et al*[3].

The authorized capital of the appellant is divided into one hundred thousand (100,000) preference shares of the par value of one dollar ($1) each and fifteen thousand (15,000) common shares without par value. The maximum consideration for which the common shares could be issued was fixed at $15,000 subject to variations in the manner prescribed in the Letters Patent. The appellant did not avail itself of such provision.

The appellant was incorporated with a private status, with a restriction on the transfer of shares to the effect that no shareholder should transfer any share held by him without first affording the other shareholders the opportunity of purchasing the shares offered for sale.

The preference shares entitle the holders thereof to a five per cent non-cumulative preferential dividend over the holders of the common shares.

The preference shares are subject to redemption, at the amount paid up thereon together with any dividend declared thereon and unpaid, at the discretion of the company; and are also subject to purchase for cancellation at a price not less than the redemption price.

The voting rights of the preference and common shares are set out in paragraph (6) of the conditions attaching to the shares and read as follows:

> (6) The holders of the preference shares shall not, as such, have any voting rights for the election of directors or for any other purpose nor shall they be entitled to attend shareholders' meetings unless and until the Company shall fail, for a period of two (2) consecutive years, to pay the dividend on the preference shares, whereupon and whenever the same shall occur, the holders of the preference shares shall, until dividends aggregating five per cent (5%) per annum have been paid

[3] [1967] S.C.R. 223; 67 DTC 5035.

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on the preference for two (2) consecutive years, be entitled to attend all shareholders' meetings and shall have one (1) vote thereat for each preference share then held by them respectively; holders of preference shares shall, however, be entitled to notice of meetings of shareholders called for the purpose of authorizing the dissolution of the Company or the sale of its undertaking or a substantial part thereof; holders of common shares shall be entitled to one (1) vote for each common share held by them at all shareholders' meetings;

At this point, it is convenient to summarize the events leading to the incorporation of the appellant.

Patrick Joseph Mahon, who had been the successful manager of a service station in Kapuskasing, Ontario for six years, moved to Sault Ste Marie, Ontario, to operate a service station there as a licensee. It was his hope that Imperial Oil Limited would purchase the service station, that he would lease the station from that Company and that he would enter into an agreement to purchase the premises from that Company. However, this arrangement did not materialize. He had purchased a home in Sault Ste. Marie from the Hollingsworth brothers. When his hope of purchasing the service station was not realized he decided to return to Kapuskasing and approached the Hollingsworth brothers to arrange for the disposition of the home he had purchased from them. On being asked, he gave the reason for his decision to do so.

A meeting among the representatives of Imperial Oil Limited, the Hollingsworths, and Mr. Mahon was arranged. The purchase price of the service station was $90,000. Imperial Oil Limited was willing to advance $60,000 secured by a first mortgage on the premises. The Hollingsworths agreed to advance the balance of $30,000. An offer to purchase the premises was made on behalf of a company to be incorporated, which became the appellant herein, and that offer was accepted.

The arrangement between the Hollingsworths and Mahon was that:

(1) Mahon was to operate the service station;

(2) he would receive a monthly salary of $600 plus a bonus of 10 per cent of the net profit before taxes, in any year the profit exceeded $25,000;

(3) the Hollingsworths were to be repaid the $30,000 advanced by them without interest as soon as the affairs of the appellant would permit; and

(4) subject to the foregoing prior charges on the profits, the profits would be shared equally between Mahon on the one hand and the three Hollingsworth brothers on the other.

The Hollingsworths consulted their legal and accountancy advisers, upon whose advice the appellant was incorporated with the capital structure which has been outlined, to implement this arrangement.

Of the 100,000 authorized preference shares of the par value of $1 each, 30,000 were issued, 10,000 to each one of the Hollingsworth brothers in consideration of the $30,000 which they had advanced to the appellant. In the first instance, 6,004 common shares were issued, 2,941 to Mahon and 3,063 to the three Hollingsworth brothers. This was done as a measure of protection to the Hollingsworths so that they would have 51 per cent of the common shares and Mr. Mahon would have 49 per cent. However, on December 30, 1960, a formal agreement was executed whereby 61 common shares were transferred by the Hollingsworths to Mr. Mahon. This was done to overcome the effect of an amendment to section 39 of the *Income Tax Act* made in 1960 and to become operative after December 31, 1960.

The agreement recites, in part, as follows:

> 2 In consideration of the aforesaid transfer of shares the Manager hereby covenants and agrees that the 30,000 5% non-cumulative redeemable preference shares of the par value of $1.00 each in the capital stock of the company now held by the owners shall be redeemed in full before any dividends are ever paid on the common shares without nominal or par value now held by the Owners and the Manager and before any increase in the present salary of SIX HUNDRED DOLLARS ($600 00) per month now being paid to the Manager and before any bonus being paid to the Manager other than the ten per cent bonus now paid to the Manager when the net profit before taxes exceeds $25,000 00

Therefore, as at December 30, 1960, the shareholding in the appellant was as follows:

Shareholder	Preference Shares	Common Shares
Patrick Mahon	Nil	3,002
F. S. Hollingsworth	10,000	1,001
I. W. Hollingsworth	10,000	1,000
E. L. Hollingsworth	10,000	1,001
	30,000	6,004

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No dividends were paid upon the preference shares at any time following the incorporation of the appellant. Accordingly, as at December 1, 1960, being after the lapse of two fiscal years or two calendar years, the preference shares would entitle the holders thereof to voting rights in accordance with the conditions attaching thereto.

In February, 1962, 15,000 preference shares were redeemed, at the prescribed redemption price, being $15,000, and the remaining 15,000 preference shares were redeemed in January, 1963, also at the prescribed redemption price. Accordingly, in the 1961 taxation year, 30,000 preference shares were issued and outstanding and in the 1962 taxation year there were 30,000 preference shares issued and outstanding for part of that year and 15,000 for the balance of the year.

It was explained in evidence that the preference shares were not redeemed earlier because the appellant was required to expend $30,000 to acquire adjoining property to comply with a municipal by-law and to expend a further $5,000 to make improvements. This resulted in a temporary shortage of funds wherewith to effect the redemption of the preference shares.

Counsel for the appellant submitted that, in accordance with paragraph (6) of the conditions attaching to the preference shares, the company did not "fail, for a period of two (2) consecutive years, to pay the dividend on the preference shares", and accordingly the right of the holders of the preference shares to voting rights did not arise. He based his submission on the circumstance that the shareholders had agreed among themselves that there should be no interest on the $30,000 advanced by the Hollingsworths and hence there was an agreement that no dividend should be paid on the preference shares. On this premise, he contended that there was no failure to pay dividends. During the argument, I intimated to counsel that I did not accept his submission in this respect. In my view, the plain meaning of the language of paragraph (6) of the conditions attaching to the preference shares is that if dividends are not declared and paid on the preference shares there has been a failure or default made to pay dividends and the remaining terms of the condition become operative. I need not look into the reason for the failure to pay but merely to the fact that dividends were not paid.

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The crux of the matter lies in the second submission of counsel for the appellant, that is that by agreement among the shareholders, it was tacitly understood that (1) dividends would not be paid on the preference shares; and (2) the holders of the preference shares would not exercise their voting rights when such rights arose.

A shareholder's vote is a right of property which he may exercise as he pleases, but he may, in some cases, bind himself by contract which can be enforced by mandatory injunction to vote or not to vote his shares in a particular way. (See *Puddephatt v. Leith*[4], *Greenwell v. Porter*[5], *Ringuet et al. v. Bergeron*[6], and *M.N.R. v. Dworkin Furs (Pembroke) Limited et al. (supra)*).

The question before me is whether such an enforcible oral contract here existed among the shareholders of the appellant.

It was frankly admitted by the witnesses F. S. Hollingsworth and P. J. Mahon that the question of the payment of dividends on the preference shares was never mentioned in the initial verbal discussions among the three Hollingsworth brothers, Mr. Mahon and the Hollingsworths' advisers nor was the matter of the voting rights vesting in the preference shareholders discussed at any time. Neither matter was mentioned in any subsequent written document. In the agreement dated December 30, 1960 whereby 61 common shares were transferred from the Hollingsworth group to Mr. Mahon so that their respective holdings of common shares became equal specific mention was made of the fact that the 30,000 preference shares outstanding should be redeemed in full before any dividends should be paid upon the common shares and before any increase in salary or bonus to Mr. Mahon would be considered.

There is no mention of an agreement not to declare dividends or not to exercise voting rights on the preference shares in any of the appellant's corporate records so far as I can ascertain from the material before me.

The positive covenants in the oral contract among the shareholders and the written agreement dated December 30, 1960 are that the advance of $30,000 by the Hollingsworths should be repaid forthwith without interest, that

[4] [1916] 1 Ch. D. 200.
[5] [1902] 1 Ch. D. 530.
[6] [1960] S.C.R. 672.

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Mahon should receive a monthly salary of $600 and a bonus of 10 per cent on any profits in any year exceeding $25,000 and that thereafter profits would be shared equally between them, presumably by the payment of dividends on the common shares.

From these affirmative covenants counsel for the appellant argues that certain negative covenants must be implied of necessity, that is there was an agreement among the shareholders not to pay dividends and the preference shareholders undertook not to exercise their votes with respect to those shares, because, as he stated, for the holders of the preference shares to vote would disturb the oral arrangement between the Hollingsworths and Mahon that the profits should be shared equally between them.

I do not think that such an implication necessarily follows. The clear agreement between the parties as is disclosed by the evidence was that the Hollingsworths would be repaid $30,000 as expeditiously as possible, without interest, and Mahon was to be paid the salary and bonuses indicated above. After this had been done profits would then be divided equally.

The redemption provisions attaching to the preference shares provided the means by which the Hollingsworths would be repaid their advance of $30,000. It follows from the oral agreement among the shareholders that, since no interest was to be paid on the advance, no dividends would be paid upon the preference shares was provided for in paragraph (1) of the conditions attaching to such shares. The declaration of dividends is a matter of discretion, when funds are properly available for that purpose, vested in the board of directors. Here the shareholders and the directors were the same persons.

However, when dividends are not declared and paid for two consecutive years, as was the circumstance here, then by virtue of paragraph (6) of the preference shares conditions the holders of those shares became entitled to vote. The facts that the Hollingsworths were to be repaid $30,000, that Mahon was to receive a salary and bonus after which profits would be shared equally, does not detract or in any way impugn the right to vote on the preference shares which arose in the Hollingsworths. The fact that they did not do so or that they did not have any occasion to do so is immaterial. What is material, is that the right

to vote the preference shares existed in the Hollingsworths and that right would vest control of the appellant in their hands being the ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors.

The onus is on the appellant to show that a contract existed between the Hollingsworths and Mahon by which the Hollingsworths specifically undertook not to exercise the voting rights vested in them by virtue of ownership of the preference shares. In my view, such an undertaking cannot be implied, either from the terms of the oral agreement between the Hollingsworths and Mahon, nor from paragraph 2 of the written agreement among them and the appellant dated December 30, 1960 which has been quoted above. I do not think that the terms of the oral agreement precluded the Hollingsworth brothers from exercising any voting rights on the preference shares except in breach of such agreement. The terms of that agreement were not set forth with sufficient clarity to so imply or that the contracting parties must have intended such a term to be part of the agreement among them.

On the contrary, such a term was not specifically discussed and agreed upon by the parties. In my view, the arrangement among them is reflected in the Letters Patent incorporating the appellant and the distribution of the share capital. This was done on professional advice. In the first instance, the Hollingsworths were given the majority of the common shares. This was changed to overcome an amendment to the *Income Tax Act* at a time when the Hollingsworths were satisfied of the business integrity of Mahon who had been previously comparatively unknown to them. But the measure of protection obviously designed for the benefit of the holders of the preference shares, in that the holders thereof would have voting rights when dividends thereon were not declared and paid for two consecutive years, was not changed nor, as I have intimated before, can I imply that the exercise of those rights were necessarily precluded by the terms of an oral agreement among the parties.

It follows that the Minister was right in assessing the appellant as he did and its appeal herein must be dismissed with costs.

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During the course of the argument, counsel for the Minister submitted that if there had been an oral agreement of the nature alleged by the appellant which by implied terms precluded the Hollingsworth brothers from exercising voting rights on the preference shares held by them, Mahon would not have been entitled to enforce such agreements because it was not to be performed within one year within the meaning of section 4 of the Statute of Frauds, 1960 R.S.O. chapter 381 and no memorandum in writing existed sufficient to satisfy the Statute.

Counsel for the Minister moved for leave to amend the reply by pleading the Statute of Frauds if such pleading were necessary in order to argue that Mahon would have been unable to obtain an injunction restraining the Hollingsworth brothers from the exercise of voting rights on the preference shares in breach of the oral agreement.

I expressed the view that the Minister's motion should be denied (1) because paragraph 10 of the reply might have been adequate to permit the Minister to argue that point, (2) the appellant would be prejudiced by an amendment at such a late stage bearing in mind that the matter had come to trial on the pleadings as drafted and (3) if the motion were allowed, I would do so only on terms as to costs.

However, I reserved the disposition of the application and afforded counsel an opportunity to exchange and file written argument on the Minister's motion to amend the pleadings and the applicability of the Statute of Frauds in the circumstance of this appeal since I had expressed doubts that the Minister was in a position to raise the Statute of Frauds as he was not a party to the oral contract and that the Statute was not being relied upon as a defence to an action on the contract but merely by way of answer to the appellant submission that an injunction would issue in a proceeding by Mahon against the Hollingsworths to restrain them from exercising voting rights on the preference shares.

I have now had the opportunity of reading the written submission of counsel and upon more mature reflection, assisted by those submissions, I adhere to my original view and dismiss the Minister's motion for leave to amend his reply.

BETWEEN:

CUSTOM GLASS LTD. ..... APPELLANT;

AND

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

Edmonton 1967 June 15-16

Vancouver July 17

Income tax—Window manufacturing business—Warranties to replace defective windows—Insurance to cover cost of warranties—Whether income of business.

In 1959 appellant company purchased the business of a window manufacturing company as a going concern. By the sale contract appellant assumed the vendor's liability on warranties to customers to replace defective windows and obtained the benefit of the vendor's insurance in respect of such warranties. The insurer substituted appellant company as insured in place of the original insured. Up to November 30th 1960 appellant received $61,080 under the policy but the insurer refused to pay further amounts on the ground that the policy was void because of non-disclosure of material facts by the original insured. Ensuing litigation was eventually settled on payment to appellant company in 1962 (a) by the insurer of $81,887 and (b) by the original insured of $12,500. In its accounts appellant credited the $61,080 received under the policy to income account and the $81,887 received in settlement of the litigation to earned surplus.

Held, the sums of $81,887 and $12,500 received by appellant in settlement of the litigation were properly assessed as income. They were not received on account of capital, *viz* goodwill or trade name, but were paid to make good loss of income.

INCOME TAX APPEAL.

A. F. Moir, Q.C. and *S. S. Purvis, Q.C.* for appellant.

D. G. H. Bowman and *S. A. Hynes* for respondent.

SHEPPARD D.J.:—This appeal is by Custom Glass Ltd. against an assessment for the taxation year 1963, by the Minister, of the 24th November, 1964, and a re-assessment affirmed by notice of 30th December, 1965, on the ground of alleged errors, namely, that two sums, received by the appellant and held by the Minister to be taxable income, should have been held to be receipts of capital. The two sums are: $81,887.35 received by the appellant from the Law Union & Rock Insurance Company Ltd. as insurer and $12,500.00 received by the appellant from Philex Sales Ltd.

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The facts follow:

By agreement of the 1st June, 1959 (ASF 1, part of Ex. 1) the appellant (a company known successively as R. H. Palmer (1959) Ltd., Custom Glass (Prairie Division) Ltd. and Custom Glass Ltd.) purchased as of the 1st May, 1959 from R. H. Palmer Ltd., now Philex Sales Ltd. (herein called Palmer Co.) the latter's business as a going concern carried on at Edmonton, Alberta and consisting essentially of the manufacture and sale of windows known as "Red seal double glazing units" with sales limited to Canada west of a line between Ottawa and Kingston, Ontario.

Palmer Co., on the sale of the Red seal units, had given each customer a warranty to replace at the nearest shipping point any unit developing material obstruction of vision within five years (Ex. 1, para. 12). Under policy of the 12th September, 1956 (ASF 3) the Law Union & Rock Insurance Company Ltd. insured Palmer Co. for five years whereby the insurer agreed to indemnify the insured for loss under breaches of the warranty with loss to be based on the actual cost of manufacture and installing or actual cost of manufacture (Clause 3), the policy to be cancellable on 30 days' notice (Clause 4). Under the agreement of 1st June, 1959, Palmer Co. agreed that the appellant should have the benefit of all contracts of Palmer Co. Under date of 22nd May, 1959, the insurer endorsed the policy as follows:

> Notice is hereby received and accepted that the within policy shall hereafter cover in the name of:
>
> R. H. PALMER 1959 Ltd.
>
> and not as heretofore
>
> ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.
>
> (Ex. 1, para. 14)

Thereafter the appellant became the insured.

On 26th May, 1959, the insurer gave notice of cancellation of the policy under Clause 4 whereby the policy expired on the 25th June, 1959. Breaches of the warranty given by Palmer Co. did arise, and the appellant replaced the defective units and filed proofs of loss with the insurer or its adjuster. The insurer paid up to the 30th November, 1960 on such proofs of loss, the sum of $61,080.37 (Ex. 1, para. 20), but later refused to pay further losses amounting to $24,387.70 (Ex. 1, para. 21). In consequence the

appellant brought action in the Supreme Court of Alberta and the insurer counterclaimed for repayment of all monies paid, on the ground that the policy had been avoided from inception by non-disclosure of material facts by Palmer Co., the original insured.

The action and counterclaim were settled by two agreements, namely, of 1st February, 1962 and of 24th May, 1962.

(a) Under agreement of 1st February, 1962 between Palmer Co. (then known as Philex Sales Ltd.) and the appellant (Ex. 1, para. 27, ASF 8) Palmer Co. paid the appellant $12,500.00 by allowing a set-off against a chattel mortgage and rents payable by the appellant (Ex. 1, para. 34).

(b) Under agreement of the 24th May, 1962 between the appellant and the insurer, by the insurer paying $90,000.00. From the receipt of that amount by the appellant there is properly deducted legal fees and other disbursements reducing the receipt by the appellant to $81,887.35 (Ex. 1, paras. 30 and 31). That sum was treated by the Minister as taxable income. In arriving at that sum in settlement, the parties considered (i) the proofs of loss submitted as of the 24th May, 1962, which amounted to $76,856.11 as of 31st March, 1962 (Ex. 1, para. 29); (ii) the estimates of future claims for breach of warranty, and (iii) other considerations, including uncertainty as to the outcome of litigation (Ex. 1, para. 32).

Those amounts, $12,500.00 and $81,887.35 were assessed by the Minister under assessment and re-assessment as income of the appellant, and the appellant has appealed in respect of those two amounts.

The sole issue is whether the sums are taxable income within sections 2 and 3 of the *Income Tax Act*, or as alleged by the appellant, are capital receipts. The onus of proving error is on the appellant: *M.N.R. v. Simpson's Ltd.*[1], cited in *M.N.R. v. Farb Investments Ltd.*[2].

As to the sum of $81,887.35, the appellant contends this was receipt of capital, for the following reason: that under the agreement of the 1st June, 1959 (ASF 1) between

[1] [1953] Ex. C.R. 93. [2] 59 DTC 1058.

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Palmer Co. as seller and the appellant as buyer, the appellant purchased the business of the seller as a going concern, which included (a) the goodwill, (b) the trade names and other assets (Clause 2); that 90% of the seller's business consisted of the manufacture and sale of "Red seal double glazing units" and that the appellant could only get the benefit of the goodwill and trade names if he fulfilled the warranties of Red seal units previously given by the seller, Palmer Co., therefore such payments were made to protect the goodwill and trade name and hence the receipts were of a capital nature, that is, to maintain the goodwill and trade name. That contention should not succeed.

Subsequent to the agreement of the 1st June, 1959 (ASF 1, Ex. 1) the appellant carried on the business formerly that of the Palmer Co. and replaced the defective Red seal units that Palmer Co. had sold under warranty. The outlays by the appellant to replace those defective units were taken from the income derived by the appellant from that business purchased from Palmer Co. (Ex. 1, para. 18). When such outlays were made the appellant filed proofs of loss under the policy of the Law Union and Rock for repayment of such outlays, and pursuant to such policy the appellant received from the insurer the sum of $81,887.35 as an indemnity for the loss involved in such outlays, which outlays in the meantime had been debited and thereby deducted from the income derived by the appellant from its business (Ex. 1, para. 18). As the sum received was a payment for items debited to income, it would appear that such sum received should, by cross entry in the same account, show that the previous outlays had been paid and were no longer a deduction from income. That was the practice adopted by the appellant, as payments of $61,080.37 made by the insurer up to the 30th November, 1960, were included by the appellant in its income for the respective taxation years (Ex. 1. para. 20), and the sum of $81,887.35 was included in the earned surplus account of the appellant and was therefore liable as taxable income.

The appellant contends that, although those monies received from the insurer were credited to the earned surplus account of the appellant, nevertheless that should not be taken as an admission for the reason that "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 test": *The Glenboig Union Fireclay Co., Ltd. v. The Commissioners of Inland Revenue*[3], by Lord Buckmaster at p. 464 and cited in *Van Den Berghs Ltd. v. Clark (Inspector of Taxes)*[4], by Lord Macmillan at p. 888. Therefore the credit of the sum to earned surplus should be taken not as an admission of the quality but only as to the amount of the receipt.

Whether a sum is taxable income is a mixed question of law and fact; of law to determine if the facts constitute taxable income within Sections 2 and 3 of the *Income Tax Act*, with other incidental legal problems, such as the meaning of the written agreement (Ex. 1, ASF 1) and also a question of fact, as stated in *Parsons-Steiner, Ltd. v. M.N.R.*[5], where Thurlow J. at p. 1151 said:

> What appears most clearly from these cases is that the question is largely one of degree and depends on the facts of the particular case and the inferences to be drawn therefrom . . .
>
> In *Kelsall Parsons & Co. v. Inland Revenue* (1938) (21 Tax Cas. 608), Lord Normand (Lord President), said at p. 619: ". . . no infallible criterion emerges from a consideration of the case law. Each case depends upon its own facts . . .".

The Court may not be bound by error in an admission by the parties as to the law and such an error appears corrected in the *Glenboig* case, *supra*, but the amount received, the parties paying and receiving and the circumstances surrounding the payment, as for example, payment by an insurer pursuant to a policy, are questions of fact, and in proof of such facts the admissions of the parties, including entries in their books, are relevant evidence of which the weight is for the Court.

Hence the entry of $81,887.35 to the credit of earned surplus is evidence of the fact that that sum was received by the appellant and was in fact credited to earned surplus. As the onus is upon the appellant to prove error, therefore the appellant must demonstrate that the sum should be taken as received on account of goodwill or trade name and not credited to earned surplus. That the appellant has failed to do. The appellant has not established that the outlays by it to replace Red seal units were for capital assets of goodwill and trade name.

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[3] (1922) 12 T.C. 427.
[4] [1935] All E.R. Rep. 874.
[5] 62 DTC 1148.

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Under the agreement of 1st June, 1959 (ASF 1 of Ex. 1) the sale and purchase on the one hand, and the appellant's promise to pay the warranties on the other hand, are in separate and distinct contracts and are separate transactions although contained in the one document. The sale of the business is contained in Clauses 2 and 5 (ASF 1) whereby Palmer Co. transfers its assets in the business (Clause 2) and the appellant pays the creditors of Palmer Co. as set forth in Schedule 3 and to Palmer Co. the sum of $75,000.00 as the excess of the value of the assets over the claims of the creditors in Schedule 3. Those are the values exchanged and the mutual considerations of the sale and purchase as declared in Clauses 2 and 5 and expressly declared in the opening words of Clause 5, "The consideration to be paid by Palmer 1959..." The promise by the appellant to assume the liability under the warranties given by Palmer Co. is contained in Clause 3 (ASF 1) which reads:

> IT IS UNDERSTOOD AND AGREED that Palmer 1959 shall assume liability for payment of all current liabilities of The Company shown on Schedule 3 and shall honour and make good all guarantees and warranties of The Company given by the Company concerning products, manufactured and sold by The Company.

In Clause 3 the appellant assumes liability for "current liabilities" of Palmer Co. "shown on Schedule 3" but that is a mere repetition of the like provision in clauses 2(d) and 5(a), and as such, is part of the consideration for the sale of the business and not part of the following promise of the appellant to assume the warranties. The following promise to honour and make good all guarantees and warranties given by the company (Palmer Co.) concerning the products manufactured and sold by the company, is a separate and distinct transaction from that included in the previous sale.

(1) That promise is not part of the consideration given by the appellant for the purchase of the business; the warranties given by Palmer Co. are not included in Schedule 3. The liabilities under those warranties could not be foreseen at the time of the agreement but were then future and contingent, and only arose as breach later occurred and claim made; moreover the amount of the liability under each warranty would depend upon the outlay later required in replacing the

particular window which had proven defective. On the other hand, the liabilities of Palmer Co. which are included in Schedule 3 and assumed by the appellant as part of the consideration for the purchase of the business were then definite in amount and were paid in advance to the appellant by conveyance of assets of Palmer Co.

(2) Clause 3 (ASF 1) contemplates a future loss in making good such previous warranties of Palmer Co. There could be no legal loss contemplated by the sale and purchase in Clauses 2 and 5. The purchase may be improvident but there could be no legal loss when the promised considerations are made good. On the other hand Clause 3 expresses no consideration as does Clause 5. Under Clause 3 the transaction is similar to *the warranty alleged given in Heilbut, Symons & Co. v. Buckleton*[6], where Lord Moulton at P. 47 said:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

Hence here in consideration of Palmer Co. entering into the agreement to sell in Clauses 2 and 5 whereby the appellant would receive the policy of insurance issued by Law Union and Rock, the appellant undertook to honour and make good the warranties of Palmer Co. concerning the products manufactured, and as an indemnity for such outlays the appellant would have received, under Clause 2 (ASF 1) the policy of the Law Union and Rock. The result is that Clause 3 (ASF 1) intended that the liability of Palmer Co. in respect of such warranties be passed over to the appellant, but the appellant was intended to pass such liability over to the insurer as a loss under the policy in question. When a claim was later made by a customer for breach of warranty given by Palmer Co., the appellant would make the outlay for such breach under Clause 3 (ASF 1) which is not part of the purchase price of the goodwill and trade names, as stated in Clauses 2 and

[6] [1913] A.C. 30.

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5 (ASF 1) but being for such breach of warranty, is in performance of that separate contract and distinct transaction contained in Clause 3 (ASF 1).

Further, the appellant, after replacing a Red seal unit warranted by Palmer Co., would file proof of loss claiming under the policy but the policy indemnifies only for loss from breach of warranty of the Red seal units (ASF 3). That claim to be indemnified for loss under the policy cannot be a loss in respect of the goodwill or a trade name, for such items are not within the subject matter of the insurance. Again, any replacement of a unit by the appellant in honouring or making good the warranty of Palmer Co. would be a sale by the appellant to the customer in consideration of the promise by the insurer under the policy. That again would appear to be a sale of a Red seal unit and within the course of business of the appellant in manufacturing and selling Red seal units and therefore properly included in the taxable income of the business.

The fact that such monies are received under the policy of insurance is not material in that insurance monies are treated as income when paid to make good, loss of income: *The King v. B.C. Fir & Cedar Lumber Co., Ltd.*[7], and *J. Gliksten & Son, Limited v. Green*[8].

The appellant also contends that there can be no income as the monies received from the insurance company do not permit any profit, that is the insurance company indemnifies only for the loss, and under Clause 3 of the policy (ASF 3) the loss is computed on the basis of the bare cost for manufacture, delivery and installing; and as there was no profit to the appellant in such payments by the insurance company, therefore there was no income. That objection should not succeed. The issue is the amount of the income of the taxpayer for the taxation year in question (Sec. 2(3), *Income Tax Act*) "from all sources" (Sec. 3, *Income Tax Act*); that is, the total of all income for the taxation year from the business (Sec. 3, *Income Tax Act*) less permitted deductions (Sec. 2(3) *Income Tax Act*). That is not determined by merely taking the total of all profitable items. Assuming there is no profit in replacing a unit warranted by Palmer Co., that does not preclude the sum received from the insurer for such outlay being included in the "taxable income" for the taxation year

[7] [1932] A.C. 441.

[8] [1929] A.C. 381.

(*Income Tax Act*, Sec. 2) otherwise advertising or club entertaining, which produced no profit, would be excluded. The fact that a particular item produces no income is irrelevant: *Royal Trust Co. v. M.N.R.*[9]

As to the further sum of $12,500.00, an action was brought by the appellant against the insurer (ASF 4 and 5) and a counterclaim raised by the insurer (ASF 6) for return of all monies paid to the appellant. That action and counterclaim were settled as follows:

(1) By agreement of the 1st February, 1962, between Palmer Co. (as Philex Sales Ltd.) and the appellant (ASF 8) whereby Palmer Co. agreed to pay $12,-500.00 by reducing payments to be made by the appellant (Clause 2) and the appellant agreed to have the insurer give a general release to Palmer Co. (Clause 5) as a condition of the agreement (Clause 6), and Palmer Co. agreed to give the insurer a general release (Clause 7).

(2) By agreement of 28th May, 1962, between the insurer and the appellant (ASF 9) the Law Union and Rock agreed to pay $90,000.00 and the appellant released the insurer from all liability under the policy.

In arriving at the settlement of $90,000.00 with the insurer, the appellant considered not only the amount of the proofs of loss and the estimate as to the possible future claims, but also "other considerations including uncertainty as to outcome of litigation" (Ex. 1 para. 32). Casey (for the appellant) has testified that if the counterclaim of the insurer succeeded, it would have been ruinous to the appellant. It is evident that the basis of the claim against Palmer Co., settled at $12,500.00, is the defect in title of Palmer Co. to the policy issued by the insurer, Law Union and Rock, by reason of Palmer Co. having allegedly not disclosed material facts, and also by reason of the notice of cancellation of the 26th May, 1959, whereby the policy expired after 30 days (Ex. 1, paras. 15 and 16). After the alleged non-disclosure of material facts and after the notice of cancellation of the 26th May, 1959, Palmer Co. on 1st June, 1959, assigned the policy to the appellant and obtained the undertaking of the appellant

[9] [1956-60] Ex. C.R. 70 at p. 80.

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contained in Clause 3 of the agreement (ASF 1) which was unlimited in point of time. It therefore appears, particularly from Item C, para. 32, Exhibit 1, that the payment of $12,500.00 was made in respect of the sums which the appellant would probably fail to collect from the insurer by reason of the non-disclosure and the cancellation of the policy. Therefore, in substance, Palmer Co. is paying the $12,500.00 on account of the monies which would otherwise have been payable under the policy. If the monies had been paid under the policy they must have been credited to the income derived from the business, and a sum agreed to be paid for loss of income is equally regarded as taxable income: *Burmah Steam Ship Company, Ltd. v. The Commissioners of Inland Revenue*[10]; *M.N.R. v. Bonaventure Investment Co., Ltd.*[11]; *The Commissioners of Inland Revenue v. The Northfleet Coal and Ballast Co., Ltd.*[12]; *Bush, Beach & Gent, Ltd. v. Road (H. M. Inspector of Taxes*[13]); *Wiseburgh v. Domville (H. M. Inspector of Taxes*[14]); *M.N.R. v. Farb Investments Ltd.*[15].

In conclusion the appellant has failed to establish any error in the assessment or re-assessment under appeal and the appeal is dismissed.

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[10] (1930) 16 T.C. 67.
[11] 62 DTC 1083.
[12] (1927) 12 T.C. 1102.
[13] (1939) 22 T.C. 519.
[14] (1953-56) 36 T.C. 527.
[15] 59 DTC 1058.

BETWEEN:

Toronto 1967 June 15-16, 19-20 Ottawa July 31

GORDON S. SHIPP, HAROLD SHIPP, BESSIE L. SHIPP, JUNE C. SHIPP ..... APPELLANTS;

AND

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

Capital gain or income—Income Tax Act, R.S.C. 1952, ss. 3, 4 and 139(1)(e)—Transfers of shares to wives—Builders of shopping centre erected by private company—Profit on sale of shares—No intention to offer shares for sale or attempting to find a purchaser—Appeals upheld.

In these cases, the four appellants were husbands and wives who controlled, as shareholders, four companies carrying on business of real estate development and builders of homes generally.

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A new company was incorporated in the year 1955 in which the four appellants held all the shares. This company, in the same year, erected a large shopping centre on land acquired from one of the other companies controlled by the appellants.

In 1959, an offer to purchase the shopping centre property was accepted by the appellants and completed by which the appellants sold their shares in the shopping centre company instead of that company selling its assets.

The profits on the sale of the shares were taxed by the Minister as income. The appellants alleged that the profits were a non-taxable capital gain

Held, allowing these appeals,

1. that the profits in the transaction were on capital account;

2 that the shopping centre company was not incorporated as an alternative method of executing a real estate transaction; and that the appellants did not incorporate the company as a shield attempting to get a profit on capital account which would otherwise be income;

3. that the shares were acquired by the appellants as investments and the sale of such shares was the realization of such investment.

APPEAL from a decision of the Income Tax Appeal Board.

Stuart D. Thom, Q.C. and *John M. Fuke* for appellants.

N. A. Chalmers and *L. G. Budd* for respondent.

GIBSON J.:—These four appeals were tried at the same time on the same evidence pursuant to an Order made at the commencement of this hearing on consent of the parties.

The subject matter is the profit on the sale in 1959 by the appellants of their respective common shares of a company known as Applewood Village Shopping Centre Limited.

This Company was incorporated in 1953 as a private corporation under the *Ontario Corporations Act*. On incorporation, one common share was issued to each of the appellants. On organization, an additional 1,000 shares were issued to each of the appellants Harold G. Shipp and Gordon S. Shipp (who are respectively son and father). In 1957 each of the latter transferred 490 of their said shares to their respective wives namely, the appellant June C. Shipp and the appellant Bessie L. Shipp.

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This was accomplished by each giving to their respective wives monies by way of gift with which they purchased these shares. Gift tax was paid at the time of these transfers. The value of such shares declared at that time was book value, but this was not accepted by the Department of National Revenue and subsequently after negotiation and settlement additional gift tax was paid based on a substantially higher value. These gifts were made in implementation of estate planning advice given to the appellant husbands by persons in the insurance business. Substantial insurance policies were also taken out by the husbands on their lives in conjunction therewith. The financial result of the death of each or both of the husbands was the motivation for implementing the estate planning advice given.

In 1959 all the shares of Applewood Village Shopping Centre Limited, owned by the appellants, were sold to N.C. Properties Limited, an Ontario corporation, the beneficial shareholders of which resided in Europe. For these shares the sum of $611,500.59 less a commission of some $40,000 was paid to the appellants in proportion to their respective share interest.

Each of the appellants' tax returns for the year 1959 were re-assessed categorizing the sums received by each on the sale of such shares as income, but there was allowed certain reserves pursuant to section 85B of the *Income Tax Act* because the whole of the said purchase sum was not paid to the appellants at one time but over the years 1959 to 1962.

The issue for decision on this trial is whether or not the payments received in the years 1959, 1960, 1961 and 1962, by the appellants (arising from the sale of these shares in 1959) constituted income for tax purposes under the *Income Tax Act*.

The husbands in their Notices of Appeal put these reasons why the assessments against them should be vacated in this way:

> (They were) at no time engaged in the business of buying and selling shares of companies nor (were they) as individual(s) engaged in the business of buying and selling land or properties. The business activities of the Appellant(s) consisted entirely of managing the operations of (their various companies).

(Applewood Village Shopping Centre Limited) was not incorporated to provide a means for the disposal of land, but to acquire a site for a shopping centre and to construct and operate a shopping centre thereon. (Applewood Shopping Centre Limited) did, in fact, acquire land and construct a shopping centre thereon and operated such shopping centre for upwards of four years before the Appellant(s) sold (their) shares of the Company as aforesaid.

The Appellant(s) at no time offered (their) said shares for sale or attempted to find a purchaser therefor. The sale thereof was not a consequence of any business or trading activity on the part of the Appellant(s) and the gain realized on such sale did not constitute taxable income.

The wives' reasons why their assessments should be vacated, set forth in their respective Notices of Appeal, are different in one substantial respect, which reads as follows, namely:

> The shares of the Company were acquired by the Appellant(s) as and by way of gift and were held by (them) as an investment.

The assumptions of the Minister upon which the reassessments of the tax returns of the appellant husbands were made are contained in each of the Minister's Reply to Notice of Appeal at paragraphs 9(a) to (e) which read as follows:

> 9. In assessing the Appellant(s) for (their) 1959, 1960, 1961 and 1962 taxation years he assumed, inter alia:
>
> (a) that subsequent to its incorporation on July 27, 1953, Applewood Village Shopping Centre Limited acquired a parcel of real estate from an associated company, Applewood Dixie Limited.
>
> (b) that on or about March 5, 1959 all the shareholders of Applewood Village Shopping Centre Limited agreed to sell their shares in that company to N.C. Properties Limited for the sum of $611,500.59.
>
> (c) that Applewood Village Shopping Centre Limited acquired the above parcel of real estate from its associated company with a view to trading, dealing in, or otherwise turning the land to account.
>
> (d) that the Appellant(s) acquired (their) shares in Applewood Village Shopping Centre Limited with a view to trading in, dealing in, or otherwise turning the shares to account.
>
> (e) that the profit from the sale of the shares of Applewood Village Shopping Centre Limited was income from a business within the meaning of Sections 3, 4, and 139(1)(*e*) of the *Income Tax Act*.

The assumptions of the Minister upon which the reassessments of the tax returns of the appellant wives were

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made are contained in each of the Minister's Reply to Notice of Appeal at paragraphs 7(a) to (e) which read as follows:

> 7. In assessing the Appellant(s) for (their) 1959, 1960, 1961 and 1962 taxation years he assumed, inter alia:
>
> (a) that subsequent to its incorporation on July 27, 1953, Applewood Village Shopping Centre Limited acquired a parcel of real estate from an associated company, Applewood Dixie Limited.
>
> (b) that on or about March 5, 1959 all the shareholders of Applewood Village Shopping Centre Limited agreed to sell their shares in that company to N.C. Properties Limited for the sum of $611,500.59.
>
> (c) that Applewood Village Shopping Centre Limited acquired the above parcel of real estate from its associated company with a view to trading, dealing in, or otherwise turning the land to account.
>
> (d) that the Appellant(s) acquired (their) shares in Applewood Village Shopping Centre Limited with a view to trading in, dealing in, or otherwise turning the shares to account.
>
> (e) that the profit from the sale of the shares in Applewood Village Shopping Centre Limited was income from a business within the meaning of Sections 3, 4, and 139(1)(*e*) of the *Income Tax Act*.

The appellant Gordon S. Shipp at all material times since 1923 was a house builder and real estate developer. In 1946, he was joined by his son Harold G. Shipp in such business, first in a partnership and later both were shareholders and officers in a company known as G. S. Shipp and Son Limited.

Subsequent to 1948, the appellants caused four other companies to be incorporated. A brief statement of their respective businesses is as follows:

APPLEWOOD DEVELOPMENT LIMITED

A company incorporated by Ontario Letters Patent dated September 12, 1951, for the purpose of rendering engineering assistance and servicing land held by the three following companies.

APPLEWOOD DIXIE LIMITED

A company incorporated by Ontario Letters Patent dated February 19, 1953 for the purpose of assembling land for future development and subdivision.

APPLEWOOD DUNDAS LIMITED

A company incorporated by Ontario Letters Patent dated September 27, 1955, for the purpose of objects and activities similar to those of Applewood Dixie Limited.

and

APPLEWOOD VILLAGE SHOPPING CENTRE LIMITED.

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Most of the business activity of these companies was conducted in the Township of Toronto but some was carried on in the Township of Etobicoke, both of which are in the County of York, and are part of Metropolitan Toronto.

The husband appellants had no business activities or interests other than as directors, officers and shareholders of the above mentioned companies except in the case of the appellant Harold G. Shipp who in 1959 acquired an interest in a General Motors of Canada Limited car agency by the name of Applewood Motors Limited.

These companies, other than Applewood Village Shopping Centre Limited developed and sold a most substantial number of lots and houses in the said Townships of Etobicoke and Toronto and in doing so, they created a market for a shopping centre. In the promotional literature of G. S. Shipp and Son Limited, it was represented to purchasers and prospective purchasers of homes that a shopping centre would be provided for their convenience.

Then as stated in July 1953, Applewood Village Shopping Centre Limited was incorporated and lands at Dixie Road and Queen Elizabeth Highway were acquired for this purpose (see Ex. 1). This shopping centre was carefully planned and advice on how to establish it was obtained over a period of years from an international organization whose objects and purposes are to aid persons developing land in the various ways (see Ex. 3). The size of the shopping centre finally decided upon sometime in 1955, was constructed substantially in that year and fully completed in the year 1956.

In 1954, Principal Investments Limited, a company with extensive experience in the development of shopping centres, acquired land for a shopping centre immediately

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opposite the site acquired by Applewood Village Shopping Centre Limited for its shopping centre. The former was a much larger site. Principal Investments Limited made representations to the appellants to buy out Applewood Village Shopping Centre Limited before construction of its shopping centre was begun; and although a contract was entered into with Principal Investments Limited, the latter did not complete it but instead withdrew from the contract as it was entitled to do.

The shopping centre of Applewood Village Shopping Centre Limited after construction was immediately and at all material times most successful, and of high quality. It provided a good financial return on investment to the appellants (see Ex. E).

Applewood Village Shopping Centre Limited invested a little over one million dollars in its shopping centre.

In 1959, one Kalmar unsolicited offered to buy the assets of Applewood Shopping Centre Limited for $1,350,000. This offer was made verbally in March, 1959 when the appellants Harold G. and June C. Shipp were leaving for a vacation in San Juan, Puerto Rico. Mr. Harold G. Shipp told Kalmar that he was not anxious to sell and would only consider a sale if the proposed purchaser purchased the shares and paid the equivalent of $1,575,000, which sum at the time he considered would be uneconomical and unacceptable to the proposed purchaser.

On March 2, 1959, Kalmar returned and informed that his principals (who were European and who operated an Ontario company known as N.C. Properties Limited) were prepared to buy on the basis offered.

From the data on Ex. E, it is clear that this proposed purchase was most advantageous to the vendors. It was half a million over book value, $275,000 over the offer made originally and would net them monies which would take years to earn in operating the shopping centre all things being equal. A formal offer was engrossed and signed by the proposed purchasers. Before this was done, the appellant Harold G. Shipp and his wife had gone to San Juan. On March 4, 1959, Gordon S. Shipp, the father, called Harold G. Shipp on the telephone at San Juan and informed him that he and Bessie L. Shipp, his wife and mother of Harold G. Shipp, had signed the offer, but that

it was not a deal until Harold G. Shipp and June C. Shipp signed. The latter returned on March 25, 1959 and finally signed the offer on April 3, 1959 (see Ex. 16). The sale was closed June 30, 1959. The method of payment was complicated and extended over a period of years as is indicated in the contract. $40,000 commission was paid by the appellants to Kalmar on an instalment basis.

So much for the facts.

The appellants allege and submit that the shopping centre company was incorporated for sound business reasons some of which were: to protect the name of "Applewood"; to put the risk, which was substantial, in one company and not prejudice financially their other companies; to facilitate the management of the shopping centre in the matter of leases and other contracts; and for other reasons. The appellants further submit that there was no event after incorporation in 1953 which caused this profit from the sale of the shares to be taxable.

On the pleadings it is not alleged by the respondent that the incorporation of Applewood Village Shopping Centre Limited was a scheme or contrivance to avoid tax.

The assumption of the Minister as stated is that the profit from the sale of the shares in Applewood Village Shopping Centre Limited was income from a business within the meaning of sections 3, 4 and 139(1)(*e*) of the *Income Tax Act*. The Minister does not say what the business was.

From the evidence it is clear that the appellants were not in the business of trading in shares.

To be taxable, therefore, the profit from the sale of these shares must be categorized as income as a result of trading in the "business" of real estate carried on by the appellants.

In my view, on the evidence, *inter alia*, the appellants established that this shopping centre was built in response to a demand which was created by the other companies above referred to owned by the appellants; that this shopping centre company and its activities were an exception to the usual activities carried on by the other companies controlled and owned by the appellants; that this shopping centre company was not incorporated as an alternative method of the appellants to put through a real estate

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transaction; and that they did not incorporate the company as a shield for the purpose of attempting to get a profit on capital account.

In my view, on the facts of this case, it is not correct to assume for the purpose of the *Income Tax Act* that the corporation of Applewood Shopping Centre Limited does not exist as a separate legal person distinct from the appellants.

The principles of *Royal K. Fraser v. The Minister of National Revenue*[1] have no application here. Such principles apply when at the time of incorporation persons (1) have acquired real estate with the thought that it be sold as well as for income and (2) have caused a company to be incorporated for the express purpose of attempting to get profit on capital account which otherwise would be income.

The husband appellants in this case, in my view, acquired the shares in Applewood Village Shopping Centre Limited as an investment; and the appellant wives by the gift transactions above referred to acquired them also as an investment; and the sale of such shares in 1959 was the realization of such investments.

The appellants have satisfied the onus required in these appeals. The letters and other documents filed at trial by the respondent purporting to be some evidence, *inter alia*, of attempts by third parties to buy the shares of Applewood Village Shopping Centre Limited, and what was done by it and the appellants or some of them, about the same, I find specifically are inconclusive and I make no inferences therefrom.

In the result on the evidence, the appellants have rebutted the Minister's assumptions as follows:

> (i) that the Appellant(s) acquired (their) shares in Applewood Village Shopping Centre Limited with a view to trading in, dealing in, or otherwise turning the shares to account.
>
> (ii) that the profit from the sale of the shares in Applewood Village Shopping Centre Limited was income from a business within the meaning of Sections 3, 4, and 139(1)(*e*) of the *Income Tax Act*.

The appeal, therefore, is allowed with costs.

[1] [1964] S.C.R. 657.

Winnipeg 1967 June 28 Ottawa July 31

BETWEEN:

BARKMAN DEVELOPMENTS LTD. ..... APPELLANT;

AND

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

AND BETWEEN:

BARKMAN CONCRETE PRODUCTS LTD. ..... APPELLANT;

AND

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

AND BETWEEN:

BARKMAN MANUFACTURING LTD. ..... APPELLANT;

AND

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

Income tax—Associated companies—Minister's power to direct companies associated—Whether exercisable after expiration of taxation year—Intention of Parliament—Income Tax Act, s. 138A(2), am. 1963, c. 21, s. 26(1).

The power of the Minister of National Revenue under s. 138A(2) of the *Income Tax Act* to direct that two or more corporations shall in the circumstances therein specified be deemed to be associated with each other in the 1964 taxation year or subsequently may be exercised after the expiration of the taxation year which it affects.

INCOME TAX APPEALS.

Walter C. Newman, Q.C. for appellants.

George W. Ainslie and *J. R. London* for respondent.

CATTANACH J.:—These appeals from the appellants' assessment to income tax for their respective 1964 taxation years were heard by way of a special case stated for the opinion of the Court which reads, in part, as follows:

SPECIAL CASE FOR OPINION OF THE COURT

A. STATEMENT OF FACTS

1. The Appellants are each a body corporate duly incorporated under the laws of the Province of Manitoba.

2. The 1964 taxation year for each of the Appellants was from the 1st day of March 1963 to the 29th day of February 1964.

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3. On the 5th day of January, A.D. 1966, the Deputy Minister of National Revenue, pursuant to the provisions of subsection (2) of Section 138A of the *Income Tax Act,* directed that the Appellants be deemed to be associated with each other during their 1964 taxation year.

4. On the 6th day of April, A.D. 1966, the Appellants were assessed income tax for their 1964 taxation year and the Respondent computed the tax payable by each of the Appellants, pursuant to the provisions of Section 39 of the *Income Tax Act,* on the basis that all of the Appellants were associated with each other.

5. The Appellants filed Notices of Objections on the 24th day of May, A.D. 1966, and the Respondent, on the 26th day of June, A.D. 1966, confirmed the assessments and notified the Appellants.

B. QUESTION FOR THE COURT

6. The following question is submitted by the parties for the opinion of the Court:

> "Did the Minister of National Revenue have the authority under Section 138A(2) of the *Income Tax Act,* R.S.C. 1952 Chapter 148, as enacted by Chapter 21, S.C. 1963, to direct, on the 5th day of January, A.D. 1966, a time subsequent to the end of the Appellants' 1964 taxation year, that the Appellants be deemed to be associated with each other during their 1964 taxation year."

C. DISPOSITION

7. The parties agree that:

(*a*) if the answer to the question is in the affirmative, the appeals should be dismissed with costs;

(*b*) if the answer to the question is in the negative, the appeals should be allowed with costs and the assessments referred back to the Respondent for re-assessment on the basis that none of the Appellants were during their 1964 taxation year associated with each other.

Section 138A(2) reads as follows:

> . . .
>
> 138A. (2) Where, in the case of two or more corporations, the minister is satisfied
>
> (*a*) that the separate existence of those corporations in a taxation year is not solely for the purpose of carrying out the business of those corporations in the most effective manner, and
>
> (*b*) that one of the main reasons for such separate existence in the year is to reduce the amount of taxes that would otherwise be payable under this Act
>
> the two or more corporations shall, if the Minister so directs, be deemed to be associated with each other in the year.

The above subsection was added to the *Income Tax Act* by Statutes of Canada, 1963, chapter 21, section 26(1), assented to December 5, 1963, and by virtue of subsection (2) thereof, subsection (2) of section 138A was made applicable to the 1964 and subsequent taxation years.

The contention of counsel for the appellants was, as I understood it, that the authority conferred upon the Minister by section 138A(2) is a delegation of legislative power. He based this conclusion upon the circumstance that under the previously existing law, that is section 39 of the *Income Tax Act*, as it previously read and still reads, the appellants were not associated corporations and in order to become associated and taxed accordingly that status had to be changed by the Minister's exercise of the discretion conferred upon him by section 138A(2) which he did in 1966 applicable to the appellants' 1964 taxation years and assessed the appellants accordingly. He then referred to the well recognized rule of construction that statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject matter, or context shows that such was their object and contended that the rule applicable to retroactive legislation enacted by Parliament should be applicable with equal, if not greater force, to the exercise of delegated legislative authority which is retroactive in its effect.

Counsel for the appellants then referred to the use of the present tense of the verb "to be" throughout section 138A(2) and section 138A(3)(*b*)(ii) as contrasted with the alternative use of the past and present tenses in section 138A(1) and section 138(3)(*b*)(ii) and submitted that section 138A(2) does not give clear authority to the Minister to operate thereafter retroactively at his own free will and choice so to be able in 1966 to change the tax status of the appellants in 1964, but rather that Parliament, by the careful employment of the present tense throughout section 138A(2) intended to authorize the Minister to make a direction thereunder only in the same year as that in respect of which he formed his opinion and gave his direction and not with respect to prior years. It was his contention that the use of the past tense would have been more appropriate to give retroactive effect. He added that the submission for which he contended would not unduly hamper the administration of the *Income Tax Act* because the Minister and his departmental officers have available to them information respecting corporations for previous years from which it can be ascertained whether the circumstances will persist into the current year and a direction

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could be made accordingly. He also added that the *Income Tax Act* contains provisions whereby investigations can be conducted or additional or supplementary information can be required during the currency of the taxation year. He had in mind section 126 and the appropriate subsections thereof.

The obvious purpose for the enactment of section 138A(2) is to provide a further basis for determining that two or more corporations are associated with each other in a taxation year and so subject to a higher rate of tax than if they were not associated. The method of determining whether corporations were associated which prevailed prior to the enactment of section 138A(2), and which still prevails as a method of so determining, is dependent upon control within the meaning of section 39 which falls to be decided as a question of fact if and when the matter ultimately reaches the Court.

Section 138A(2) is a section which is intended to bring within the classification of associated corporations a class of corporations which under pre-existing law would be outside it and this is done by vesting in the Minister the right to make a discretionary determination upon being satisfied as to the existence of certain facts.

I have no doubt that section 138A(2) is not retrospective legislation. It received assent on December 5, 1963 and was specifically made applicable to the 1964 and subsequent taxation years. It does not purport to change the tax payable by the appellants in their 1963 and previous taxation years. That is the appellants' vested right. If an Act provides that as at a past date the law shall be taken to have been that which it was not then that Act would be retrospective. That is not the present case. Retrospective operation is one matter. Interference with existing rights is another. There is a presumption that an Act speaks only as to the future, but there is no corresponding presumption that an Act is not intended to affect existing rights. Most Acts of Parliament do just that. I do not think that the appellants are entitled to have their status as non-associated corporations under prior law preserved inviolate for the future when a subsequent and different law will be applicable to them. The legislation is therefore, prospective.

There is no question whatsoever that where the Minister is satisfied that when the circumstances contemplated by section 138A(2) subsist in the 1964 and subsequent taxation years he is vested with an absolute discretion to direct or not to direct that the corporations are deemed to be associated. If he so directs after the taxation year then certainly that direction is retroactive in its effect.

The question to be determined is whether Parliament intended to authorize him to make such a determination. To answer this question I must consider the language used in the section and consider that language in the context of the Act for the purpose of deciding what is its fair meaning.

The legislative scheme of the *Income Tax Act* is that taxes thereunder are imposed on a yearly basis. One of the two factors upon which the Minister must be satisfied in order to exercise his discretion under section 138A(2) is that one of the main reasons for separate corporate existences during the taxation year is to reduce the amount of tax payable. Clearly the Minister cannot determine what the amount of the tax payable by a corporation is, whether associated with another corporation or not, until the conclusion of the taxation years of all such corporations. In order to determine the amount of tax payable by a particular corporation he must have before him the return of income of that corporation and those with which it may be deemed to be associated to determine if the amount of tax is to be increased as well as other information which may be available to him as to the state of facts at some time during the currency of the year. Under section 44 of the *Income Tax Act* a corporation may file its return of income for a taxation year within six months from the end of that year. Different corporations may have different taxation years. It is therefore logical to conclude that Parliament, being aware of such provisions in the *Income Tax Act,* must have contemplated the Minister ordinarily exercising his discretion after the conclusion of the relevant taxation years.

In my opinion therefore the language of section 138A(2) clearly points to the legislative intent that the Minister in 1964 or subsequently, for any taxation year subsequent to

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a 1963 taxation year, if he is satisfied as to the state of facts contemplated by section 138A(2) for the year in question, can exercise the discretion vested in him prior to assessing or re-assessing.

I would, therefore, answer the question posed in the Special Case for the opinion of the Court in the affirmative and dismiss the appeals with costs.

Toronto 1967

June 14-15

Aug. 3

BETWEEN:

HAMILTON MOTOR PRODUCTS (1963) LIMITED ..... APPELLANT;

AND

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

Income tax—Income tax regulations s. 1101(1)—Income Tax Act, R.S.C. 1952, ss. 20(1), 79C(1) to (4), (6), (7), (9), (15), 137(1)—Deferred profit sharing plan—Change of franchises by automobile agency—Capital cost allowance—Failure to pass amending by-law pursuant to the Minister's request—Registration of deferred profit sharing plan made invalid—Nature of business not affected by change of franchises—Artificial reduction of income—Recapture of capital cost allowance inapplicable—Appeal allowed.

The appellant operated a new and used car agency holding a Chevrolet/Oldsmobile franchise. Another company carrying on another new and used car agency holding a Buick/Pontiac franchise carried on business at the same time in the same city. The main shareholder of the latter company was the father of the principal shareholder of the appellant. The father wished to retire from the latter business and the said son wished to change franchise, viz., by giving up the Chevrolet/Oldsmobile franchise and by acquiring the Buick/Pontiac franchise and also to take over the premises on which the company controlled by his father did business.

Accordingly, the appellant acquired an option to buy in bulk the assets and franchise of the agency controlled by the father and at the same time the appellant gave an option to buy the assets and the franchise of its own agency to another company.

The two options were exercised on October 4, 1963, at which time the appellant discharged its employees, except the principal shareholder and his brother and took over all the assets and hired all employees of Buick/Pontiac agency.

On September 27, 1963, just prior to closing these two transactions, the appellant submitted an application to the Minister for approval of a deferred profit sharing plan under section 79c of the *Income Tax Act*. On September 30, 1963, the Minister requested the appellant to

amend a certain by-law passed on September 13, 1963. The appellant revised the particular article of the by-law in question whereupon the Minister did approve the registration of the plan on October 4, 1963 and made it effective as of September 27, 1963.

The principal shareholder of the appellant who along with his brother and its accountant were trustees of the plan received from the appellant on September 27, 1963 the sum of $103,500 representing the amounts allocated under section 79c(7) of the *Act* to the employees of the appellant listed in the appellant's minutes of September 14, 1963.

The Minister disallowed the deduction for income tax purposes of the whole sum of $103,500; and also caused to be recaptured a capital cost allowance, under section 20(1) of the *Act*.

The taxpayer appealed the Minister's reassessment.

Held, 1. that this appeal is allowed in part and the matters were referred back to the Minister for reassessment.

2. that the appellant remained in the same business at all material times with the meaning of section 1101(1) of the regulations of the *Income Tax Act* and therefore no recapture of capital cost allowances should have been added to the appellant's income for the year 1963 pursuant to section 20(1) of the *Act*.

3. that the sum of $103,500 paid under section 79c of the *Act* was not deductible for two reasons namely,

   I. Because, either no valid by-law was passed revising the by-law setting up the plan; or that the revised by-law was never validly passed until October 2, 1963, at which time there were only two employees and therefore there was no basis for setting up a deferred profit sharing plan by reason of the limits placed on the allocation of monies in respect of each employee in such plan by section 79c(7) of the *Act*, and

   II. The appellant never intended to set up a *bona fide* profit sharing plan and section 137(1) of the *Act* was applicable in that what was done here was a mere sham, and was a transaction or operation designed to unduly or artificially reduce the income of the appellant for the taxation year 1963.

APPEAL from the Minister's assessment.

Wolfe D. Goodman and *B. Sischy* for appellant.

G. W. Ainslie and *B. Verchere* for respondent.

GIBSON J.:—On the hearing of this appeal two issues were raised, namely: (1) the deductibility for income tax purposes of a payment made in September 1963 by the appellant in the sum of $103,500 to certain trustees purporting to be in respect to a deferred profit sharing plan within the meaning of section 79c of the *Income Tax Act*; and (2) the recapture of certain capital cost allowances included in the income of the appellant for the year 1963, purportedly pursuant to section 20(1) of the *Income Tax Act*.

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The relevant facts in brief are these: In the summer of 1963, the appellant operated a new and used car agency in the City of Hamilton, Ontario holding a Chevrolet/Oldsmobile franchise from General Motors of Canada Limited. Another company carrying on another new and used car agency holding a Buick/Pontiac franchise from General Motors of Canada Limited carried on business in the City of Hamilton at the same time. The main shareholder of the latter company was the father of the principal shareholder of the appellant. The father wished to retire from the latter business and the said son wished (i) to change franchises, *viz,* by giving up the Chevrolet/Oldsmobile franchise and by acquiring the Buick/Pontiac franchise, and also (ii) to take over the premises on which the company controlled by his father did business, which premises were more desirable than the premises where the appellant carried on business under the Chevrolet/Oldsmobile franchise.

Accordingly, at the said time, the appellant acquired an option to buy in bulk the assets of the new and used car agency of the company controlled by his father, (which held the Buick/Pontiac franchise) and at the same time the appellant gave to Motors Holding Company of Canada Limited an option to buy in bulk the assets of the appellant's new and used car agency where it operated the Chevrolet/Oldsmobile franchise.

Both options were exercised and on or about October 4, 1963, both contracts of purchase and sale were completed.

In the result, the appellant did two things which are relevant regarding the second issue raised on this appeal and a third thing which is relevant regarding the first issue raised on this appeal. The first two things are namely:

(1) the appellant sold all the assets used at the premises where it carried on the Chevrolet/Oldsmobile Agency and discharged all its employees who worked there from its employ, save and except the principal shareholder of it and his brother. (The new purchaser purchased these assets and hired these said employees); and

(2) the appellant acquired all the assets used at the premises where the Buick/Pontiac Agency was carried

on and hired all the employees of the company (controlled by his father) which had formerly carried on that agency at those premises.

The third thing done by the appellant relevant to the first issue raised in this appeal was namely:

(3) Just prior to closing these two transactions, *viz,* September 27, 1963, the appellant wrote an undated letter to the Department of National Revenue, Ottawa, (Ex. I) and enclosed with it a Trust Agreement and a copy of its By-Law No. 7 (Ex. J). This letter was an application, and the Trust Agreement and By-Law were the supporting documents, for approval of a deferred profit sharing plan pursuant to the enabling provisions of section 79c of the *Income Tax Act.* Said By-Law No. 7, according to the company Minute Book (Ex. 4) the appellant purports to have passed on September 14, 1963.

Then, subsequently on September 30, 1963 the Department of National Revenue wrote requesting an amendment to Article V, sub-paragraph (3) of the said By-Law No. 7 of the proposed deferred profit sharing plan of the appellant, and on October 2, 1963 the solicitors for the appellant forwarded to the Department of National Revenue a copy of a revised Article V, sub-paragraph (3) of the said By-Law (see Ex. 5). Following this, the Department of National Revenue (see Ex. 6) approved the registration of the plan under section 79c of the *Income Tax Act,* and pursuant to the enabling statutory provisions in section 79c stated that the approval was as of the date of the application, namely, September 27, 1963.

At this time, there were only two employees of the appellant, namely, the principal shareholder and his brother who was a nominal shareholder.

As stated, although the Minutes of the appellant company record that By-Law No. 7 was passed on September 14, 1963, there was no amending by-law passed by the appellant authorizing the change requested by the Minister to Article V, sub-paragraph

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(3) of By-Law No. 7 of the deferred profit sharing plan.

On September 27, 1963, there was paid to the three trustees (who were the principal shareholder of the appellant, his brother and its accountant) the sum of $103,500 for the purpose of this plan (see Ex. 7).

Attached to the Minutes of the appellant company of September 14, 1963 authorizing the payment of this sum is a list of employees to whom certain amounts were allocated pursuant to the enabling provisions contained in section 79c(7) of the *Income Tax Act*. The maximum allocated to any employees was $1,500 which is the maximum permitted by the said subsection.

To permit this plan to be implemented under the statute utilizing the payment of $103,500, it was necessary for the appellant to have a sufficient number of employees (because of the $1,500 limit per employee permitted under section 79c(7)), or otherwise the said sum could not have been paid into such a deferred profit sharing plan.

When the approval retroactively to September 27, 1963 was given by the Minister on October 4, 1963, there were in fact only two employees of the appellant, *viz*, the principal shareholder and his brother.

No employee of the appellant, other than the principal shareholder and his brother ever was told of the precise terms of this plan at any time.

On the discharge by the appellant of its employees other than the principal shareholder and his brother by September 30, 1963, the sum of a little over $19,000 less withholding tax was allocated among and paid to such former employees and a T-4 income tax form was subsequently filed (see Ex. 9) by the trustees, on which was noted the Department of National Revenue file number of the plan.

Then in December 1963, pursuant to and as permitted by the provisions of this particular alleged deferred profit sharing plan, all of the funds in it were transferred to a suspense account and then re-allocated

in the proportion of 60% thereof to the principal shareholder and 40% to his brother.

So much for the facts of this case.

In respect to the issue of recapture of certain capital cost allowances included in the income of the appellant for the year 1963, I am of the opinion that the appellant was still in the same business at all material times (namely, the new and used car sales and service business) within the meaning of section 1101(1) of the Regulations of the *Income Tax Act* when it took the necessary action above recited in brief to change franchises, namely, from the Chevrolet/Oldsmobile to the Buick/Pontiac franchise and accordingly, no recapture of capital cost allowance should have been added to the income of the appellant for the year 1963 pursuant to the provisions of section 20(1) of the Act.

In respect of the issue of the payment made by the appellant in September, 1963 in the sum of $103,500 purporting to be in respect of a deferred profit sharing plan within the meaning of section 79c of the *Income Tax Act,* I am of the opinion that it is not deductible by the appellant for income tax purposes for at least two reasons, hereinafter recited.

Section 79c of the *Income Tax Act* in the wording in which it was in 1963 was added to the statutes in 1961. Section 79c(1)(*a*)[1] defines "Deferred Profit Sharing Plan". Section 79c(1)(*b*)[2] defines "Profit Sharing Plan". Section

[1] (*a*) "deferred profit sharing plan" means a profit sharing plan accepted by the Minister for registration for the purposes of this Act, upon application therefor in prescribed manner by a trustee under the plan and an employer of employees who are beneficiaries under the plan, as complying with the requirements of this section; and

[2] (*b*) "profit sharing plan" means an arrangement under which payments computed by reference to his profits from his business or by reference to his profits from his business and the profits, if any, from the business of a corporation with whom he does not deal at arm's length are made by an employer to a trustee in trust for the benefit of employees of that employer or employees of any other employer, whether or not payments are also made to the trustee by the employees.

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79c(15)[3] prescribes that the payments to such a plan must be made "out of profits". The payments may be made by an employer to the trustee of such a plan for the benefit of any employee. If the plan is accepted by the Minister for registration, then the payments to the plan are deductible for income tax purposes subject to certain ceilings on the amount that may be allocated to any employee, namely, $1,500 under section 79c(7)[4]. The profit from such a plan is not subject to income tax, subject to certain modifications under section 79c(6)[5]. The employees are not taxable on monies paid into such a plan unless and until they actually receive the monies from the plan under section 79c(9)[6].

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[3] (15) Where the terms of an arrangement under which an employer makes payments to a trustee specifically provide that the payments shall be made "out of profits", such arrangement shall be deemed, for the purpose of subsection (1), to be an arrangement for payments "computed by reference to his profits from his business".

[4] (7) There may be deducted in computing the income of an employer for a taxation year the aggregate of each amount paid by the employer in the year or within 120 days after the end of the year, to a trustee under a deferred profit sharing plan for the benefit of employees of the employer who are beneficiaries under the plan, not exceeding, however, in respect of each individual employee in respect of whom the amounts so paid by the employer were paid by him, an amount equal to the lesser of

(*a*) the aggregate of each amount so paid by the employer in respect of that employee, or

(*b*) $1,500 minus the amount, if any, deductible under paragraph (*g*) of subsection (1) of section 11 in respect of that employee in computing the income of the employer for the taxation year,

to the extent that such amount was not deductible in computing the income of the employer for a previous taxation year.

[5] (6) No tax is payable under this Part by a trust on the taxable income of the trust for a period during which

(*a*) the trust was governed by a deferred profit sharing plan, and

(*b*) not less than 90% of the income of the trust for the period was from sources in Canada, and for the purpose of this paragraph contributions to or under the plan shall not be included in computing the income of the trust.

[6] (9) There shall be included in computing the income of a beneficiary under a deferred profit sharing plan for a taxation year each amount received by him in the year from a trustee under the plan, minus any amounts deductible under subsections (10) and (11) in computing the income of the beneficiary for the year.

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Sections 79c(2) and (3)[7] of the Act prescribe that certain matters must be included in a deferred profit sharing plan failing which such a plan will not be accepted for registration. The Minister in any event, is not bound to accept any plan. The Minister, if he accepts a plan, may back-date a plan for its effective date, pursuant to section

[7] (2) The Minister shall not accept for registration for the purposes of this Act any profit sharing plan unless, in his opinion, it complies with the following conditions:

(a) the plan provides that each payment made by an employer to a trustee in trust for the benefit of employees of that employer or employees of any other employer who are beneficiaries thereunder, is an amount that is the aggregate of amounts each of which is identifiable as a specified amount in respect of an individual employee;

(b) the plan does not provide for the payment of any amount to an employee or other beneficiary thereunder by way of loan;

(c) the plan provides that no part of the funds of the trust governed by the plan may be invested in notes, bonds, debentures or similar obligations of

(i) an employer by whom payments are made in trust to a trustee under the plan for the benefit of beneficiaries thereunder, or

(ii) a corporation with whom that employer does not deal at arm's length;

(d) the plan provides that no part of the funds of the trust governed by the plan may be invested in shares of a corporation at least 50% of the property of which consists of notes, bonds, debentures or similar obligations of an employer or a corporation described in paragraph (c);

(e) the plan includes a provision stipulating that no right or interest under the plan of an employee who is a beneficiary thereunder is capable, either in whole or in part, of surrender or assignment;

(f) the plan includes a provision stipulating that each of the trustees under the plan shall be resident in Canada; and

(g) the plan, in all other respects, complies with regulations of the Governor in Council made on the recommendation of the Minister of Finance.

(3) The Minister shall not accept for registration for the purposes of this Act any employees profit sharing plan unless all the capital gains made by the trust governed by the plan before the date of application for registration of the plan and all the capital losses sustained by the trust before that date have been allocated by the trustee under the plan to employees and other beneficiaries thereunder.

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79c(4)[8], namely to the date of the application for the registration of the plan or when in the application for registration a later date is specified as the date upon which the plan is to commence as a deferred profit sharing plan, on that date.

Once the Minister has accepted a plan, the monies do not have to be paid into the plan so that they irrevocably vest in the employees in the proportion that they are allocated to such employees. (This was changed by subsequent legislation).

The purported plan in this action provided for the vesting of monies in any employee only if he was an employee when he reached the age of 65, but if any such employee died before that time or left the employ of the employer he had no rights under this plan.

On the evidence, two things are obvious. Firstly, no valid by-law was passed amending By-Law No. 7 pursuant to the request of the Minister in October, 1963, or alternatively, By-Law No. 7 was never validly passed until some time after October 2, 1963. At that time there were only two employees, all the other employees having been discharged from service. There therefore was no basis for setting up a deferred profit sharing plan by reason of the limits placed on the allocation of monies in respect of each employee in such plan by section 79c(7) of the Act.

I therefore find as a fact and conclude as a matter of law that no valid deferred profit sharing plan under section 79c was ever set up by the appellant.

Secondly, and in any event, section 137(1)[9] of the *Income Tax Act,* in my opinion, is clearly applicable. The

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[8] (4) Where a profit sharing plan is accepted by the Minister for registration as a deferred profit sharing plan, the plan shall be deemed to have become registered as a deferred profit sharing plan

(*a*) on the date the application for registration of the plan was made, or

(*b*) where in the application for registration a later date is specified as the date upon which the plan is to commence as a deferred profit sharing plan, on that date.

[9] 137. (1) In computing income for the purposes of this Act, no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

appellant never intended to set up a *bona fide* profit sharing plan. What was done was a mere sham, and on the evidence, beyond any doubt, was a transaction or operation that was designed to unduly and artificially reduce the income of the appellant for the taxation year 1963.

The matters are referred back to the Minister for reassessment not inconsistent with these reasons.

Success being divided, there shall be no order as to costs.

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BETWEEN:

CYRIL JOHN RANSOM ..... APPELLANT;

AND

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

Montreal 1967 Apr. 13

Ottawa Aug. 18

Income tax—Income from office or employment—Reimbursement of transferred employee for loss on sale of house—Company policy—Whether benefit received in course of employment—Whether allowance—Income Tax Act, ss. 5(1)(a),(b), 25.

In accordance with a statement of policy of appellant's employer appellant was reimbursed by his employer in respect of the loss sustained by him on the sale of his house in Sarnia following his transfer by his employer to Montreal.

Held, the amount reimbursed was not chargeable as income to appellant under either s. 5 or s. 25 of the *Income Tax Act*. Under s. 5 the effective cause, i.e., the legal source, of the payment must be the services rendered by the employee, and in this case the source was not services rendered but the agreement which resulted from appellant's acceptance of his employer's offer to compensate him for loss.

The reimbursement of a loss or expense actually incurred by an employee in the course of employment is not an "allowance" within the meaning of s. 5(1)(*b*), which word implies a payment in respect of some possible expense without obligation to account. Neither is it remuneration nor a "benefit of any kind whatsoever" within the meaning of s. 5(1)(*a*) of the Act. Finally, such a payment is not within the language of s. 25 of the *Income Tax Act*.

Jennings v. Kinder, Hochstrasser v. Mayes 38 T.C. 673, discussed. *Tenant v. Smith* [1892] A.C. 150, referred to.

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RANSOM
v.
MINISTER OF
NATIONAL
REVENUE

INCOME TAX APPEAL.

R. de Wolfe MacKay, Q.C. for appellant.

A. Garon and *P. F. Cumyn* for respondent.

NOËL J.:—This is an appeal from an assessment dated November 8, 1965, whereby the appellant was assessed for additional tax in the amount of $773.04 by reason of adding to his declared taxable income for the year 1963 the amount of $2,809, a portion of the loss incurred by him on the sale of his home in Sarnia, which amount had been reimbursed by DuPont of Canada Limited, his employer.

The appellant was transferred on January 16, 1961, from Sarnia, in the Province of Ontario, to the City of Montreal, in the Province of Quebec.

On March 23, 1959, he had purchased a house in Sarnia in which he dwelt until September 30, 1961, at which date he moved his family to Montreal, where since January 16, 1961, he was then working. He then attempted to sell his house in Sarnia with no success until the year 1963 when on May 15 of that year he sold it for a gross price of $17,000 which, after payment of legal fees and real estate commission of $808, resulted in a net selling price of $16,192. According to the appellant, the cost of the said house was $21,002 made up as follows:

Purchase price	$ 18,750
Extras	275
Inside painting	335
Legal fees and mortgage insurance	805
Improvements	837
	$ 21,002

The expense which the appellant claims he incurred on the sale of the house, caused by his employer's requirement that he move from Sarnia to Montreal amounted, therefore, to $4,810 (i.e., $21,002 minus $16,192 (net selling price)).

In accordance with the general policy of the appellant's employer, DuPont of Canada Limited, as set forth in its statement of General Company Procedure (Exs. ASF-6,

ASF-7, ASF-8 and ASF-29) of which I will say more later, the employer reimbursed the appellant in respect of such expense an amount of $3,617 which, less legal fees and real estate commission of $808, namely $2,809, was, as aforesaid, added to appellant's taxable income for the 1963 taxation year as a taxable allowance under section 5 of the *Income Tax Act* of Canada.

Prior to selling the said house, it was appraised by independent appraisers at Hamilton Loan & Investment Company, of Sarnia, Ontario, at an appraised selling price of $20,012.

The appellant herein states that as his employer, Du-Pont of Canada Limited, required as a condition of his employment, that he move from Sarnia, Ontario, to Montreal, P.Q., reimbursement to the extent above mentioned constituted reimbursement of expenses caused to him by reason of his employment.

The appellant further urged (although this allegation was not established at the trial) that the said reimbursement by the employer was a matter of convenience for the employer who preferred to make the above mentioned reimbursement rather than purchase the employer's house (as it could have done under the company's housing scheme) at the appraised selling price and then incur expenses of subsequently disposing of it.

The appellant, therefore, takes the position that as the expenses incurred by him were caused wholly and exclusively by reason of the terms and conditions of his employment in respect of which his employer, by reason of its General Company Procedure, undertook to reimburse him, this reimbursement constituted one of the expenses incurred by him in the course of his employment, and one provided for as a term and condition of his employment.

It does not, he says, in any manner whatsoever, constitute a benefit for services as an employee under the provisions of section 5 of the *Income Tax Act* or any other section of the said Act.

In making the assessment for the appellant's 1963 taxation year, the respondent assumed that:

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(*a*) the sum of $2,809 paid by DuPont to the Appellant constituted salary, wages or other remuneration paid to Appellant in 1963, within the meaning of s.s. (1) of Section 5 of the *Income Tax Act*;

(*b*) the aforementioned sum was paid to the Appellant as an allowance for personal expenses or for some other purpose and therefore was income of the Appellant within the meaning of paragraph (*b*) of s.s. (1) of Section 5 of the *Income Tax Act*.

and relies *inter alia* upon section 3, paragraphs (*a*) and (*b*) of subsection (1) of section 5 and section 25 of the *Income Tax Act*.

The respondent admits that the appellant sold his house for $16,192, that he had purchased it for $18,750 and that his employer paid him $2,809 but refused to admit that the appellant is entitled to add to the amount of $18,750 the "extras, inside painting, legal fees and mortgage insurance and improvements" totalling $2,252. The respondent also contests the right of the appellant to place in the amount of loss the price of the following items: mortgage insurance ($255), inside painting ($335), television antenna and tower ($120), drape-rods ($90), and fire screen and grate ($40) (the last two of which are included in the item of $837 for improvements). The respondent, indeed, alternatively submits that the real expense incurred by the appellant upon selling his house was not $2,809 but rather (a) $1,479.88 being the difference between the house's cost price of $18,750 and its selling price of $16,192 with a three per cent per annum allowance for occupancy or, subsidiarily, (b) $2,669.31 being the difference between the house's appraised value of $20,012 and its selling price of $16,192, with a three per cent per annum allowance for occupancy, and that in either case the excess of appellant's allowance over his real expense should be included in his taxable income for 1963 for services in that year.

The appellant joined Canadian Industries Limited on June 3, 1950, after graduating from the University of Toronto with a degree in mechanical engineering and first commenced to work for the above corporation at Shawinigan Falls, P.Q. He agreed that when he became an employee of the corporation, he knew he would not work in Toronto and expected that the company would move

him to different locations in Canada. He also knew, and it was understood, that he would be reimbursed for his expenses, but this did not form part of the written contract. The evidence also shows that he had no inducement to move as he expected no increase in salary nor any advancement when it occurred. It was a practice of the company to move its employees from one location to another, because of their experience, skill and qualifications, the employees having no say in the matter as the transfer is the decision of the company and not the employee.

From Shawinigan, he was transferred to Montreal, P.Q. on June 1st, 1952, where he dwelt with his wife and children until he was transferred on August 1st, 1955, to Winnipeg, Manitoba. Prior thereto, as appears from Ex. ASF-3, on June 1st, 1954, the appellant's employment was transferred from Canadian Industries Limited to DuPont Company of Canada Limited, as a result of the segregation of the assets of the former company pursuant to a compromise sanctioned by the Quebec Superior Court under section 126 of the *Companies Act* of Canada. Under an assignment (Ex. ASF-3) the appellant agreed to the transfer to DuPont Company of Canada Limited of all rights accruing to Canadian Industries Limited under his employment agreement in consideration of the assumption by DuPont Company of Canada Limited of all the obligations of Canadian Industries Limited. On January 1st, 1957, the appellant then agreed, pursuant to a record of assignment (Ex. ASF-4) to the transfer to DuPont Company of Canada (1956) Limited of all rights accruing to DuPont Company of Canada Limited under his employment agreement in view of the consolidation of the latter company into DuPont Company of Canada (1956) Limited. The latter company's name was later changed to DuPont of Canada Limited in 1958.

On June 1st, 1957, he was transferred from Winnipeg to Montreal where he bought a house and on July 3rd, 1959, he was transferred to Sarnia, Ontario. On this occasion he sold his Montreal house at a capital loss of $1,000 which,

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however, he did not claim from the company because he did not think the amount involved was large enough.

He stated that he was roughly familiar with the policy of the company permitting him to claim compensation for his loss but did not know exactly the details of the procedure to follow to recover it until he was returned to Montreal in 1961.

He left his family in Montreal until his wife sold his Montreal house and stayed in Sarnia alone where he attempted to rent a house. There were, however, no houses available for rental and he therefore had one built and moved into it in November of 1959. He financed the purchase of this house through the Dominion Bank and paid the balance of six or seven thousand dollars in cash.

He was then transferred from Sarnia to Montreal on June 20, 1961, and as soon as he was notified of his transfer, the house in Sarnia was put up for sale. He advertised in the newspaper and then shortly thereafter it was placed in the hands of a real estate agent until it was sold. He had considerable difficulty in selling his house in Sarnia because at that time Imperial Oil had just decided to move a fairly large number of their senior personnel from Sarnia to Toronto with the result that there were about 60 homes in the same price bracket as his for sale at the same time. The company participated in no way in the sale of his house, which took place on May 15, 1963, for a gross price of $17,000.

Upon arriving in Montreal, he bought a three-bedroom house and has not moved since.

The parties admitted that the General Company Procedure, which the employees of DuPont of Canada could take advantage of in order to obtain reimbursement for the financial loss sustained as a result of their transfer to another location was ASF-29, for the period January 1st, 1956, to May 31st, 1961, ASF-6 for the period June 1st, 1961, to August 4th, 1963, and ASF-7 from August 5th, 1963, and is still in effect.

The main difference between General Company Procedure Exs. ASF-29 and ASF-6 and ASF-7 is that ASF-29

and ASF-6 contain a provision for reimbursement of transfer expenses and real estate losses only, whereas Ex. ASF-7 contains in addition thereto a housing scheme under which it provides interest-free loans to an employee who has been transferred to another location in an amount not to exceed the difference between the adjusted cost and the outstanding indebtedness on the employee's present residential property which loan must be used for the purchase of a house at the new location. To be eligible for such a loan the employee must evidence his intention of disposing of his present residential property by placing it on the market with a real estate broker or agent unless there is a *bona fide* offer or sales contract relating to the employee's property in existence at the time of his loan application.

The appellant herein did not, however, borrow from his employer as he purchased his house by means of a loan from a bank and a personal investment of some $7,000, nor does it appear did he borrow for the purchase of a house at the new location. He merely claimed and obtained reimbursement for the real estate loss he sustained as a result of his transfer to Montreal.

It is stated in Ex. ASF-6 that "it is the policy of the Company that an employee transferred to a new location by the Company should not suffer financial loss as a result of such transfer except through his own fault", and except for the above mentioned differences the moving or transfer expenses provided for under the old and new procedure are substantially the same. They are spelt out in the procedure as covering (a) the cost of moving the employee's household goods, (b) transportation for the employee and his family, (c) hotel expenses for a temporary period, (d) unexpired rental payments under a lease agreement, (e) other necessary expenses arising out of the transfer at the discretion of the department manager.

A number of incidental expenses can also be reimbursed the employee as out of pocket expenses, such as (a) connection of appliances, (b) alteration of rugs and draperies, (c) house cleaning and other similar expenses within the discretion of the department manager. The procedure which

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covers reimbursement of real estate losses upon providing details of same to the Real Estate Division of the company sets down the manner in which the loss shall be calculated which, the procedure provides, shall be the amount by which the cost of the employee's house (i.e., the purchase price plus reasonable legal and survey fees and capital improvements which increased the market value of the property) exceeds the net selling price of the house (i.e., gross sale price less the amount of any normal real estate commission and mortgage prepayment penalty paid, legal fees and other reasonable costs incidental to the sale). In the event the loss appears greater than warranted by local real estate conditions, the Real Estate Division may, at its discretion, make an appraisal of the property. Where the appraisal reveals that either purchase or sale was out of line with prices for comparable properties in the area the procedure provides that such deviation shall be taken into account and the loss reduced accordingly.

I should also add that under the old procedure, ASF-6, the real estate loss is adjusted by reducing it by 1/60 for each full calendar month of owner occupancy (thus the loss of $4,810 reduced by $1,844 gives us an adjusted loss of $2,966) whereas under the new or more recent procedure (Ex. ASF-7, which was adopted in the present case and where the amount reimbursed is equal to (a) selling expenses or (b) capital loss, whichever is the greater) the capital loss is the excess of adjusted cost over net proceeds or $3,617. This is the amount paid to the appellant from which legal fees and real estate commission of $808 was deducted to obtain $2,809, which as already mentioned, was added to the taxable income of the appellant by the assessment appealed from.

There are no decisions in this country on the taxability of an indemnity paid to an employee against the loss sustained on the sale of his house when he is transferred from one locality to another and the present appeal is a test case of special interest to a number of employees who, like the appellant, do not wish to be taxed on amounts which they consider to be reimbursement for expenses incurred in the course of their employment.

There are, however, two English decisions, *Jennings v. Kinder*[1] and *Hochstrasser v. Mayes*[2], which were heard together in the Court of Appeal and the House of Lords and were reported together in 38 T.C. at p. 673.

In the case of *Jennings v. Kinder*, the majority in the Appeal Court held that the payment in question made under a scheme to compensate the employee for the loss suffered on the sale of his house, when he had to move in the course of his employment, was a payment for a consideration other than services, as such payment had been received not in his capacity as employee but in his capacity as party to the contract concerning his house and that the amount received should, therefore, not be added to his income.

There is, in that case, a statement by Jenkins L.J. to the effect that even if the employee had not given any consideration other than service for the payment, it might not have been taxable as not constituting a profit. He expressed this at p. 693 of volume 38 of Tax Cases as follows:

> The transaction may be described as a form of insurance. It cannot bestow any profit on the employee but merely protects him against loss. To segregate the benefit (in cases in which it materialises) from the burden, and to ignore the cost to the employee of obtaining it (in the shape of the purchase money he has laid out in the faith of the housing scheme and agreement and lost through the depreciation in value of the house), ignoring also the other forms of consideration moving from the employee as above described, and thus to arrive at the conclusion that the sum paid by I.C.I. under the indemnity by way of recoupment for that loss is a profit of his employment as being a sum received for no consideration other than services appears to me to involve a considerable distortion of the facts.

And at p. 694 he concludes:

> I find it difficult to rid myself of the inclination to think that, if the house-purchase transaction is looked at as a whole, no profit arises from it to the employee even in a case in which the guarantee becomes operative.

The above English decisions were rendered under Schedule E, the first rule of which reads as follows:

> Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in

[1] [1958] 3 W.L.R. 215. [2] [1959] 1 Ch. D. 22.

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Schedule E or to whom any annuity, pension or stipend chargeable under that Schedule is payable in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and *bona fide* paid and borne by the party to be charged.

The above rule is quite different from the sections under which the appellant was assessed and which are reproduced and emphasized hereunder:

5. (1) 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 plus

(*a*) the value of board, lodging and *other benefits of any kind whatsoever* (except the benefit he derives from his employer's contributions to or under a registered pension fund or plan, group life, sickness or accident insurance plan, medical services plan, supplementary unemployment benefit plan or deferred profit sharing plan) *received* or *enjoyed* by him in the year *in respect of, in the course of, or by virtue of* the office or employment; and

(*b*) all amounts received by him in the year as an *allowance* for personal or living expenses or as an *allowance for any other purpose except*

(i) travelling or personal or living expenses allowances.

A number of specific exceptions then follow of expenses which are not included in income and the section then ends as follows:

minus the deductions, permitted by paragraphs (*i*), (*ib*), (*q*) and (*qa*) of subsection (1) of section 11 and by subsections (5) to (11), inclusive, of section 11 but *without any other deductions whatsoever,* (emphasis added).

25. An amount received by one person from another,

(*a*) during a period while the payee was an officer of, or in the employment of, the payer, or

(*b*) on account or in lieu of payment of, or in satisfaction of, an obligation arising out of an agreement made by the payer with the payee immediately prior to, during or immediately after a period that the payee was an officer of, or in the employment of, the payer,

shall be deemed, for the purpose of section 5, to be remuneration for the payee's services rendered as an officer or during the period of employment, unless it is established that, irrespective of when the agreement, if any, under which the amount was received was made or the form or legal effect thereof, it cannot reasonably be regarded as having been received

(i) as consideration or partial consideration for accepting the office or entering into the contract of employment,

(ii) as remuneration or partial remuneration for services as an officer or under the contract of employment, or

(iii) in consideration or partial consideration for covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment.

The language of section 5(1)(*a*) appears to be wider than its English counterpart as it taxes ". . . *other benefits of any kind whatsoever . . . received or enjoyed* by him (the employee) in the year *in respect of, in the course of, or by virtue* of the office or employment".

I should also point out that the facts of the present case are not entirely the same as in the two English decisions in that the appellant had not taken advantage of the interest-free loan in purchasing the house he later sold at a loss having merely availed himself of the right he had as an employee to require reimbursement of the capital loss he sustained upon the sale of it. In the English cases, on the other hand, both taxpayers had taken advantage of the whole scheme having borrowed from their employer to purchase their house and having later claimed compensation for the loss sustained through depreciation in its value against which the employer had guaranteed them.

In the English cases under the terms of the agreement signed by each employee taking advantage of the scheme, he was required, if he wanted to sell or let the house on being transferred to a new place of employment in the company's service, to offer to sell the house first to the company. Furthermore, the employee was bound to keep the house in good tenantable repair.

It was because of this that the Court held that the payment made to the employee in both cases was made for a consideration other than services and, therefore, was not taxable. Jenkins L.J. clearly sets this out in *Hochstrasser (H. M. Inspector of Taxes) v. Mayes* and *Jennings v. Kinder (supra)* at p. 692:

> In order to participate in the housing scheme an employee of I.C.I., over and above answering that description, and being married, had to comply with a number of conditions. In order to bring himself

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within the ambit of the scheme he had, of course, as an essential prerequisite, to buy a house and find the purchase money for it either out of his own resources or by means of an ordinary mortgage supplemented by an interest-free loan granted by I.C.I. It is, of course, true that an employee need not buy a house or enter the scheme unless he chose. But any employee buying a house and entering the scheme must, I think, be taken to have done so on the faith of the scheme. Apart from the scheme and the guarantee which it promised, he would in all probability not have ventured to buy a house owing to the risk of capital loss in the event of his having to sell, especially in the case of his being transferred. Then he had to enter into the housing agreement and comply with the conditions on which his right to the indemnity was by that agreement made to depend. In the forefront of those conditions is the positive obligation laid upon him to offer the house for sale to I.C.I. in the event of his desiring to sell or let it by reason of transfer. This, as I understand it, is an obligation with which the employee is bound to comply in that event and not merely a condition he must fulfil in order to claim the benefit of the guarantee. Moreover, it applies when the employee desires to let and not merely when he desires to sell. This, I think, is a restriction of substance. The employee might have perfectly good reasons for wishing to let rather than sell on being transferred. But the housing agreement precludes him from doing this without first offering the house for sale to I.C.I. Then it is to be observed that the agreement makes it a condition precedent to any claim under the guarantee that the employee should keep the house in good tenantable repair . . .

And then lower down at p. 693 he continues:

. . . In the event of the house depreciating in value, the employee does no doubt gain a substantial advantage, but not, as I think, by any means an advantage representing pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than his services.

Jenkins L.J. then concluded at p. 696 as follows:

I think it may well be said here that, while the employee's employment by I.C.I. was a *causa sine qua non* of his entering into the housing agreement and consequently, in the events which happened, receiving a payment from I.C.I., the *causa causans* was the distinct contractual relationship subsisting between I.C.I. and the employee under the housing agreement, coupled of course with the event of the house declining in value.

Mr. Pennycuick said, in effect, that a consideration other than services could only be shown if the consideration, other than services, moving from the employee for the benefit received demonstrably represented full value in money or money's worth for the benefit in question. I find no warrant in the authorities for this proposition. It would no doubt be right to disregard a fictitious or colourable bargain designed to disguise what was in fact remuneration as payable on some other account. But nothing of that sort enters into this case. The housing agreement constitutes a genuine bargain, advantageous

no doubt to the employee, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payments sought to be taxed in these two appeals.

In the house of Lords[3] both Viscount Simonds and Lord Cohen appear to attach little importance to the adequacy of the consideration involved in the two cases. Indeed, both stated that the housing agreement was a *bona fide* arrangement in which the employer received consideration, the adequacy of which was irrelevant, in accordance with ordinary legal principles. The agreement, therefore, in their view, and not the employee's office or employment was the effective cause of the payment and constituted the source of the payment. In this respect Lord Cohen expressed himself as follows at p. 710:

> It is clear from the finding of the Commissioners that the Respondent was receiving under his service agreement the full salary appropriate to the appointment he held. The *housing scheme* pursuant to which the housing agreement was made was introduced by I.C.I. *not to provide increased remuneration for employees* but as part of a general staff policy to *secure a contented staff and to ease the minds of employees compelled to move from one part of the country to another as the result of the Company's action.* The housing agreement itself gave advantages to the Company which may not be easy to quantify but which are not negligible or colourable. For these reasons, as well as the reasons given by the noble and learned Lord on the Woolsack, I agree with Jenkins L.J., that the housing agreement constituted a genuine bargain, advantageous no doubt to the Respondent but also not without its advantages to I.C.I., and I see no reason for disregarding it as the *source* of the payment sought to be taxed in the appeal.

(The emphasis added).

Lord Radcliffe on the other hand seems to regard the conclusion that the amount received was not taxable as supported by the facts on the case, whether or not the employee provided consideration under the agreement. He expressed this at p. 708 as follows:

> . . . It is true enough that the guarantee or indemnity offered was not unqualified, that an employee adopting the housing scheme undertook certain obligations, and that some of these were capable of enuring in certain events to the advantage of the employer. But there is no reason to suppose that the employer's purpose in proposing the scheme was to obtain these advantages. What he wanted was *to ease the mind and mitigate the possible distress of an employee who,*

[3] Reported at 38 T.C. 702.

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having sunk money in buying a house, might find himself called upon at short notice to put it on the market without any assurance of getting the whole of his money back. To me therefore, it seems beside the point to scrutinize the housing agreement with the aim of measuring precisely how much in the way of valuable consideration was afforded by the employee under the agreement. *I should have taken the same view of the result if he had afforded none.*

(Emphasis added).

I can deal with section 25 of the Act briefly by saying that the appellant has, in my view, rebutted by the production of adequate evidence the presumption this section creates that the payment he received from his employer is remuneration for services rendered. It indeed appears clearly that the indemnity paid to the appellant in respect of the capital loss sustained upon the sale of his house when transferred, cannot reasonably be regarded as falling within any of the following categories: (i) "as consideration or partial consideration for accepting the office or entering into the contract of employment" as the evidence discloses that it had nothing to do with his engagement as an employee; (ii) "as remuneration or partial remuneration for services as officer or under the contract of employment" as the evidence discloses that the appellant was receiving under his service contract the full salary appropriate to his appointment. Furthermore, the source of the payment was not the services rendered by the appellant but resulted from the fact that he availed himself of the procedure whereby he could claim compensation for the capital loss sustained as a result of his transfer from Sarnia to Montreal. The fact that he did not claim the loss sustained in 1959 on the sale of his house in Montreal prior to his transfer to Sarnia, Ontario, would indicate that it was not part of his remuneration for services under his employment and that if he wanted to obtain such an amount, it was necessary to claim it by means of the procedure set down in the company's policy regulations and comply with its conditions; (iii) nor can it be said that the payment received by the appellant was "in consideration or partial consideration for covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment".

I now come to section 5(1)(*a*) and (*b*) of the Act which, as already mentioned, is couched in language which appears to be wider than the English taxation rule on which the taxpayers in *Hochstrasser v. Mayes* and *Jennings v. Kinder (supra)* were held not to be taxable. The Canadian taxation section indeed uses such embracing words that at first glance it appears extremely difficult to see how anything can slip through this wide and closely interlaced legislative net.

In order, however, to properly evaluate its intent it is, I believe, necessary to bear in mind firstly, that section 5 of the Act is concerned solely with the taxation of income identified by its relationship to a certain entity, namely, an office or employment and in order to be taxable as income from an office or employment, money received by an employee must not merely constitute income as distinct from capital, but it must arise from his office or employment. Similar comments were made in *Hochstrasser v. Mayes* with reference to the English legislation by Viscount Simonds at p. 705 and by Lord Radcliffe, at p. 707. Secondly, the question whether a payment arises from an office or employment depends on its causative relationship to an office or employment, in other words, whether the services in the employment are the effective cause of the payment. I should add here that the question of what was the effective cause of the payment is to be found in the legal source of the payment, and here this source was the agreement which resulted from the open offer of the employer to compensate its employee for his loss and the acceptance by him of such offer. The cause of the payment is not the services rendered, although such services are the occasion of the payment, but the fact that because of the manner in which the services must be rendered or will be rendered, he will incur or have to incur a loss which other employees paying taxes do not have to suffer.

Indeed, here, as in *Hochstrasser v. Mayes,* the real basis for the decision that the payment received should not form part of his income, is that the legal source of the payment, and therefore the effective cause, was the source designated by the *bona fide* procedure and agreement entered into by

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the parties and not the services rendered. It may indeed be inferred from the evidence that, as in the English cases, the company policy pursuant to which the present claim and reimbursement was made, was introduced by the appellant's company "not to provide increased remuneration for employees, but as part of a general staff policy to secure a contented staff and ease the minds of employees compelled to move from one city to another as the result of the company's action".

Furthermore, the agreement to pay this compensation to the appellant gave to the company the advantage of an employee whose production would not be affected by the prospect of sustaining a loss on the house he was leaving to proceed to another city where, again, he would be faced with other problems of location, which in view of the numerous transfers required as a result of its extended operations throughout the country, cannot be considered as negligible. It cannot be said here also that the payment was a fictitious or colourable bargain designed to disguise remuneration payable on some other account, nor is this the case of an employer undertaking to purchase a particular asset from an employee at a price in excess of the apparent value of the asset. The procedure laid down in the company procedure is indeed such that the price determined thereby is, in my view, substantially a fair evaluation of the capital loss sustained in all cases.

That the payment is made for no consideration in the legal sense, should not (as pointed out by Jenkins L.J. in *Jennings v. Kinder (supra)* at p. 692) "be treated as referable to services or as made to the employee in that capacity" if the payment is motivated or caused by reasons of efficiency or even of mere compassion. In this vein, it should not be irrelevant to point out in passing, that if a certain class of taxpayers in this country are required, in order to earn their emoluments of office or of employment, to incur certain expenses, reimbursement of these expenses should not be considered as conferring benefits under section 5(1)(*a*) of the Act. Furthermore, and this is really the answer to the respondent's case, a reimbursement of an

expense actually incurred in the course of the employment or of a loss actually incurred in the course of the employment is not an "allowance" within the meaning of the word in section 5(1)(*b*) as an allowance implies an amount paid in respect of some possible expense without any obligation to account.

There can, I believe, be no difference in principle between the reimbursement of an expense or of a loss nor, in my view, can anything turn on the fact that the loss or expense which is the subject matter of the present reimbursement covers the value of a capital asset.

Although I have no doubt, as a matter of substance, that the payment received by the appellant should not be included in his income, I have had some difficulty in expressing the reasons why such a result should be obtained. The English House of Lords' decision has been of some use in dealing with section 25 of the Act, it has not, however, been too helpful in applying section 5 to the instant case, as the wording of the English rule is quite different from our section 5 even though some of the facts are similar.

The correctness of the conclusion arrived at under section 5 can, however, I believe, be sustained by a mere examination of the notion of *remuneration, reimbursement* for money disbursed in the course of or by reason of the employment and *allowance*. These seem to me to be three distinctively different concepts.

In a particular case, it may be difficult to decide as a question of fact into which category a particular payment falls. There is, however, no difficulty when an employee is required to disburse money in the course of his employment, i.e., to make payments on behalf of the employer. A clear example is where a cashier pays wages. There would equally be no difficulty with reimbursement of such an expense paid out of an employee's own pocket and then reimbursed i.e., if a lawyer's clerk or stenographer paid search fees out of his or her own pocket and, upon returning to the office, took the money out of petty cash. Such transactions are too obvious for debate.

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Another class of payment by an employer to an employee is also so well established as to be beyond debate. Where an employment contract contemplates an employee being away from his home base from time to time, the employee must eat and sleep while away from home. The expense involved in providing himself with food and shelter while away from home are personal expenses, but they are personal expenses that arise because the employee is required to perform the duties of his employment away from his home base temporarily. Such a payment is money disbursed "by reason of" but not "in the course of" his employment. Nobody questions that reimbursement of such an expense is something quite different from remuneration for the services performed by the employee. Such personal expenses are incurred *by reason of* the employment. Until the employee has been reimbursed for such expenses, he is out of pocket *by reason of* the employment. His remuneration can only be what he receives over and above such reimbursement.

In a case such as here, where the employee is subject to being moved from one place to another, any amount by which he is out of pocket by reason of such a move is in exactly the same category as ordinary travelling expenses. His financial position is adversely affected *by reason of* that particular facet of his employment relationship. When his employer reimburses him for any such loss, it cannot be regarded as remuneration, for if that were all that he received under his employment arrangement, he would not have received any amount for his services. Economically, all that he would have received would be the amount that he was out of pocket *by reason of* the employment.

An *allowance* is quite a different thing from reimbursement. It is, as already mentioned, an *arbitrary* amount usually paid in lieu of *reimbursement*. It is paid to the employee to use as he wishes without being required to account for its expenditure. For that reason it is possible to use it as a concealed increase in remuneration and that is why, I assume, "allowances" are taxed as though they were remuneration.

It appears to me quite clear that reimbursement of an employee by an employer for expenses or losses incurred by reason of the employment (which as stated by Lord MacNaughton in *Tenant v. Smith*[4] puts nothing in the pocket but merely saves the pocket) is neither remuneration as such or a *benefit* "of any kind whatsoever" so it does not fall within the introductory words of section 5(1) or within paragraph (*a*). It is equally obvious that it is not an allowance within paragraph (*b*) for the reasons that I have already given.

I would, however, exclude from the cost of the appellant's house the item added to its purchase price under "inside painting ($335)" because the appellant has not established clearly that it is not maintenance and, therefore, if so, it is a personal or living expense under section 139(1) (*ae*) (i). I would also exclude the television power antenna, the fire screen and grate, as well as the drape rods because the appellant has not established that such items could not be used in the new location. If they could have been so used, they could have been moved to Montreal, and cannot be considered as part of the real expense of moving to Montreal.

The remainder of the items, however, should be included in the cost of the house and the appellant's loss calculated on that basis. Such a loss, in my view, is in the same category as those other "removal expenses" (such as the expenses incurred by the employee in moving himself, his family and his household effects) which are considered by the respondent as conferring no benefit on the employee and which, as a matter of fact, are not added by the respondent to the appellant's income.

I can, indeed, see no difference in principle between the case of a salaried employee who is sent away for a few days to work outside and whose expenses are paid whether he remains away for a week, a month or even a year[5], or the case of the appellant here who incurred expenses in moving back and forth to wherever he was employed.

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[4] [1892] A.C. 150.

[5] (Although, of course, if the employee is away for more than a normal period, such expenses considered as travelling expenses may then become personal expenses).

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As a matter of fact, I would think that the situation of the appellant is very similar in that the payment he received covers a loss sustained by him because of the exigencies of his employment and is as far removed from remuneration for services or from a benefit of employment or even from an allowance, as the "removal expenses" he now receives without taxation liability.

I should also add that, although the procedure set down in Exhibit ASF-7 (whereby the capital loss was determined as being the excess of adjusted costs over net proceeds less legal fees and real estate commission of $808, namely $2,809) was not effective (as it bears the date of August 5, 1963) on the date of the sale of the appellant's house which took place on May 15, 1963, it was in operation and, therefore, available to the appellant on December 5, 1963, when his claim was finally settled.

It therefore follows that the cost of the inside painting and the estimated value of the television antenna, of the drape rods and fire screen and grate, totalling $585, should not be added to the cost of the house of the appellant.

Subject to the above correction, the amount received by the appellant represents in my view a fair calculation of the real expenses incurred by him as a result of his transfer to Montreal and should not be added to his income.

I would, therefore, allow the appeal with costs and refer the assessment back to the respondent for reassessment on the above basis.

BETWEEN:

HOME JUICE COMPANY, HOME JUICE COMPANY LIMITED and JAY-ZEE FOOD PRODUCTS LIMITED ..... APPLICANTS;

Ottawa 1967 June 27 Sept. 5

AND

ORANGE MAISON LIMITÉE ..... RESPONDENT.

Trade Marks—"Orange Maison" used in association with orange juice—Whether indicating product home-made—Meaning of "maison" in French—Trade Marks Act, s. 12(1)(b).

Applicants applied to strike out the registration of the trade mark "Orange Maison" used in association with orange juice on the ground that it was clearly descriptive in French of the character or quality of the orange juice in that the word "maison" suggested home-made qualities, and that the mark was therefore non-registrable by virtue of s. 12(1)(*b*).

Held, dismissing the application, the word "maison" does not indicate a home-made product though as used in some cases in the culinary art in France, but seldom in Quebec, it conveys a remote suggestion to that effect.

The Solio Case (1898) 15 R.P.C. 476, referred to.

ORIGINATING NOTICE to strike out registration of trade mark.

Christopher Robinson, Q.C. for applicants.

Gordon F. Henderson, Q.C. and *K. H. E. Plumley* for respondent.

NOËL J.:—This is a proceeding by originating notice of motion to strike out a registration, under the *Trade Marks Act,* R.S.C. 1952-53, chapter 49, of the words ORANGE MAISON as a trade mark in the name of the respondent on December 9, 1960, under number 120,375 in respect to orange juice.

The motion is made by the applicants on the ground that the trade mark ORANGE MAISON was not registrable at the date of registration in that it is clearly descriptive in the French language of the character or quality of the wares in association with which it is used and is thus contrary to section 12(1)(*b*) of the Act.

The applicant, Home Juice Company, is incorporated under the laws of Illinois, one of the United States of

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America, the applicants Home Juice Company Limited and Jay-Zee Food Products Limited, are incorporated under the laws of Ontario, with head offices respectively in the City of Hamilton and the City of Windsor, and the respondent is a company incorporated under the laws of the Province of Quebec, having an office at 2323 Aubrey Street, in the City of Montreal, in the said province.

The applicant, Home Juice Company, has before the Trade Marks Office an application filed in 1964 to register the words HOME JUICE in Canada as a trade mark in respect of fruit flavoured drinks on the basis of intention to use it in Canada. This application has been opposed by the respondent on the ground that HOME JUICE is confusing with the respondent's registered trade mark ORANGE MAISON, No. 120,375 and that the wares of the applicant and the respondent are identical and are merchandized to the public by identical means.

Furthermore, the applicants, Home Juice Company Limited and Jay-Zee Food Products Limited are defendants in an action brought against them in this Court under No. B-1455 by the respondent in respect of *inter alia* alleged infringement of the respondent's aforesaid registered trade mark No. 120,375.

The sole wares which have been sold or otherwise used or advertised in association with the registered trade mark ORANGE MAISON No. 120,375 are orange juice bearing the mark ORANGE MAISON which has been applied to a drink composed of fresh and reconstituted orange juice with added vitamin C, the said drink being manufactured, sold and delivered directly by the respondent to the homes of customers in 64-ounce jugs.

It is of some interest to note that respondent's trade mark was first used in Canada on January 16, 1954, was used for some seven years before it was registered on December 9, 1960, and has been used for about six and a half years since registration.

The respondent's reply to the attack made upon its trade mark ORANGE MAISON by the applicants is twofold:

(1) its trade mark is not clearly descriptive in the French language of the character or quality of the wares or

services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production as set down in section 12(2) of the Act.

(2) If its trade mark is descriptive it had acquired a distinctive meaning at least in the Province of Quebec at the date of its registration (i.e., December 9, 1960) within the meaning of section 18(2) of the Act and, therefore, because of sections 12(2) and 31(1) and (2) of the Act this acquired distinctiveness at the date of registration established by evidence of the extent to which and the time during which its trade mark has been used in Canada, should give it in any event a restricted registration "to the wares or services in association with which the trade mark is shown to have been used as to have become distinctive and to the defined territorial area in Canada in which the trade mark is shown thus to have become distinctive".

The position taken by the respondent is, therefore, that it would be entitled to a registration in the province of Quebec even if its trade mark was held to be descriptive.

The applicants' attack of respondent's trade mark ORANGE MAISON on the ground that it is descriptive and, therefore, not registrable under section 12(1)(*b*) of the Act as expressed by counsel for the applicants, is that the word "maison" in the French language has a meaning which suggests that the products sold in association therewith have the qualities of a home made product. He urged that the idea conveyed by the use of the word "maison" is that this is a home orange juice, either or both from the point of view of being home made or coming to the house (as being home delivered) and generally that by extension it expresses the idea of good quality. He indeed suggests that in French and probably in English also, the expression "maison" (or home) in relation particularly to a food or a beverage, had gone even beyond the strict meaning of home made to the idea of quality and that this meaning was an extension from the meaning of home made and did not necessarily import the meaning of home made.

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The applicants rely on a particular meaning of quality of the word "maison" found in a few French dictionaries such as the following:

Petit Larousse (1959)

Adj Fam. Fait à la maison; de bonne qualité; tarte maison.

Dictionnaire Alphabétique et Analogique de la Langue Française, par Paul Robert

1° T. de comm. (hôtellerie). Qui a été fait à la maison, sur place, et non pas acheté au dehors. Pâté, tarte, vol-au-vent maison (cf. de chef). —Par ext. (le fait d'avoir été fait à la maison étant considéré comme une assurance de qualité). Pop. particulièrement réussi, soigné.

Le Grand Larousse Encyclopédique—1962

Adj. Fam. De première ordre, fabriqué par une maison réputée, selon des recettes éprouvées. Une tarte maison. Pop. soigné particulièrement, même appliqué à un mot qui ne désigne pas un objet fabriqué. Un exposé maison.

The above meaning of the word "maison", however, does not occur in all French dictionaries and there are several such as Littré and Quillet, where such a meaning does not appear. It does not appear either in Belisle's Dictionnaire Général de la Langue Française au Canada, 1954, nor in the Larousse Canadien Complet, 1954. As a matter of fact "maison" to anyone is essentially a place where one lives and the meaning of quality it may convey in some cases is an exotic one even in France and is restricted to the culinary art. The use of the word "maison" in this sense merely suggests that a particular victual is made by the chef of a restaurant in which one is eating such as pâté maison or tarte maison and may (but not necessarily so) because of this, be of a better quality than if it was purchased outside.

The word "maison" used such as here, however, in association with the word orange (which although it is disclaimed in the registration and, therefore, cannot in any sense add anything to the strength of the trade mark) does not, in my view, indicate that the product is home made as in French one should not merely use the word "maison" to express or convey such an idea but should use the words "fait à la maison" and even if these words were used, they would in association with the word "orange" be complete nonsense as indicating home made oranges. They do not either indicate that one refers to an orange house where oranges are grown or kept as in such a case the word

"orangerie" should be used. As a matter of fact, they do not even describe orange juice or even a quality or characteristic thereof and if they did would be deceptively misdescriptive of the character or quality of the wares as being home made which is not an issue raised in these proceedings.

If one, indeed, considers the respondent's trade mark in its entirety, they are not indicative of juice at all, nor do they refer to a feature or essential peculiarity of that particular product. They may at the most be suggestive of a food consumed in the house or the home but they do not, in my view, indicate some essential peculiarity or nature of the wares or some quality or character thereof.

The most one can say of the respondent's trade mark ORANGE MAISON is that if one takes an exotic meaning of the word "maison" as used in some cases in the culinary art in France but seldom used in Quebec except in a few sophisticated restaurants on menus describing pâté maison (a meat paste or loaf made locally) which meaning can be found in some French dictionaries, but not in all, and which cannot be found in any French-Canadian dictionary, one may find a remote suggestion that something which deals with oranges is made at home, in the house, or has some characteristic of a home made product.

This, in my view, is not sufficient to render the respondent's trade mark unregistrable as it has been held in several instances that mere suggestiveness should not deprive a trade mark of registrability even in the case where a word used skilfully alludes to the wares in association with which it is used unless, of course, it is clearly descriptive of their character or quality as contemplated by the statute.

In the *Solio* case[1] at p. 486, Lord MacNaghten had this to say on this subject:

> . . . the word must be really an invented word; nothing short of invention will do. On the other hand, nothing more seems to be required. If it is . . . "new and freshly coined" (to adopt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods.

It also appears that such a solution should also be accepted in this country, as the *Trade Marks Act* (section

[1] (1898) 15 R.P.C. 476.

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12(1)(*b*)) seems to contemplate the acceptance of some descriptive connotation. It indeed does not say any description of any kind but one which is *clearly* descriptive of the character or quality of the wares.

If I had to determine here the matter of descriptiveness on the basis of the words used being a covert allusion to the quality or character of the respondent's wares, I would have considerable difficulty in doing so because the use of the word "maison" with "orange" (particularly without the use of other words such as "fait à la maison" or "jus d'orange") does not, in my view, even suggest a feature or even an essential peculiarity of the respondent's wares.

I cannot even accept that the word "maison" used with another word to indicate quality is in general use even in France. It is certainly not in common or current use anywhere in the world in association with the word "orange". As for this country, to the greater part of its French population, the word "maison" is certainly seldom, if at all, used in association with another word to indicate a home made product nor so far as ordinary language is concerned is the word used to denote the quality of anything. It, therefore, follows that it is not a word with which the word "orange" would be used in any country by others in the description of their products or wares nor would it be used particularly in Canada where its descriptiveness must be realistically considered for the purpose of the Act.

I have, therefore, reached the conclusion that the word "maison" is not descriptive and that its registration as a trade mark is not excluded by subsection (*b*) of section 12(1) of the *Trade Marks Act*.

Having determined that the respondent's trade mark ORANGE MAISON is not descriptive, there is no necessity to deal with respondent's alternative reply in that it would at least be entitled to a registration restrictive to the wares in association with which its trade mark had been so used as to have become distinctive and to the defined territorial area in Canada in which it is shown to have become distinctive. In view, however, of the possibility of an appeal herein, it may be useful to deal with this submission.

Without considering the evidence submitted by the respondent, by way of affidavits, which goes beyond the

date of December 9, 1960 (which is the date upon which the registration of the trade mark was obtained) to which counsel for the applicants objected on the basis that such evidence, subsequent to the date of registration, was irrelevant, or the statements by some of respondent's witnesses on the very point the Court is called upon to adjudicate such as whether the trade mark of the respondent has become well known and distinctive of the respondent or whether the said trade mark was known to persons engaged in this business as being distinctive of the respondent's orange juice, or was well known to competitors as being distinctive and even disregarding a letter produced by Maurice Primeau the owner of the respondent company in paragraph 25 of his affidavit relating to the expansion of his business and without, however, deciding their relevance or admissibility, I must conclude on the basis of the remaining evidence that the respondent and its predecessor, Plus 4, Limitée, has manufactured, advertised extensively and sold orange juice directly to householders in jugs in association with the mark "maison" for a considerable period of time prior to the date of registering its trade mark. This evidence indeed discloses that the first sales were in Montreal and from 1954 until the date of registration of the said mark ORANGE MAISON (i.e., December 9, 1960) orange juice was sold in association with its trade mark in Montreal and in other cities of the Province of Quebec such as Hull, Trois-Rivières, Ste-Rose, Verchères, L'Assomption, Drummondville, Quebec City, Joliette, Lachute, St-Jérôme, Valleyfield, St-Hyacinthe, St-Jean, Chaudière and Terrebonne.

Since 1954 the respondent and its predecessor in title has continuously and extensively advertised in the Province of Quebec its orange juice in association with the trade mark ORANGE MAISON by product information mailed or delivered directly to household consumers, by contests concerning and advertising its orange juice on home delivery trucks, letterheads, invoices, exterior signs, posters placed on transit vehicles, cards, radio and television advertising and decals placed on store windows.

There is, therefore, no question in my mind that by virtue of continuous use and extensive advertising in the Province of Quebec at the date of registration, the respondent's trade mark ORANGE MAISON had

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acquired a distinctive meaning of the orange juice of the respondent and its predecessor in title among dealers and purchasers of orange juice and other fruit flavoured drinks and non-alcoholic beverages in the Province of Quebec within the meaning of section 18(2) of the *Trade Marks Act*, R.S.C. 1952-53, chapter 49.

Having thus acquired a distinctive meaning in the Province of Quebec within the meaning of section 18(2), I must hold that the respondent's trade mark ORANGE MAISON was registrable even if it had been held that it was not registrable under subsection (*b*) of section 12, i.e., as being "clearly descriptive or deceptively misdescriptive in the English or French languages of the character or quality of the wares" although in such a case such registration would be in accordance with section 31(2) of the Act restricted "to the wares or services in association with which the trade mark was shown to have been so used as to have become distinctive and to the defined territorial area in Canada in which the trade mark is shown thus to have become distinctive".

The motion will accordingly be dismissed with costs.

Montreal 1967

Sept. 13-15

BETWEEN:

STEPHEN SURA .....APPELLANT;

AND

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

Income tax—Income or capital gain—Company incorporated to carry on promoter's house-building business—Sale of land to company by promoter—Intention—Whether business profit.

In 1954 appellant caused the incorporation of a company to carry on a house-building business which he had previously carried on himself and thereafter it was his practice to buy land for the company on his own account and sell it to the company at cost when the company needed it. In 1954 he purchased a large parcel on Montreal Island for a housing development but he was unable to arrange financing and the land remained idle until 1960 when he accepted a profitable offer for a large part of it.

Held, although appellant's sole intention in acquiring the land was to use it in the company's house-building business the transaction was

designed to benefit him as a shareholder of the company and his profit from the transaction was therefore profit from a "business" within the enlarged meaning of that word in the *Income Tax Act*. *M.N.R. v. Taylor* [1956-60] Ex. C R. 3, applied.

INCOME TAX APPEAL.

John Ewasew, Q.C. for appellant.

P. F. Cumyn and *P. R. Coderre* for respondent.

JACKETT P.:—This is an appeal from a decision of the Tax Appeal Board dismissing an appeal from the appellant's assessment under the *Income Tax Act* for the 1960 taxation year.

The question to be decided is whether the appellant was rightly assessed for that year on the basis that a profit made by him on the disposition of certain land is profit from a business within the meaning of the word "business" as used in the *Income Tax Act*.

The appellant was, prior to 1954, engaged in the business of building houses—some under contract for others and some on his own account for re-sale. In so far as he built the houses on his own account for re-sale, this business involved acquiring land, building houses on the land so acquired, and selling the land with the houses on it.

Early in 1954, the appellant caused a company—Stephen Sura Inc.—to be incorporated, and from that time on, the appellant carried on for the account of the company the business that he had previously carried on for his own account, with this additional feature, that, when he—as Stephen Sura—found land that he decided should be acquired to be used in the company's house building business, he acquired it on his own account and so held it until the company was ready to acquire it and use it, at which time he sold it to the company at its cost to him.

In 1954 the appellant embarked, for the first time, on a large scale low-cost housing development. It had apparently been a "dream" of his that he should ultimately carry out such a development in addition to the business, in which he had been very successful, of building relatively expensive homes in well established residential areas on Montreal Island.

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According to his story, which I accept, he allowed himself to be persuaded that a very long, narrow piece of farm land in an undeveloped municipality on Montreal Island was so situated, having regard to, among other things, the availability of cooperation from the local authorities, that, notwithstanding its remoteness from built-up areas, it was an attractive site for the realization of his "dream". Strangely, the appellant's usual business acumen was so beclouded by the persuasiveness of the persons who took an interest in having him embark on this project that he bought the land in question at a cost of $44,000 even though, while he knew that he could not proceed with this building scheme without finding someone to finance the construction of the houses, he had taken no steps to ensure that he would obtain the necessary financing except to ascertain by verbal inquiry that the land was in an area where Central Mortgage and Housing Corporation would guarantee loans.

Having so bought the property, without any solid assurance of financing, the appellant very soon found out that no lending company would lend money for a housing development in the area where the property was. At that moment he realized that he was "stuck" with this land and he "just left it" as it was as he saw no alternative to waiting in the hope that things would change in the future.

In 1957, Hydro Québec acquired a servitude over part of the land, either by expropriation or by virtue of having power to expropriate, and Canadian National Railways expropriated a part of the land. Apart from those transactions, the situation in relation to this land remained uneventful from early 1955 until 1960 when an offer was made to the appellant as a result of which he sold a large part of the land to a purchaser for a consideration of $95,830. It is the part of the profit from this sale that the Minister attributed to the 1960 taxation year that is in issue in this appeal.

The appellant's position is that the sole reason motivating the appellant in acquiring the aforesaid tract of land in 1954 was the use that it was intended should be made of that land in the house-building business of Stephen Sura Inc. Counsel for the respondent did not contend that I should find that the appellant had any other purpose

in mind at the time of the acquisition. This is not, therefore, a case of a profit from a purely speculative acquisition of land; nor is it a case of an acquisition for a primary purpose that was also motivated by an anticipation that, in any event, the property acquired could be turned to advantage at a profit (popularly referred to as a "secondary intention"). This is a case where property was acquired for use in the current operations of a business and for no other reason.

I propose to consider the problem first as though Stephen Sura Inc. were the appellant and had acquired the land to be used in a house-building business that it was carrying on, and then I propose to consider whether the situation is any different where the land was acquired by the appellant for the purpose of re-sale at cost to his wholly-owned company to be used by that company in a house-building business that it was carrying on.

It helps me to appreciate the problem if I think of the business of purchasing land, erecting buildings and selling improved land with buildings on it as being the same in principle as the business of buying leather and other raw materials, manufacturing boots and selling the boots. In each case, the business consists in acquiring the ingredients, manufacturing something that is merchantable and selling the finished product; and the profit consists of the proceeds of disposition less all the costs of making the product sold.

The situation here (on the assumption that the land had been bought in the name of the company and that the company is the litigating taxpayer) is that the taxpayer, while it was carrying on an active business of buying land, erecting houses and selling the land with houses on it, acquired this large tract of land in a neighbourhood where houses were not then being built, with the purpose of launching a large-scale house-building programme, which programme, if it had been launched, would have been an extension of its already existing business; and quickly found that, because its management had been too optimistic and trusting about financing arrangements, it could not launch such programme and had acquired land for use in its business which, at least for the time being, it could not utilize. Not only could such land not be utilized in the business, but, if I properly understand the evidence, there was at

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that time and for several years after that time, no alternative way of using or disposing of the land so as to realize the money that had been put into it. In other words, $44,000 had been put into property for use in what was, in effect, a manufacturing business, but, by reason of the poor judgment shown in acquiring it, no use could be made of the property at the time of acquisition.

Going back to my analogy with the boot manufacturer, it is the same, as I see it, as if the boot manufacturer had bought a large stock of raw leather for use in his manufacturing business, had then discovered that there was no market for the kind of boots that he could make out of that leather and, there being no immediate way of realizing the money so expended, had left such leather in his warehouse until a demand arose for it some six years later.

So regarded, the land was land that had been acquired in the course of the operation of a profit-making business and that was still being held as part of the assets of the business when it was sold. The profit from a sale of such land was therefore a profit from the business, and, as it arose from a sale, in the course of the business, of raw materials designed for use in making the finished product of the business, it was a profit from the operation of the business and not a profit of a capital nature.

If, therefore, the appellant had so carried on his house-building business that he did everything for the account of his wholly-owned company (or if he had done everything for his own account), I should have no doubt that the profit from this sale of property acquired as raw material for his business of producing houses was a profit from the business and must, therefore, be included in computing the income from the business for tax purposes.

The situation is complicated, however, as I have already indicated, by the fact that the appellant was not carrying on the house-building business on his own account but was the "management" of the company on whose account that business was being carried on when he bought the land in question on his own account to hold it until the company was ready to acquire and use it.

It should be noted that there were financial advantages to the company (and thus indirect financial advantages to

the appellant as its shareholder) in having the land acquired and held during such a period by someone who would then sell it to the company at cost when it was ready for it.

Accepting, as I do, the appellant's testimony that he had no intention of making an immediate profit out of the acquisition of the land and the sale thereof to his own company, I cannot escape the conclusion that the acquisition was, from the appellant's point of view, a transaction of a business character designed to result in an ultimate benefit to him inasmuch as he would be entitled, as shareholder, to whatever profits the company made. Indeed, I cannot distinguish the facts in this case, from this point of view, from the facts in *M.N.R. v. Taylor*.[1] Just as the respondent in the *Taylor* case was substantially, if not exclusively, motivated in buying the lead for re-sale to his employer on pre-arranged terms by his desire to facilitate his employer's business for the benefit that he would get from its increased profits, so here, I must conclude that the appellant was motivated in buying the land for re-sale to his company on pre-arranged terms by his desire to facilitate the company's business for the benefit that he would get from its increased profits.

Having reached that conclusion, I must conclude, as President Thorson did in the *Taylor* case, that the property having been acquired in the course of an operation of a business character, a profit from its disposition, at least in the circumstances under which the land was sold in this case, is a profit from a "business" within the extended meaning of that word as used in the *Income Tax Act*.

The appeal is dismissed with costs.

[1] [1956-60] Ex. C.R. 3.

Ottawa 1967
Sept. 18-20

BETWEEN:

SMITH KLINE & FRENCH INTERAMERICAN CORPORATION .... } APPELLANT;

AND

MICRO CHEMICALS LIMITED .....RESPONDENT.

Patents—Compulsory licence—Decision of Commissioner—Appeal from—Retroactivity of royalty and other terms, whether valid—Terms fixed by Commissioner—Whether error—Patent Act, s. 41(3) and (4).

On June 21st 1966 the Commissioner of Patents granted a compulsory licence effective that day under s. 41(3) of the *Patent Act* but the royalty and other terms were not fixed by him until February 3rd 1967 though made retroactive to June 21st 1966. The patentee appealed from the decisions of both dates.

Held: (1) An appeal under s. 41(4) lies only from a decision which fixes the royalty and other terms. *Hoffmann-La Roche Ltd. v. Delmar Chemicals Ltd.* [1966] Ex. C.R. 713, followed.

(2) A decision under s. 41(3) cannot be made retroactive and hence a term of the licence of February 3rd 1967 that royalties should be paid on sales subsequent to June 21st 1966 must be struck out. *Hoffmann-La Roche Ltd. v. Delmar Chemicals Ltd., ante* p. 209 followed; *Hoffmann-La Roche Ltd. v. Delmar Chemicals Ltd., ante* p. 63, distinguished.

(3) The Commissioner did not err (1) in directing that the licensee reimburse the patentee's expense of employing an accountant to inspect the licensee's books only on certain conditions; (2) in failing to fix certain conditions proposed by the patentee for the public safety (*Hoffmann-La Roche Ltd. v. Delmar Chemicals Ltd.* [1965] 1 Ex. C.R. 611, [1965] S.C.R. 575, referred to); (3) in failing to find good reason to refuse the licence where the patentee was manufacturing the drug in Canada in every form, meeting the Canadian demand at a reasonable price, exporting the drug, and carrying on research in Canada; (4) in fixing the royalty at 15% of the net selling price. (*Hoffmann-La Roche Ltd. v. Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd.* [1966] S.C.R. 313, referred to).

APPEAL from Commissioner of Patents.

Gordon F. Henderson, Q.C. and *R. G. McClenahan* for appellant.

Hon. J. T. Thorson, P.C., Q.C. for respondent.

JACKETT P.:—This is an appeal by the patentee under section 41 of the *Patent Act* arising out of an application by the respondent under that section in the case of Canadian patent No. 612,204 (which is a patent for an invention

intended for or capable of being used for the preparation or production of a drug) for a licence for the use of the invention.

The application was filed with the Commissioner under subsection (3) of section 41, which reads as follows:

> (3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

At the request of the patentee, the Commissioner agreed that the parties should restrict their presentations to him, in the first instance, to the question whether there was "good reason" why he should not grant the licence sought and leave their presentations on the royalty and other terms for such a licence until such time, if any, as the Commissioner should decide to grant a licence.

Upon both parties having availed themselves of full opportunity to make their presentations on the question of "good reason", the Commissioner delivered a decision on June 21, 1966, reading in part as follows:

> The patentee has objected to the grant of a licence and has filed a counterstatement. The applicant has filed a reply. The parties have filed additional material in support of their statements.
>
> I have carefully reviewed the application, the counterstatement, the reply and other material on the file. I have come to the conclusion that no valid reasons to refuse the application have been advanced. The objections of the patentee do not contain anything new over the reasons advanced by the patentees over the years in similar applications.
>
> I do hereby grant a non-exclusive licence, effective as of this day, to the applicant Micro Chemicals Limited to carry out the patented process in Canada in its own establishment and to sell the resulting product for the sole purpose of the preparation or production of medicine but not otherwise.
>
> On the question of royalty and other terms of the licence, I order that the patentee file his submission with me, and a copy to the applicant, within thirty days and the applicant will have also thirty days thereafter to file his own submission and comments. Upon consideration of the submissions I shall finalize the licence with effect as of the date of this decision.

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On September 2, 1966, the patentee appealed to this Court from "the decision of the Commissioner of Patents in this application for a compulsory licence..." The appeal was presumably launched under subsection (4) of section 41, which reads as follows:

> (4) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

On February 3, 1967, after both parties had filed their submissions on the question of royalty and other terms of the licence, the Commissioner issued a decision in which he settled the terms. In particular he fixed the royalty at 15 per cent of the licensee's net selling price to others of the product prepared or produced pursuant to the licence and sold by it and stipulated that such royalty be paid on all sales made by the licensee subsequent to June 21, 1966.

On May 2, 1967, the patentee appealed to this Court from the decision of the Commissioner in this application for a licence "comprising" his order of June 21, 1966 and his order of February 3, 1967.

The proceedings in this case reflect the confusion surrounding proceedings under section 41 which was apparent in an application that is the subject matter of my decision in *Hoffmann-La Roche Limited v. Delmar Chemicals Limited*[1] where I discussed the problem arising there in the following passage:

> On May 20, 1965, the appellant filed in this Court a "Notice of Appeal" by which it purports to appeal
>
> (*a*) from the "decision" of the Commissioner made on May 7, 1965, refusing the appellant the opportunity of submitting further evidence and submissions, and
>
> (*b*) from the "decision" of the Commissioner made on May 14, 1965 "ordering the grant of a licence to the respondent".
>
> The respondent's application to the Commissioner was made under subsection (3) of section 41 of the *Patent Act*, which reads as follows:
>
> 41. (3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard

[1] [1966] Ex. C.R. 713.

to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

The only provision upon which the appellant relies for authority for its appeal is subsection (4) of section 41, which reads as follows:

41. (4) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

Having regard to section 17 of the *Patent Act*, which provides that whenever an appeal to this Court from "the decision" of the Commissioner is permitted under that Act, notice of his decision shall be mailed by registered letter and "the appeal shall be taken within three months from the date of mailing", and to the characterization by the Commissioner of the document that he issued on May 14, 1965 as a "decision", it is not surprising that the appellant concluded that it was necessary to appeal from the "decision" contained in that document to avoid the risk of losing its right to appeal from that "decision". This risk is apparently enhanced by the fact that the practice under section 41(3) has been, in some cases at least, for the Commissioner to purport to grant the licence, when its terms are ultimately settled, with effect retroactive to the date when he announced that he had concluded that the grant of a licence should be ordered. Nevertheless, I have come to the conclusion that there is no "decision" in this case from which there can be an appeal under subsection (4) of section 41.

Subsection (4) of section 41 provides for an appeal from a "decision of the Commissioner under this section". The only authority conferred on the Commissioner by section 41 to make a decision is that impliedly conferred by that part of subsection (3) thereof which requires him "unless he sees good reason to the contrary" to "grant" a "licence" to any person applying for one. The balance of this subsection makes it clear that he will ordinarily include various terms in a licence including a provision for royalty or other consideration. What is contemplated by that subsection, therefore, is

(*a*) an application by an applicant for licence, and

(*b*) a decision by the Commissioner

(i) refusing the application, or

(ii) granting a licence containing appropriate terms and providing for royalty or other consideration.

In my view, it is that "decision" that is subject to an appeal to this Court. It is of course true that, before the Commissioner reaches the point of making a decision disposing of an application by refusing it or granting a licence, the application will have given rise to the necessity of his making many decisions, which are impliedly authorized by subsection (3) of section 41. He must decide on the procedure to be followed in processing the application; he must decide whether there will be an oral hearing; he must decide the disposition of applications to hear further evidence or argument; and, indeed, he must decide each of the preliminary questions that arise in the course of formulating his decision as to the disposition of the application.

In my view, however, Parliament did not contemplate a whole series of appeals in the course of the hearing of the rather simple application contemplated by subsection (3) of section 41. Parliament did not, therefore, contemplate that there should be an appeal either from the Commissioner's refusal to hear further evidence and submissions or from his conclusion on the question whether a licence should

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be granted. (The formulation of such conclusion is, of course, only a part of the process of deciding what disposition to make of the appeal.[2]) Both these matters can be brought under review in an appeal from the ultimate decision disposing of the application.

It follows, therefore, that, in my view, the appeal is a nullity and should be quashed.

As indicated in the passage that I have just read, my view of section 41(3) is that it contemplates a decision of the Commissioner refusing an application or a decision by the Commissioner "granting a licence containing appropriate terms and providing for a royalty or other consideration", and that those are the only decisions from which there can be an appeal under section 41(4). In my view, therefore, the appeal of September 6, 1966 is a nullity and I shall, accordingly, ignore it, and the appeal of May 2, 1967 is, in effect, an appeal from the decision granting the licence containing the terms and royalty provision as settled by the Commissioner. I propose to deal with the latter appeal only.

The patentee's attacks on the grant of the licence under section 41(3) may be summarized as follows:

(a) The Commissioner erred in principle or was manifestly wrong in not seeing "good cause" why the licence applied for should not be granted;

(b) The Commissioner erred in principle or was manifestly wrong in fixing such a low royalty;

(c) The Commissioner erred in principle in including in the terms of the licence a term reading as follows:

"The said royalty shall be paid on all sales of the product made by Micro Chemicals Limited subsequently to June 21, 1966";

(d) The Commissioner was manifestly wrong, when he settled a term (Term 7) under which the licensee must reimburse the patentee, in certain circumstances, for the expense of employing an independent accountant to inspect the licensee's books, in requiring that the patentee be so reimbursed only if the cost of production as determined by such accountant is over 20 per cent greater than that used by the licensee and not whenever the amount determined by the accountant exceeds that used by the licensee;

[2] The word "appeal" here is a mistake. It should have been "application".

(e) The Commissioner was manifestly wrong in not including in the terms certain provisions proposed by the patentee for the safety of the public.

In addition, the patentee made an attack on the last sentence of Term 13 of the terms as settled by the Commissioner, but counsel for the licensee has consented to judgment deleting that sentence so that it is unnecessary for me to reach a decision on the point.

I might say at this point that, as far as Term 7 is concerned, and as far as the additional terms concerning public safety for which the patentee contended are concerned, I see no reason to interfere with the Commissioner's decision and I do not see any need to discuss such terms further. I might just add that, as far as the use of terms in the licence to protect public safety is concerned, I see no difference in principle between a contention that the Commissioner is bound to include such terms in a licence under section 41 and a contention that the Commissioner is bound to inquire into similar considerations as a possible "good reason" for refusing a licence. As the latter class of contention was rejected in *Hoffman-La Roche Limited v. Delmar Chemicals Limited*[3] per Thurlow J. at page 617 (affirmed on appeal for reasons expressed differently[4]), it follows, in my view, that the contention that the Commissioner ought to have included terms to ensure public safety in the licence should also be rejected. Reference was made by counsel for the patentee to a recommendation made by a committee of doctors to the Minister of National Health and Welfare that such terms be included in such a licence. Such a recommendation should, of course, be given consideration in considering a possible amendment to the statute. It cannot be of any weight in considering the effect of the present legislation.

That leaves the first three attacks on the Commissioner's decision as enumerated above to be dealt with.

I turn first to the appeal in so far as it relates to the Commissioner's decision to grant the licence. The attack by the patentee took two forms; first, that the decision was manifestly wrong and that it should therefore be quashed, and, alternatively, that the Commissioner did

[3] [1965] 1 Ex. C.R. 611.

[4] [1965] S.C.R. 575.

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not give the matter the consideration that he ought to have given to it, and that the matter should therefore be returned to him for re-consideration.

The attack commences with a reference to that part of the Commissioner's reasons, as quoted above, where he says first that he has "carefully reviewed the application, the counterstatement, the reply and other material on file" and that he has come to the conclusion that no valid reason to refuse the application has been advanced, and then says: "The objections of the patentee do not contain anything new over the reasons advanced by the patentees over the years in similar circumstances". The second stage of the attack consists in underlining certain allegations put before the Commissioner in the material that the patentee filed before the decision of June 21, 1966, which are summarized in paragraph one of the notice of appeal of May 2, 1967 as follows:

> The patentee was manufacturing in Canada every form of the drug. It was supplying every form of the drug in accordance with the Canadian demand at a price reasonable having regard to its costs. The patentee was manufacturing the drug in Canada for export to other countries. The patentee was carrying out research in Canada applicable to this drug and other drugs made by it.

The third stage of the attack is the contention that the Commissioner was manifestly wrong in not seeing "good reason" for refusing a licence where

(a) the patentee was manufacturing in Canada every form of the drug,

(b) the patentee was supplying every form of the drug in accordance with the Canadian demand at a price reasonable having regard to its cost,

(c) the patentee was manufacturing the drug in Canada for export to other countries, and

(d) the patentee was carrying out research in Canada applicable to the drug in question, and other drugs.

Counsel for the patentee went so far as to argue that section 41(3) contemplates the existence of "good reason" for not granting a licence, that it follows that there must be something that a patentee can do to put himself in a position to show "good reason" why licences should not be granted in respect of his patent under section 41(3), that it is impossible to visualize anything that a patentee could do to establish a case for "good reason" in addition

to what the patentee has done in this case and that it follows that what the patentee has done in this case must, therefore, be "good reason" for refusing a licence under section 41(3).

I do not accept any of the steps in this chain of reasoning. In particular, I do not think that it follows from the wording of section 41(3) that Parliament was saying that there is, in respect of every patent, a possible state of affairs that is "good reason" for not granting any licence. The provision is framed so as to allow for the possibility that there may be "good reason" for not granting a particular licence, which is quite a different matter. I also reject the view that section 41(3) contemplates that a patentee should be able himself to create a set of circumstances which will constitute "good reason" why no licence should be granted in respect of his patent under section 41(3). Finally, I cannot accept the conclusion that the particular circumstances set out in paragraph one of the notice of appeal are of such a character as to be necessarily "good reason" even if it be assumed that there must be some circumstances that would constitute "good reason". In *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*[5], a contention that the Commissioner was wrong in not finding "good reason" in the fact that the Canadian market for the drug was already adequately served by the patentee was rejected. I cannot satisfy myself that, from the point of view of section 41(3), what is enumerated in paragraph one of the notice of appeal is so different in character that it is manifestly wrong not to have seen it as "good reason".

For the above reasons, I reject the contention that this is a case in which it can be held that the Commissioner was manifestly wrong in not seeing "good reason" for not granting the licence.

The appellant's alternative contention was that, even if it cannot be held that the Commissioner was manifestly wrong in not seeing "good reason" for not granting the licence, it should be held that the Commissioner has demonstrated that he has not considered the material that was put before him and that the matter should therefore be sent back to him for consideration.

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[5] [1959] S.C.R. 219.

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This contention is based upon the statement by the Commissioner that "the objections of the patentee do not contain anything new over the reasons advanced by the patentees over the years in similar circumstances", which, it is said, shows that he could not have carefully reviewed the material put before him, which contained the "reasons" summarized in paragraph one of the notice of appeal which I have already quoted and which, it is contended, are "reasons" for not granting a licence that should at least have been considered.

I also reject this contention. After I had reviewed the material that had been filed with the Commissioner before he issued his conclusions on June 21, 1966, I reached the conclusion that, if I had been doing so in the role of Commissioner, I would have concluded that there was in that material nothing really new over what I had read and heard in a recent similar case in which I was involved in so far as "good reason" for not granting a licence is concerned.

I turn now to the attack on the Commissioner's decision as to *quantum* of royalty.

My basic difficulty in considering arguments in relation to royalty, and I assume the difficulty that faces all others involved in these matters either as counsel or otherwise, is that it seems improbable that there is a "market" to which one can turn for direct evidence as to what a willing licensee would pay to a willing licensor for a licence for the particular drug containing the particular terms. (Compare *Aktiebolaget Astra, Apotekarnes Kemiska Fabriker v. Novocol Chemical Manufacturing Company of Canada, Limited*[6] at page 963.) I assume that there is no person with sufficient experience in such a specialized "market", either as a party to such transactions or as a broker, that he is competent to assist the Court by expressing an opinion based on his experience as to what royalty would be reached by arm's length negotiation between a willing licensor and a willing licensee for this licence for this drug. In the absence of such assistance, the tribunal, in this case the Commissioner, must form the best conclusion that he can as to what would be the result of such negotiations in the light of all the evidence

[6] [1964] Ex. C.R. 955.

of factors that would affect the bargaining parties and must then apply the statutory direction contained in the latter part of section 41(3). This is what I assume was done in the case of *Hoffmann-La Roche Ltd. v. Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd.*[7] where the material available was very much the same as that available to the Commissioner in this case and where his determination was upheld by the Supreme Court of Canada. I have given careful consideration to the differences between the two cases that have been urged on me. In the first place it was urged that the result in this case is that the licensee will pay a much smaller proportion of his proceeds of sale as royalty. I have no basis for making that a ground for interference. Then I have been pressed with a United Kingdom decision in relation to the same drug. That is a decision, as far as I know, on different evidence and with reference to a licence containing different terms. In any event, I know of no principle whereby it can be said that this Court should accept the finding of an official of another country in relation to a licence under the legislation of that country in preference to the judgment of the Commissioner of Patents in this country. Reference was made to the evidence of certain doctors concerning the necessity for the appellant incurring certain expenses during its distribution of the drug. I cannot see the relevance of that evidence to the question of royalty. Finally, there is evidence in this case of a licence negotiated by the patentee with a third party at a substantially higher royalty. That evidence was before the Commissioner and I assume that he gave it such weight as, in his opinion, it was worth.

The appeal in respect of royalty is therefore rejected.

I come finally to the attack on the term requiring that the royalty be paid by the licensee on sales of the product made subsequent to June 21, 1966.

I dealt with a similar term in a licence under section 41(3) in my decision in *Hoffmann-La Roche Limited v. Delmar Chemicals Limited*[8] as follows:

> Paragraph numbered four in the licence provides that the royalties payable pursuant to the licence are to be paid on sales made by the

[7] [1966] S.C.R. 313.

[8] *Ante* p. 209.

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licencee during the period between the Commissioner's decision to grant the licence and the actual grant of the licence. As I am of opinion that a licence cannot be made retroactive, and as this licence does not purport to be retroactive, I am of opinion that it was wrong in principle to make the royalty payable in respect of a period prior to the effective date of the licence. The respondent resists the attack on paragraph 4, even though that clause has the result of increasing the amount of royalty payable by it. I gather from argument of its counsel that it is contemplated that the licence with paragraph 4 in it may be of some use to it in infringement proceedings. That is not a valid reason for retaining a clause that is contrary to principle.

It was urged on me that there was a difference between the facts in this case and the facts in the earlier case in that, there, the Commissioner, in the first instance ordered that a licence be granted, whereas here, by his first decision, on June 21, 1966, he said: "I do hereby grant a non-exclusive licence, effective as of this day..." It was contended that there was therefore in this case a licence in effect from June 21, 1966 and that there is therefore no retroactivity involved in the term under attack.

It is clear, however, from the Commissioner's decision of June 21, 1966, that the purported grant of a licence on that day was not a completed act because, immediately after stating that he was thereby granting a licence effective that day, he used these words:

> On the question of royalty and other terms of the licence, I order that the patentee file his submission with me, and a copy to the applicant, within thirty days and the applicant will have also thirty days thereafter to file his own submission and comments. Upon consideration of the submissions I shall finalize the licence with effect as of the date of this decision.

By these words, the Commissioner makes it quite clear that, at some time in the future, he proposed to "finalize" the licence with effect as of that earlier time.

As I have already indicated, as I read section 41, what the Commissioner is required to do is to "grant" a "licence", which licence is to have "terms" that are to be settled by the Commissioner having regard to the statutory direction in the latter part of section 41(3). As I see it, what he grants is a licence containing the terms and, therefore, until the terms are settled, he cannot grant it.

Reference was made to the fact that there have been a number of cases where the Court has upheld the grant of the licence but has sent the matter back to the Com-

missioner to reconsider the royalty so that, in the intervening time, a licence has existed without a valid royalty clause. That is, of course, if it be so, a necessary consequence of the Court's jurisdiction to review the matter by way of appeal. When the Commissioner corrects his original finding on a reconsideration pursuant to a judgment of the Court, it is of the same effect as if he had decided it correctly in the first instance. That is quite a different matter from saying that there can be a licence before the terms on which it is granted have been settled. Compare *Hoffmann-La Roche Limited v. Delmar Chemicals Limited*[9] per Thurlow J. (May 16, 1967).

My judgment is, therefore, that paragraph 3 of the Terms of the licence be deleted[10] and that, the parties consenting, the last sentence of paragraph 13 be deleted. Subject thereto, the appeal is dismissed. The respondent will have two-thirds of the taxed costs of the appeal. (I have fixed this percentage on the basis that the appellant has been approximately one-sixth successful.)

[9] *Ante* p. 63.

[10] The pronouncement also contains other changes in the licence consequential upon the last conclusion that I expressed.

BETWEEN:

C. I. BURLAND PROPERTIES LIMITED ..... APPELLANT;

AND

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

Toronto 1967 Sept. 12-13
Ottawa Oct. 3

Income tax—Withholding tax—Payment of municipal taxes by tenant of foreign owner—Whether similar to rent—Income Tax Act, s. 106(1)(d).

Under the Ontario *Assessment Act*, R.S.O. 1960, c. 23, a tenant is jointly liable with his landlord for municipal taxes. Hence a tenant who pays taxes pursuant to a covenant to do so pays them in discharge of the statutory obligation and such a payment is not subject to withholding tax as being a payment similar to rent within the meaning of s. 106(1)(*d*) of the *Income Tax Act* where the landlord resides outside Canada.

Finch v. Gilroy (1889) 15 Ont. A.R. 484, *Boone v. Martin* (1920) 47 O.L.R. 205, and *United Geophysical Co. of Canada v. M.N.R.*, referred to.

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INCOME TAX APPEALS.

Wolfe D. Goodman and *Max M. Steidman* for appellant.

J. R. London for respondent.

CATTANACH J.:—These are appeals from assessments by the Minister under the *Income Tax Act*, R.S.C. 1952, chapter 148, wherein additional tax was levied against the appellant in respect of its 1961 to 1964 taxation years inclusive.

There is no dispute between the parties with respect to the facts which are relatively simple and straight forward.

The appellant is a joint stock company incorporated by an Act of the Legislature of Bermuda under date of January 28, 1955 for the purpose of acquiring real property in any part of the world outside those islands.

In the exercise of its powers the appellant acquired real property from the former owner thereof, C. I. Burland, who, prior to his death, was the principal shareholder in the appellant.

The real property so acquired is part of Lot 106 situate on Clifton Hill in the City of Niagara Falls, in the Province of Ontario. At all times material to these appeals this particular property was the only property owned by the appellant. The real property, being in the mecca for honeymooners and tourists, had constructed thereon a motel building, a restaurant, a gift shop and like facilities.

Under a lease dated April 1, 1961 the appellant leased the property to Melforte Limited from year to year at an annual rental of $60,000.

Melforte Limited is a joint stock company incorporated pursuant to the laws of the Province of Ontario and is resident in Canada.

During the currency of the lease dated April 1, 1961 the appellant constructed greatly expanded facilities on the land at an approximate cost of $700,000.

Accordingly the appellant and Melforte Limited entered into a new lease dated May 1, 1963 whereby the appellant leased to Melforte Limited the land and the improved facilities which had been constructed thereon for a term of five years and six months from May 1, 1963 to October 31, 1968, at an increased annual rental of $150,000.

Melforte Limited, in turn sublet the motel, restaurant and gift shop facilities and premises to three Ontario companies which conducted those respective enterprises. If my recollection of the evidence serves me correctly the premises on which these enterprises were conducted had been sublet by Melforte Limited under the lease dated April 1, 1961 to individuals rather than joint stock companies as was the case under the subsequent lease dated May 1, 1963.

The lease dated April 1, 1961 provided in part as follows:

> THE said Lessee COVENANTS with the said Lessor to pay rent.
>
> AND to pay taxes.
>
> AND to pay water rates and charges for gas, electricity and telephone.
>
> AND to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.
>
> AND to keep up fences.
>
> AND not to cut down timber.

The lease dated May 1, 1963 provided in paragraph 4, as follows:

> The said lessee covenants with the said lessor to pay rent and to pay all property and business taxes, including, without limiting the generality of the foregoing, all public utilities and services including maintenance and charges for heating and air conditioning.

Both the lease dated April 1, 1961 and the lease dated May 1, 1963 contained the usual proviso for the right of re-entry by the lessor on non-payment of rent or non-performance of covenants.

In addition both such leases contained a provision that, in the event of circumstances as therein specified, the current month's rent, together with the rent for the three months next accruing and, if payable by the lessee, the taxes for the then current year, shall become due and payable and in the circumstances provided for, such taxes or accrued portion thereof shall be recoverable by the lessor in the same manner as the rent reserved.

The appellant financed the construction of the additional facilities on its property from the proceeds of a first mortgage on the property in question with The London Life Insurance Company. Under the terms of the mortgage indenture, the appellant, as mortgagor, authorized the mortgagee to pay all taxes or charges and assessments and undertook to repay the mortgagee in blended monthly instalments of principal, interest and taxes.

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By arrangement between the appellant and Melforte Limited these monthly instalments were regularly paid on due date by Melforte Limited to The London Life Insurance Company, the mortgagee.

The amount of the principal and interest paid to The London Life Insurance Company by Melforte Limited on behalf of the appellant was considered and treated as payments of rent to the appellant by Melforte Limited under the leases dated April 1, 1961 and May 1, 1963 between them and entered in the books of account of both as such.

The amount attributable to the taxes on the real property in the blended payments made to The London Life Insurance Company by Melforte Limited was used by the Insurance Company to pay the property taxes imposed by the Municipality of the City of Niagara Falls directly to the municipality.

Counsel for both parties took the position, with which I was in agreement, and argued the case on the basis that the payments of the real property taxes by The London Life Insurance Company to the Municipality was, in effect, the payment of those taxes by Melforte Limited.

The amounts of the municipal property taxes assessed and so paid in respect of the demised premises were:

for the year 1961	$ 4,217.97
for the year 1962	7,739 65
for the year 1963	10,878.88
for the year 1964	28,743 01
Total	$51,579 51

Melforte Limited deducted and remitted to the Minister withholding tax under section 106(1)(*d*) of the *Income Tax Act* at the rate of 15% on the rent of $60,000 per year and $150,000 per year, when applicable, as stipulated under the leases between it and the appellant.

In assessing the appellant the Minister added withholding tax at the rate of 15% in respect of the property taxes in the above total paid by the tenant, Melforte Limited, through the instrumentality of The London Life Insurance Company pursuant to the above mentioned leases for the years 1961 to 1964 inclusive.

The Minister so assessed the appellant on the assumption,

> that the payment of the sums aforesaid by Melforte Ltd. to the City of Niagara Falls in respect of the demised premises for the taxation years 1961 to 1964 inclusive were amounts which were paid or credited to the Appellant on account of or in lieu of or in satisfaction of rent or similar payments for the use in Canada of property within the meaning of paragraph (*d*) of s s. (1) of sec. 106 of the *Income Tax Act*.

Section 106(1)(*d*) of the *Income Tax Act* reads as follows:

> 106.(1) Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,
>
> . .
>
> (*d*) rent, royalty or a similar payment, including, but not so as to restrict the generality of the foregoing, any such a payment
>
> (i) for the use in Canada of property,
>
> (ii) in respect of an invention used in Canada, or
>
> (iii) for any property, trade name, design or other thing whatsoever used or sold in Canada,
>
> but not including
>
> (A) a royalty or similar payment on or in respect of a copyright, or
>
> (B) a payment in respect of the use by a railway company of railway rolling stock as defined by paragraph (25) of section 2 of the *Railway Act;*
>
> . .

In disputing the assessment counsel for the appellant contended that it was not subject to withholding tax under section 106(1)(*d*) on the amounts which were paid by Melforte Limited, the tenant, as property taxes with respect to the demised premises.

The question which rises sharply for determination is whether the amount of the municipal taxes paid by Melforte Limited is an amount paid or credited to the appellant "as, on account or in lieu of payment of, or in satisfaction of", rent or a similar payment for the use in Canada of property.

The word "rent" has a fixed legal meaning and does not include all payments which a tenant is bound to make under the terms of his lease. Normally money expended for taxes is not rent because it is not usually reserved or payable to the landlord.

In *Finch v. Gilroy*[1] and in *Boone v. Martin*[2] it was decided that a mere covenant to pay taxes is not a

[1] (1889) 16 Ont. A.R. 484.

[2] (1920) 47 O.L.R. 205.

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covenant to pay rent. Upon the authority of the two foregoing cases I am of the view that the covenants in the two leases here involved to pay taxes do not constitute covenants to pay taxes as rent.

However, there remains for consideration whether the amounts paid constitute "a similar payment including, but not so as to restrict the generality of the foregoing, any such a payment for the use in Canada of property" within the meaning of the section.

Thurlow J. in *United Geophysical Company of Canada v. Minister of National Revenue*[3] had occasion to consider the meaning of section 106(1)(*d*) to determine if amounts paid to a non-resident parent company by its subsidiary resident in Canada as "rental" (the correct term being "hire") for equipment used in Canada in the conduct of the subsidiary's business, fell within the meaning of that section.

He said this at page 294:

> On behalf of the appellant, it was submitted that the word "rent" is a technical term used to refer to a profit issuing from real property, that the words "or any similar payment including any such a payment for the use of property" which follow "rent" in s. 106 are to be construed as meaning payments having the characteristics of rent and that the payments in question do not have such characteristics, there being no certainty in the agreement as to the amount to be paid or as to the time when payment is to be made.
>
> It is, I think, apparent from the use in the section of the wording which follows the words "rent" and "royalty" that Parliament did not intend to limit the type of income referred to in the subsection to either what could strictly be called "rent" or "royalty" or to payments which had all of the strict legal characteristics of "rent" or "royalty".
>
> . . .

He concluded his remarks in this particular context with the following words on page 295:

> . . . Without attempting to determine just how wide the net of s. 106(1)(*d*) may be, I am of the opinion that the subsection does refer to and include a fixed amount paid as rental for the use of personal property for a certain time.

From my brother Thurlow's remarks I conclude that in his opinion (assuming the amount was paid for the use of property) there must be two attributes present to constitute a payment similar to rent, although without

[3] [1961] Ex. C.R. 283.

all other strict legal requirements thereof, (1) that it is a fixed amount and (2) that it is paid for a certain time. I would add that the amount is fixed if it is stated so that it can be ascertained with certainty. Both of the foregoing attributes are present in the circumstances now under review.

There remains to be considered whether the payment of municipal property taxes by the tenant Melforte Limited is a payment for the use of property in Canada, rather than payment of a statutory obligation on the tenant. If the latter is the case then any payment so made would not be for the benefit of the landlord, the appellant, and would not be credited to him.

Section 32, subsection (4) of the *Assessment Act*, R.S.O. 1960, chapter 23 provides as follows:

> 32.(4) Occupied land owned by a person who is not a resident in the municipality shall be assessed against the owner, if known, and against the tenant.

Subsection (7) of the same section provides that where the land is assessed against a tenant under subsection (4) for the purpose of imposing and collecting taxes upon and from the land, the tenant shall be deemed to be the owner.

The remedies afforded the Municipality to collect taxes from an owner or tenant assessed therefor are, under section 105 by special lien and sale, under section 106 by action for a debt due and under section 121 by distress and sale for taxes that are a charge on the land. These remedies are based upon a personal liability of the landlord or tenant.

Under section 107 an additional method of collection of unpaid taxes is afforded a municipality where taxes are due on land occupied by a tenant. The tenant may be notified that rent for the premises shall be paid to the municipality to be applied to the unpaid taxes and by virtue of section 108 the tenant may deduct from his rent any taxes paid by him that as between him and his landlord, the latter ought to pay. This is a remedy different from that which exists directly against the person who is assessed.

By section 20 every assessor is required to prepare an assessment roll in which, after diligent inquiry, he shall

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set down the names of all persons, whether they are resident in the municipality or not, who are liable to assessment thereon and by section 73 the assessment roll is made binding on all parties.

Extracts from the assessment roll of the City of Niagara Falls for the years 1960, 1961, 1962, 1963 and 1964 were produced in evidence. In each such roll the appellant was assessed as owner.

In the years 1960, 1961, 1962, Dudley Burland, and Noel Burland, were included presumably as proprietors of one or other business enterprises conducted on the premises.

In the roll for 1963 these same two persons were also included but with the additional symbol "T" which by virtue of section 20(2) would indicate that they were tenants.

The roll for 1964 is substantially the same as that for 1963 except that Honeymoon Hotel Ltd., House of Burland Ltd., and Beefeater (Niagara) Ltd., are added as tenants. These three companies are the subtenants of Melforte Limited which I previously referred to as three Ontario companies.

In none of the rolls was Melforte Limited assessed as tenant or in any other capacity.

All notices of real property assessments were addressed to the appellant at 943 Clifton Hill, Niagara Falls, Ontario as were all tax bills.

The appellant appealed against the assessment on the buildings on the 1963 roll for the ensuing year and was successful in having that assessment reduced by a Court of Revision.

The failure of the assessor to include Melforte Limited on the assessment rolls as tenant, as it was his mandatory duty to do under section 20(1)I, would preclude the municipality from resorting to any of the remedies available to it to recover unpaid taxes from the tenant, but such omission does not affect the nature of the liability of the tenant.

The liability to pay taxes to the taxing authority is, under the *Assessment Act*, a joint liability of the landlord and the tenant. If, therefore, one of them pays the taxes, the other is relieved of his obligation to pay.

As between the landlord and the tenant the question as to which of them will pay the taxes is usually settled by the terms of the lease. It must be emphasized, however, that when the tenant by agreement with his landlord undertakes to pay municipal taxes, he is not agreeing to discharge an obligation of the landlord towards the municipality but is only assuming an obligation which has been imposed on him by the provincial statute.

Therefore it cannot be said that the payment of municipal property taxes by Melforte Limited is a payment to the appellant for the use in Canada of the demised property.

Accordingly the appeals are allowed with costs.

BETWEEN:

HERMAN E. GAMACHE .....PLAINTIFF;

AND

D. R. JONES, J. A. MAHEUX and J. W. PICKERSGILL ..... } DEFENDANTS.

Crown—Pilot—Downgrading of—Powers of Pilotage Authorities—General By-Laws of Quebec Pilotage District—Whether intra vires—Mandamus, whether available—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 327, 329(p), 333.

On April 6th 1966 plaintiff, who had been a licensed pilot in the Quebec Pilotage District since 1948, was appointed a Class A pilot by defendant Maheux, the District Superintendent of Pilots, Department of Transport. Maheux had been appointed to his post by defendant Jones, the Superintendent of Pilots in the Department at Ottawa. On July 22nd 1966 plaintiff was downgraded to Class B at Jones' instance by reason of his conduct as a pilot in a 1963 collision although he had not been penalized therefor by the Commissioner who had investigated the collision under s. 558 of the *Canada Shipping Act*.

The General By-Laws of the Quebec Pilotage District, made by order in council, authorize the District Pilotage Authority to grade pilots, to assign pilots of different grades to various sizes of vessel, and to reclassify pilots found incompetent or unsuitable. The Minister of Transport (defendant Pickersgill) was District Pilotage Authority in accordance with s. 327 of the *Canada Shipping Act*, and the General By-Laws as authorized by s. 327(2) provided for the appointment of a superintendent of pilots to carry out the relevant provisions of the By-Laws.

Held, that the provisions of the General By-Laws for (1) grading pilots, (2) assigning them to various classes of vessel, and (3) downgrading

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them, are *ultra vires* of the Governor in Council and invalid and plaintiff's right as a fully licensed pilot is unaffected thereby or by any acts done thereunder.

1. Sec. 329 of the *Canada Shipping Act* authorizes the issue only of unrestricted pilots' licences and only by by-law confirmed by the Governor in Council (and not by simple appointment); and the Pilotage Authority has no authority under the Act to change or limit a licence after issue. *McGillivray v. Kimber et al* (1916) 52 S.C.R. 146, referred to.

2. Apart from the foregoing a pilot's licence issued under s. 333 confers a vested right to exercise a profession and as such becomes absolute and cannot be affected by regulations subsequently made, as, e.g. by establishing a grade system. *Proc. Gén. du Canada v. La Presse Ltée* [1967] S.C.R. 60, distinguished.

3. Moreover even if there was power to downgrade pilots plaintiff could not be formally downgraded solely on the ground of his conduct in a collision which occurred long before his appointment and for which he had not been penalized by the investigating Commissioner.

4. Assuming the above General By-Laws to have been validly enacted Maheux as District Superintendent of Pilots appointed pursuant to the General By-Laws had the delegated authority required by s. 329(*p*) of the Act to grade plaintiff, but a formal delegation was unnecessary where as here the Pilotage Authority was Minister of Transport, and even though Maheux was appointed not by the Minister but by Jones since the act of the latter as a departmental official was equally the act of the Authority. *Lewisham Borough Council v. Roberts* [1949] 1 All E.R. 815, applied.

5. Moreover as Maheux was the person empowered to carry out the provisions of the By-Laws Jones had no power to downgrade plaintiff.

6. The profession of pilotage has evolved from a mere service to shipping to one of public interest and pilotage officials are therefore officers of the Crown and amenable to the jurisdiction of the Exchequer Court. While the Minister of Transport is not an officer of the Crown he is sued here as Pilotage Authority appointed by the Governor in Council under s. 327 of the Act. *Garièpy v. The King* [1940] 2 D.L.R. 12 and *Humelman v. The King* [1946] Ex. C.R. 1, applied.

7. The action should be dismissed against defendant Pickersgill who did not direct his mind to the appointment or demotion of plaintiff but left the matter to the other defendants.

8. The downgrading of plaintiff without a hearing violated s. 2(*e*) of the *Canadian Bill of Rights*, S. of C. 1960, c. 44. Although the decision to demote plaintiff was an administrative one it entailed a duty to observe the principles of natural justice. *L'alliance des professeurs catholiques de Montréal v. Labour Relations Bd. of Que.* [1953] 2 S.C.R. 140, referred to. *Ridge v. Baldwin* [1964] A.C. 40 applied.

9. While *mandamus* would lie against defendants, who acted not merely as servants of the Crown but in the performance of statutory duties, a declaratory judgment would suffice. *The Queen v. the Secretary of State* [1891] 2 Q.B. 326, *The Queen v. Lords Com'rs of Treasury* (1872) 7 Q.B.D. 387, *The Queen v. Special* (1888) 21 Q.B.D. 313, *Min. of Finance of B.C. v. The King* [1935] S.C.R. 278 and *Eastern Trust Co. v. McKenzie Mann & Co.* [1915] A.C. 750, referred to.

ACTION.

Raynold Langlois for plaintiff.

P. M. Troop and *P. R. Coderre* for defendants.

NOËL J.:—This is an action by the plaintiff, a licensed pilot, residing and domiciled in Quebec City, P.Q., against D. R. Jones, the Superintendent of Pilotage in Ottawa, J. A. Maheux, the Acting Local Supervisor (sometimes called superintendent) of Pilots at Quebec and J. W. Pickersgill, the Minister of Transport, as the Pilotage Authority for the Quebec Pilotage District, praying that this Court

(1) issue an order declaring that the plaintiff has the right to be a Grade A pilot and that he has had this right from the date of his appointment, April 6, 1966;

(2) order that defendants reclassify plaintiff as a Grade A pilot for the Quebec Pilotage District, and grant him every right and privilege attending such grade;

(3) order that, if plaintiff is not so reclassified immediately, a writ of *mandamus* be issued by this Court against defendants;

(4) order that costs be assessed against defendants whatever the issue of the cause;

(5) reserve the rights of plaintiff for any other remedy; and finally

(6) in any event declare that Order in Council P.C. 1960-756 and Order in Council P.C. 1961-425 (whereby the Quebec Pilotage District General By-laws were amended, three grades of pilots, namely Grade A, B and C were established and only Grade A pilots were authorized to pilot any vessel regardless of size, whereas Grade B pilots cannot pilot a vessel exceeding ten thousand tons) are illegal and *ultra vires* of the powers of the Governor-in-Council and order that defendants grant plaintiff every right and privilege attending to pilots entitled to pilot vessels without restriction as to size and order the defendants jointly and severally to pay plaintiff an amount equal to the remuneration received by the Grade A pilots from July 25, 1966, to date.

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The parties immediately prior to trial produced an agreed signed statement as to certain facts which are hereinafter set down:

1. The Plaintiff is and was at all material times a licensed pilot of the Quebec Pilotage District residing and domiciled in the City of Quebec in the Province of Quebec.
2. The Defendant, D. R. Jones, is and was at all material times, the Superintendent of Pilotage of the Department of Transport residing in the City of Ottawa in the Province of Ontario.
3. The Defendant J. A. Maheux was at all material times, the acting Supervisor of Pilots for the Quebec Pilotage District of the Department of Transport and residing at Quebec in the Province of Quebec.
4. The Honourable J. W. Pickersgill is and was, at all material times, the Minister of Transport, and as such the Pilotage Authority for the Quebec Pilotage District.
5. Captain G. Lahaye is and was at all material times the Regional Superintendent of Pilots of the Department of Transport, residing in the City of Montreal in the Province of Quebec.
6. By Order in Council P.C. 1960-756 made on the 2nd day of June, 1960, as amended by Order in Council P.C. 1961-425 made on the 23rd day of March, 1961, section 24 of the General By-law of the Quebec Pilotage District (was implemented):

"24(1) Every pilot in the District shall be graded by the Authority as a Grade A, Grade B or Grade C pilot and at the commencement of each season of navigation a list of pilots shall be issued by the Authority showing the grade of each pilot.

(2) Every pilot shall on admission to service in the District be classified as a Grade C pilot.

(3) The Authority may classify a pilot

(a) as a Grade B pilot after he has served satisfactorily at least two years as a Grade C pilot; and

(b) as a Grade A pilot after he has served satisfactorily such period as a Grade B pilot as the Authority deems necessary.

(4) Every Grade A pilot who has not attained the age of sixty-five years prior to the day on which this section comes into force shall become a Grade B pilot at the end of the season in the year in which he attains the age of sixty-five years.

(5) Every Grade A pilot who, in the opinion of the Authority, is incompetent or unsuitable may be reclassified as a Grade B pilot by the Authority.

(6) Notwithstanding anything in this section, every pilot who, at the time of the coming into force of this By-law, holds a pilot's licence shall be classified by the Authority as a Grade A or Grade B pilot."

7. On the 2nd day of June, 1960, there were about 77 pilots licensed for the Quebec Pilotage District, 10 of which were classified as Grade A Pilots and the remainder, including the Plaintiff, were classified as Grade B Pilots

8. Prior to the 30th day of January, 1966, the Defendant J. A. Maheux asked the Plaintiff whether if he was asked, he would be interested, merely as a matter of information, in accepting a classification as a Grade "A" pilot.

9. By letter dated the 30th day of January, 1966, the Plaintiff wrote to the Defendant J. A. Maheux as follows:

> «Pour faire suite à notre récente conversation, il me fait plaisir de vous dire que j'accepterai de passer dans la classe «A» quand mon tour viendra d'y être nommé par l'autorité.»

10. By letter dated the 6th day of April, 1966, the Defendant J. A. Maheux wrote to Mr. Wilfrid Ménard, Secretary-Treasurer of La Corporation des Pilotes du Bas St-Laurent as follows·

> «Nous désirons vous informer que les Pilotes Olivier Paquet et H. E. Gamache ont été nommés dans la classe «A», en attendant d'autres développements »

11. On the 27th of April 1966, by inter-departmental telex, the Defendant D. R. Jones sent the following message to the Defendant J. A. Maheux:

> "Kindly supply this office with dates when Pilots Charles Auguste A. Chouinard and Hermend Gamache became "A" Pilots"

12. On the 27th of April, 1966, by inter-departmental telex, the Defendant J. A. Maheux sent the following message to the Defendant D. R. Jones:

> "Charles Auguste Chouinard became "A" Pilot 21-04-61 Hermend Gamache became "A" Pilot 06-04-66"

13. Subsequent to the receipt of the message referred to in paragraph 12 hereof, the Defendant D R Jones requested his assistant Captain Seeley to secure an explanation from Captain Lahaye on the Plaintiff's 'appointment'.

14. By inter-departmental memorandum dated May 5th, 1967, Captain Lahaye recommended to the Defendant, D R Jones that the Plaintiff be reclassified as a Grade "B" pilot as a result of the collision between the *Tritonica* and *Roonagh Head* (which collision took place on July 20th, 1963 and the report of the Commissioner therein is dated November 30th, 1963) stating that his "appointment" was a mistake in the first place.

15. By inter-departmental memorandum dated May 27, 1966, the Defendant J A. Maheux forwarded to the Defendant D R. Jones a list of pilots in which the Plaintiff was classified as an "A" Pilot.

16. By inter-departmental memorandum dated July 8th, 1966, the Defendant D. R. Jones advised Captain Lahaye that he concurred with Captain Lahaye's action in reclassifying the Plaintiff as a class "B" Pilot.

17. By letter dated the 22nd July, 1966 Captain Lahaye wrote to the Defendant J. A. Maheux as follows.

> «La classification des pilotes de la circonscription de Québec a été revisée dernièrement par l'Autorité, spécialement en ce qui a trait aux pilotes faisant parti présentement de la catégorie «A».

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Il a été décidé que Monsieur Jean Bernier conserverait sa présente classification jusqu'à ce que jugement soit rendu sur l'appel qu'il a logé dans l'affaire *Lawrencecliffe Hall/Sunek*

L'Autorité considère que Monsieur H. E. Gamache soit reclassifié de la catégorie «A» à «B» en raison de son comportement lors de la collision *Tritonica/Roonagh Head.*

18. Subsequent to 6th April, 1966 and prior to July 25th, 1966 the Plaintiff was dispatched on 34 voyages on vessels requiring a Grade "A" Pilot.

19. After April 6th, 1966, the Plaintiff did nothing to render him, in the opinion of the Pilotage Authority, unsuitable or incompetent to be a Grade "A" pilot and to warrant reclassification of the Plaintiff to a Grade "B" pilot pursuant to subsection (5) of section 24 of the Quebec Pilotage District General By-law, and there was no change in the Plaintiff's physical ability to render him unsuitable or incompetent to be a Grade "A" pilot since April 6th, 1966.

20 By letter dated the 25th day of July, 1966, the Defendant J A. Maheux wrote to the Plaintiff as follows·

«Je reçois, ce jour, l'instruction que le Ministère a réétudié la liste que j'ai fait parvenir en regard des classes de pilotes.

On m'informe que le Ministère n'approuve pas votre statut de pilote classe «A» et que vous êtes, à partir d'aujourd'hui, classé dans la classe de pilote «B».

21. The Pilotage Authority for the Quebec Pilotage District has not, at any material time, expressly authorized the Superintendent of Pilots or the local Supervisor of Pilots for the Quebec Pilotage District to exercise the function or power vested in the Pilotage Authority by section 24 of the Quebec General By-laws

Nothing in this Agreement prevents the parties or either of them advancing any additional evidence at the trial of this action.

The plaintiff's experience as a navigator commenced in the year 1928. He obtained a Canadian certificate as mate for home trade voyages in 1932. Between 1932 and 1948 he was employed on various ships as deck officer in the capacity of mate. On July 9, 1948, he was granted a pilot licence by the Minister of Transport for Canada as Pilotage Authority for the Quebec Pilotage District and from July 9, 1948, to June 2, 1960, he acted as pilot in the Quebec Pilotage District. On June 2, 1960, the Quebec Pilotage District General By-laws (P.C. 1957-191) were amended by Order in Council 1960-756 and three (3) grades of pilots, namely Grade A, Grade B and Grade C were established thereby. From the above date, the plaintiff was appointed to Grade B and acted as such until April 6, 1966. On April 6, 1966, the plaintiff was appointed to Grade A in the following circumstances. J. A. Maheux,

Acting Supervisor or Superintendent of Pilots for the District of Quebec, in his examination on discovery which forms part of the evidence herein, explains how the appointment was made at pp. 4, 5, 6 of the transcript:

Q Pourriez-vous expliquer à la Cour dans quelles circonstances le pilote Gamache a été assigné aux bateaux de classe A?

R. Voici: c'est que d'abord il a été décidé, je me rappelle pas s'il en manquait à ce moment-là ou si on a décidé...quand je dis «on» c'est le département, si le département a décidé d'augmenter le nombre des pilotes de classe A, je me rappelle pas exactement les circonstances, c'est un ou l'autre; de toute façon, le nombre n'était pas suffisant, il fallait en avoir d'autres; on a suivi les normes d'habitude, c'est-à-dire qu'on a...quand je dis «on» c'est le capitaine Lahaie et moi-même, avons relevé les dossiers des pilotes suivant...par ordre de séniorité, tel que ça se fait d'habitude; à ce moment-là, quand on est arrivé sur le dossier de monsieur Gamache, j'ai fait remarquer au capitaine Lahaie que monsieur Gamache était le pilote qui avait été sur le Tritonica; sa réponse a été: «Est-ce qu'il a été condamné?»; j'ai dit: «Non, pas à ma connaissance».

Q Et puis?

R A ce moment-là j'ai demandé verbalement à monsieur Gamache si ça l'intéressait si on le demandait, tout simplement comme matière d'information; la première chose que j'ai sue, il m'a écrit, il m'a dit: «J'accepterais si vous me demandiez, ça me ferait plaisir»; à ce moment-là il avait accepté, il avait écrit; quand on l'a nommé il avait déjà accepté.

Q Qui l'a nommé monsieur Gamache?

R Moi, sous les directives du capitaine Lahaie.

Q Vous, sous les directives du capitaine Lahaie?

R Oui.

This appointment was confirmed to the Secretary of the Corporation of Lower St. Lawrence River Pilots by letter dated April 6, 1966 (Exhibit 1) from Maheux, the local supervisor or superintendent of pilots.

At pp. 6, 7 and 8 of the transcript, J. A. Maheux further explains how the appointment of plaintiff as a Grade A pilot was made and under what authority.

Q Ça sera le document «A» de cet examen au préalable. Vous dites que vous avez suivi des normes d'habitude, expliquez-moi donc ça, qu'est-ce que vous voulez dire par normes d'habitude?

R On examine les dossiers pour s'assurer que le pilote en question n'a pas eu d'accidents graves, qu'il n'a pas été condamné, qu'il a un bon record pour qu'il soit considéré; s'il a un mauvais record il peut être simplement rejeté.

Q Est-ce qu'à votre connaissance toutes les promotions sont accordées de cette façon?

R. Oui monsieur.

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Q Elles sont accordées par consultation entre le surintendant du district et le surintendant régional?
R. Oui.
Q. Est-ce à votre connaissance, avant juillet 1966, est-ce qu'il y a eu des nominations de changées par d'autres personnes ailleurs au Ministère des Transports?
R Des gens...des pilotes qui étaient de classe A qui ont été retournés à B?
Q Des promotions qui ont été changées?
R. Oui, si on s'en tient à ça; Jean-Paul Blouin, qui a été replacé dans la classe B à la suite d'un accident.
Q Mais il est arrivé quelque chose entre sa nomination et le moment où il a été dégradé?
R Il a eu un accident.
Q. Est-ce qu'il y a eu des nominations de pilotes, nominations qui ont été faites par vous-même après consultation avec le capitaine Lahaie, et qui auraient été changées pour des causes autres qu'un événement qui se serait produit après la nomination?
R Pas à ma connaissance.
Q Est-ce qu'on vous a déjà fait part du fait que vous n'auriez pas l'autorité pour faire des nominations semblables?
R Je ne le crois pas.
Q. En vertu de quelle autorité avez-vous fait ces nominations?
R Sous les directives de mes supérieurs qui me donnent des ordres; je suis un employé, je suis les ordres qu'on me donne.
Q Vos supérieurs dans les circonstances c'est le capitaine Lahaie?
R. Le premier, oui, c'est-à-dire mon suivant par ordre d'hiérarchie.
Q Le capitaine Lahaie, si je comprends bien, a été le surintendant du district de Québec pendant plusieurs années?
R. Oui.
Q Avant d'être promu?
R Disons quelques années.
Q Deux ans, je crois?
R. Oui.
Q Avant d'être promu surintendant régional?
R. Oui.
Q. Maintenant, après sa nomination est-ce que le pilote Gamache a été assigné à des navires de classe A?
R. Oui.
Q. Est-ce que vous avez eu des faits à rapporter, soit des accidents ou autres choses, après sa nomination?
R. Non monsieur.
Q. Est-ce que la conduite du pilote Gamache a été...doit être critiquée en tant que pilote de classe A, de quelque façon?
R. Pas que je sache.
Q. Pas à votre connaissance?
R. Non.
Q Est-ce que vous êtes satisfait, vous, en tant que surintendant à l'époque de la conduite du pilote Gamache?
R Aussi bonne que les autres.

He also added at pp. 12 and 13 of the transcript that since the system of classes has existed all appointments are made in the very same manner in which the plaintiff was appointed:

Q Une fois qu'un pilote est nommé comme ça à une classe, qu'est-ce qui arrive, qu'est-ce que vous faites en particulier?
R. J'avise le Comité des Pilotes, le bureau des Escoumins, le bureau de Québec, que monsieur Untel est dans la classe A à ce moment-là; le lendemain, du moment qu'il commence à voyager, il figure sur la liste de toutes les classes, pas en partie, pas séparé comme ça.

Maheux explained at pp. 14 and 15 of the transcript how the plaintiff was downgraded from Grade A to Grade B:

Q Pourriez-vous expliquer pourquoi il n'est plus pilote de classe A?
R A un moment donné j'ai eu une lettre du capitaine Lahaie de bien vouloir l'aviser qu'il était pilote de classe B, qu'il était reclassifié B, parce que le Département n'approuvait pas sa nomination.

Q C'était la première fois que ça arrivait une chose semblable?
R. Qu'on demandait...qu'on forçait...

Q Qu'on dégradait?
R. C'était la première fois; à part l'accident, Jean-Paul Blouin en a été un; je me rappelle pas d'autres.

Q Charles-Auguste Chouinard?
R. C'est toujours la même suite; à la suite d'un accident aussi.

Q. Le pilote Gamache n'agit plus comme pilote de classe A depuis juillet 1966?
R. Non monsieur.

Q. Est-ce que vous savez, à votre connaissance personnelle, pourquoi on a changé la nomination du pilote Gamache?
R Parce que j'ai eu une lettre.

Q. Savez-vous pourquoi?
R. Si vous me demandez mes impressions, c'est une autre paire de bottes.

Q Vos impressions?
R. Est-ce que je suis obligé de les donner?

Q. J'aimerais connaître vos impressions.
R. Je suis sous l'impression qu'il y a eu des influences quelconques, des téléphones peut-être même anonymes, je le sais pas.

He reiterated at p. 16 of the transcript that before the plaintiff was appointed as a Grade A pilot, he had had discussions with Mr. Lahaie, the Regional Superintendent of Pilots.

Q Avant que soit faite la nomination de monsieur Gamache dans la catégorie A, est-ce que vous avez eu des entretiens avec monsieur Lahaie au sujet de cette nomination?
R. Oui, dans son cas comme dans les autres, son dossier a été ouvert, son dossier a été sorti, on l'a examiné tous les deux à ce moment-là.

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Q Lorsque vous dites que vous l'avez examiné tous les deux, est-ce qu'il était question à ce moment-là de collision?

R. Certainement; j'ai même fait la remarque que c'était monsieur Gamache qui était à bord du Tritonica; sur cette remarque-là le capitaine Lahaie m'a demandé: «Est-ce qu'il a été condamné?»; il n'y avait absolument rien dans son dossier.

D. R. Jones, the Superintendent of Pilotage in Ottawa, had this to say on the matter of his appointment as well as the appointment of J. A. Maheux as Acting Supervisor or Superintendent of Pilots for the District of Quebec and of Captain Lahaie as the Regional Superintendent of Pilots, at Montreal, at pp. 20, 21, 22 and 23 of the transcript:

Q. And what are your terms of reference as superintendent of pilotage?

A. Terms of reference in the precise sense of a document furnished to me? Is that the way you mean?

Q Yes.

A. I don't think that such a document exists; the duties, of course, are well known to me; we are appointed to the position, as you are aware, by the Civil Service Commission; this does not outline the duties in a precise way.

Page 3:

Q What are those duties, captain, that you know very well?

A. The duties of the position are those of the operating chief of the pilotage district where the minister is; I am the head office operating chief for all pilotage matters, head office at the Department of Transport

Q You are signing your letters, I believe, as superintendent of pilotage; where does that title come from?

A This is really a Civil Service title, it has no relevance in the Act, in the Canada Shipping Act which, as you are well aware, refers to the pilotage districts and the by-laws under the Act do not refer to the superintendent of pilotage in Ottawa at all.

Q Who was superintendent of pilots for the Quebec Pilotage district between April 1966 and July 1966?

A There was no person properly at that position at that time, but there was an acting superintendent: Mr. Maheux.

Q. Am I to presume that as acting superintendent he had all the immediate responsibility of a superintendent, but in a temporary capacity?

A. Yes

Page 5:

Q. By whom Mr. Maheux was appointed?

A He was appointed...I cannot think of a precise person that I can be sure of; he was appointed with the full cognizance of various officers, including myself.

Q You're going to answer, captain Jones! Who appointed Mr. Maheux? I want to know the person.

A Well! It is when we do not have to make, to the best of my recollection, a written appointment of him, but there is no doubt that he was appointed; I cannot recall of any written document signed by any particular person.

Q. For the third time, captain Jones: who appointed Mr. Maheux?
A. I would say that I appointed him.

Now, later on, My Lord, on the same page:

Q Under which authority did you appoint Mr. Maheux as acting superintendent of pilots for the Quebec Pilotage district?
A. I appointed Mr. Maheux to carry out my duties; I am appointed to my duties, and subject to confirmation by other people, I am able to do this

Q In other words, you have implied authority?
A Yes

Page 7.

Q Now, there is another element involved in this matter, a person who became involved in the correspondence in this file· captain Lahaie; could you explain to me who captain Lahaie is?
A Captain Lahaie is the regional superintendent of pilots, his office in Montreal, he exercises surveillance over the districts of Quebec, Montreal and Cornwall.

Q Does he have, in his position, any authority under the regulation by-laws governing pilotage?
A No, it is not the regulations, nor is it the Act; this is a Civil Service position

This answer, My Lord, is on page 8; and we continue:

Q Do I understand clearly that he has no authority in this position...
A. Yes.

Q. He has no authority either under the Canada Shipping Act or the regulation by-laws governing pilotage?
A No; he has authority from another source.

Q Where does he get this authority from?
A He gets his authority from his appointment to the position as a civil servant.

Q Authority in matters of pilotage; you will admit you will concur with me, captain Jones, that a civil service appointment is merely a formality, authority must come from somewhere; from where will he get this authority?
A He has no authority in the sense ..

Q He doesn't have any authority?
A Not in the legal sense you speak of.

Q How about the pilotage authority? Has he delegated authority as local regional superintendent?
A. He has no delegated authority in a formal manner, no

Q Informally?
A No.

Asked if he had delegated his authority to the Regional Superintendent of the Pilots, he answered at p. 24:

A No I have no authority in that sense myself. I cannot delegate it.

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At p. 25 Jones stated it is not frequently that pilots are assigned to a grade and then downgraded afterwards adding that he didn't know why it (the appointment) did happen in this case "you can see that when I saw it, I cleared (queried) it".

He also explained at pp. 26 and 27 of the transcript how a pilot was appointed from Grade B to Grade A:

A. We first approach him to find out whether he is interested.

Q Who approaches him?

A The local supervisor approaches him after having decided that this man can possibly be a satisfactory grade A pilot.

Q Under whose authority does he do that?

A. It is conceivable that at this stage he has not received any authority from anyone; it's his duty to find out the general changes in pilots, this does not involve any commitment of any sort.

Q. This is the first stage?

A. Yes.

Q. The pilot is approached to see whether or not he agrees to become a class A pilot?

A. Yes.

Q He is approached by the local superintendent?

A. Yes.

Q Do you know if pilot Gamache had been approached by the local superintendent to become a class A pilot?

A. Yes, he had.

Page 17, My Lord:

Q. What procedure was followed?

A. In this case of Mr. Gamache's appointment, his assignment to his duty was made prior to his consulting with head office.

Q Consulting you?

A. Consulting me, yes.

Q Is Gamache's case the only case?

A. No, I didn't think it is, I suspect there were others; at that time, for example, there was Chouinard's case, the same development took place; when I saw this, I acted as subsequent events show.

Q You saw this in April 1966 and action was taken in July?

A. This is right.

He admitted, however, at pp. 27 and 28 that no appointments to Grade A had since 1960 ever been made by the Pilotage Authority and that "this matter had in fact been handled perhaps at lower levels in the Pilotage Authority". He also admitted that he could not give a valid reason why such a procedure had been followed and that in fact the pilots are appointed by "people like (myself) and juniors (to him)" and that the documents or letters confirming the appointments are signed by the acting super-

visor at the time, that is the district supervisor of pilots whom he says is the man referred to in the by-law as the superintendent and that "in this case, of course, no man had succeeded the former superintendent, it was done by Mr. Maheux". He also admitted at p. 29 that it was under his instructions that Gamache's appointment was subsequently changed from A to B in July 1964.

He was then asked at p. 29 of the transcript whether what occurred in July 1966 with respect to the plaintiff was a reclassification to which he answered at p. 30:

A. No, I would say no; it was a reassignment properly speaking.

as, according to Jones, Gamache was never properly appointed a Grade A pilot.

Asked by counsel for the plaintiff why Gamache was not properly appointed, he answered:

A. He was not properly appointed to A according to my knowledge and my knowledge is reliable.
Q Do you have authority to appoint pilots?
A. No
Q Are you the person mentioned as the superintendent in the by-law of the Quebec Pilotage District?
A. No.
Q. Who is?
A. That time in question, Mr. Maheux.

The parties through counsel agreed that:

> J. W Pickersgill, as Pilotage Authority, did not personally appoint the plaintiff as Grade A pilot or otherwise direct his mind to this case.

It is against the above background that the present proceedings were taken.

The Pilotage District of Quebec is established by statute and is, according to the *Canada Shipping Act*, R.S.C. 1952, c. 29, under the authority of the Pilotage Authority. Section 327 of the Act, which is set out hereunder, provides that the Minister of Transport may be appointed Pilotage Authority by the Governor in Council:

> 327. (1) Notwithstanding anything in this Part, the Governor in Council may, when it appears to him to be in the interest of navigation, appoint the Minister to be the pilotage authority for any pilotage district, or for any part thereof; and the Minister shall thereupon supersede the then existing pilotage authority for that district or part of a district.
>
> (2) Whenever the Minister is appointed as pilotage authority for any district, his successors in office or any Minister acting for him

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or, in the absence from Ottawa of the Minister, or of any Minister acting for him, his lawful deputy, shall be the pilotage authority, and any such pilotage authority may by by-law confirmed by the Governor in Council authorize the Superintendent of Pilots in the district to exercise any of his functions, and, for such time or such purpose as he may decide, authorize any person to exercise any particular function or power vested in the pilotage authority by this Act or any by-law made hereunder.

Section 329(*p*) of the Act provides that "... every pilotage authority shall, within its district, have power, from time to time, by by-law, confirmed by the Governor in Council to

> (*p*) authorize the pilotage authority to delegate to any person or persons either generally or with reference to any particular matter all or any of the powers of such pilotage authority."

In 1957 by P.C. 1957-191, the Minister of Transport of the time was named pilotage authority for the pilotage district of Quebec and section 3 thereof provided for the appointment of a "superintendent" and set down his duties as follows:

> SUPERINTENDENT
>
> 3. (1) The superintendent shall have the direction of pilots and apprentices and may make orders for the effective carrying out of this By-law and, without limiting the generality of the foregoing, may make orders with respect to
>
> (*a*) the conduct of pilots and apprentices;
>
> (*b*) the use by pilots and apprentices of buildings and premises; and
>
> (*c*) the attendants of pilots and apprentices before the Superintendent.

Section 15 and section 24 of the above Order in Council (which deals with the pilots assigned for special service on regular lines or vessels) were amended in 1960 by P.C. 1960-756 and replaced by a new section 24 which, as already mentioned, classified pilots in three grades and contained the following paragraph 5:

> (5) Every Grade A pilot who, in the opinion of the Authority, is incompetent or unsuitable may be reclassified as a Grade B pilot by the Authority.

Prior to the year 1960, the system was quite different as explained by J. A. Maheux, at pp. 11 and 12 of the transcript. There existed line pilots and the companies who owned ships decided who their pilots would be. The pilots who were interested in piloting a ship of a company made a request to the latter who in turn requested the Department of Transport to appoint certain pilots for their line

of ships and the Department would then send the district superintendent a note to the effect that such a pilot had been appointed. In 1960, these line pilots were replaced by Grade A pilots and the larger ships (above 10,000 tons) are now the responsibility of this selected highly qualified group who are paid higher fees for their services.

The first question to be determined here is whether or not the classification of pilots in grades and the discretionary power given a pilotage authority, in its licensing capacity to demote a pilot from Grade A to Grade B for incompetence or unsuitability as effected by section 24(1) and (5) respectively of the Quebec Pilotage District General By-law (P.C. 1957-191 as amended by P.C. 1960-756) are validly enacted.

The second matter to be dealt with is whether or not in the event the above by-law is validly enacted, the appointment of pilot Gamache to Grade A by Maheux was a valid one.

I will deal with the position taken by the plaintiff on the latter question first and then look into the validity of the Quebec Pilotage District General By-law. The plaintiff submits that in an organization such as the Department of Transport, or the Government, an appointment or a decision made by someone in authority in the department, is presumed to be a valid decision and that, therefrom, it is for the defendants to establish that it is not valid. Counsel for the plaintiff further submits that the appointment of Gamache to Grade A is valid as although section 327(2) provides that "any such pilotage authority may by by-law, confirmed by the Governor in Council, authorize the Superintendent of Pilots in the district to exercise any of his functions" he has so delegated his authority under section 3 of P.C. 1957-191, hereinabove reproduced.

According to plaintiff, the classification of a pilot is merely a question of administration dealing with the despatching of pilots to various categories of vessels. The superintendent, in accordance with section 3 of the said by-law, is authorized to make orders for the effective carrying out of the by-law and this is in fact how the law was interpreted by the Pilotage Authority and by his officers, as both Maheux and Jones admit that the appointment of pilot Gamache was made in the same manner as all the other appointments to class A had been made since

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the system started in 1960. Counsel for the plaintiff further submits that it is not even necessary for the Pilotage Authority to pass a by-law in order to authorize the district superintendent of pilots to exercise any of his functions and that mere authorization is sufficient as the latter part of section 327(2) of the *Canada Shipping Act,* R.S.C., 1952, chapter 29, Part VI states that the Pilotage Authority may..."for such time or such purpose as he may decide, authorize any person to exercise any particular function or power vested in the pilotage authority by this Act or any by-law made hereunder".

Plaintiff's other line of attack is that in any event, section 24 of the by-law is invalid in that the Pilotage Authority must act within the limits of the powers given him in section 328 *et seq.* of the *Canada Shipping Act* and that nowhere in these sections is there authority to limit the licence of any pilot issued under section 333, paragraph (2) of the Act which reads as follows:

> (2) Every pilot who has received a licence from a duly constituted authority in that behalf, may retain the same, under and subject to the provisions of this Part, and shall, for the purposes of this Part, while so retaining the same, be a pilot licensed by the pilotage authority of the district to which his licence extends.

This licence gives its holder the right to pilot vessels of any size, as nowhere in the Act is the holder of a licence restricted in this respect. There are, in fact, two limitations only in the Act which can be applied to a licence holder: (1) a limitation of district under section 333(2) of the Act and (2) a limitation of time under section 329(*n*) (as amended by 4-5 Elizabeth II, chapter 34, section 12) during which any licence to a pilot shall be in force, and under 329(*o*) where a pilotage authority may renew for a further limited term any licence issued for a limited period pursuant to paragraph (*n*).

Counsel for the plaintiff urged that a pilot who is issued a licence and has complied with all requirements prior to the issuance of such a licence has an acquired right that cannot be taken away from him unless he has violated the statute or a validity implemented rule or by-law, such as a pilot involved in a shipping casualty whose certificate is suspended following a formal investigation or the case of a pilot who violates one of the stipulations of the by-law

which deals with liquor or drugs (cf. section 329(*f*)(iii) of the *Canada Shipping Act*) or who is guilty of insubordination (as contemplated by section 329(*f*)(iv) of this Act).

Nor can a pilotage authority by a mere by-law or regulation limit a pilot who possesses an unlimited licence, to a certain category or type of vessel only and prevent him from being assigned to a vessel or vessels involving higher remuneration. The holder of a pilot's licence under the statute has a right to pilot the largest vessels in the district and, thereby, receive the privileges of those who do.

The plaintiff finally submits that he was, on April 6, when he was appointed a Grade A pilot, competent and suitable, that he did nothing thereafter to render himself incompetent and unsuitable or to warrant a reclassification to Grade B and that the acts of the defendants in downgrading him as they did are illegal and unjust and "in complete disregard to the *Canadian Bill of Rights,* 1960 S.C., chapter 44, more specifically to section (1) of said Act and to his fundamental common law rights".

The position taken by the defendants, on the other hand, is most extraordinary. Counsel for the defendants submits that by-law 24 of P.C. 1960-756 is valid and that although the plaintiff had been given an A pilotage grading by Maheux, the latter was in no way authorized to do so. He agrees that he was the Acting District Superintendent for the District of Quebec, but maintains that he was not appointed by the Pilotage Authority (i.e., the Minister of Transport) as such having been merely appointed by the Civil Service although Jones, the Superintendent of Pilotage, in Ottawa, admitted he had appointed him. He finally urged that in any event, this Court had no jurisdiction to entertain an action against the Honourable J. W. Pickersgill as under the authority of a decision of the President of this Court in *Pouliot v. The Minister of Transport*[1] he could not be considered as an officer of the Crown and, therefore, this Court has no jurisdiction herein under section 39 of the *Exchequer Court Act,* R.S.C. 1952, chapter 98, which is the only section under which such jurisdiction could exist. This section reads in part as follows:

> 29. The Exchequer Court has and possesses concurrent original jurisdiction in Canada
>
> . .

[1] [1965] 1 Ex. C R 330.

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(c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; ...

I will first deal with the question as to whether section 24 of P.C. 1960-756, which established the three classes of pilots in the district of Quebec, is valid or not as, if it is not valid, then it cannot affect the rights of the plaintiff to pilot any type or class of ships nor, for that matter, can it restrict any other pilot duly licensed to pilot in that district and that would be the end of the matter.

I do believe that section 15(2a) (as amended by P.C. 1961-425) (whereby pilots of different grades were assigned to various sizes of vessels) and section 24(1) (whereby pilots were graded in three classes, A, B and C) which are both contained in Order in Council P.C. 1960-756, are illegal and *ultra vires* of the powers of the Governor in Council. It therefore also follows that section 24(5) of P.C. 1960-756 which purports to give discretionary power to a pilotage authority to demote a pilot from Grade A to Grade B for incompetence or unsuitability also becomes useless and falls by the way as a result of the illegality of the above sections although this last section is also invalid for additional reasons of which I will say more later.

The above sections 15(2a) and 24(1) are illegal and *ultra vires* for the simple reason that section 329 of the *Canada Shipping Act*, chapter 29 and its heads of power reproduced hereunder do not authorize the Pilotage Authority to license pilots or to affect a pilot's licence otherwise than as set down therein or in the statute. From a reading of these heads of power, it is clear that the only licences the Pilotage Authority is authorized to issue are licences for full pilots (without any restrictions as to the size of vessels they may pilot) and apprentices and the only manner in which such pilots can be licensed is by by-law confirmed by the Governor in Council (cf. subsection (*d*) of section 329 of the *Canada Shipping Act*). They indeed cannot be licensed by a simple appointment under a procedure set down in a by-law such as contemplated in the above Orders in Council nor can they be broken down in categories by by-law without an amendment to the Act.

The Pilotage Authority under section 329(*a*) is entitled to determine the qualifications of pilots but in so far only as they are "persons applying to be licensed pilots and apprentices".

The pilot must then be licensed by by-law as provided in subsection (*d*) of section 329 of the Act and the licence so obtained cannot then be revoked or otherwise affected except in the manner provided for in the statute. The only provisions in the statute which can affect a pilot's licence are section 568 of the *Canada Shipping Act* where a pilot's licence can be cancelled or suspended by a Court of inquiry and subsections *f*(iii), (iv), (v), (vi), (vii) or (*g*) of section 329 where for the offenses therein set down, and providing valid by-laws are passed, a pilot's licence can be affected by suspension or withdrawal. There are also three other cases contemplated by the statute where a pilot's licence may be affected and that is 329(*i*) which provides for the compulsory retirement of any licensed pilot who has reached 65 years of age or where under 329(*j*) he has become incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot. Finally, section 333(3) states that a pilot who acts beyond the limits of his licence becomes an unlicensed pilot.

There is nothing in the statute or in the heads of power of section 329 hereunder which authorizes the Pilotage Authority to go beyond what I have hereinabove set out and this appears clearly from a reading of the subsections:

> (*a*) determine the qualification in respect of age, time of service, skill, character and otherwise required of persons applying to be licensed as pilots and apprentices;
>
> . . .
>
> (*d*) licence pilots and apprentices, and grant certificates to masters and mates to act as pilots of ships on which they are employed as masters or mates respectively, as hereinafter provided;
>
> (*e*) fix the terms and conditions of granting licences to pilots and apprentices, the terms and conditions of granting such pilotage certificates as are in this Part mentioned to masters and mates, settle the form of such licences and certificates and the fees payable for such licences and certificates, and regulate the number of pilots;
>
> (*f*) make regulations for the government of pilots, and of masters and mates holding certificates enabling them to act as pilots on their own ships, and for ensuring their good conduct on board ship and ashore and constant attendance to and effectual performance of their duty on board and on shore, and for

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the government of apprentices, and for regulating the number thereof and for the holding of enquiries either before the pilotage authority or any other person into any matters dealt with in this Part; and without restricting the generality of the foregoing make regulations with respect to every licensed pilot or apprentice pilot who, either within or without the district for which he is licensed,

(i) lends his licence,

(ii) acts as pilot or apprentice pilot whilst suspended,

(iii) acts as pilot or apprentice pilot while under the influence of intoxicating liquor or narcotic drugs, while on duty or about to go on duty,

(iv) is guilty of insubordination, misbehaviour, or malingering, or who pilots a vessel beyond the limits of the pilotage district without the consent of the pilotage authority,

(v) refuses or delays, when not prevented by illness or other reasonable cause, proof of which to the satisfaction of the pilotage authority shall lie on him, to take charge of any ship within the limits of his licence, upon the signal for a pilot being made by such ship, or upon being required so to do by the master, owner, agent or consignee thereof, or by any officer of the pilotage authority of the district for which such pilot is licensed, or by any chief officer of Customs,

(vi) refuses, when requested by the master to conduct the ship on board of which he is into any port or place into which he is licensed to conduct the same, except on reasonable ground of danger to the ship, or

(vii) quits the ship which he has undertaken to pilot, before the service for which he was hired has been performed, without the consent of the master;

(*g*) make rules for punishing any breach of any regulation made pursuant to this section by penalty or by the withdrawal or suspension of the licence or certificate of the person guilty of such breach and notwitstanding anything contained in any other provision of this Act, impose, recover and enforce any such punishment;

(*i*) provide for the compulsory retirement of any licensed pilot who has attained the age of sixty-five years, subject to the provisions of this Part for the granting of a new licence;

(*j*) provide for the compulsory retirement of any licensed pilot who has not attained the age of sixty-five years who has become incapacitated by mental or bodily infirmity or by habits detrimental to his usefulness as a pilot;

...

(*n*) limit the period during which any licence to a pilot shall be in force . . .

(*o*) renew for a further limited term, not less than two years, any licence issued for a limited period pursuant to paragraph (*n*);

There is indeed nothing therein which authorizes the Pilotage Authority to categorize the pilots in classes as it

did in 1960 or to change or limit a licence once it is issued, and I should add, nor can a licence-holder be affected by terms and conditions created after his licensing.

In this regard, counsel for the defendants took the position that although section 329 of the *Canada Shipping Act* and the above mentioned subparagraphs employ general words relating to the licensing of pilots or the government of pilots, they can be construed to authorize interference with acquired private rights. He also relies on section 31, of chapter 158, R.S.C. 1952, subparagraph (1), paragraph (*g*) of the *Interpretation Act* which states that:

> 31(1) in every Act, unless the contrary intention appears,
>
> . . .
>
> (*g*) if a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations or by-laws and make others;

and here he maintains that under authority of the decision of the Supreme Court of Canada in *Le Procureur Général du Canada v. La Compagnie de Publication La Presse, Limitée*[2] which held that an Order in Council passed prior to the expiry of a radio licence changing the basis on which the fees were to be charged for such licence and increasing such fees was still valid even if it had the effect of retroactivity affecting the licence of the respondent.

I can find no application of the above decision to the present instance as Abbott J. (at p. 76), who wrote the notes for the majority decision of the Court, relied on the fact that in that case "... there was no contractual relationship between the Crown and respondent, and the latter had no vested or property right in the licence which it held. What it did have was a privilege granted by the state, conferring authority to do something which without such permission would be illegal."

In the present instance I have no doubt that the licence obtained by a pilot under section 333 cannot be revoked or otherwise affected except in the manner provided for by the statute. The licence obtained by a pilot under section 333 of the Act is not merely a privilege granted him but once granted becomes a vested or acquired right to pilot ships and exercise his profession. This right (unless

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[2] [1967] S.C.R. 60.

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restricted by the statute) is absolute and cannot be affected or limited in any way, unless when acquired it was limited by terms and conditions contained in the Act governing the licensing authority and in the regulations as they existed at the time the licence was issued. Such acquired rights as those obtained by a licensed pilot cannot be affected even by a valid amendment to the regulations subsequent to the issuance of the licence unless he acquiesces thereto or such changes are made by way of an amendment to the Act.

There is no question in my mind that the acquired rights of the holders of licences were infringed when the grade system was created in the Quebec district by section 24 of P.C. 1960-756 in so far as it limited existing licences to Grade B and I would so hold even if the grading system of pilots had been validly passed and pilots could be validly licensed as Grade A pilots by a simple appointment as contemplated in the Order in Council.

I am compelled, however, to go one step further and say that even the legality of the discretionary power purported to be given to a Pilotage Authority by section 24(5) of P.C. 1960-756 where it is stated that "every Grade A pilot who, in the opinion of the authority is incompetent or unsuitable may be reclassified as a Grade B pilot by the authority" is most questionable. I say it is questionable because a Pilotage Authority's control of the terms and conditions of a pilot's licence is neither absolute or discretionary. This was clearly set out in *John B. McGillivray v. F. C. Kimber et al*[3] by the Supreme Court (per Anglin J.) when he stated at p. 173:

> . . . The relationship of master and servant does not exist between the Board and the pilot The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory . . .

A pilot's licence cannot be issued otherwise than under the statute, by by-law and once given cannot be affected except, as already mentioned, by the statute or by by-laws or regulations validly passed at the time of the licensing. If a pilot is validly graded he also cannot be downgraded except for reasons contemplated by the statute or by validly passed by-laws or regulations. Indeed once a licence

[3] (1916) 52 S.C.R. 146

is issued or a pilot is graded, he has an acquired right to the licence or grade he possesses. A pilot holding a Grade A licence can be downgraded at the discretion of the Pilotage Authority only if a Grade A is considered a privilege and this it cannot be without an appropriate amendment to the Act making it such. It certainly cannot be done by the mere passing of a (unauthorized) by-law. It therefore follows that for this additional reason, section 24(5) of the said by-law is invalid and *ultra vires* of the powers of the Governor in Council under the Act and could not validly be used to downgrade plaintiff.

It is, however, also questionable that even if the discretionary powers given the Authority to downgrade pilots had been validly enacted, plaintiff would have been validly downgraded from Grade A to Grade B retroactively so to speak on the sole basis of his conduct as a pilot in the collision between the *Tritonica* and the *Roonagh Head* on the St. Lawrence River which had occurred on July 20, 1963, some three years prior to his appointment to Grade A. This collision was the subject of a formal investigation by the Honourable Mr. Justice Arthur Smith as Commissioner under section 558 of the *Canada Shipping Act*, chapter 29, R.S.C. 1952, and a decision was rendered on November 29, 1963, some two and a half years prior to the date upon which the plaintiff was classified as a Grade A pilot.

I should mention here that although the plaintiff was made a party to the above formal investigation and although his conduct was held in some respects to have "caused or at least contributed to" the collision (cf. p. 13 of the Report, Exhibit 12) I must conclude that it was not blameworthy as it did not involve the cancellation or suspension of his licence or the payment of a penalty as provided for in section 568 of the *Canada Shipping Act*.

The evidence disclosed that the Acting Superintendent of Pilots for the District of Quebec, Maheux, together with the Regional Superintendent of Pilots for the District of Montreal and Quebec, had both graded the plaintiff as a Grade A pilot on April 6, 1966, at a time when not only was the above investigation's report available to Jones in Ottawa, to Lahaie and Maheux in Quebec, but also only after the latter had raised the matter of the plaintiff's implication in the collision, had discussed it with Lahaie, and

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finally discarded it as not involving anything which could affect his "suitability or competence" to be appointed a Grade A pilot.

Maheux, at pp. 16 and 17 of the transcript deals with this matter as follows:

> Q. Lorsque vous dites que vous l'avez examiné (le dossier de Gamache) tous les deux, est-ce qu'il était question à ce moment-là de collision?
>
> R. Certainement; j'ai même fait la remarque que c'était monsieur Gamache qui était à bord du Tritonica; sur cette remarque-là le capitaine Lahaie m'a demandé: «Est-ce qu'il a été condamné?». Il n'y avait absolument rien dans son dossier.

Having thus by his appointment to Grade A acquired rights to such a grade, I fail to see how he could be downgraded and lose such rights on the sole basis of something which had occurred long before his appointment and which had not been considered serious enough to warrant any disciplinary action by the Commissioner or even prevent him from being appointed by both Lahaie and Maheux unless, of course, his appointment to Grade A was invalid. Such, indeed, is the position taken by counsel for the defendants on the basis that the appointment of Gamache to Grade A was a nullity because neither the local superintendent of pilots for the district of Quebec, Maheux, nor the regional superintendent, Lahaie for that matter had authority to so appoint him.

He submits that the only manner Maheux could have been authorized to make this appointment was by delegation as provided by section 329(*p*) of the Act which authorizes the Pilotage Authority "to delegate to any person or persons either generally or with reference to any particular matter, all or any of the powers of such pilotage authority" and that as there was no delegation herein either to Lahaie or Maheux, they were not authorized to appoint the plaintiff to Grade A and such appointment is, therefore, nonexistent. Both Lahaie and Maheux, and even Jones, although bearing the title respectively of Regional Superintendent of Pilots for the District of Quebec, Acting Superintendent of Pilots for the District of Quebec and Superintendent of Pilotage in Ottawa are, according to counsel for the defendants, merely appointments made by the Civil Service Commission and have, in fact, no statutory powers whatsoever regarding pilotage under Part VI of the *Canada*

Shipping Act. There is, I believe, an answer to this submission in that, firstly, section 3 of P.C. 1957-191 hereinabove reproduced is a delegation to the superintendent (which, the definition in the by-law states, "means: the Superintendent of Pilots or a person authorized to perform any of the functions of the Superintendent") of the powers of the Pilotage Authority which section states that "the Superintendent shall have the direction of pilots and apprentices and may make orders for the effective carrying out of this By-law".

The superintendent in the present instance contemplated by the by-law (and admitted by Jones, the Superintendent of Pilotage in Ottawa) is the local supervisor in Quebec, Maheux who, as already mentioned, appointed the plaintiff as a Grade A pilot.

If he had under section 3 of P.C. 1957-191 the authority to make orders for the effective carrying out of his by-law, including the upgrading of pilots as contemplated by section 24 of the by-law and could validly appoint under the statute, I would have to conclude that his appointment of plaintiff as a Grade A pilot was, therefore, legally and validly effected.

I should add, however, assuming the validity of P.C. 1957-191 and its amendments, that even if the grading of pilots had not, in accordance with section 327(2) of the *Canada Shipping Act*, been delegated by by-law to the local superintendent, or that the latter had not been appointed in express terms by the Pilotage Authority, as claimed by Jones, this would not end the matter as I do not believe that in a case such as here where the Pilotage Authority is the Minister of Transport a formal delegation or a formal appointment of officials is required to authorize all those who in fact exercise such powers to make proper decisions and appointments and this is particularly so when they have, as here, exercised such powers over a long period of time. Furthermore, the evidence discloses that Maheux as well as Lahaie were appointed by Jones, the Superintendent of Pilots in Ottawa and although there is a well known maxim which states that a delegate may not re-delegate and therefore the Pilotage Authority may not permit another to exercise a discretion entrusted by a statute to himself, I do not believe that the principle of *delegatus non*

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potest delegare applies to the present instance where the Pilotage Authority happens to be the Minister of Transport. It does not apply because the act done by a departmental official such as here is equally the act of the authority and the departmental official has the power to act as if the authority had done it personally.

In *Lewisham Borough Council and Another v. Roberts*[4] Bucknill L.J., referring to the dictum of the county court judge pointed out the manner in which ministers must operate in discharging their numerous duties and functions:

> After quoting from the judgment of Lord Greene M.R. in *Carltona, Ltd. v. Works Comrs* ([1943] 2 All. E.R. 563) the learned county court judge continued:
>
> . . applying these considerations to the present case, I am unable to say that the evidence shows that Mr. O'Gara in purporting to sanction on behalf of the Minister the requisitioning of property, and in particular in issuing the document of Nov. 12, 1946, was acting without authority to do so On the contrary, the presumption being that ministerial acts will be performed, not by the Minister in person, but by responsible officials in his department, I think where such acts of an official nature, all of them involving the knowledge and some of them requiring and receiving the concurrence of other officials, have, as here, continued over a long period, this of itself affords cogent evidence that the person in fact acting in such an official capacity was duly authorized to act.

Bucknill L.J. at p. 822, referring to the dictum of Lord Greene M.R. in the *Carltona* case at p. 563, enlarged upon the manner in which ministers with multiple functions must of necessity operate when he said:

> In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to the ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would

[4] [1949] 1 All E.R. 815 at 821.

have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them. In the present case the assistant secretary, a high official of the ministry, was the person entrusted with the work of looking after this particular matter and the question, therefore, is, relating those facts to the argument with which I am dealing, did he direct his mind to the matters to which he was bound to direct it in order to act properly under the regulation?

As a matter of fact, when a government department delegates its functions to an official, it is only putting someone in its place to do the acts which it is authorized to do. And as stated by Denning L.J., at p. 824, in the *Lewisham* case (*supra*):

> ...I take it to be quite plain that when a Minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorised official of his department.

In the same case, Jenkins J., at p. 828, had this to say on this same matter:

> The validity of the delegation which Mr. O'Gara purported by this letter to effect on behalf of the Minister was further attacked on the ground that, even if he was, in fact, authorized by the Minister to effect such delegations in the sense that the duties entrusted to him in terms extended to the making of such delegations, he could only be so authorized as a delegate of the Minister's powers with the result that as a matter of law he could not himself validly effect any further delegations, in view of the well-known principle of *delegatus non potest delegare*. I think this contention is based on a misconception of the relationship between a Minister and the officials in his department. A Minister must perforce, from the necessity of the case, act through his departmental officials, and where, as in the Defence Regulations now under consideration, functions are expressed to be committed to a Minister, those functions must as a matter of necessary implication, be exercisable by the Minister either personally or through his departmental officials, and acts done in exercise of those functions are equally acts of the Minister whether they are done by him personally, or through his departmental officials, as in practice except in matters of the very first importance they almost invariably would be done. No question of agency or delegation as between the Minister and Mr. O'Gara seems to me to arise at all. I think this view is borne out by the observations of Lord Greene M R, in *Carltona, Ltd. v. Commissioners of Works*. The delegation effected by the letter of Nov. 12, 1946, must, therefore, in my view, be regarded as a delegation by the Minister acting through one of his departmental officials in the person of Mr. O'Gara, and not as a purported delegation by Mr. O'Gara of functions delegated to him by the Minister. I am, accordingly, of opinion that this ground of objection also fails.

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It would, therefore, follow (if sections 15(2a), 24(1) and 24(5) of P.C. 1960-756 had been validly passed) that whether a proper delegation of the powers took place or not, Maheux and Lahaie would have been properly appointed as local and regional superintendents of pilots for the district of Quebec by the Pilotage Authority, through his department official Jones, and by virtue of the authority given him by section 3(1) of the general by-laws of the Quebec Pilotage District, Maheux's appointment of plaintiff as a Grade A pilot would have been therefore validly effected.

It also follows that if Maheux was the authorized authority to appoint Gamache and the latter was properly appointed by him as a Grade A pilot, it would seem that charged with the effective carrying out of the above by-law, he alone could downgrade him provided, of course, he had valid reasons to do so. It is indeed questionable that Jones had the authority or the right to downgrade him for unsuitability or incompetence under section 24(5) of the said by-law as he did although it is clear that even if he could do so, it could not be for conduct, which had occurred some three years prior to his appointment as a Grade A pilot which had not been held blameworthy by the Commissioner and which had been considered and weighed by Maheux who was authorized to appoint him and for this additional reason also, such downgrading is a nullity and of no effect.

Counsel for the defendants also submitted that Jones and Maheux and the Minister, as the public authority, were public officials but were not officers of the Crown and, therefore, this Court had no jurisdiction herein. He argued that the Pilotage Authority, historically and traditionally is not a Crown function and has never been a Crown function, and referred to *Paquet and another v. Corporation of Pilots for and Below the Harbour of Quebec and Attorney-General for Canada*[5] as showing that originally the supervision and control of pilots in the Quebec District was a private function carried out by the Trinity House of Quebec. Now although originally the services of pilots were merely for the convenience of shipping, the *Canada Shipping Act*, R.S.C. 1952, indicates that the profession has evolved from a mere service to shipping to one of public interest and it therefore follows that the Pilotage Authority

[5] [1920] A C. 1029.

and those officials who apply the Act with regard to pilotage are not merely acting as public officials but as officers of the Crown as well to whom Parliament has assigned public duties.

Defendants further submitted that in any event this Court has no jurisdiction to entertain an action against J. W. Pickersgill because as Minister of Transport he is not an officer of the Crown. A Minister of the Crown was held not to be an officer of the Crown by the President of this Court in *Pouliot v. The Minister of Transport (supra)*. Mr. Pickersgill is not, however, being sued here as Minister of the Crown but as the Pilotage Authority appointed by the Governor in Council under section 327 of the *Canada Shipping Act*, Part VI, chapter 29, R.S.C. 1952, and as the Pilotage Authority he is an officer of the Crown, as decided in *Gariépy v. The King*[6] by Angers J. and by O'Connor J. in *Harris H. Humelman et al v. The King*[7]. In the case of *Gariépy v. The King* Angers J. expressed himself as follows:

> It was not in his capacity as Minister of the Crown but as pilotage authority that the Minister of Marine acted. It is only in the pilotage districts of Quebec and Montreal that the Minister constitutes the pilotage authority in virtue of the law in force on the dates concerned; in other districts the pilotage authority is composed of pilot commissioners or of a committee of three to five persons appointed by the Governor in Council. Section 399 of the *Canada Shipping Act*, R S C 1927, c. 186 provides "The Halifax Pilot Commissioners shall be the pilotage authority of the pilotage district of Halifax" and s. 400 of the Act provides that "The St John Pilot Commissioners shall be the pilotage authority of the pilotage district of St John" Section 411 provides that "The Governor in Council may constitute pilotage authorities for any pilotage district established in any places not included within either of the pilotage districts of Quebec, Montreal, Halifax or St. John;" the section adding that such authorities shall consist of not less than three or more than five persons
>
> It follows from these provisions, it seems to me, that the Minister of Marine when acting as pilotage authority on the Montreal or Quebec districts does not exercise the powers conferred on him by the *Department of Marine Act* but those attributed to him by ss. 395 and 397 of the *Canada Shipping Act*, and that being the case he appears to me to be an officer of the Crown in the same position as the pilotage authority created by ss. 399 and 400 or constituted under s. 411.

I have no intention of belabouring the capacity or quality of the Pilotage Authority in this case because I need not come to a conclusion with respect to the present Pilotage

[6] [1940] 2 D L R 12 at 26 [7] [1946] Ex C R 1.

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Authority incumbent, Mr. Pickersgill (who, incidentally, according to the newspapers resigned as Minister of Transport and, therefore, no longer is the Pilotage Authority) as the latter, as agreed by the parties, never directed his mind to the appointment or the demotion of the plaintiff, leaving such matters as he had always done while he was the Pilotage Authority for the District of Quebec to those departmental officials (the other defendants) who, in fact, did discharge such duties. I must, therefore, dismiss the action taken against him. This dismissal, however, will be without costs for obvious reasons in that plaintiff had every reason to believe, until the beginning of this trial, that he had personally discharged his statutory duties as Pilotage Authority, and the defence was conducted on behalf of all the defendants with no additional costs involved in the defence of Mr. Pickersgill.

I am also of the view that plaintiff's demotion, or the refusal to allow him to pilot ships beyond 10,000 tons, as effected by the sole arbitrary decision of defendant Jones in Ottawa, was in complete disregard of the *Canadian Bill of Rights*, 8-9 Elizabeth II, vol. 1, 1960. Notwithstanding what the *Canada Shipping Act* says it cannot be construed as saying that it goes against the clear prescriptions of the *Canadian Bill of Rights* and particularly paragraph (*e*) of section 2 thereof which reads as follows:

> 2. . . . No law of Canada shall be construed or applied so as to
>
> . . .
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

The decision taken by Jones and Maheux was no doubt an administrative one but it also entailed in my view a duty to act herein judicially and it involved a matter which affected the rights of subject and which carried with it an extra-remuneration. It therefore contained all that was necessary to require these public officials to observe the principle of natural justice (cf. *L'alliance des professeurs catholiques de Montréal v. Labour Relations Board of Quebec*[8]). Rinfret C.J. stated the principle in the *Alliance* case as follows:

> Le principe que nul ne doit être condamné ou privé de ses droits sans être entendu, et surtout sans avoir même reçu avis que ses droits

[8] [1953] 2 S.C.R. 140 at 154.

seraient mis en jeu est d'une équité universelle et ce n'est pas le silence de la loi qui devrait être invoqué pour en priver quelqu'un. A mon avis, il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu.

In the same case, Rand J. stated at p. 161:

...but in the complexity of governmental activities today, a so-called administrative board may be charged not only with administrative and executive but also with judicial functions, and it is these functions to which we must direct our attention. When of a judicial character, they affect the extinguishment or modification of private rights or interests. The rights here, some recognized and others conferred by the statute, depend for their full exercise upon findings by the Board; but they are not created by the Board nor are they enjoyed at the mere will of the Board; and the Association can be deprived of their benefits only by means of a procedure inherent in judicial process.

The most recent decision on the question of natural justice is *Ridge v. Baldwin et al*[9], where the watch committee of a municipality dismissed the chief constable of its police force on evidence which it felt was satisfactory without affording him a hearing. The majority of the House of Lords held that the decision of the watch committee to dismiss the chief constable was null and void for failure to observe the principles of natural justice, although from a reading of the notes of judgment it appeared that the chief constable was arrested and charged together with other persons, with conspiracy to obstruct the course of justice and was later acquitted on the criminal charge. Later, on a further charge alleging corruption against the chief constable on which no evidence was offered, the judge referred to the borough's police force and remarked on its need for a leader "who will be a new influence and who will set a different example from that which has lately obtained". The majority of the Court held that:

. . . As the appellant was not the servant of the respondents and they could dismiss him only on grounds stated in section 191(4) of the Act of 1882, and they dismissed him on the ground of neglect of duty, they were bound to observe the principles of natural justice by informing the appellant of the charges made against him and giving him an opportunity of being heard and that they had not done so.

The above decision is very apposite and for the same reasons I also would hold that the decision of Jones to

[9] [1964] A.C. 40 at 42.

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downgrade Gamache from Grade A to Grade B was also null and void for failure to observe the principles of natural justice.

Having thus come to the conclusion that plaintiff could not be restrained as he was to piloting ships under 10,000 tons only, or if the categorizing in classes were valid he could, in the circumstances, be validly downgraded, the question now remains what remedy can be applied to correct the situation. The matter is not an easy one to determine because the parties involved, both Maheux and Jones, are officials acting at the same time as public officials and officers of the Crown.

The plaintiff requests this Court to declare that he has a right to be a Grade A pilot and that he has had this right from the date of his appointment, April 6, 1966, and this, in view of the decision I have arrived at that the grade system is invalid I cannot do nor can I for the same reasons order as requested by plaintiff his reclassification as a Grade A pilot for the Quebec Pilotage District with every right and privilege attending such grade.

Plaintiff has also requested in the conclusions of his statement of claim that Order in Council P.C. 1960-756 and Order in Council P.C. 1961-425 be declared illegal and *ultra vires* of the powers of the Governor in Council and that defendants be ordered to grant plaintiff every right and privilege attending to pilots entitled to pilot vessels without restriction as to size and to pay plaintiff jointly and severally an amount equal to the remuneration received by the Grade A pilots from July 25, 1966 to date.

I am prepared to declare that the following sections of P.C. 1960-756 and P.C. 1961-425, i.e., sections 15(2a) (whereby pilots of different grades were assigned to various sizes of vessels) section 24(1) (whereby pilots were graded in three classes A, B and C) and section 24(5) (which purports to give discretionary power to a pilotage authority to demote pilots) are *ultra vires* and invalid. I am also of the view that defendants Jones and Maheux should grant plaintiff every right and privilege attending to pilots entitled to pilot vessels without restrictions as to size.

The means requested to enforce the Order of this Court is the prerogative remedy of *mandamus* which is a useful means for compelling performance of public duties. In

essence it is a royal command issued in the name of the Crown from the High Court ordering the performance of a public legal duty. Disobedience to a *mandamus* is a contempt of court for which the normal penalty is imprisonment. As *mandamus* emanates from the Crown, it follows I believe, that it cannot be against the Crown as it would be incongruous that the Crown should command itself to act.

The legal problem here is whether such a writ could be issued against a Crown servant simply acting in his capacity of servant as there can be no judicial interference where a Crown servant is entrusted with certain duties by the Crown even if such duties involve some statutory duty owed to members of the public. His only duty in such a case is owed by him to the Crown and no one else but the Crown can enforce such duties. In *The Queen v. the Secretary of State*[10] Lord Esher M.R. said:

> . . . Assuming that the Crown were under any obligation to make this allowance to the claimant a *mandamus* would not lie against the Secretary of State, because his position is merely that of agent for the Crown and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not; he has no legal duty as such agent towards any individual.

In *The Queen v. Lords Commissioners of the Treasury*[11] where money in the Treasury was appropriated by Parliament for a given purpose, it was also "held that a *mandamus* would not lie inasmuch as the Lords of the Treasury received the money, which was granted to Her Majesty, as servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable".

It therefore follows that in such a case any complaint or default cannot be made to the servant but must be made to the Crown.

The distinction between a person acting as a servant of the Crown and a mere agent of the legislature is well put by Lord Esher when Sir George Jessel, as he then was, as counsel in the above case at p. 389 thereof:

> Where the legislature has constituted the Lords of the Treasury agents to do a particular act, in that case a *mandamus* might lie against them as mere individuals designated to do that act; but in the present case, the money is in the hands of the Crown of the Lords

[10] [1891] 2 Q.B. 326 at 338.
[11] (1872) 7 Q.B. 387.

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of the Treasury as ministers of the Crown; in no case can the Crown be sued even by writ of rights. If the Court granted a *mandamus*, they would be interfering with the distribution of public money; for the applicants do not shew that the money is in the hands of the Lords of the Treasury to be dealt with in a particular manner.

When Parliament has imposed a duty on a particular person acting in a particular capacity a *mandamus* may therefore issue although such person is a servant of the Crown and acting on the Crown's behalf because his legal duty is personal and owed personally to the members of the public.

Such a situation was found in *The Queen v. The Commissioners for Special Purposes of the Income Tax*[12] where it was held that a *mandamus* would lay against the Special Commissioners of Income Tax (who were acting as servants of the Crown) "to issue orders for repayment of the amounts certified to be overpaid".

I should also refer to *The Minister of Finance of British Columbia v. His Majesty the King*[13] where it was held (per Davis J.):

> that in a proper case a *mandamus* lies against the Minister of Finance to compel payment out of the assurance fund

and the distinction was also made in that case between

> a Minister acting as a servant of the Crown and acting as a mere agent of the legislature to do a particular act.

I do find that such a personal duty has been imposed by Parliament on the Pilotage Authority as well as on all those officials such as Jones or Maheux or Lahaie who, as already mentioned, are officials through whom the Pilotage Authority here exercises his statutory functions and the Crown's immunity from *mandamus* is therefore no impediment in the present case.

There will be, I believe, no necessity of issuing a *mandamus* herein and a simple declaratory judgment should be sufficient. When saying this I have in mind the words of Sir George Farwell in *Eastern Trust Company v. McKenzie, Mann & Co.*[14] at p. 759:

> The second point taken by Idington J. is equally untenable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue

[12] (1888) 21 Q.B.D. 313.
[13] [1935] S.C.R. 278.
[14] [1915] A.C. 750.

and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a *declaratory order obtained,* as has been recently explained by the Court of Appeal in England in *Dyson v. Attorney General* ((1911) 1 K.B. 419) and *Burghes v. Attorney-General* ((1912) 1 Ch. D. 173). It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.

Judgment should and is therefore hereby issued declaring that section 15(2a) of P.C. 1960-756 as amended by P.C. 1961-425, sections 24(1) and 24(5) of P.C. 1960-756 (which revoked section 24 of P.C. 1957-191, the Quebec Pilotage District General By-law) are *ultra vires* of the powers of the Governor in Council and, therefore, invalid and that consequently plaintiff has the right since July 9, 1948, when he was licensed as a pilot to be a fully licensed pilot for the District of Quebec, to be treated as such and to be granted every right attending thereto including the right to pilot ships and vessels of any tonnage within the said pilotage district of Quebec.

It should also follow, however, that in the event the categorizing of pilots in 1960 and their appointment to Grade A is valid, the plaintiff shall be entitled to a declaration that he has the right to be a Grade A pilot, that he had this right from the date of his appointment, April 6, 1966, and that plaintiff should be reclassified as Grade A pilot for the Quebec Pilotage District and granted every right and privilege attending such grade.

The plaintiff is entitled to costs against both defendants Maheux and Jones to be taxed in the usual way.

Saskatoon 1967 Oct. 10-11

BETWEEN:

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

AND

WILLIAM ALBERT HANSEN ..... RESPONDENT.

Income tax—Alimony or maintenance—Separation agreement—Payment of lump sum in monthly instalments—Whether paid for maintenance of wife—Income Tax Act, s. 11(1)(l).

A separation agreement provided *inter alia* for a division of property between husband and wife and for payment by the husband to the wife "in full and final settlement of the husband's obligation to support and maintain the wife during their joint lives" the sum of $20,000 as follows: $6,000 on execution of the agreement and $14,000 in monthly instalments of $100.

Held, on the proper construction of the agreement read as a whole the monthly instalments were for the maintenance of the wife and they were therefore deductible under s. 11(1)(*l*) of the *Income Tax Act* in computing the husband's income.

INCOME TAX APPEAL.

Gordon V. Anderson for appellant.

Benjamin Goldstein for respondent.

JACKETT P.:—This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board allowing, in part, an appeal by the respondent from his assessment under the *Income Tax Act* for the 1961 and 1962 taxation years.

The only question in issue in the appeal to this Court is whether the Tax Appeal Board was in error in holding that the respondent was entitled, by virtue of section 11(1)(*l*) of the *Income Tax Act*, to deduct, in the computation of his income for the purpose of that Act for each of those years, twelve payments of $100 made to his former wife pursuant to an agreement made by him with his wife before they were divorced.

Section 11(1)(*l*) of the *Income Tax Act*, in so far as it is relevant, reads as follows:

> 11. (1)...the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*l*) an amount paid by the taxpayer in the year,... pursuant to a written agreement, as...allowance payable on a periodic basis for the maintenance of the recipient thereof...if he was living apart from, and was separated pursuant to a . . . written

> separation agreement from, his spouse or former spouse . . . to whom he was required to make the payment at the time the payment was made and throughout the remainder of the year;

There is no dispute as to the facts. It is common ground that the respondent and his wife entered into a so-called "Property Settlement and Separation Agreement" on September 27, 1960, and it is common ground that the payments in question were made by the respondent in accordance with the terms of that agreement. The only question is whether such payments fall within the class of payments the deduction of which is permitted by section 11(1)(*l*). This question depends upon a proper understanding of the effect of the agreement.

The agreement must be considered as a whole and I find it necessary, therefore, to quote a large part of it. It reads in part as follows:

> 1. CONSIDERATION. The consideration for this Agreement is the mutual promises and agreements herein contained.
>
> 2. SEPARATION. It shall be lawful for each party at all times hereafter to live separate and apart from the other party at such place or places as he or she may from time to time choose or deem fit.
>
> 3. NO INTERFERENCE. Each party shall be free from interference, authority, and control, direct or indirect, by the other party as fully as if he or she were single and unmarried. Neither shall molest the other, or compel or endeavor to compel the other to co-habit or dwell with him or her.
>
> 4. WIFE'S DEBTS. The wife represents and warrants to the Husband that she has not incurred any debts or made any contracts for which the Husband or his estate may be liable. The Wife will not incur any such debts or make any such contracts so long as the Husband performs all of his obligations under this agreement. If the Wife violates this provision, and as a result thereof the Husband is obligated to make a payment or payments to others, he shall have the right to deduct the amount of such payment or payments from the next earliest amounts payable to the Wife under this Agreement.
>
> 5. MUTUAL RELEASE. Subject to the provisions of this agreement each party has released and discharged, and by this agreement does for himself and herself, and his or her heirs, legal representatives, executors, administrators, and assigns, release and discharge the other of and from all causes of action, claims, rights, or demands, whatsoever in law or equity, which either of the parties ever had or now has against the other, except any or all cause or causes of action for divorce.
>
> 6. DIVISION OF PERSONAL PROPERTY. The parties have divided between them, to their mutual satisfaction, the personal effects, household furniture and furnishings, and all other articles of personal property which have heretofore been used by them in common, and neither party will make any claim to any such items which are now in the possession or under the control of the other.

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Jackett P.

7. PAYMENT. In full and final settlement of the Husband's obligation to support and maintain the Wife during their joint lives, the Husband agrees to pay the Wife the sum of Twenty-Thousand Dollars ($20,000.00) in lawful currency of Canada, as follows:

(1) The sum of Six Thousand Dollars ($6,000.00) in lawful Canadian currency upon execution of this Agreement.

(2) The sum of Fourteen Thousand Dollars ($14,000 00) by equal consecutive monthly instalments of One Hundred Dollars ($100 00) each, payable on the First (1st) day of each and every month, in each and every year, the first of such payments to become due and be paid on the First day of November, A.D. 1960.

(3) The deferred payments hereinbefore referred to shall be made payable to the wife by deposit to her account in the Royal Bank of Canada, Main Branch, Saskatoon, Saskatchewan, on the First day of each month during the currency of this Agreement.

(4) In the event of any other payments made by the Husband to the Wife, the balance due and owing will be reduced proportionately.

8. WAIVERS OF CLAIMS AGAINST ESTATE. Except as herein otherwise provided, each party may dispose of his or her property in any manner, and each party hereby waives and relinquishes any and all rights she or he may now and/or hereafter acquire, under the present or future laws of any jurisdiction, to share in the property or the estate of the other as a result of the marital relationship, including without limitation, dower, thirds, curtesy, statutory allowance, widow's allowance, homestead rights, right to take in intestacy, right to take against the will of the other, and right to act as administrator or executor of the other's estate, and each party will, at the request of the other, execute, acknowledge, and deliver any and all instruments which may be necessary or advisable to carry into effect this mutual waiver and relinquishments of all such interests, rights, and claims.

9. ACCEPTANCE BY WIFE. The Wife acknowledges that the provisions of this agreement for her support and maintenance are fair, adequate, and satisfactory to her and in keeping with her accustomed standard of living for her reasonable requirements. The Wife, therefore, accepts these provisions in full and final settlement and satisfaction of all claims and demands for alimony or for any other provision for support and maintenance, and fully discharges the Husband from any such claim and demands except as provided in this agreement.

10. SUBSEQUENT DIVORCE. Nothing herein contained shall be deemed to prevent either of the parties from maintaining a suit for absolute divorce against the other in any jurisdiction based upon any past or future conduct of the other, nor to bar the other from defending any such suit. In the event any such action is instituted, the parties shall be bound by all the terms of this agreement. If consistent with the rules or practice of the Court granting a decree of absolute divorce, the provisions of this agreement, or the substance thereof, shall be incorporated in such decree, but, notwithstanding such incorporation, this agreement shall not be merged in said decree, but shall in all respects survive the same and be forever binding and conclusive upon the parties.

11. BREACH. If the Husband breaches any provision of this agreement, the Wife shall have the right, at her election, to sue for damages for such breach, or seek such other remedies or relief as may be available to her.

12. ADDITIONAL INSTRUMENTS. Each of the parties shall from time to time, at the request of the other, execute, acknowledge, and deliver to the other party any and all further instruments that may be reasonably required to give full force and effect to the provisions of this agreement, and in particular, the Wife covenants and agrees to relinquish her Homestead rights in property known as the Arrow Confectionery and Barber Shop, situate at Civic No. 616, 33rd Street West, being Lot Eight (8) and the East Eight Feet (8') of Lot Nine (9), in Block Six (6), Plan FU, in the City of Saskatoon, Province of Saskatchewan, at or before the signing of this Agreement;

AND FURTHER, the Husband covenants and agrees with the Wife that notwithstanding anything contained in the within Agreement, the wife has the right to register a Homestead Caveat against the property known as Civic No. 518—3rd Avenue North, being Lot Ten (10), in Block One Hundred and Eighty-Four (184), Plan Q13, in the City of Saskatoon, Province of Saskatchewan, such Homestead Caveat to be released upon payment in full of the $14,000.00 as aforesaid.

* * *

18. BINDING EFFECT. Except as otherwise stated herein, all the provisions of this agreement shall be binding upon the representatives, the representative heirs, next of kin, executors, and administrators of the parties.

The payments in question are the twelve monthly payments made in each of the years 1961 and 1962 pursuant to that part of paragraph 7 of the agreement that reads:

> ". . . the Husband agrees to pay the Wife the sum of . . . $20,000 . . . as follows:
>
> (1) The sum of . . . $6,000 . . . upon execution of this Agreement.
>
> (2) The sum of . . . $14,000 . . . by equal consecutive monthly instalments of . . . $100 . . . each . . . the First . . . to become due . . . on the First day of November, A.D. 1960."

There is no question between the parties that each of the payments in question was an amount paid by the respondent pursuant to a written agreement on a periodic basis; there is similarly no doubt that the payments were made in the taxation years in question; and finally there is no doubt that, at the time the payments were made and subsequent thereto, the appellant was living apart from, and separated pursuant to a written separation agreement[1] from, his spouse or former spouse to whom he was required to make the payments.

The appellant's position is, however, that the monthly payments in question were not made "as . . . allowance

[1] A divorce took place following the execution of the separation agreement but counsel for the Minister took the position that the divorce did not alter the position as far as section 11(1)(*l*) is concerned from what it would have been had there been no divorce.

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payable . . . for the maintenance of the recipient thereof" and for that reason, and that reason alone, do not fall within the class of amounts the deduction of which is permitted by section 11(1)(*l*).

The appellant's position that the monthly instalments of $100 in question were not paid as "allowances payable . . . for the maintenance of the recipient", as I understand it, was based on the following submissions:

(a) that such monthly payments were merely payments on account of the sum of $20,000, which is what counsel for the appellant describes as a "lump sum payment" that the appellant bound himself by the agreement to pay, and the lump sum payment of $20,000 was either the consideration for settlement of all the wife's property rights and for a release of all the obligations of the appellant to his wife pertaining to the marriage relationship, or it was a lump sum payment in relation to his obligation to maintain his wife;

(b) alternatively, the payments were payments for a release of the obligation to maintain the wife and were not made as allowances for her maintenance; and

(c) alternatively, the payments were part of the amount payable by the appellant under the agreement in respect of the wife's claims in respect of the appellant's property, her rights against his estate *and* her right to maintenance, and, for that reason, cannot be regarded as allowances for her maintenance within section 11(1)(*l*).

The preamble of the agreement shows that the purpose of the agreement was to confirm the separation of the parties that had already taken place, and to make arrangements in connection therewith, including

(a) arrangements for settlement of their property rights,

(b) arrangements for the support and maintenance of the wife, and

(c) arrangements in respect of other rights and obligations growing out of the marriage relationship.

When the substantive provisions of the agreement are examined, it is found that, as forecast by the preamble, the

agreement does "make arrangements" for the settlement of the property rights of the parties. For example, paragraph 6 records and confirms a division that had taken place of the personal property that had been used by them in common and, by paragraph 8, they waived all rights against each other's property or estates. The agreement also contains many provisions making arrangements in respect of other rights and obligations growing out of the marriage relationship. For example, paragraph 2 provides for their living separate and apart, by paragraph 3 they agree not to interfere with, or molest, each other, paragraph 4 absolves the appellant from liability for the wife's debts, and, by paragraph 5, they mutually release each other from all legal obligations one might have had against the other.

Finally, as forecast by the preamble, the agreement contains a provision which, in my view, was intended as "arrangements" for "the support and maintenance of the wife". I refer, of course, to paragraph 7.

If there could have been any doubt that paragraph 7, read by itself, is a provision for the maintenance of the wife (by reason of the use of the rather inept language "In full and final settlement of the Husband's obligation to support and maintain the Wife . . ." instead of some more appropriate words such as "For the support and maintenance of the Wife . . ."), and I am not to be taken as suggesting that there could have been any such doubt, when paragraph 7 is read with the preamble and with the reference in paragraph 9 to "the provisions of this agreement for her support and maintenance", there cannot, in my view, be any doubt that paragraph 7 provides exclusively for the maintenance of the wife.

A supplementary argument was made for the appellant that the paragraph 7 payments cannot be regarded as allowances for maintenance within section 11(1)(*l*) because they lack certain characteristics of provisions for the maintenance of a wife. Reference was made, for example, to the fact that the amounts are not expressed to be payable during the wife's life, the fact that the husband is permitted to make prepayments, and the fact that the payments are assignable. Some such considerations may be helpful in certain cases in deciding whether particular payments are to be made for the wife's maintenance or not. I do not, however, find any of the factors upon which counsel for the

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appellant relied for that purpose in this case, to the extent that they seemed to exist, to be inconsistent with the conclusion that I have reached that the agreement read as a whole points clearly to the conclusion that the parties intended the paragraph 7 payments to be provision for the wife's maintenance.

With reference to the contention that the payments were really part of the consideration running from the appellant under the agreement for all the various benefits accruing to him under the agreement, I have already made it clear that, as I read the agreement, it has been so constructed so as to make paragraph 7 a provision for maintenance and nothing else.

Finally, I reject the contention that paragraph 7 provides for a "lump sum payment" of $20,000 and that the monthly payments in question are merely payments on account of that lump sum. Quite the contrary, in my view, paragraph 7 provides for a number of payments totalling $20,000 and the monthly payments in question are some of the payments so provided for. A reference to the words of the paragraph makes it quite clear. It says, "the Husband agrees to pay the Wife the sum of . . . $20,000 . . . as follows", and then it sets out the actual payments that are to be made. The real question is, of course, whether the payments were made pursuant to a provision for payments on a periodic basis and, in my view, paragraph 7(2), pursuant to which the payments in question were made, is precisely that.

The appeal is dismissed with costs.

Toronto 1967 Oct. 18-19

BETWEEN:

QUALITY CHEKD DAIRY PRODUCTS ASSOCIATION (COOPERATIVE) ..... APPELLANT;

AND

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

Income tax—Withholding tax—Fees paid for use of trade marks and "know-how"—Income Tax Act, s. 106(1)(d)(iii)—"Property or other thing"—Onus of proof.

Appellant, an American company, provided services to its members in the dairy industry, *viz* production advice, production seminars, laboratory

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analysis of products, preparation of advertising programs and materials, marketing and sales advice, sales workshops, and permitted them to use its certification marks. Appellant was remunerated *inter alia* by fees on a sliding scale based on sales and for 1964 was assessed to 15% withholding tax under s. 106(1)(*d*) of the *Income Tax Act* in respect of $397.83 fees received by it from one of its Canadian members.

Held, the payment in fees by appellant was in part for "a royalty or similar payment" for use in Canada of marks within the meaning of those words in s. 106(1)(*d*) of the *Income Tax Act*, which part was less than $397.83, but which was part of the payment for a so-called "package deal" which included services referred to in the evidence and the use of the marks and that in respect to the part of the fees that represented services such was not a payment within the ambit of s. 106 (1)(*d*) of the Act so as to be subject to withholding tax.

INCOME TAX APPEAL.

S. E. Edwards, Q.C. for appellant.

D. G. H. Bowman and *J. R. London* for respondent.

GIBSON J.:—In this appeal under the *Income Tax Act* the issue is whether or not certain payments made in 1964 to the appellant by a corporation known as Kellough Brothers Dairy Limited are subject to a withholding income tax of 15 per cent under section 106(1)(*d*).

The appellant is a State of Wisconsin corporation without share capital, having no offices or place of business in Canada, which at the material time had on its staff certain itinerant personnel experienced and trained in the dairy industry especially in the fluid milk, ice cream and cottage cheese, sour cream, dips and other related products business. In 1964 there were 97 members of the appellant all of whom were independently in business dealing in the said products. Nine of these members were from Canada, and one of them was the said Kellough Brothers Dairy Limited, a corporation with share capital incorporated under the *Ontario Corporations Act* carrying on business in the Port Arthur-Fort William, Ontario area.

At the material time the appellant allowed Kellough Brothers Dairy Limited in common with other members, in consideration of certain "dues", "fees", "mechanical charges" and "assessments" to use its certification mark "Quality Chekd" and its mark including the symbol "Q" with a check mark, application for certification of which has been filed with the Trade Marks Office in Ottawa; and in addition provided services which in brief were: (1)

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production advice on an ad hoc basis to individual members according to their needs; (2) the holding of production seminars on an annual basis in each district at which sometimes experts outside the staff of the appellant were included in such things as panel discussions; (3) laboratory analysis of products; (4) preparation of advertising programmes and materials; (5) marketing and sales advice, also on an ad hoc basis; and (6) the holding of sales workshops at which sales people from various member companies attended to exchange ideas and also to share other ideas and suggestions from the staff of the appellant and sometimes outside consultants.

The "dues", "fees", "mechanical charges" and "assessments" respectively are adequately described in the by-laws of the appellant Exhibit A-2, the membership agreement Exhibit A-6 and the financial statements of the appellant for the years 1963 and 1964 Exhibit A-14.

I make only one comment as to these, namely, that the difference between "dues" and "fees" was that the latter were charged according to size of the business of the member and were on a sliding scale based on sales. This, it was said, enabled there to be a more equitable distribution of the costs of the appellant in providing the services to the members of it.

The respondent in its pleading relies, among other things, on the following assumption, (which was amended at trial) as follows, at paragraph 6(*a*) namely:

> 6. In making the assessment for the Appellant's taxation year 1964 the Respondent acted on the following assumptions, *inter alia*:
>
> (*a*) that during the 1964 taxation year Kellough Bros. Dairy Limited paid or credited to the Appellant an amount not less than $397.83 for the use in Canada of the certification mark "Quality Chekd" and the mark applied which included the symbol "Q" with a check mark, of which the Appellant was at all material times the owner;

In addition, the respondent pleaded at paragraph 6A as follows, which paragraph also was amended at trial, namely:

> 6A. The Respondent says in the alternative that if the said sum of $397 83 was not, in its entirety, paid or credited to the Appellant in satisfaction of rent, royalty or similar payment for the use in Canada of the certification marks, it was, to the extent that it was not so paid or credited for the use in Canada of the certification marks, paid or credited on account of or in satisfaction of rent, royalty or similar

payment for the use in Canada of know-how and that the said know-how is "property or . . . other thing" within the meaning of s. 106 (1)(*d*) of the *Income Tax Act*.

Fees are the only item of payment involved in this appeal.

The respondent submits these pleadings are supported by the evidence adduced.

The appellant, on the other hand, submits that the fees paid in 1964 by Kellough Brothers Dairy Limited to the appellant were not paid for use of the said marks and not for "know-how" in so far as it might be categorized as "property or . . . other thing" within the meaning of section 106(1)(*d*) of the *Income Tax Act,* but instead were membership fees paid to reimburse the appellant for expenses it incurred for providing (1) the services referred to above, and (2) the use of the marks; and that the excess of monies so collected by the appellant from its members, as the evidence indicated, which were over and above expenses, were returned to them by way of patronage dividends. (As to this see Schedule B-1 of Exhibit A-14).

The appellant also submits that the principle of mutuality applies to the monies paid in the matter by Kellough Brothers Dairy Limited to the appellant.

Dealing first with this latter submission, I am of opinion that the principle of mutuality has no application in the circumstance disclosed in the evidence of this case, to a payment under section 106(1)(*d*) of the Act.

As to the other issue raised in this case, it is my view that the Minister's assumption in paragraph 6(*a*) of the Reply is not supported by the evidence, but instead the appellant has shown this to be wrong. Specifically, I find as a fact that during the 1964 taxation year Kellough Brothers Dairy Limited paid or credited to the appellant an amount less than $397.83 for the use in Canada of the certification mark Quality Chekd and the mark including the symbol "Q" with a check mark for which certification had been applied for.

In my view, what was paid for by Kellough Brothers Dairy Limited was for a so-called "package deal". This is a colloquial phrase used so often now in business transactions, and in reference to its meaning, I note there is a definition of it in *Webster's Third New International Dictionary* which reads in part as follows:

> PACKAGE DEAL—1a: an agreement to accept or pay a lump sum for a correlated group of goods or services (a *package deal* with

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all 30 to be leased for four years at a total fee reported somewhat in excess of $1,250,000—*Wall Street Jour.*) . . . *specif*: a contract involving such an agreement achieved through collective bargaining (union-management committees have reportedly worked out a *package deal,* with increased fringe benefits . . . but no flat wage increase—*Time*) b: the goods or services supplied through such an agreement (offers the franchise operator a complete *package deal,* including ground development, building construction—R. B. Andrews) . . .

The so-called package deal in this matter for which payment was made was in my view (1) a "royalty or similar payment" for use in Canada of the certification mark and the mark including the symbol "Q" with a check mark for which certification has been applied for; and (2) the "know-how" of the appellant with respect to the services rendered as described above.

The only question left for decision therefore is whether or not these services provided by the appellant as disclosed in the evidence constituted "know-how" as pleaded in paragraph 6(*a*) of the respondent's Reply, and if so, whether "know-how" is "property or . . . other thing" within the meaning of section 106(1)(*d*) of the *Income Tax Act.*

"Know-how" is not a word of art but instead of the vernacular. Again *Webster's Third New International Dictionary* describes know-how as:

> KNOW-HOW: practical knowledge of how to do or accomplish something with smoothness and efficiency: ability to get something done with a minimum of wasted effort: accumulated practical skill or expertness (business *know-how*) (needed the *know-how* of a good carpenter) (salesmanship *know-how*) (the *know-how* involved in producing a play) (developed his bowling *know-how*); esp: technical knowledge, ability, skill, or expertness of this sort (the company needed to use all its ingenuity and *know-how* to succeed in laying the oil lines).

In argument certain English and other cases were cited in which a distinction is made between "know-how" as a capital asset payment for which is a capital receipt and "know-how" as a service, payment for which is income; and also some cases in which the Court did not find it necessary to decide whether or not the particular know-how was a capital asset to enable it to adjudicate on whether a particular receipt was income or capital. These cases were: *Handley Page v. Butterworth (H.M. Inspector of Taxes)*[1]; *Evans Medical Supplies, Ltd. v. Moriarty (H.M. Inspector of Taxes)*[2]; *Jeffrey (H.M. Inspector of Taxes) v. Rolls-*

[1] 19 T.C. 328.

[2] 37 T.C. 540.

Royce, Ltd.[3]; *English Electric Company Limited v. Musker*[4]; *Technical Tape Corporation v. M.N.R.*[5]; and *The Federal Commissioner of Taxation v. United Aircraft Corporation*[6].

For the purpose of this case, these cases show that the line between asset "know-how" and service "know-how" is illusory. However, in this case, it is sufficient to find upon a consideration of the whole of the evidence, and I do find, that the "know-how" provided by the appellant to Kellough Brothers Dairy Limited should be categorized as services rendered, or at least and in any event not "property" within the meaning of the word as it is employed in section 106(1)(*d*)(iii) of the Act and also not "other thing" as those words are also so employed there, applying as I do the *ejusdem generis* rule of construction to it and not the extremely wide dictionary definition of "thing" as may be found, for example, in the *Shorter Oxford Dictionary* and other dictionaries.

In the result, therefore, I find that the payment of fees in 1964 in this matter to the appellant by Kellough Brothers Dairy Limited were in part for "a royalty or similar payment" for the use in Canada of the said certification mark and other mark referred to in the evidence and in the pleadings within the meaning of those words in section 106(1)(*d*) of the *Income Tax Act* which part of such payment of fees was less than $397.83 but which was part of the payment for a so-called "packaged deal" which included the services referred to above and the use of the marks and that the part of the fees paid in 1964 which represented payment for the services was not a payment within the ambit of section 106(1)(*d*) of the Act so as to be subject to a withholding income tax of 15 per cent.

As the onus was on the respondent under paragraph 6A of the Reply in the pleadings quoted above to adduce evidence of the proper apportionment to be made of this payment between these two matters and he has failed to do so, the appeal is allowed with costs to the appellant and the assessments is vacated.

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[3] 40 T.C. 443.
[4] (1964) 25 T.R. 129.
[5] 64 D.T.C. 428.
[6] (1943) 68 C.L.R. 525.

Ottawa 1967
Sept. 27
Oct. 30

BETWEEN:

HER MAJESTY THE QUEEN in right of Canada represented by the Attorney General of Canada

OF THE FIRST PART;

AND

CANADIAN WAREHOUSING ASSOCIATION, a company incorporated under the laws of Canada,

OF THE SECOND PART.

Combines—Transportation of household goods—Whether covered by Act—"Article", meaning—Combines Investigation Act, R.S.C. 1952, c. 314, ss. 2(a), 32(1)(c), am. 1960, c. 45, ss. 1, 13.

On its proper construction s. 32(1)(c) of the *Combines Investigation Act* prohibits conspiracies to restrict competition unduly in the storage or transportation of household goods even though such is in a service industry. Household goods fall within the definition of "article" in s. 2(a) which must be interpreted to include all tangible articles or commodities whether or not they have left the stream of commerce.

ARGUMENT of question of law under s. 18(1)(*g*) of the *Exchequer Court Act*.

C. R. O. Munro, Q.C. and *S. M. Leikin* for H.M. the Queen.

K. E. Eaton for Canadian Warehousing Ass'n.

GIBSON J.:—This question of law comes before the Court pursuant to section 18(1)(*g*)[1] of the *Exchequer Court Act*, R.S.C. 1952, c. 98, by way of Agreement dated June 13, 1967 between the parties.

The operative parts of the said Agreement prescribing the question put to the Court, the evidence adduced, and the provision as to costs read as follows:

(1) The Exchequer Court of Canada shall determine the following question:

"Subject to section 32(2) of the *Combines Investigation Act* is a person who conspires, combines, agrees or arranges with another

[1] 18.(1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

. . .

(*g*) the amount to be paid where the Crown and any person have agreed in writing that the Crown or such person shall pay an amount of money to be determined by the Exchequer Court, or any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court;

person to prevent, or lessen, unduly, competition in the storage or transportation of household goods, guilty of an offence under section 32(1)(*c*) of the *Combines Investigation Act*?"

(2) That question shall be determined on the facts set forth in the recitals to this agreement, the facts appearing in Exhibit "A" and any other facts of which the Court may take judicial notice.

(3) The costs of the proceedings launched in the Exchequer Court by the submission of the above question, and of all appeals from any decision therein shall be in the discretion of the courts.

"Household goods" referred to in the question are defined in the first recital of the said Agreement as follows:

being goods owned by householders and used in their households.

The party of the second part, Canadian Warehousing Association, (which represents approximately 300 firms who are engaged in the business of "transporting and storing household goods in Canada") takes the position with the Director of Investigation and Research under the *Combines Investigation Act* that "household goods" are not within the meaning of the word "article" in section 32(1)(*c*) of the *Combines Investigation Act* and that "therefore a conspiracy, combination, agreement or arrangement with another person to prevent or lessen unduly competition in the storage or transportation of household goods would not as a matter of law constitute an offence under the said section 32(1)(*c*)".

The full text of the Agreement is set out in Schedule "A" to these Reasons excepting therefrom Exhibit "A" being the Dominion Bureau of Statistics Report on *Moving and Storage Household Goods 1964*.

Section 32(1)(*c*) of the *Combines Investigation Act* reads as follows:

32. (1) Every one who conspires, combines, agrees or arranges with another person

. . .

(*c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

The statutory definition of the word "article" in the said section 32(1)(*c*), is in section 2(*a*) of the Act, and reads as follows:

2. In this Act,

(*a*) "article" means an article or commodity that may be the subject of trade or commerce;

(Underlining is mine)

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The statutory definition of "business" in the Act is in section 2(*aa*) of the Act and reads as follows:

> 2. In this Act,
>
> ...
>
> (*aa*) "business" means the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles;

The statutory definition of "trade or industry" is in section 2(*h*) of the Act and reads as follows:

> 2. In this Act,
>
> ...
>
> (*h*) "trade or industry" includes any class, division or branch of a trade or industry.

A history and extracts of statutory provisions preceding section 2(*a*) and section 32(1)(*a*) of the *Combines Investigation Act* as enacted in 1960 is set out in Schedule "B" to these Reasons.

The submission of counsel for the Canadian Warehousing Association is that the question should be answered in the negative because: household goods are not within the meaning of the word "article" in section 32(1)(*c*) of the *Combines Investigation Act* which applies to storage and transportation only in the flow of goods from production to consumption or utilization; that the *Combines Investigation Act* is a penalty statute and must be construed strictly so that no cases are brought under it that do not fall within the reasonable meaning of its terms and within its spirit and scope; that paragraph (*a*) of section 2 of the *Combines Investigation Act* should be interpreted as not extending to household goods having regard to (a) the ordinary meaning of the words used in that paragraph, (b) the judicial interpretation of the language used there, and (c) the judicial interpretation of "trade and commerce" in section 91(2)[2] of the *British North America Act, 1867*;

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[2] 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

. .

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that unless interpreted as submitted the definition in section 2(*a*) would be unnecessary, which could not have been intended, since all personal property except royalties of the country and *ferae naturae* may be bought and sold; and that the interpretation of the word "article" as excluding household goods is consistent with the context in which that word appears in section 32 of the Act, which is directed primarily to economic availability of goods as opposed to services, and applies only incidentally to services, such as storage and transportation when they are related to the former.

The submission of counsel for the Attorney General of Canada, among other things, is that the definition of the word "article" is a necessary part of the statute in order to complete the sense of section 32(1)(*c*) and those other sections of the *Combines Investigation Act* in which the word "article" is used; that the use of the word "article" in section 32(1)(*c*) is grammatically an ellipsis leaving unstated the kind of article intended; that the definition of the kind of article is left unstated in section 32(1)(*c*); that the kind of article defined by the definition is one that may be subject of trade and commerce and therefore section 32(1)(*c*) includes within its purview articles of a kind that can be bought or sold; and that because household goods consist of many articles all of which are of a kind that can be bought and sold etc., and all are commodities, therefore household goods come within the meaning of the word "article" as used in section 32(1)(*c*) of the *Combines Investigation Act*.

Firstly, in my view, the judicial interpretation of the words "trade and commerce" as used in section 91(2) of the *British North America Act, 1867* are not of assistance in interpreting the meaning and application of those same words in the *Combines Investigation Act* in that this Act has been judicially held to be criminal law legislation.

Secondly, from a consideration of the relevant statutory provisions of the *Combines Investigation Act* and the case law in respect thereto, as I understand it, the general purpose of this legislation is to put a particular limit (*viz.*, not to "conspire, combine, agree or arrange with another person . . . to prevent, or lessen, unduly, competition in the production..." etc.) on a party's right to contract in so far as it affects competition (that is "the public interest

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in free competition" as understood by the Courts—see Duff C.J. in *Container Materials, Limited et al v. His Majesty The King*[3])—"in the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles"[4], "that may be the subject of trade or commerce"[5], but that it does not limit in this said respect any party's right to contract in so far as it affects competition (in the manner described) in businesses in those service industries not specifically included in section 32(1)(*c*) of the Act; and further, in elaboration of this latter premise, that, except for "the price of insurance upon persons or property", section 32(1)(*c*) of the Act puts such a limit only on contracts in the businesses listed in section 32(1)(*c*) of the Act in the service industries which touch or concern tangible things, i.e., "articles" "that may be the subject of trade or commerce"[6] and not on contracts in other businesses in the service industries which relate solely to the provision of services.

It follows, in my view, that in interpreting the meaning of the word "article"—"that may be the subject of trade or commerce", the widest meaning of "may be" should be employed so as to include all articles or commodities which are tangible things, generally, whether or not they have left the stream of commerce, so to speak, such as "household goods" in this case, which normally would be in private ownership and not for sale.

In the case of "rental" contracts, as another example, as that word is used in section 32(1)(*c*) of the Act, the articles rented also would normally be out of the stream of commerce in the sense stated.

Therefore, in my view, the business[7] of "transporting and storing household goods in Canada" carried on by the

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[3] [1942] S.C.R. 147 at 152.

[4] See section 2(1)(*aa*) of the Act.

[5] See section 2(1)(*a*) of the Act.

[6] From the decisions in some cases, however, it is sometimes submitted that there is a possible inference that the Court may find that the evidence in a given case establishes only a conspiracy to prevent or lessen unduly competition in the performance of work and labour and not in, for example, the sale, supply, or transportation, etc., of the "article" which is made up of both materials and work and labour. This submission is usually made in cases where there is a very large and predominant element of work and labour. See *Rex v. Alexander Ltd. et al* [1932] 2 D.L.R. 109 at 124; *Regina v. Electrical Contractors Association of Ontario and Dent* [1961] O.R. 265 at 278; and *Rex v. Singer et al* [1931] O.R. 202 at 216.

[7] (cf., "business" in sections 2(1)(*aa*) and 32(3) of the Act).

member firms of the party of the second part, Canadian Warehousing Association is a business in a service industry within the purview of section 32(1)(*c*) of the *Combines Investigation Act;* and the question put therefore is answered in the affirmative.

The Attorney General of Canada is entitled to the costs of these proceedings.

SCHEDULE "A" TO REASONS FOR JUDGMENT in
HER MAJESTY THE QUEEN and
CANADIAN WAREHOUSING ASSOCIATION.

THIS AGREEMENT made this 13th day of June, A.D. 1967.

BETWEEN:

HER MAJESTY THE QUEEN, in right of Canada, represented herein by the Attorney General of Canada (hereinafter referred to as "Her Majesty")

OF THE FIRST PART

—AND—

CANADIAN WAREHOUSING ASSOCIATION, a company incorporated under the laws of Canada, (hereinafter referred to as "the Association")

OF THE SECOND PART

WITNESSETH THAT, whereas the transportation and storage of goods commonly described as household goods, "being goods owned by householders and used in their households", is a substantial business in Canada, as evidenced by the Dominion Bureau of Statistics' report on "Moving and Storage Household Goods 1964", a copy of which is Exhibit "A" hereto.

AND WHEREAS the Association represents, *inter alia,* approximately three hundred firms engaged in the business of "transporting and storing household goods in Canada".

AND WHEREAS section 8 of the *Combines Investigation Act* authorizes the Director of Investigation and Research (hereinafter called "the Director"), whenever he has reason to believe that any provision in Part V of that Statute has been or is about to be violated, to cause an inquiry to be made into all such matters as he considers necessary to inquire into with a view of determining the facts.

AND WHEREAS section 32(1)(*c*) of the *Combines Investigation Act* which is contained in Part V thereof, makes it an offence to conspire, combine, agree, or arrange with another person to prevent, or lessen, unduly, competition in the storage or transportation of an article.

AND WHEREAS the Director purported to cause an inquiry to be commenced with a view of determining the facts as to whether anyone had conspired, combined. agreed or arranged with another person to prevent, or lessen, unduly, competition in the storage or transportation of household goods.

AND WHEREAS the Chairman of the Restrictive Trade Practices Commission, pursuant to section 10(3) of the *Combines Investigation Act,* purported to authorize

representatives of the Director to exercise the powers conferred by section 10(1) of the said Statute in relation to premises of the Association and of eight of the principal companies engaged in the business of transporting and storing household goods.

AND WHEREAS the Association has taken the position with the Director that household goods are not within the meaning of the word "article" in section 32(1)(*c*) of the *Combines Investigation Act,* and that therefore a conspiracy, combination, agreement, or arrangement with another person to prevent, or lessen, unduly, competition in the storage or transportation of household goods would not as a matter of law constitute an offence under the said section 32(1)(*c*).

AND WHEREAS pursuant to section 18(1)(*g*) of the *Exchequer Court Act,* Revised Statutes of Canada, 1952, Chapter 98, the Exchequer Court has exclusive original jurisdiction to hear and determine any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court.

NOW THEREFORE Her Majesty and the Association agree that:

(1) The Exchequer Court of Canada shall determine the following question:

"Subject to section 32(2) of the *Combines Investigation Act* is a person who conspires, combines, agrees or arranges with another person to prevent, or lessen, unduly, competition in the storage or transportation of household goods, guilty of an offence under section 32(1)(*c*) of the *Combines Investigation Act*?"

(2) That question shall be determined on the facts set forth in the recitals to this agreement, the facts appearing in Exhibit "A" and any other facts of which the Court may take judicial notice.

(3) The costs of the proceedings launched in the Exchequer Court by the submission of the above question, and of all appeals from any decision therein shall be in the discretion of the courts.

IN WITNESS WHEREOF the parties hereto have executed these presents the day, month and year first above written.

Executed in the presence of:

(J. R. Geoffrion)

(P. E Trudeau)
Attorney General of Canada

(Y C Rhode)
Executive Vice President

SCHEDULE "B" to REASONS FOR JUDGMENT in
HER MAJESTY THE QUEEN and
CANADIAN WAREHOUSING ASSOCIATION.

History and extracts of statutory provisions preceding paragraph (*a*) of section 2 and paragraph (*c*) of subsection (1) of section 32 of the *Combines Investigation Act* as enacted in 1960.

1889 *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade. 52 Vict., Chap. 41.*

"1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,

(*a*) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in "any article or commodity which may be a subject of trade or commerce;" or—

(*b*) To restrain or injure trade or commerce in relation to any such article or commodity; or—

(*c*) To unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or—

(*d*) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property,—

Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding $4,000 and not less than $200, or to imprisonment for any term not exceeding 2 years; and, if a corporation, is liable on conviction to a penalty not exceeding $10,000 and not less than $1,000."

1892 *The Criminal Code, 1892. 55-56 Vict., Chap. 29.*

"520. Everyone is guilty of an indictable offence and liable to a penalty not exceeding $4,000 and not less than $200, or to 2 years' imprisonment, and if a corporation to a penalty not exceeding $10,000 and not less than $1,000 who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully—

(*a*) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce, or

(*b*) To restrain or injure trade or commerce in relation to any such article or commodity; or

(*c*) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d*) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property."

N.B. Section 1 of the Act of 1889 was repealed by this statute.

1897 *The Customs Tariff, 1897. 60-61 Vict., Chap. 16.*

"18. Whenever the Governor in Council has reason to believe that with regard to any article of commerce there exists any trust, combination, association or agreement of any kind ....."

N.B. This statute contained no definition of "article of commerce".

1899 *62-63 Vict., Chap. 46.*

"1. Section 520 of *The Criminal Code, 1892* is hereby amended by striking out the word 'unduly' in paragraphs (*a*), (*c*) and (*d*) and by striking out the word 'unreasonably' in paragraph (*c*)."

1900 *63-64 Vict., Chap. 46.*

This statute re-enacted section 520 of *The Criminal Code, 1892,* so that it read in the same way as before the 1899 amendment.

1906 *R.S.C., 1906, Chap. 146.*

Section 520 of *The Criminal Code, 1892* was re-enacted as section 498 with the same wording.

1910 *The Combines Investigation Act. 9-10 Edw. VII, Chap. 9.*

"(c) 'combine' means any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of restricting competition in or of controlling the production, manufacture, transportation, storage, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce, and includes the acquisition leasing or otherwise taking over or obtaining by any person to the end aforesaid, of any control over or interest in the business, or any portion of the business, of any other person, and also includes what is known as a trust, monopoly or merger."

1919 *The Combines and Fair Prices Act, 1919. 9-10 Geo. V, Chap. 45.*

"2. The expression 'combine' is used in this Act with intended relation to "articles of commerce" and . . . shall be deemed to include

.....

(c) any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of (1) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing; or (2) preventing, limiting or lessening manufacture or production; or (3) fixing a common price, or a resale price, or a common rental, or a common cost of storage or transportation, or enhancing the price, rental or cost of an article, rental storage or transportation; or (4) preventing or lessening competition in, or substantially controlling, within any particular district, or generally, production, manufacture, purchase, barter, sale, transportation, insurance or supply; or (5) otherwise restraining or injuring commerce."

1923 *The Combines Investigation Act, 1923. 13-14 Geo. V. Chap. 9.*

"2. In this Act, unless the context otherwise requires,—

(a) the expression 'combine' in this Act shall be deemed to have reference to such combines immediately hereinafter defined as have operated or are likely to operate to the detriment of or against the interest of the public, whether consumers, producers or others; and limited as aforesaid, the expression as used in this Act shall be deemed to include

. . .

(3) any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of

. . .

(v) preventing or lessening competition in, or substantially controlling within any particular area or district, or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply; ....."

1927 *The Criminal Code, R.S.C., 1927, Chap. 36.*

Section 498 of the Revised Statutes of 1906 was re-enacted without change.

1927 *Combines Investigation Act. R.S.C., 1927, Chap. 26.*

"2. In this Act, unless the context otherwise requires,

(1) combines which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others and which

. . .

(c) result from any actual or tacit, contract, agreement, arrangement, or combination which has or is designed to have the effect of

. . .

(v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply,

. . .

are described by the word 'combine'."

1935 *The Combines Investigation Act Amendment Act, 1935. 25-26 Geo. V, Chap. 54.*

"2. In this Act, unless the context otherwise requires,

(1) 'combine' means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of

. . .

(e) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply; or . . . . ."

1952 *Combines Investigation Act, R.S.C., 1952, Chap. 314.*

Paragraph (a) of section 2 of this statute contained the same definition of "combine" as appeared in subsection (1) of section 2 of the 1935 Act.

1954 *The Criminal Code 2-3 Eliz., Chap. 51.*

"411 (1). Everyone who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(b) to restrain or injure trade or commerce in relation to any article,

(c) to prevent, limit, or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or

(d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation, or supply of an article, or in the price of insurance upon persons or property,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) For the purposes of this section, 'article' means an article or commodity that may be a subject of trade or commerce."

1960 *Statutes of 1960, 8-9 Eliz., Chap. 45.*

I. Section 1 enacted a new paragraph (a) of section 2 of the *Combines Investigation Act,* R.S.C., 1952, Chap. 314, reading:

"(a) 'article' means an article or commodity that may be the subject of trade or commerce."

II. Section 13 enacted a new section 32 of the *Combines Investigation Act,* reading:

"32. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(*b*) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,

(*c*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

(*d*) to restrain or injure trade or commerce in relation to any article,

is guilty of an indictable offence and is liable to imprisonment for two years."

III. Section 21 repealed section 411 of *The Criminal Code*, and section 22 provided as follows:

"22. Except to the extent that subsection (1) of section 32 of the *Combines Investigation Act* as enacted by this Act is not in substance the same as section 411 of *The Criminal Code* as in force immediately before the coming into force of this Act, the said subsection (1) of section 32 of the *Combines Investigation Act* shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said section 411 of *The Criminal Code*."

Ottawa 1967
Oct. 23-26
Nov. 1

BETWEEN:

NATIONAL CAPITAL COMMISSION .....PLAINTIFF;

AND

MICHAEL BUDD, personally and as Executor of the Estate of Theresa Budd, and ISABELLE BUDD .... DEFENDANTS.

Expropriation—Value of land to owner—Factors involved—Market value not necessarily highest.

Evidence—Expropriation of land—Expert witness—Competence of—Exchequer Court R. 164B—Contents of affidavit—"Value to owner" insufficient statement of issue.

Plaintiff expropriated 42.4 acres of a 50.1 acre parcel which defendant operated as a market garden, leaving an area too small for economic operation as a market garden. The market value to the owner of the whole parcel as a market garden before the expropriation did not exceed $35,000 and while the evidence was insufficient to determine the amount by which defendant's buildings increased the market value of the bare land the court found that a reasonably prudent man in defendant's position would have paid a further $30,000 rather than give up his land and buildings and move his operation elsewhere. The court also found that as speculative building land, which was the parcel's highest and best use, its market value was $65,000. The value of the unexpropriated area was found to be not more than $10,000 as a market garden and $12,000 as potential building land.

Held, the value to defendant of his land before the expropriation was $65,000 and the value to him of what he had left afterwards was $12,000 and the compensation to be awarded was therefore $53,000.

While the value of land to an owner is not less than its market value for its highest and best use it may have a higher value to him, as e g. where it is used in the owner's business, in which case its value to the

owner will be its market value for use in his business (which may be its highest and best use) plus the amount by which his business buildings and fixtures increase that market value plus what he would have been out of pocket if he had to move his business elsewhere (business disturbance).

For the above reason it is not sufficient for purposes of an expert witness' affidavit under Rule 164B to define the issue as "value to the owner" since this may involve market value simply but may also involve market value for some particular use plus a further amount depending on the facts peculiar to the particular former owner.

An expert witness as to land values is not qualified to express an opinion as to the amount an owner would have been prepared to pay for land over and above its market value in order to be allowed to remain in possession.

INFORMATION for expropriation of land.

Mrs. E. M. Thomas, Q.C. for plaintiff.

Jacie C. Horwitz, Q.C. for defendants.

JACKETT P.:—This is an information (substituted pursuant to an order made on August 15, 1967 for two separate informations that had been filed previously) to determine the compensation payable in respect of a 42.4 acres parcel of land, part of which was expropriated on March 24, 1961, and part of which was expropriated on June 12, 1961.

While it was not so at earlier stages, it was common ground at the time of the trial that, at the time of the expropriation, the defendant Michael Budd (hereinafter referred to as "the defendant") was the sole beneficial owner of the whole 42.4 acre parcel subject to the dower rights of his wife, the defendant Isabelle Budd, and subject to an option in respect of which a release had been given since the expropriation.

It is also common ground that, while the property was expropriated on two separate dates, nothing turns on the difference in the dates and the amount of the compensation may be determined as though the expropriation had taken place on June 12, 1961.

The defendant, with the aid of his wife and children, was, prior to the expropriation, producing vegetables for sale to the public on the expropriated property and an adjoining 7.653 acres parcel of land, which he also owned and on which were situate the family residence and some other buildings. The defendant and his family operated a vegetable stand in season on By Ward Market in Ottawa, and

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also sold vegetables from a stand on the roadside outside their property and to persons who came to their place to buy them.

The combined area used by the defendant for growing vegetables is about 3½ miles from the city limits of Ottawa and about 7½ miles from By Ward Market in downtown Ottawa. The part of that land that was not expropriated (the 7.653 acres parcel) is in the Hamlet of Blackburn which is surrounded by the so-called "Green Belt" that has been established by the National Capital Commission. The expropriated area is outside the Hamlet of Blackburn and inside the Green Belt area, having been expropriated for the purposes of that area.

Since the expropriation, the defendant has been continuing in the business of producing and selling vegetables but he has been doing so on a precarious basis. He has left only 4½ to 5 acres that are usable for growing vegetables. That amount of land is not sufficient for an economic operation without the use of a greenhouse or hotbeds, which, as he understands it, he cannot use under the governing by-laws because he was not previously using them. He has only found it possible to supplement the 4½ acres by renting other land on a seasonal basis, and that does not enable him to do the necessary work of preparing the land in one year for growing vegetables in the next year.

While the Information filed by the plaintiff in this Court contains an indication that the plaintiff was willing and had offered to pay $56,000 (less certain advance payments that had been made) as compensation for all claims arising out of the expropriation of the defendant's property, this offer was not accepted, and, at the trial before me, the plaintiff's evidence consisted of the opinion of an experienced real estate dealer, Mr. James A. Crawford—

(a) that the market value of the defendant's combined holdings of land (50.1 acres) immediately before the expropriation was $60,000; and

(b) that the market value of the land remaining to the defendant immediately after the expropriation was $14,500.

The plaintiff's position was that the compensation payable is the difference between these amounts, or $45,500.

The defendant's claim was put before the Court in the form of a document prepared by an experienced real estate dealer, Mr. Louis Titley, and was based on the contention that

(a) the defendant's combined holdings had a value to him immediately before the expropriation of $97,104; and

(b) the land remaining to the defendant immediately after the expropriation had a value to him of $18,636;

and the defendant therefore claims the difference, which amounts to $78,468.

In some, if not all, cases where an expropriation takes some of a person's land and leaves contiguous land to the former owner, the former owner's compensation may be determined by deducting the value to the former owner of the land that he has left from the value to the former owner of all the land that he had before the expropriation. It is common ground that this is such a case.

I have, therefore, to determine the value to the defendant of his land before the expropriation, and the value to the defendant of the land that he had left after the expropriation.

While value to the owner and market value are not necessarily the same thing, market value is always an important factor in the determination of value to the owner. Market value of property means "what it would fetch in the market under the state of things for the time being existing". (Stroud's Judicial Dictionary, Second Edition, page 1164) More specifically, it is the price or consideration that would have been arrived at between a willing vendor and a willing purchaser "bargaining on equal terms". (Compare *The King v. Irving Air Chute Inc.*[1])

To understand the problem in this case, it is important to have in mind that one and the same piece of land may notionally have one market value for one possible use and different market values for other possible uses. That is, a parcel of land may have such of the various characteristics required for farming that willing purchasers of land for farming purposes, considering it in relation to other lands suitable for farming purposes that are in the market,

[1] [1949] S.C.R. 613, per Rand J. at page 623.

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would pay $200 per acre for it (and a willing vendor would sell it for such a price if its only possible use was for farming) while, at the same time, the extension of the built-up area of a city to the neighbourhood of the same parcel of land has brought it among the parcels of land regarded as suitable for building development so that willing purchasers, considering it in relation to other lands suitable for building development that are in the market, would pay $500 per acre for it (and a willing vendor would sell it for such a price if it had no higher or better possible use). In other words, such a hypothetical parcel of land would notionally have a market value of $200 per acre for farming use and a market value of $500 per acre for building development use.

It is, I think, common ground that the value to an owner of land as of any time must be *not less than* its market value for its highest and best use. That is, as I have already indicated, the price that would have been arrived at between a willing purchaser and a willing vendor bargaining on equal terms at that time. Obviously, the beneficial owner can sell his land for the best price obtainable in the market and his land has *a value* to *him* equal to that amount. There are, however, cases where land has a value to its owner in excess of its market value for its highest and best use. The typical case is where a person who owns land is using it for carrying on a business, which use is the highest and best use that may be made of the land. To such a person the land has a value equal to

(a) the market value of the land for that highest and best use (because that is, in theory at least, what it would cost him to obtain equally valuable alternative premises for his business), plus

(b) an amount equal to the various amounts that he would be out of pocket if he had to move his business (moving costs, depreciation in fixtures, loss of profits during the move, etc.), sometimes referred to as "business disturbance".

Clearly, ownership of the land has a "value to the owner" in such a case equal to what he would have to pay for alternative premises for his business plus what he would be out of pocket if he had to move his business, because such ownership saves him from the necessity of acquiring alternative premises for his business and moving it.

Put another way, where use of a parcel of land by the owner for his business constitutes the highest and best use of land, the land has *a value to the owner* equal to

(a) the market value of the bare land for its highest and best use,

(b) the amount by which his business buildings and fixtures increase that market value, and

(c) an amount equal to all the amounts by which he would be out of pocket if he had to move his business to alternative premises (i.e., business disturbance).

Where, however, use of land by the owner for his business does not constitute the highest and best use of the land, a further problem arises.[2] It seems obvious, and I think that it is common ground in this case, that *value to the owner* in such a case is the larger of

(a) market value of the bare land for the highest and best use, or

(b) market value of the bare land for the use for which it is being used, plus the amount that that value is improved by the business buildings and fixtures plus the "business disturbance" amounts to which I have referred.

I can now discuss the problem in this case as it appears to me.

The plaintiff says that the defendant's land before the expropriation, and what was left to him after the expropriation, had, at that time, a market value to a speculator acquiring land to hold for future building development that was higher than its market value for any other use. The defendant says that the highest and best use of his land before expropriation was for the vegetable production (market gardening) business for which he was using it, and that the property left to him after the expropriation had value only as Hamlet property with no special use.

The evidence that has been adduced is hardly sufficient to make any finding as to the value of the defendant's land

[2] This problem is that one must avoid the "duplication trap". See "Federal Expropriation Problems" by Mr. Keith E. Eaton in The Canadian Bar Journal, Vol. 1 (1958) 33, at page 40; also, *Horn v. Sunderland,* [1941] 2 K.B. 26, and *The King v. Edwards,* [1946] Ex. C.R. 311, the cases referred to by him in that connection.

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before the expropriation for use in his kind of market gardening. If I were to conclude that it is not possible to make such a finding on the evidence, I should have to reject the claim in so far as it is based on value to the owner for use in his business as the defendant would have failed to discharge the onus[3] of establishing the amount to which he was entitled on that basis. It would be most unfortunate if I found it necessary to make such a disposition of the claim. I propose therefore to make a finding in connection with that question as best I can on the evidence available.

To begin with, I should say that it seems reasonably clear on the evidence that, prior to the inauguration of the Green Belt scheme, land suitable for farming in the general area with which we are concerned was not too expensive for farm use. One of the experts mentioned prices for ordinary, good farm land in the general area of $200 to $250 per acre. However, the result of the inauguration of the Green Belt scheme was to send land prices in the area so high that, by the time of the expropriation, no reasonably prudent person would have bought such land for the purpose of carrying on an ordinary farming operation. I am inclined to the view that the same thing might be said about the acquisition of land in the area for the purpose of dedicating it to a market garden enterprise such as the defendant's.[4]

In that connection, it is significant that, while the experts refer to some sales where farmers as market gardeners have sold within the relevant time for some other use, there is only one sale of which any knowledge was communicated to the Court where the acquisition was for farming or market gardening purposes, and that was the acquisition by the witness Renaud for his business of market gardening which involved the use of a green house and hot beds and the much more intensive cultivation of a much smaller area than that involved in the defendant's operation. In many ways the site so acquired by Renaud appears to differ radically from the defendant's property, and I have not had the benefit of any helpful comparison by the experts so far as market value is concerned.

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[3] The onus of proof of value is on the former owner. See *The King v. W. D. Morris Realty Ltd.*, [1943] Ex. C.R. 140, per Thorson P. at page 155.

[4] The real estate expert who was called to give evidence for the defendant testified that he would advise a person looking for land to use in a farming operation like the defendant's "to get out of the Ottawa Valley".

Another aspect of the matter that makes it very difficult to appraise the value of the defendant's land for his market gardening operation is the fact that he was able to make available to the Court only the most inadequate information concerning the financial results of his operations. He filed two documents entitled, respectively, "Financial Statement for 1960" and "Financial Report for 1961" in which he adds together his "Income Tax Recorded Net Profit", his "cash increase" for the year, and the total of certain itemized payments largely of a non-business nature to get a "total" which was put forward as being his earnings for the year from his market gardening business and his snow ploughing and similar operations in the winter season. For 1960, this was

Cash increase	$ 563.89
Expenditures	3,499.48
Income tax recorded net profit	2,978.15
Total	$7,041.52

For 1961, it was

Balance	$1,750.45
Payments	1,783.96
Net profit on recorded income tax report	2,108.11
Total	$5,642.52

Other figures are contained in these statements but they are even less meaningful to me than those that I have set out. Taken all together, these statements raise considerable doubt in my mind that a reasonably prudent man would invest any substantial amount in land for the sort of business operation reflected by them, much less the very large sum of money that I am asked to accept as having been the market value of the defendant's land for market gardening before the expropriation.

The figures put forward by the defendant as being the market value of his land before the expropriation for his market gardening operation are

42.4 acres of expropriated area	$55,050
6.636 acres of part remaining	9,954
	$65,004

(This did not take into account 1.017 acres on which his house and fruit trees are located.)

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On the evidence, in my judgment, the balance of probability is that a reasonably prudent man would not have willingly paid $65,000 for this land for use in a business such as the defendant's, and I so find.

It is much more difficult to make any finding as to what a reasonably prudent man would have paid for the defendant's land as it was before the expropriation for use in a business such as the defendant's. I have in mind that there is some evidence that ordinary farm land could have been purchased in the pre-Green Belt times, when this area was a place to buy a farm, for about $250 per acre. I have heard much evidence about the cost of upgrading raw land to a state where it could be used in an operation such as the witness Renaud's. Remembering the differences between the defendant's land and Renaud's and the much larger area involved here, the balance of probability in my opinion is that no reasonably prudent person would have paid more than $700 per acre for all 50.1 acres of the defendant's land as it was immediately before the expropriation to use it in a business such as that that was being carried on by the defendant. That is, I find that the market value of the bare land for such a purpose did not exceed $35,000 in 1961.

I do not propose to make any specific finding with reference to the various amounts that the defendant contends should be added to market value of the land for the purpose for which the land was being used as elements of damage or value to the owner, and in respect of the buildings that were on the land. The amounts so claimed are:

Residence	$12,000[5]
Farm buildings	4,700
Value of custom work	7,000
Location value	8,400
	$32,100

I regard the location value as being included in the amount that I have already fixed as the market value of the bare land for the purpose of the defendant's business. I cannot accept the present value of net winter earnings for snow ploughing, etc. (Value of custom work) as being an amount that can, as such, be added to market value to obtain value

[5] This amount included 1.017 acres of land.

to the owner. Compare *Pastoral Finance Association v. The Minister*.[6] I am not satisfied that I have sufficient evidence to fix any amount as being the amount by which the buildings increase the market value of the bare land. However, I do not think that the matter must necessarily be approached, in a case such as this, by a process of specific findings and the addition of the amounts so found. Having regard to the evidence that I heard as to the way of life that the defendant had developed for his family and himself in connection with this property and the business that he carried on there, having regard to the ordinary elements of expense and loss involved in moving a business and residence, and having regard to the position in the community that the defendant had, according to the evidence, carved out for himself in Blackburn Hamlet, I am satisfied that the balance of probability is that a reasonably prudent man in the defendant's position would have paid an amount of $30,000 over and above market value of the bare land for his type of business sooner than have had to give up his land with the buildings on it and to move his place of residence and business to some other place where an alternative site was available.

Putting the two amounts together, I get a total value to the owner on this basis of not more than $65,000.

Coming to market value for the highest and best use of the whole of the defendant's land before the expropriation, I accept the opinion given by Mr. Crawford for the plaintiff that the highest and best use of the land was as a speculative holding for building development. I have considered as well as I can the various sales that have been brought to my attention and, as nearly as I can tell, he endeavoured to give full weight to all the relevant factors. This again, however, is not a matter that can be determined mathematically, and, giving the matter the best consideration that I can, and allowing a little more weight than Mr. Crawford has to the indication of market movement to be found in subsequent sales, I find that the balance of probability is that the market value of the defendant's land before the expropriation for its highest and best use was $65,000, being an average value per acre of $1,300.

[6] [1914] A.C. 1083 at p. 1088.

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In coming to this conclusion, I have not overlooked the defendant's contention that a person in his position could have stripped the top soil off his land and sold it for an amount that would have realized $500 per acre before selling his land for subdivision purposes. This possibility, in my view, has exactly the same weight in the case of the defendant's lands as it had in the case of the comparable lands that were sold with their top soil. Those are the sales on which I am relying. I have also given careful consideration to the alternative opinion expressed by Mr. Titley, the defendant's expert, at trial, based upon a calculation of the amounts for which the defendant's land could have been sold on a per lot basis, if he had subdivided it, and the costs that he would have incurred in so doing. I do not think that that is an acceptable basis for determining the speculative value of raw land for future building purposes. Even if the land were already subdivided, it would not be a proper approach. Compare *The King v. Halin*[7] per Kerwin J. (as he then was) at page 134: "In any event, the trial judge did not take into consideration the fact that the prices obtained on the sale of individual lots should not be applied to the disposal by the respondent of a great number of lots at one time."

I find, therefore, that the *value to the defendant* of his lands before the expropriation was $65,000.

I come now to the value to the defendant of what he had left after the expropriation.

Looking at it from the point of view of the defendant with a market gardening business from which the major part of his producing land had been cut off, I should not have thought that a reasonably prudent person in his position would have regarded the land as having much value for that purpose. I have, moreover, no evidence before me upon which I can make any finding as to the value of the residence. I discount greatly the evidence given on behalf of the defendant of its being worth $12,000 because that was put forward on the assumption that it would be considered both "before" and "after", so that the actual amount was unimportant. I am unable to conclude that the property

[7] [1944] S.C.R. 119.

left to the defendant after the expropriation was worth more than $10,000 as the remnant of a market gardening operation.

I think, however, that the soundest approach is to regard the remaining land, as Mr. Crawford did, as land in the market for speculators having in mind potential building development. I find, however, that the amount of $1,900 per acre put by Mr. Crawford on this parcel as of 1961 is too high.[8] Having regard to the evidence that I have heard as to the market, I am of the opinion that the market value as of that time was not much more than $1,500 per acre, and I find that the 7.653 acres parcel left to the defendant after the expropriation had a value to the defendant at that time of $12,000.

My conclusion is, therefore, that the value of the defendant's land to him before the expropriation was $65,000, and the value to him of what was left after the expropriation was $12,000 so that the difference, to which he is entitled as compensation for releases of all claims arising out of the expropriation, is $53,000.[9] As the defendant has been paid amounts by way of advances on the compensation that total $36,000, there will be judgment for the balance, subject to the usual conditions, in the sum of $17,000.

It is common ground that the defendant is also entitled to interest on unpaid amounts of compensation at 5 per cent. per annum from November 1, 1961 until the date of the judgment.

As an advance of $14,000 was paid in April, 1961, the amount unpaid on November 1, 1961 was $39,000. There will be interest, therefore, on that amount from November 1, 1961 until November 17, 1961, when the second advance of $10,000 was paid. There will be interest at 5 per cent. on $29,000 from November 17, 1961 until April 25, 1962,

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[8] There is no necessary inconsistency between Mr. Crawford's opinion that the 50.1 acres had a value of $1,200 per acre and that the 7.653 acres at almost the same time had a value of $1,900 per acre. These amounts are average rates for the 50.1 acres and 7.653 acres respectively. The 7.653 acres are on the highway and are the most valuable part of the whole area. When they are added to the 42.4 acres, to which he has given a value of $1,073 per acre, they raise the *average* value per acre accordingly.

[9] I am not overlooking the reference to $56,000 in the Information, but I am bound to restrict the judgment to the amount established by the evidence. *The King v. Hooper,* [1942] Ex. C.R. 193.

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when the third advance of $6,000 was paid. There will be interest on $23,000 at 5 per cent. from April 25, 1962 until July 26, 1963, when the fourth advance of $6,000 was paid. There will finally be interest at 5 per cent. on $17,000 from July 26, 1963, until the date of judgment.

The defendant will also have his costs of the action.

There is a procedural matter on which I should comment. It is not uncommon, in expropriation matters instituted under section 27 of the *Exchequer Court Act*, R.S.C. 1952, chapter 106, as this matter was, that the pleadings are not very informative as to the issues of fact on which the Court will have to adjudicate. This is probably due in part at least to the peculiar nature of the proceeding under which the defendant is really a claimant who would ordinarily be a plaintiff.

In accordance with a practice of long standing, the Information in this case alleges no facts material to the amount of compensation payable. This is probably as it should be inasmuch as it is clear that the onus of establishing the compensation payable rests on the former owner. The only allegations in the Statement of Defence that in any way bear on the compensation payable read as follows:

> 2. The defendant Michael Budd was the owner of 52 acres of land of which the plaintiff expropriated 42.4 acres.
>
> 3. The defendants claim the sum of $95,000.00 as compensation for all the expropriated land which sum includes severance damage to the remainder of their lands and premises.

A reply was filed joining issue on the Statement of Defence and saying that the defendant was, at the time of the expropriation, the owner of 53.9 acres.

It would appear that there has not been any pretence of complying with provisions in the Rules of Court, such as:

> *Rule 88:* 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;
>
> . . .
>
> *Rule 93:* Each party in any pleading, not being an information, petition of right or statement of claim, must allege all such facts not appearing in the previous pleadings as he means to rely on . . .
>
> *Rule 96A:* . . . every pleading shall contain the necessary particulars of any claim . . . pleaded . . .

In this case, if I am right in my analysis of it, the plaintiff's claim was based on allegations

(a) as to the various features of the expropriated lands, including improvements, that affect their market value and their value for any use to which he might be putting them,

(b) that the market value of the defendant's lands for their highest and best use before the expropriation was not less than $X, while the market value of the lands left to the defendant after the expropriation for their highest and best use was not more than $Y,

(c) that the defendant was, before the expropriation, using his lands for a particular purpose, and that they had a market value of not less than $A for the use to which he had been putting them, and that, by reason of certain additional facts, they had a value to him over and above such market value; but the value to him of what was left, on the same or any other basis, after the expropriation was not more than $B,

or on some of such allegations.

I do not pretend to be giving an exhaustive or precise indication of the material facts. I am merely endeavouring to indicate that there were material facts that should have been pleaded and to which the plaintiff should have responded.

My suggestion is that, if the material facts were pleaded in cases under section 27 of the *Expropriation Act*, there would be a basis for discovery and the issues would be defined and narrowed so that, when the matter comes to trial, the witnesses, counsel and the Court would be able to concentrate attention on the matters that are actually in dispute. I invite counsel for both the Crown and the owner in similar cases in the future to consider this suggestion.

I also consider it appropriate that I should comment briefly on the application of Rule 164B concerning the evidence of expert witnesses in the light of this case.

Rule 164B provides, as far as relevant for purposes of this comment, that no evidence in chief of an expert witness shall be received at trial unless the Court otherwise orders "in respect of any issue", unless

(a) that issue has been defined to the satisfaction of the Court, and

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(b) the proposed evidence has been set out in written form and filed and served on the opposing party 10 days before trial.

In this case, counsel for the defendant submitted to the Court for approval before trial a statement of the issues in respect of which he proposed to adduce the evidence of "expert witnesses", reading as follows:

> 1. The defendants say that the value to them, the owners of the lands taken, namely, 42.4 acres as of March 23rd, 1961 was $97,104.00.
>
> 2. The defendants further say that the value to them, the owners of the land left after expropriation, namely, 7.6 acres was $18,636.00.
>
> 3. The defendants further say that the difference between these figures, namely, $78,468.00 is the value of the expropriated lands to the owners and reflects the value of the severance damage or injurious affection to the remainder of the property.

This document was not accepted by the Court as a satisfactory statement of the issues in respect of which the experts might give opinion evidence.

The reason that such document was not regarded as satisfactory is that it stated the issues in terms of *value to the owner* which, as I have endeavoured to explain earlier in these reasons, may involve simply market value, but very often involves in addition (a) market value for some particular use, plus (b) a further amount depending on facts peculiar to the particular former owner. The document that I have quoted is not in my opinion a satisfactory statement of an issue in respect of which the testimony of an expert witness would be admissible.

The only basis upon which, in my experience, the testimony of expert witnesses has been tendered in relation to the *quantum* of compensation for expropriated property is that persons who have had sufficient experience in the buying and selling of land can assist the Court by opinion evidence as to what the "willing" vendor would have paid for the land in question at the time in question and what the "willing" purchaser would have accepted for it. They may also, by reason of their experience, be able to give evidence of the factual background of the particular market or of other relevant facts of which they have knowledge.

I know of no special learning or experience that enables a real estate broker, or any other "expert", to give the Court assistance by way of opinion evidence as to the amount that a particular former owner in possession would have

been prepared to pay for the land over and above its market value in order to be allowed to continue in possession. This, as it seems to me, is a matter that must be decided by the Court on the facts of the particular case with such assistance as counsel may be able to supply. I have no doubt that many real estate men who assist counsel in such cases are very useful in making suggestions to counsel as to the manner in which he should frame his submissions. The fact remains that, as I see it, it is a matter for submissions by counsel having regard to the proven facts and not for "expert" opinion given under oath.

For the above reasons, as I have indicated, I did not approve the form in which counsel for the defendant stated the issues in respect of which he proposed to adduce the testimony of his expert witness. Nevertheless, a report prepared by an experienced real estate broker was filed and served on the plaintiff as contemplated by Rule 164B, and the defendant was permitted to put it in evidence at trial to be used to the extent that it was proper evidence; and I think I can say that I have not ignored anything in that report in reaching the conclusions that I have expressed earlier in these reasons.

However, it might not be possible in another case to follow that course and, for that reason, it seems expedient for me to state my personal view as to the contents of this particular document.

The contents of that particular document might be classified as follows:

(a) statements of fact within the personal knowledge of the expert and more or less closely related to his knowledge or experience as a real estate man (these are obviously admissible and require no further comment);

(b) statements of fact based upon information obtained by questioning the former owner or some other person;

(c) opinions as to market value (these are clearly admissible and require no further comment); and

(d) opinions as to what amounts should be paid to the former owner over and above market value.

So far as such a report contains information obtained from third persons, I suggest that, while such statements are

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frequently necessary as a means of indicating what is the subject matter of the opinion and of supporting the opinion, many of them are of such a character that they must be proven as part of the defendant's case and any such statements should, in addition to being in the expert's report, either be the subject of admissions from the other side or of admissible testimony. Others may, of course, be the sort of hearsay that an expert may properly take into account in forming an opinion.[10] With reference to opinions as to amounts in addition to market value that should be awarded to the former owner, I have already indicated that I know of no basis for receiving such opinions by way of expert testimony.

[10] Compare *The City of Saint John v. Irving Oil Company Limited*, [1966] S.C.R. 581, per Ritchie J. at pages 591-2.

Vancouver 1967 Oct. 30 Nov. 1

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

SUMITOMO SHOJI CANADA LTD. .....PLAINTIFF;

AND

THE SHIP *WAKAMIYASAN MARU*, HER OWNERS, MITSUI O.S.K. LINES, LTD., AND THEIR AGENTS, C. GARDNER JOHNSON LTD. .... DEFENDANTS.

AND BETWEEN:

SUMITOMO SHOJI CANADA LTD. .....PLAINTIFF;

AND

THE SHIP *KENSHO MARU*, HER OWNERS, MITSUI O.S.K. LINES, LTD. AND THEIR AGENTS, C. GARDNER JOHNSON LTD. ..... DEFENDANTS.

Shipping—Practice—Damage to cargo—Non-resident defendant—Motion for leave to serve notice of writ in foreign country—Supporting affidavit—Essential requirements of—Admiralty Rules 20, 21, 22, 23, 24, 25—Exchequer Court Rule 215.

Plaintiff issued a writ of summons *in rem* against a ship and *in personam* against its owner and agent claiming for damage to cargo carried into Vancouver and applied for leave to serve notice of the writs on the owner in Japan. The motion was supported by an affidavit by plain-

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tiff's solicitor deposing (1) that the action was for damage by negligence to cargo carried into Vancouver, (2) that the owner had a head office in Tokyo and deponent believed it was a company incorporated by the laws of Japan, and (3) that deponent believed plaintiff had a good cause of action.

Held, the motion must be dismissed for non-compliance with the rules.

1. Admiralty Rules 20 and 21 require that the supporting material disclose by reasonable evidence a cause of action and that the cause of action is within Rule 20. It is not enough merely to state what the action is about and that deponent believes there is a good cause of action. *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks* [1904-7] All E.R. 234, *Orr v. Brown* [1932] 2 W.W.R. 626, 45 B.C.R. 323, *Shore v. Hewson* (1908) 7 W.L.R. 634, *Collins v. North British and Mercantile Ins. Co.* [1894] 3 Ch. D. 228, referred to.

2. The supporting material did not disclose that the owner could not be found in British Columbia, as required by Rule 21, or that the owner was not in a British Dominion, as required by Rule 23.

3. The proper order on such a motion should be for leave to issue a writ for service out of the jurisdiction in Form 7 and to serve such writ in Japan by notice under Admiralty Rule 22. Where as here the action is commenced by writ for service within the jurisdiction the writ issued for service out of the jurisdiction should bear *teste* the date of the original writ in the same manner as a concurrent writ in accordance with the practice authorized by Exchequer Court Rule 2 which is made applicable by Admiralty Rule 215.

MOTION.

E. C. Chiasson for plaintiff.

SHEPPARD D.J.:—In each of two actions the plaintiff has moved *ex parte* for leave to serve out of the jurisdiction on the defendant Mitsui O.S.K. Lines, Ltd., owners of the ship, the writ of summons issued for service in the jurisdiction by serving notice thereof.

In each action the plaintiff, according to the endorsement on the writ of summons, has claimed for damage to cargo carried into Vancouver by the ship *Wakamiyasan Maru* in Action 28/67 and by the ship *Kensho Maru* in Action 29/67. In each action the plaintiff issued a writ *in rem* against the ship and *in personam* against the owners, Mitsui Co. and their agents, C. Gardner Johnson Ltd., claiming for such damage, and has now applied for leave to serve each such writ of summons in Japan on the defendant Mitsui Co. by serving notice of that writ. Each motion is supported by an affidavit of Rolf Weddigen, a barrister and solicitor associated with the plaintiff's solicitors, who deposed:

(1) That the action is for damages by negligence to a cargo carried into Vancouver, B.C.;

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(2) That the ship was owned by the defendant, Mitsui Co., which has a head office in Tokyo, Japan, and which he verily believes is a company incorporated by the laws of Japan;

(3) That the deponent verily believes that the plaintiff has a good cause of action.

The material does not permit an order for service out of the jurisdiction as not complying with the Admiralty Rules. Service out of the jurisdiction is provided in Admiralty Rules 20 to 24[1] inclusive; Rule 20 defines the causes of action in which such service may be ordered and the remaining Rules, particularly Rule 21 provide for matters to be dealt with in the material supporting the application.

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[1] 20. Service out of the jurisdiction of a writ of summons or a third party notice, may be allowed by the Court whenever:—

(*a*) Any relief is sought against any person domiciled or ordinarily resident within the district or division in which the action is instituted;

(*b*) The action is founded on any breach or alleged breach within the district or division in which the action is instituted of any contract wherever made, which according to the terms thereof ought to be performed within such district or division;

(*c*) Any injunction is sought as to anything to be done within the district or division in which the action is instituted;

(*d*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the district or division in which the action is instituted;

(*e*) The action is in tort in respect of goods carried on a ship into a port within the district or division of the registry in which the action is instituted.

21. Every application for leave to serve a writ of summons, or notice of a writ of summons, on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction.

22. Any order giving leave to effect such service, or give such notice, shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country, where or within which, the writ is to be served or the notice given.

23. When the defendant is neither a British subject nor in British Dominions, notice of the writ, and not the writ itself, is to be served upon him. A form of notice will be found in the Appendix hereto, Form 8.

24. Notice in lieu of service shall be given in the manner in which writs of summons are served.

Admiralty Rules 20 and 21 are similar in part to the Rules found in the Supreme Court of Judicature in England (Annual Practice, 1957, Order 11, Rules 1 and 4) and followed in various provinces, and such Rules have been construed to require the following proof to obtain an order for service out of the jurisdiction:

1. That facts be proven to disclose a reasonable cause of action.

In *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks*[2], Lord Davey at p. 236 said:

> If the court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order.

In *Orr v. Brown et al*[3], M. A. Macdonald J.A. at p. 630 stated:

> This appeal may be disposed of on one ground. The material in support of the application must disclose, by reasonable evidence, a cause of action: *Van Hemelryck v. Lyall Shipbuilding Co.* [1921] 1 A.C. 698, at 701, 90 L.J.P.C. 96.

and applied in *K. J. Preiswerck Limited v. Los Angeles-Seattle Motor Express Incorporated et al*[4] where Lord J. at p. 94 said:

> The material in support of the application must disclose, by reasonable evidence, a cause of action: *Orr v. Brown* [1932] 2 W.W.R. 626, 45 B.C.R. 323. See also O. 11, R. 4, Supreme Court Rules.

See also *Bell Bros. Transport Ltd. v. Cummins Diesel Power Ltd. et al*[5], per Johnson J.A. at p. 171.

2. That such facts bring the cause of action within Rule 20.

In *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* Lord Davey at p. 236 said:

> Rule 1 of Ord. 11 (the equivalent of Admiralty Rule 20) enumerates the cases in which the court may give leave to serve a writ out of the jurisdiction.

and in *Vitkovice Horni a Hutni Tezirstvo v. Korner*[6], Lord Radcliffe at p. 882 said:

> Rule 1 defines the circumstances in which a judge may in his discretion allow such a writ to be served; . . .

Hemelryck v. William Lyall Shipbuilding Company, Ltd.[7], per Lord Buckmaster at pp. 700-701.

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[2] [1904-7] All E.R. 234.
[3] [1932] 2 W.W.R. 626 (B.C.).
[4] (1957) 22 W.W.R. 93 (B.C.).
[5] (1962) 40 W.W.R. 169 (Alta.).
[6] [1951] A.C. 869.
[7] [1921] 1 A.C. 698.

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In the affidavits in support of the applications there is no proof of facts disclosing a cause of action nor proof of facts to bring such cause of action within Admiralty Rule 20. The deponent merely states what the action is about.

On this ground the applications fail.

3. That Rule 21 expressly states that the application "shall be supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action".

It has been held that it is not necessary to state in those words that the plaintiff has a good cause of action.

In *Shore v. Hewson*[8] Lamont J. at p. 636 said:

> In Fowler v. Barslow, 51 L.J. Ch. 104, Jessel, M.R., said: "The rule is that when the facts are stated in the affidavit, it is not necessary to say in words 'there is a good cause of action'." The affidavit of the plaintiff sets out facts which satisfy me that he had a good cause of action.

However, a mere statement of the facts of the plaintiff's case does not exclude the possibility of a defence, and therefore does not necessarily imply the deponent's belief in a good cause of action. Hence the material should include a statement of the deponent's belief in the cause of action as directed by the Rule: *Collins v. North British and Mercantile Insurance Company*[9].

It is to be observed that every order for service out of the jurisdiction, although complying with the Rules is, nevertheless, discretionary. In *Vitkovice Horni a Hutni Tezirstvo v. Korner, supra,* at p. 882, Lord Radcliffe said: "Rule 1 defines the circumstances in which a judge may in his discretion allow such a writ to be served;" and in *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* Lord James of Hereford at p. 236 said:

> To bring those who may be foreigners from far away—without knowledge of our language or procedure—without possible means of proof at hand, imposes a burden and difficulty which ought not to be lightly inflicted. But this power does exist, and the conditions under which it is to be exercised are to be found in Ord. 11, rr. 1 and 4.

That discretion is expressly provided for in Admiralty Rule 21 which states: "and no such leave shall be granted unless it shall be made efficiently to appear to the Court that the case is a proper one for service out of the jurisdiction".

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[8] [1908] 7 W.L.R. 634 (Sask.).

[9] [1894] 3 Ch. D. 228 at p. 235.

By reason of such discretion the deponent or other witness to support the application is restricted. In *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* Lord Davey at p. 236, after referring to the rules, said:

> This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient . . . . But I think that the application should be supported by an affidavit stating facts which, if proved, would be a sufficient foundation for the alleged cause of action, and, as a rule, the affidavit should be by some person acquainted with the facts, or, at any rate, should specify the sources or persons from whom the deponent derives his information.

There is the question whether the affidavits disclose such knowledge of the facts as to make the deponent a proper deponent of belief in the action under *Chemische Fabrik Vormals Sandoz v. Badische Anilin und Soda Fabriks, supra,* but that appears to be a matter of weight and not the omission of something required by a rule. As a matter of weight it is rather more important on a motion to set aside the order on the ground that this jurisdiction is not *forum conveniens* as in *K. J. Preiswerck Limited v. Los Angeles-Seattle Motor Express Incorporated et al*[10] per Lord J. at p. 575. A solicitor for the plaintiff would usually have inquired of the cause of action and also of any possible defence, hence a belief by such solicitor or his associate would permit an order for service out of the jurisdiction, particularly here where the affidavit states inquiries were made.

4. Rule 21 requires the affidavit or other evidence to show "in what place or country such defendant is or probably may be found", and under Rule 23 there is required evidence whether or not the defendant is a British subject or in a British Dominion.

The material should show "in what place or country such defendant is or probably may be found" (Admiralty Rule 21). There is evidence the Mitsui Company was incorporated in Japan and has its head office there. There is no evidence that it cannot be found in British Columbia so as to make service out of the jurisdiction unnecessary, or that it is not in a British Dominion within Rule 23. It follows that the material in support of the application is deficient.

[10] (1957) 23 W.W.R. 574 (B.C.).

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Sheppard D.J.

The plaintiff asks for service by notice of the writ of summons issued in the action. That has been issued for service within the jurisdiction. Notice of the writ is merely an alternative method of effecting service of the writ. When the defendant is neither a British subject nor in a British Dominion, then the notice of the writ and not the writ is served (Admiralty Rule 23) but otherwise the writ is served.

A writ of summons for service out of the jurisdiction is in Form 7 and is in contrast to a writ *in personam* for service within the jurisdiction, which is Form 6. In a writ for service within the jurisdiction the time for appearance is fixed by the Rules (Rule 25 and Form 6), whereas the time for appearance to a writ for service out of the jurisdiction is fixed by order of the Court (Rule 22). Hence whether the writ or notice thereof be served, the writ must be in Form 7 for service out of the jurisdiction and the notice is a "Notice in lieu of Writ for Service out of Jurisdiction" (Form 8).

It follows that the proper order should be for leave to issue a writ for service out of the jurisdiction in Form 7, and to serve such writ in Japan by notice (Rule 22). While there is no express rule permitting a concurrent writ, nevertheless, as this action has been commenced by writ for service within the jurisdiction and this proposed writ is issued only for the purpose of service, it should bear *teste* of the date of the original writ in the same manner as a concurrent writ. This practice is authorized by the Exchequer Rule 2 made applicable by Admiralty Rule 215.

In conclusion, the applications of the plaintiff are refused and there is leave to apply.

BETWEEN:

RONALD K. CUMMING .....APPELLANT;

AND

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

Ottawa 1967 Sept. 26-28 Nov. 8

Income tax—Practice of profession—Anaesthetist—Services rendered at hospital—Administrative work done at home—Automobile expense of travel between home and hospital—Whether deductible—Whether "personal and living expenses"—Income Tax Act, s. 12(1)(h).

Appellant, a doctor, carried on practice exclusively as an anaesthetist, rendering all of his services to patients at the Ottawa Civic Hospital. As there was no place in the hospital where the administrative functions of his practice, billing etc., could be carried on he performed most of this work at his home about half a mile away, using an automobile to travel between his home and the hospital.

Held, since appellant could not live at the hospital nor carry out all of his activities there he had to have a place away from the hospital for the successful carrying on of his practice, and therefore the expense of maintaining and operating the automobile in travelling between the two places for the purpose of his practice was a deductible expense and not a "personal and living expense" within the meaning of s. 12(1)(*h*) of the *Income Tax Act*. *Newsom v. Robertson* (1952) 33 T.C. 452, distinguished.

INCOME TAX APPEALS.

Gordon F. Henderson, Q.C. and *Antoine de L. Panet* for appellant.

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

THURLOW J.:—The issue in these appeals, which are from re-assessments of income tax for the years 1962 and 1963 respectively, is the extent of the deductions to which the appellant is entitled, in computing his income, for the expenses of operating an automobile and for allowances in respect of its capital cost.

The appellant is a physician and is engaged in practicing exclusively in his specialty as an anaesthetist. He holds what is referred to as an appointment to the staff of the Ottawa Civic Hospital and it is there that he renders all of his services to his patients. But there are no emoluments paid to him by the hospital. His income receipts from his practice consist of the amounts which the patients pay him for his services. The billing of these patients and most of

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what may be classed as the administrative work involved in securing payment for his services is done at his home, which is located about half a mile from the hospital. In both years the appellant used an automobile for the purpose of travelling between his home and the hospital and the principal dispute in the appeals turns on the question whether expenses incurred in maintaining and operating the automobile for this purpose are properly deductible in computing his income from his practice. The Minister's position is that the expenses of ordinary travelling between these points at the beginning and end of a day's scheduled work at the hospital and of travelling between them in response to a call at a time when the appellant happens to be at his home (as opposed to travelling to the hospital on receipt of a call when actually engaged in working on his records at home) are not "incurred for the purpose of gaining or producing income" from the appellant's business within the meaning of the exception to section 12(1)(*a*) of the *Income Tax Act* but are "personal or living expenses" the deduction of which is prohibited by section 12(1)(*h*) of the Act. There is also an issue of fact to be determined as to the extent to which the expenses incurred and the use made of the automobile in the years in question were referable to travelling concerned with the appellant's practice as opposed to travelling for purposes in no way referable to it.

In general the services rendered by the appellant in connection with the administration of anaesthetic for a scheduled operation consist in visiting the patient in his room in the hospital the evening before the operation for the purpose of determining the particular anaesthetic and the quantity to be administered and other details, administering the anaesthetic immediately prior to and during the operation, visiting the patient to determine his condition *vis-à-vis* the anaesthetic prior to his leaving the recovery room and visiting the patient again about twenty-four hours afterwards for the purpose of checking on the effects of the anaesthetic and ascertaining whether they have completely disappeared. In the case of an emergency operation the appellant's services are the same save that the pre-operative visit may not be possible. In addition the appellant and other anaesthetists render emergency resuscitative services for patients suffering from impairment of

the respiratory or circulatory systems when occasion to do so arises. There are some twenty-six different rooms or areas in the hospital where anaesthetics are administered and at the material times there were fifteen anaesthetists engaged in administering them at the hospital. The appellant's services to his patients were thus rendered in a variety of different places within the hospital itself including the various operating rooms, the recovery rooms and the patients' rooms.

A minor portion of the equipment which the appellant used in rendering his services was his own and this he carried with him when visiting the patients. Most of the equipment used belonged to and was provided by the hospital which also provided all the anaesthetic and other medical supplies which he required.

The appellant had a locker at the hospital but no office or desk was provided for him and there was no place at the hospital where the administrative functions of his practice could be carried out. The hospital maintained an operation booking office which produced daily a list of operations scheduled for the next day from which the appellant obtained each evening information respecting the cases to which he had been assigned for the following day and he proceeded to carry out his routine with respect to each patient on the basis of that information. In addition he attended to emergency cases when called on whenever they might arise. For the latter purpose the hospital maintained a duty roster requiring two duty anaesthetists and what was referred to as a "back up" anaesthetist to be available on call for specified periods. Even when on call for emergencies the appellant was not required to remain at the hospital when not actually engaged with a patient. There was a library where he might study and a lounge where he might sit if he wished. There was also a couch in the office of the department of anaesthesia where he might take a nap, if he could, between cases. These facilities, however, were not for his use alone but were provided for the use of all the anaesthetists on the hospital staff.

The appellant's routine was to go to the hospital at about 6:30 each evening to obtain the schedule of operations for the following day and to visit in their rooms the patients to whom he was scheduled to administer anaesthetic the following day and patients to whom he had

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administered anaesthetic the previous day. This usually took him until about 8:00 o'clock when he would return to his home. The following morning he would return to the hospital in time for the first scheduled operation at which he was to serve and he would remain there until his schedule for the day was completed unless there was a gap in his schedule or cancellations should occur leaving him time to go home to work on his records or to study. If a gap was not long enough to make it worthwhile to go home he might use the time in visiting patients to whom he had administered anaesthetic on the previous day. The schedule for the day was normally completed by 4:00 o'clock in the afternoon when he would again return to his home. Some days there would be no opportunities to go home before the schedule was completed while on others there might be several.

Emergency work was, of course, unscheduled and was in addition to the routine of scheduled or elective work. In emergency cases the call for his services might come at any time of the day or night and whether on weekends or other days. It might occur when he was at home or when he was elsewhere whether for social or business reasons. In such cases he was expected to go to the hospital with all necessary dispatch. When he was on emergency call duty, if not already at the hospital in connection with other cases, he was usually at his home and it is there that he was called.

When going to the hospital the appellant carried a booklet in which he would make notes of the names and locations in the hospital of patients that he was to attend and he also carried a supply of cards on each of which, whenever an opportunity to do so occurred, he would enter the name of a patient, his address, next of kin, age, telephone number, location in the hospital, date of operation, surgeon's name, the operation performed, and the time of day, the anaesthetic administered, information as to any insurance coverage which the patient might have and possibly other details concerning the particular patient. From the information on these cards, the appellant would later prepare and send out a bill to the patient for his services. The amount of the fees charged would also be entered on the card and subsequent payments would be recorded on it as well. The work of completing the entries of charges on the cards, making up the bills, preparing insurance claim

forms, corresponding with insurance companies, receiving and making entries with respect to payments, preparing and sending out receipts and follow-up bills both for unpaid accounts and for balances not paid by the insurer, the making up of bank deposits, the paying of bills or expenses and the keeping of records of receipts and expenditures, was all done at his home, by the appellant himself and his wife.

The appellant's home was built to serve his needs and to his specifications. In an area of the building designated on its plan as a den, there was a built-in secretary where the appellant kept his business records and stationery, text books and periodicals and other office equipment and it was there that the work of maintaining the records, sending out accounts, and other office work was done. This was also the part of his home where the appellant's professional study and writing were done. His wife estimated that he works about twelve hours a week on his accounts and that she also works about twelve hours a week attending to opening the mail, posting payments, preparing and sending out receipts and follow-up bills, telephone calls to patients who have not paid their accounts and other details.

When patients call at the house, whether to pay bills or to have insurance forms completed, which is not encouraged and is infrequent, they are received in this room but they are not treated there. The room is also said to be out of bounds to the appellant's children.

This was the appellant's system during 1962, the first of the taxation years in question. In 1963 there was a difference in the original billing and collection phases of the operation. During that year the appellant submitted the necessary information to DARMCO Limited, a company organized to render and collect physicians' accounts, which thereupon billed the patients on the appellant's behalf, collected the payments and accounted to the appellant for them. When DARMCO Limited was unable to collect an account it was returned to the appellant who thereafter took steps to collect it by re-billing the patient, telephoning him and if necessary putting the account into the hands of a collection agency. In other respects the operation was carried out in the same way in both years in question.

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In both years the appellant maintained two automobiles one of which, a Vauxhall, was used generally by his wife and by him only when the other was undergoing repairs or when for some reason it was convenient for him to use it. The expenses of operating this car do not enter into the problem. The other car, a 1961 Chevrolet station wagon, was used by the appellant in travelling to and from the hospital, to the bank or to the DARMCO office or elsewhere in connection with his practice and to some extent as well, for purposes not connected with his practice. The appellant considered it to be mandatory for him to have a car available for his use when required to go to the hospital in response to emergency calls and he also said that apart from this without a car the carrying on of his practice would be more complicated and his office work would pile up. There is evidence that the other anaesthetists practicing in Ottawa also used automobiles to travel to and from the hospital and that the expenses of operating an automobile for that purpose were regarded as being properly deductible for the purpose of computing profit from the practice on commercial accounting principles.

In his return for the year 1962 the appellant claimed deductions of $1,454.01, in respect of the use of the automobile in his practice this being 90 per cent. of a total amount of $1,615.57 made up of $993.06 for operating expenses and $622.51 for capital cost allowance. For the year 1963 the appellant claimed to deduct $1,002, being 90 per cent. of $1,113.33 of which $677.57 was for operating expenses and $435.76 was for capital cost allowance. In respect of each of the two years the Minister in assessing the appellant disallowed the whole of the amount claimed for capital cost allowance and all but $100 of the amount claimed for operating expenses.

It is common ground that the appellant's practice is a business within the meaning of that expression as defined in the *Income Tax Act*. That definition reads:

> 139(1) In this Act,
>
> . . .
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

As this definition makes it clear that "business" does not include an office or employment[1] cases such as *Ricketts v. Colquhoun*,[2] *Mahaffy v. M.N.R.*[3] and *Luks v. M.N.R.*,[4] in each of which particular statutory provisions relating to the computation of income from an office or employment were under consideration, have no application and indeed none of these cases was relied on as governing the present case. The case of *Pook v. Owen*[5] arose under the same statutory provision as *Ricketts v. Colquhoun* and as I see it, is inapplicable for the same reason. The statutory provisions on which the present case is to be determined are, in addition to the definition already cited, section 4 of the *Income Tax Act*, which defines income from a business for a taxation year as being, subject to the other provisions of Part I of the Act, "the profit therefrom for the year" and paragraphs (*a*) and (*h*) of section 12(1) of the Act. These read as follows:

> 12(1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer, . . .
>
> (*h*) personal or living expenses of the taxpayer except travelling expenses (including the entire amount expended for meals and lodging) incurred by the taxpayer while away from home in the course of carrying on his business.

It appears to have become established in England, as well as in Rhodesia and in some other parts of the Commonwealth, that where a professional man lives at a distance from the office or chambers where he carries on his practice the expenses of travelling between his home and his office or chambers are not to be regarded as having been incurred "wholly and exclusively" for the purposes of his practice but on the contrary are personal or living expenses, even though he may do at his home a considerable portion of the work by which his income is earned.

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[1] Income from employment is specifically defined in section 5 of the *Income Tax Act* and that section goes on to prohibit any deduction therefrom whatsoever save what is specifically permitted by certain particular paragraphs of section 11.

[2] [1926] A C 1.

[3] [1946] S C R 450

[4] [1959] Ex. C R. 45.

[5] [1967] 2 All E R 579

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Thus in *C. v. Commissioner of Taxes*[6] Macdonald J.A. speaking for the Appellate Division of the High Court of Rhodesia described the situation as follows at page 141:

> A taxpayer who earns his income in several different places cannot perform the impossible feat of living in all those places at the same time. He will normally choose to live in one of the places where he earns income. The cost of travelling between his home and business in that place are, for reasons which are, to a certain extent, historic and are in modern conditions somewhat artificial, regarded as "living expenses"; see *Newsom v. Robertson, supra.* Journeys for business purposes between that place and the other places in which "income" is earned are not made from choice but of necessity if such income is to be earned and generally speaking, it is not possible, without doing violence to the plain meaning of words, to describe the expense of making these journeys as a "living", "domestic" or "private" expense. If, in the particular circumstances of the case, such expense can be properly described as "domestic or private", then, of course, no deduction may be made.

In the *Newsom v. Robertson*[7] case the Court of Appeal in England had considered the case of a barrister who had chambers in London where he carried on his practice but resided at Whipsnade where he maintained a library and worked on professional matters during the evenings and weekends in term time and throughout the week days as well during the long vacation. He claimed deductions in respect of the expense of travelling between his residence and his chambers both in term time and during the vacation but the Court denied both.

Somervell L.J. said at page 462:

> Mr. Tucker for Mr. Newsom based his argument naturally on the finding that Mr. Newsom's profession was exercised partly at the Old Rectory. Many examples were given in the course of the argument, but the following would be I think a fair example of the type of case to which Mr. Tucker would assimilate the present.
>
> A professional man, say a solicitor, has two places of business, one at Reading and one in London. He normally sees clients and does his professional work at Reading up till noon and then comes to London. He may live at Reading or in London or at neither. I would have agreed with Mr. Tucker that the journeys to and fro between Reading and London were deductible within the Rule. He is carrying on one profession partly in London and partly at Reading. It is therefore necessary to examine in the light of the facts what is meant by the finding that he exercises his profession at the Old Rectory and what are the implications of the fact that the Inland Revenue have recognised that he uses a room there for the purposes of his profession.
>
> One thing is quite clear, that Whipsnade as a locality has nothing to do with Mr. Newsom's practice. That differentiates it from the case of the solicitor which I have put. If he had found a house that suited

[6] [1966], S.A.T.C., 127.

[7] (1952) 33 T.C. 452.

him in Hertfordshire or Oxfordshire, everything would have gone on in precisely the same way. There is, I think, force in Mr. Talbot's criticism of the form of the Commissioners' finding in the Crown's favour, which I have read, namely, that there was a dual *purpose*. Mr. Newsom's purpose in making the journeys was to get home in the evenings or at weekends. The fact that he intended to do professional work when he got there and did so does not make this even a subsidiary "purpose" of his profession. An author who has to go to the seaside to recuperate may write an article while he is there, but in ordinary language that was not the purpose of the journey. He was exercising his profession there, but some authors who do not depend on libraries or local colour can do that anywhere. The places where they exercise their profession would be irrelevant to their profession and I cannot see how the cost of moving from one to the other could be said to be wholly and exclusively laid out for the purpose of their profession. It would be laid out because the author found it pleasant to have, say, two homes. The position would not, I think, be affected by the fact that the author might be entitled to a study allowance in one or perhaps both of his homes.

The conclusion of the Special Commissioners with regard to the expenses in term time seems to me to be right in law. I would myself have doubted whether the journeys to and fro were for the purposes of the profession in any sense. If they were, then in my opinion they were a second and subsidiary purpose.

He also said at page 463:

The Commissioners accepted that a practising barrister need not have chambers and can carry on his profession anywhere he pleases. That is unusual in London, at any rate, and anyhow is not this case. Mr. Newsom had chambers in Lincoln's Inn. They remained open in the vacation. I think they remained his professional base although for his own convenience he had papers sent down from there, or possibly on instructions direct by solicitors, to Whipsnade. The learned Judge held that the position throughout the period of assessment must be taken as a whole. So far as this case is concerned, I agree. There might, of course, be cases where *quoad* travelling expenses the position for one period of the year might differ from the rest of the year. The learned Judge based his decision on what I may call the principle of a dual purpose. He had the authority for that principle not only in the words "wholly" and "exclusively" but in a statement in a judgment of this Court in *Bentleys, Stokes & Lowless v. Beeson,* [1952] 2 All E.R., pages 82, 87. I agree with the learned Judge's reasoning though, as I have stated, I doubt whether the taxpayer in the present case reaches this stage. I therefore would dismiss the appeal.

Denning L.J. said at page 463:

In the days when Income Tax was introduced, nearly 150 years ago, most people lived and worked in the same place. The tradesman lived over the shop, the doctor over the surgery, and the barrister over his chambers, or, at any rate, close enough to walk to them or ride on his horse to them. There were no travelling expenses of getting to the place of work. Later, as means of transport quickened, those who could afford it began to live at a distance from their work and to travel each day by railway into and out of London. So long as people

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had a choice in the matter—whether to live over their work or not—those who chose to live out of London did so for the purposes of their home life because they preferred living in the country to living in London. The cost of travelling to and fro was then obviously not incurred for the purpose of their trade or profession.

Nowadays many people have only a very limited choice as to where they shall live. Business men and professional men cannot live over their work, even if they would like to do so. A few may do so, but once those few have occupied the limited accommodation available in Central London, there is no room for the thousands that are left. They must live outside, at distances varying from 3 miles to 50 miles from London. They have to live where they can find a house. Once they have found it, they must stay there and go to and from it to their work. They simply cannot go and live over their work. What is the position of people so placed? Are their travelling expenses incurred wholly and exclusively for the purposes of the trade, profession, or occupation? I think not. A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense.

On this reasoning I have no doubt that the Commissioners were right in regard to Mr. Newsom's travelling expenses during term time. The only ground on which Mr. Millard Tucker challenged their finding during term time was because Mr. Newsom has a study at his home at Whipsnade completely equipped with law books and does a lot of work there. The Commissioners did not regard this as sufficient to make his home during term time a base from which he carried on his profession, and I agree with them. His base was his chambers in Lincoln's Inn. His home was no more a base of operations than was the train by which he travelled to and fro. He worked at home just as he might work in the train, but it was not his base.

Romer L.J. put the matter thus at page 465:

> Now it is, of course, true that on days when Mr. Newsom has to appear in Court in the Chancery Division the expense of his journey to London from Whipsnade is incurred for the purpose of enabling him to do so in the sense that if he did not come to London he could not earn his brief fee. But if this view of the position were sufficient to justify the deduction of his fares to London for Income Tax purposes every taxpayer in England whose profits are assessable under Schedule D could claim as a permissible deduction his expenses of getting from his place of residence to his place of work. On the other hand, it could scarcely be argued that the cost of going home at the end of the day would be similarly eligible as a deduction and it would be a curious

result of Rule 3 that the morning journey should qualify for relief but that the evening journey should not. Mr. Newsom, in a letter to the Inspector of Taxes, frankly disclaimed any right to relief founded merely on the ground of having to proceed from his home to his place of work and conceded that a man's "profession is not exercised until he arrives at the place at which it is carried on". In my judgment this proposition is, in general, true Moreover, it cannot be said even of the morning journey to work that it is undertaken in order to enable the traveller to exercise his profession; it is undertaken for the purpose of neutralising the effect of his departure from his place of business, for private purposes, on the previous evening. In other words, the object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it.

Is the position altered, then, by the fact, as found by the Commissioners, that Mr. Newsom works in his house at Whipsnade as well as in his chambers in Lincoln's Inn? I am clearly of opinion that it is not. It seems to me impossible to say that this element assimilates the case to that of a man who possesses two separate places of business and, for the furtherance and in the course of his business activities, has to travel from one to another. The appellant could, if he liked, carry on the whole of his profession in London, though he certainly could not do so at Whipsnade if only for the reason that the Courts of the Chancery Division do not sit there. It seems to me accordingly that it is almost impossible to suggest that when the Appellant travels to Whipsnade in the evenings, or at week-ends, he does so for the purpose of enabling him "to carry on and earn profits in his" profession—let alone that he does so exclusively for that purpose. That purpose, as I have said, could be fully achieved by his remaining the whole of the time in London. He goes to Whipsnade not because it is a place where he works but because it is the place where he lives and in which he and his family have their home. Even busy barristers occasionally have an evening free from legal labour, and I feel sure that if Mr. Newsom were lucky enough to have one he would not remain in London on the ground that there was no work to take him to Whipsnade.

Whether or not the reasoning of this decision is applicable in Canada, where the imposition of federal income tax has a history of but fifty years, and where the expression "not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, etc." does not appear in section 12(1)(*a*) of the present *Income Tax Act*, is a matter on which I have some doubt. In the absence of such a decision it would not have occurred to me to think of expenses of operating an automobile for the purpose of getting to a place where the taxpayer's services are to be rendered and returning therefrom were in any ordinary sense "personal or living expenses", nor would it have occurred to me to think that the expenses of the appellant in the circumstances described in this case in travelling between his home, where the administrative side of his practice was carried out, and the hospital, where his

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medical services were rendered, were not incurred by him for the purpose of gaining or producing income from his business. But, as I see it, the applicability or otherwise under the Canadian statute of the opinions expressed in *Newsom v. Robertson* as to the expenses there in question being personal or living expenses is a question which it is unnecessary to decide for in my view the decision rests on the particular facts of the case as well as on the applicable statutory provision and besides the differences in the statutory provisions the facts of the present case present a very different picture. It might well be observed of the barrister in the English case that his living at such a distance as to involve both car and train journeys to get from his home to his professional chambers was the result of a choice made for his personal, rather than his professional, reasons and that this coloured the expense of travelling between these points with a personal character. Here on the contrary, I would think that the appellant's choice of a location for his home about half a mile from the hospital was dictated either wholly or at least partially by the desirability for reasons relating to his practice of his living conveniently near to the place where his services were required as opposed to personal preferences for that over any other location in Ottawa or elsewhere. Somervell L.J., appears to me to have made this point when he said at page 462:

> One thing is quite clear, that Whipsnade as a locality has nothing to do with Mr. Newsom's practice. That differentiates it from the case of the solicitor which I have put. If he had found a house that suited him in Hertfordshire or Oxfordshire, everything would have gone on in precisely the same way.

Romer L.J. also appears to me to have had the same consideration in mind when he observed at page 465:

> The appellant could, if he liked, carry on the whole of his profession in London, though he certainly could not do so at Whipsnade if only for the reason that the Courts of the Chancery Division do not sit there.

I doubt therefore, as well, that the reasoning of this case has any clear application to facts such as I have described in the present case.

However, even assuming that the reasoning of the case may be applied for resolving the present problem, I am of the opinion that it does not support the Minister's position. The reasoning poses the question of the location of

the base of the taxpayer's operation and proceeds to its conclusion after determining this point. On it the Minister's contention was that the base of the appellant's operation was the hospital, where the appellant rendered the services for which he was paid. It was, however, admitted in the course of argument that the appellant conducted part of his practice at his home, that the nature of the business was such that the bookkeeping and financial activities had to be carried on at a location different from that where the patients were treated and that there were no office facilities available to him at the hospital where he might have carried out this part of his business.

While I think it might be said in a particular sense that the appellant exercised his profession at the hospital, as I see it, he had no base of his practice there. His services were not performed in any one place in the hospital but in the numerous areas in which anaesthetics were administered, in the recovery rooms, in the areas where resuscitation procedures were carried out and in the various patients' rooms. The appellant had no space there but a locker that he could call his own. There was a cot in the office of the department of anaesthesia where he might go for a nap if he wished and time permitted between cases. There was also a library where he might study and a lounge where he could sit when not engaged with a patient. But these were not his nor were they for his use alone. They were for the use of all the anaesthetists. Nor had he an office or even a desk there to which he could repair to do the administrative work of his practice when he was not immediately engaged with a patient. The operations booking office was also a place to which he might go for some purposes such as to get a copy of the schedule of operations for the next day but I do not regard any of these places or the aggregation of them as having been any more in the nature of a base for his operation of practicing his profession than any other room which he may have visited for a purpose associated with the carrying out of his professional activity. And if the whole hospital were to be considered his base I fail to see why the area consisting of the whole hospital plus his house and the distance between them could not just as readily be said to be the base of his practice. As I view the matter the appellant had no more of a base for his professional business at the hospital than a

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barrister can be said to have at a court house where he attends frequently as required and in the course of a day may have occasion to be engaged in one or more court rooms on one or more cases and incidently to spend some time in the barristers' robing room and possibly in the court registry office as well. In my view therefore there is no basis for holding that the base of the appellant's practice within the reasoning of *Newsom v. Robertson* was at the Ottawa Civic Hospital.

In my opinion the base of the appellant's practice, if there was any one place that could be called its base, was his home. This was the place from which he was called when required and whence he set forth to serve patients, whether by scheduled appointment or in emergencies. It was the place where the records of his practice were kept, where he worked on them and where his studying for particular cases and for the purpose of keeping up with developments in his specialty was done. It was the place to which he returned during the day whenever the time available was long enough to enable him to make the trip and do some work of the kind which he did there. Indeed, though in fact he went nearly every day, he had no occasion to go to the hospital at all in connection with his practice except when there was some service to be rendered to a patient there. And when he had no work to do there he had no place of his own or base of his practice to repair to but his home where the administrative side of his practice was carried out.

It seems to me that if the appellant had not found it convenient to carry out at his home that part of the work of his practice in fact done there and had maintained an office for the purpose, whether near to or at some distance from the hospital, there could have been little doubt that such office was the base of his practice and that both the reasonable expense of maintaining it and the expense of travelling between it and the hospital would have been expense of his business. The result is, I think, the same where the office, such as it was, was at his home and the work was done there. In the present case it seems to me to be the only single place which could be regarded as the base from which his professional operation was carried on. The case is thus not like that of the barrister travelling from his home to his professional chambers—which, in

Newsom v. Robertson was the base of his operation—but resembles more closely that of the same barrister's travelling between his chambers and the courts, the expense of which, had it involved expense, would, I apprehend, not have been regarded as personal or living expense and would, I also think, have been allowable as a deduction even under the stringent prohibition of the English statute. As I view the matter therefore *Newsom v. Robertson* affords no guide for the determination of the present case and it seems to me to be necessary to reach a conclusion by applying the words of section 12(1)(*a*) and 12(1)(*h*) of the Act without assistance from the jurisprudence of other countries.

In my view, since the appellant could not possibly live in or over the hospital so as to incur no expense whatever in getting to and from it when required and since he could not even carry out at the hospital all the activities of his practice necessary to gain or produce his income therefrom, it was necessary for the successful carrying on of the practice itself that he have a location of some sort somewhere off the hospital premises. This necessity of itself carried the implication that travel by him between the two points would be required. Where, as here, the location off the hospital premises was as close thereto as it might reasonably be expected to be from the point of view of his being available promptly when called as well as from the point of view of economizing on the expense of travelling between the two points it is, I think, unrealistic and a straining of the ordinary meaning of the words used in the statute to refer to any portion of the expense of travelling between these points in connection with his practice as "personal or living expenses" and this I think is so whether the taxpayer lives at or next door to his location off the hospital premises or not. There may no doubt be cases where a further element of personal preference for a more distant location has an appreciable effect on the amount of the expense involved in travelling between the two points but I do not think such an element is present here. In the appellant's situation there is, in my view, no distinction to be made either between journeys from his home to the hospital and returning therefrom in the course of his scheduled daily and evening routines and similar journeys made in response to emergency calls or between journeys

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of either of these types and those made either in response to a call when he was working on his records at home or from the hospital to his home for the purpose of working on his records and then returning to the hospital to attend another patient. In my view whenever he went to the hospital to serve his patients he was doing so for the purpose of gaining income from his practice and the expenses both of going and of returning when the service had been completed were incurred for the same purpose. All such expenses, in my view, fall within the exception to section 12(1)(*a*) and are properly deductible and none of them in my opinion can properly be classed as personal or living expenses within the prohibition of section 12(1)(*h*).

There remains, however, the question of how much of the amounts claimed by the appellant as deductions was properly referable to the appellant's use of the automobile in question in his practice and how much was referable to his use of the automobile for other purposes.

The evidence indicated that the expenses claimed were the expenses of one car, the 1961 Chevrolet, used principally by the appellant in connection with his practice and that the Vauxhall was maintained for his wife's use though on occasion the appellant would use it. It appears from the information in the vouchers accompanying Exhibits 16 and 17 that the Chevrolet travelled 8,071 miles in the period of about one year between January 24, 1962 and January 18, 1963 and a further 5,505 miles in the six months' period between January 18, 1963 and July 15, 1963. It also appears from the vouchers that an item of $440 paid to Cockwell Body Shop and an item of $25.75 paid to Carling Muffler Ltd. included in the expenses claimed for 1962 were in respect of the Vauxhall and there is no explanation of how these became referable to the appellant's practice. In the course of argument Mr. Mogan for the Minister suggested 2,000 miles a year as an estimate of the mileage travelled for the purposes of the appellant's practice and on the basis of the appellant's evidence that five round trips from his house to the hospital per day would be a fair average, I would not regard any more than 2,000 miles per year of the mileage travelled by the car as being referable to the practice. Deducting from the total expenses of $993.06 for the year 1962 the amounts of $440 and $25.75 above mentioned, and discounting the balance of 75 per

cent. in respect of operation of the car other than for the purposes of the practice I assess the expenses of operating the car for the purposes of the practice in 1962 at $130.

On the same rough and ready basis I fix $170 of the total expenses of $677.57 as the proportion of the 1963 expenditures attributable to the operation of the car for the purposes of the practice.

The appellant's claims for capital cost allowances, however, must, I think, be dealt with on a somewhat different basis. With respect to these claims section 20(6) provides as follows:

> 20(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:
>
> . . .
>
> (*e*) Where property has, since it was acquired by a taxpayer, been regularly used in part for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business and in part for some other purpose, the taxpayer shall be deemed to have acquired, for the purpose of gaining or producing income, the proportion of the property that the use regularly made of the property for gaining or producing income is of the whole use regularly made of the property at a capital cost to him equal to the same proportion of the capital cost to him of the whole property; and, if the property has, in such a case, been disposed of, the proceeds of disposition of the proportion of the property deemed to have been acquired for gaining or producing income shall be deemed to be the same proportion of the proceeds of disposition of the whole property;

On the basis of mileage alone, the use made by the taxpayer of the Chevrolet for the purposes of his practice appears to me to have been no more than 25 per cent. of the total use and if this were the only thing to be considered as being "use" of an automobile the basis for calculation of the appellant's capital cost allowance would, it seems, necessarily be limited by section 20(6)(*e*) to 25 per cent. of the total capital cost of the automobile. The appellant on the other hand, and his accountant, considered that 90 per cent. of the use of the car was use for the purposes of the practice and this I think was derived by considering its use from the point of view of the time involved in keeping it available for operation in the practice. Thus on a day when the appellant drove the car to the hospital, left it standing there while he was at the hospital, drove it again to return home and perhaps made several more trips with it to the hospital and back in the course of the

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day and at no time had any occasion to drive it for any purpose not associated with the practice, the car might well be considered as having been used throughout that day solely for the purposes of the practice. It was urged as well, and it is I think notorious, that an automobile depreciates both from operating it and by becoming obsolete and that the loss in capital value over a year through the latter might well be greater than through the former. I have no difficulty in accepting the evidence that the car was used (in the time sense) a great deal more for the purposes of the practice than it was used for other purposes but I think that an estimate of the proportion of the use to be attributed to the practice must have some regard both to the extent of wear and tear through driving it for the purposes of the practice as compared with the driving done for other purposes and to the extent of the time in which it was in use for the purposes of the practice as compared with the time it was in use for other purposes. On this basis I would fix the proportion of the use made of the car for the purposes of the practice at 50 per cent. and the capital cost for the purposes of section 11(1) (*a*) and the regulations at 50 per cent. of its capital cost. The appellant is entitled to deductions in each year for capital cost allowance calculated on that basis.

The appeals therefore succeed and they will be allowed to the extent indicated.

The appellant is entitled to costs.

Montreal
1967
Nov. 6
Nov. 9

BETWEEN:

NORD-DEUTSCHE VERSICHERUNGS GESELLSCHAFT *et al.* — SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT;

AND

KONINKLIJKE NEDERLANDSCHE STOOMBOOT- MAATSCHAPPIJ N.V. (THE ROYAL NETHERLANDS STEAMSHIP COMPANY) ..... — THIRD PARTY DEFENDANT.

Court—Judges—Allegation of bias—Motion to appoint another judge—Principles of natural justice.

A Commissioner appointed under s. 558 of the *Canada Shipping Act* to investigate a collision of ships in the lower St. Lawrence River found that negligence by a ship's pilot was the cause of the collision, but this court, on an appeal by the pilot heard by three judges, rejected this finding Subsequently suppliants filed a petition of right in this court for the loss of lives and a ship in the collision. The defence was that the collision was caused by the pilot's negligence, as the Commissioner had found, and the Crown moved that on the ground of natural justice the case be heard by a judge who had not sat on the appeal which rejected the Commissioner's finding.

Held, the motion must be dismissed.

Exchequer Court Rule 2, considered.

MOTION.

A. S. Hyndman for suppliants.

Léon Lalande, Q.C. and *Paul Ollivier, Q.C.* for respondent.

J. Brisset, Q.C. for third party.

JACKETT P.:—This is an application by the Attorney General of Canada for an order that the judge who will preside at the trial of this Petition of Right proceeding be other than one of the judges who sat and rendered judgment in the appeal of Cyrille Bélisle, being Admiralty Proceeding No. 308[1], on the following ground:

That having heard and considered evidence relating to and expressed their opinion on some of the principal questions in issue

[1] [1967] 2 Ex. C.R. 141.

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in this action, it is not in accordance with the principles of natural justice that any of the judges who sat on the said appeal should now preside at the trial of this action.

Pursuant to Part VIII (section 588(1)) of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, the Minister of Transport appointed The Honourable Mr. Justice Charles A. Cannon of the Superior Court of Quebec to be a Commissioner to hold a formal investigation into the circumstances attending a collision between the M.V. *Transatlantic* and the M.V. *Hermes* on the St. Lawrence River on April 10, 1965, and the subsequent loss of the M.V. *Transatlantic* with loss of lives.

The Commissioner, who was for that purpose a "court" (section 558(1)), held the investigation with three assessors selected for the purpose by the Minister (section 563).

By virtue of paragraph (*a*) of section 568(1) of the *Canada Shipping Act*, the "court" (i.e. the Commissioner) holding a formal investigation into such a "shipping casualty" has power, if at least one assessor concurs, to cancel or suspend the licence of a pilot "if the court finds that the loss..., or serious damage to, any ship, or loss of life has been caused by his wrongful act or default". In other words, the pilot must have committed a "wrongful act or default" and that wrongful act or default must have "caused" the loss or damage to the ship or loss of life.

On March 18, 1966, the Commissioner delivered his decision, with which all three assessors concurred.

To understand the present application, it is important to note some of the background.

As far as I can ascertain, it is common ground that the *Hermes* entered a narrow channel that was only partially marked when the *Transatlantic* was approaching from the other direction, and went too close to the submerged bank of that channel with the result that she took a sheer that resulted in her colliding with the *Transatlantic*.

The pilot on the *Hermes* took the position that he was following the line indicated by an aid to navigation—the Pointe du Lac ranges—and that a recent change in the position of one of the marks in question, of which mariners did not know and had not been advised, was the cause of his ship going over too close to the bank of the channel.

The Commissioner held, *inter alia*, that the licence of the pilot on the *Hermes* should be suspended for three months for reasons expressed as follows:

> All this evidence shows that there is no doubt that there is no fault to impute to the *Transatlantic* nor to her pilot or officers, but that on the contrary the fault is to be attributed to Pilot Bélisle who was imprudent in deciding to meet the *Transatlantic* in the narrow part of the channel when he could have met her in the wide part of the Yamachiche anchorage and that he was in fault:—
>
> (*a*) in going full speed into the narrow part of the channel when he had to meet a ship in it;
>
> (*b*) in attempting this manoeuvre when buoy 51 L that was to serve him as a guide to indicate the entrance of the narrow channel was not in place;
>
> (*c*) in following the line given by the Pointe du Lac ranges in line when he knew since last year that the lower range was not in its place;
>
> (*d*) in proceeding at full speed when it was the first time in 1965 that he was going down this part of the River as the pilot of a ship;
>
> (*e*) in neglecting to use his radio telephone.

The Commissioner explained the relatively light sentence, notwithstanding the "disastrous consequences" of the collision, as follows:

> In suspending the licence of Pilot Cyrille Bélisle for a relatively short period, the Court has taken into account the fact that he has a good record and that the primordial responsibility is that of the Department of Transport Pilot Bélisle was attentively following the line indicated by the Pointe du Lac ranges in line and which was supposed to be in the middle of the channel. He mentions this fact several times in his evidence If this line had indicated the middle of the channel, the accident would not have happened. Also, if there had been buoys on the South side of the channel and specially if there had been a buoy at the place where buoy 51 L is put in the Summer, the pilot would have known the exact location of the commencement of the narrow channel and he could have avoided the accident.

By virtue of section 574(3) of the *Canada Shipping Act*, the pilot appealed to the Exchequer Court of Canada on its Admiralty side from this decision in so far as it applied to him, and this Court heard and decided the appeal when Dumoulin and Noël JJ. and the undersigned were present. This Court heard the appeal with the assistance of two assessors brought in under section 30 of the *Admiralty Act*, R.S.C. 1952, chapter 1; and, in accordance with the practice of the Court, decided questions of seamanship involved in the appeal after having obtained and given consideration to the assistance received from such assessors with regard thereto. (It is important to remember that the

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views concerning such questions expressed to the Commissioner by the assessors sitting with him were not available to this Court, and that, as far as questions of seamanship are concerned, this Court's only expert assistance was the opinions obtained from the assessors called in aid in this Court.)

Reasons for Judgment in this Court were delivered by Noël J.[2] Dumoulin J. and myself adopted the Reasons so given. They dealt with the Commissioner's findings of "wrongful acts or omissions" as follows:[3]

> With respect to the finding that Bélisle was imprudent in deciding to meet the *Transatlantic* as he did there appears from the evidence to have been no good reason why the *Hermes* coming downstream should have stopped or reduced her speed in order to meet the *Transatlantic* in the anchorage section of the Yamachiche bend rather than in the bend in the dredged channel. The weather and visibility were good and had there been any reason to take any measure in order to meet a vessel coming in the opposite direction at a sharp turn or narrow passage, the ship stemming the tide, i e, the *Transatlantic* and not the *Hermes* (which was going downstream with the current) would have had to stop or come to a position of safety below or above the point of danger in accordance with Regulation 12, P C. 1954-1925 dated December 3, 1954, (Appendix B), (Exhibit C-5).
>
> Furthermore, it must be borne in mind that, although the Yamachiche bend and anchorage appear clearly on Exhibit C-2, on the day of the collision there was only one spar buoy on the north side that, if visible and reliable, would be of use in indicating to those on board the M/V *Hermes* the limits of the cut of the channel at the eastern part of the anchorage On the other hand, it must be borne in mind that while the Pointe du Lac beacons were Belisle's only aid to navigation, the Commissioner has held that ships were entitled to rely on them "to know where is the center of the narrow channel". Bélisle was therefore entitled to believe that his ship would meet the *Transatlantic* in a normal manner, port to port and without difficulty.
>
> It therefore follows that it is not possible under these circumstances to find in the conduct of the appellant, in choosing to enter the channel and meet the *Transatlantic* therein, anything to justify the suspension of the appellant's certificate as a pilot.
>
> The Commissioner held Bélisle blameworthy for going full speed into a narrow part of the channel when he had to meet a ship in it. The evidence discloses that the speed of the *Hermes* was 15 knots which is not full speed but full manoeuvring speed and which, under the favourable weather conditions which prevailed at that time, does not appear to have been excessive. Furthermore, he was guiding the ship by the Pointe du Lac range beacons on which he was entitled to rely and while he was entering a portion of the channel that, at this point, was narrower than it had been in Yamachiche bend which

[2] [1967] 2 Ex. C.R. 141.

[3] *Loc. cit.* at pp. 145 ff.

he was leaving, it was still of a breadth of 550 feet, which allowed ample room for navigation having regard to the size of the two ships involved. Now, although there is always a danger of interaction between two ships meeting in a narrow channel and of bank effect, which may cause a ship to sheer if a ship is too close to the bank, the appellant had no way of knowing at the time, and there was no reason why he should have apprehended, that he was being misled by Pointe du Lac range into an area in proximity to the bank (the latter being covered by water) where danger of bank effect existed and, therefore, cannot be held blameworthy because of the speed of the *Hermes* at the time even if such speed would increase the unforseeable bank effect on his vessel.

Indeed, had the *Hermes* been in the central portion of her own fairway as Bélisle was entitled to assume he was with Pointe du Lac ranges in line, there was no imprudence in entering the cut at full manoeuvring speed.

The Commissioner blames the appellant, secondly, for attempting this manoeuvre (i e, going full speed into the narrow part of the channel) which, for the appellant, consisted only in a slight change of course to port, when summer buoy 51 L, a guide to indicate the entrance of the narrow channel, was not in place.

The evidence discloses that buoys are not considered fully reliable at any time and of course the summer buoys had not been in place here during the period of winter navigation. The only permanent aids to navigation in this area were the Pointe du Lac ranges which the appellant was entitled to rely on in order to navigate through the channel at this point regardless of the presence or absence of any floating aid to navigation. Here again, it is not possible to find, in the conduct of the appellant, anything that would justify the suspension of his certificate.

The appellant was taken to task by the Commissioner, thirdly, for "...following the line given by the Pointe du Lac ranges in line when he knew since last year that the lower range was not in its place;" and, fourthly, for "...proceeding at full speed when it was the first time in 1965 that he was going down this part of the river as the pilot of a ship;".

The evidence discloses that between 1959 and 1964 there was a movement of the cement base of the lower range (as distinct from the steel tower itself on which the range was fitted) towards the southeast of the order of approximately 21 feet with a net effect at the end of the course of a misalignment of 100 feet south of the center line. The structure itself, however, had been strengthened by lengthening two of its legs to take care of the tilt of the base prior to 1963 which would have moved the beacon and light some six feet to the northwest and compensated somewhat for the displacement of the base.

The evidence of the appellant and other pilots disclose that prior to the year 1965, they knew that, with Pointe du Lac range lights or beacons in line, a vessel proceeding downriver would be about halfway between the imaginary center line in the dredged channel and the imaginary line marking the edge of the channel to the south.

For a down bound ship it was a practice of the mariners to correct the situation by keeping the ranges in line and thus placing the ship on the starboard side of the mid-channel and for an upbound

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ship, it consisted in opening the ranges astern to the north, thus placing the ship on her side of true-mid-channel and thereby allowing a safe port to port meeting.

While the appellant knew of the above displacement, he had no reason to suspect that the conditions had changed since 1964. No notification of any such change had been issued by the Department of Transport and there is no evidence of any other ground for apprehension having come to his attention. He could not have known, and did not know, nor had he any reason to believe that between 1964 and the date of the collision, the cement base of the lower range of Pointe du Lac had been displaced towards the southeast by an additional 11 feet which had the effect of showing the center line of the channel near buoy 54 L and 250 feet south of the true center.

Under the above circumstances, this Court cannot see how the appellant can be held blameworthy for the displacement of the lower range of Pointe du Lac or in proceeding at full manoeuvring speed in a channel relying on the line given by the Pointe du Lac ranges which he had no reason to believe had moved beyond the position they were in in the fall of 1964 nor can he be blamed for proceeding downstream at manoeuvring speed even if he was going down this part of the river for the first time in 1965.

The appellant was finally blamed for "...neglecting to use his radio-telephone".

The evidence discloses that no signal was given prior to the collision because both ships were too close by then and the collision had then become inevitable. As a matter of fact, the appellant being in no position that would cause him to anticipate any danger, it is difficult to understand why the appellant should have used the radio-telephone, how he could have done so and in what manner it would have prevented the collision There is no suggestion that it occurred to the pilot on the other ship involved to use that instrument to warn the appellant of the apprehensions that he says that he had as a result of his observations and no finding or evidence upon which a finding could have been made that he could have communicated anything to the appellant that would have avoided the collision.

Prior to the sudden and unforseeable sheering of the M/V *Hermes* both vessels were on their own side of the channel at a safe distance of each other and there was no obligation for either one to give out signals of any kind or to use the radio-telephone until the sudden and unexpected sheering to port and, of course, by then it was too late to discuss the situation over the radio-telephone. Here again, the appellant cannot be held guilty of any wrongful act or omission sufficient to justify the suspension of his certificate.

The Reasons then dealt with the question as to the "test" that should be applied in deciding how serious a "wrongful act or default" should be to warrant disciplinary action, and concluded as follows:

> Applying that test, it follows that even if the appellant was guilty of the acts or omissions which the Court of Investigation found him to have been guilty of, which, as has already been indicated,

has, in the opinion of this Court, not been demonstrated, they were not of a sufficiently culpable nature to justify the suspension of his certificate, nor was it established, in view of the Commissioner's finding that the range light's last displacement took place prior to the collision, that these acts or omissions were the cause or even a contributing cause of the collision. Counsel for the Minister of Transport took an alternative position in this Court. He attacked the position taken by the Commissioner in holding that the last displacement of the range light had occurred prior to the collision, submitting that the evidence on this point was such that it should be inferred that this displacement took place between the 14th and 17th of April 1965, which was a few days after the collision. During the course of argument the Court took the position that it was not open to the respondent to put forward this submission in this appeal. No attack was made upon the appellant's testimony that he did set his course by the range lights and followed them. In fact, one of the charges against him, of which he was found guilty, was that he did follow the range lights at too great a speed when he should not have done so. Assuming that he did follow the line indicated by the range lights, his ship could not have followed the course that it did unless the last displacement had already taken place. The only explanation of the disaster, if the last displacement had not already taken place, is that pilot Bélisle had failed to set his course by reference to the range lights. An accusation that he did not avail himself of the only aid to navigation that was available to him would have been a very serious one indeed. No such charge was made against him before the Commissioner and it is too late at this stage to endeavour to support the Commissioner's decision to suspend the pilot's licence on the basis of a charge against which he has never had an opportunity to defend himself.

Judgment was pronounced by this Court on April 5, 1967. In the meantime, various proceedings had been instituted against the Crown in respect of death and injury resulting from the collision of the *Transatlantic* and the *Hermes*, of which this Petition of Right is one. As a result of an appearance of counsel involved in the various proceedings, it has been arranged that the other proceedings will be stayed while this action proceeds.

Counsel for the Attorney General of Canada has filed, before the motion came on for hearing, a memorandum in support of his motion, the substantive portion of which reads as follows:

1. The facts, and questions at issue between the parties to this action, appear from the pleadings.

2. It is alleged in paragraph 18 of the Petition of Right that the front range of the Pointe du Lac leading lights was displaced and out of alignment and in paragraph 19, that the misalignment of the Pointe du Lac leading lights was the immediate and sole cause of the collision between the *Transatlantic* and the *Hermes*.

3. These allegations are denied by paragraphs 15 and 16 of the Defence and paragraph 16 alleges that the collision between the two

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ships was due, *inter alia,* to the fault, negligence, imprudence and want of skill of the pilot of the *Hermes,* who was Mr. Cyrille Bélisle.

4 Paragraph 43, and the other paragraphs herein referred to, of the Defence give particulars of the fault committed by Pilot Bélisle by alleging, *inter alia,*

(*a*) that he entered the narrow part of the channel at full speed;

(*b*) that he so entered this part of the channel under winter navigation conditions when, as indicated in paragraph 39, only winter buoys are in place;

(*c*) that he so entered this part of the channel when a meeting with the *Transatlantic* was imminent, instead of reducing his speed and meeting in the Yamachiche Anchorage;

(*d*) that he failed to use his radio-telephone;

(*e*) that he relied entirely on the Pointe du Lac beacons when he knew that this range was inaccurate and unprecise, and as further indicated in paragraph 52, that the front beacon had been displaced and the range was out of line.

5. The Suppliant, by his reply, joined issue on these allegations.

6 A Formal Investigation under the *Canada Shipping Act* into the circumstances attending the collision aforesaid was held by the Honourable Mr. Justice Charles A. Cannon who delivered his report on the 18th day of March, 1966 and found that Pilot Bélisle had caused or contributed to the collision by his wrongful act or default,

(*a*) in going full speed into the narrow part of the channel when he had to meet a ship in it;

(*b*) in attempting this manoeuvre when buoy 51L that was to serve him as a guide to indicate the entrance of the narrow channel was not in place;

(*c*) in following the line given by the Pointe du Lac ranges in line when he knew since last year that the lower range was not in its place;

(*d*) in proceeding at full speed when it was the first time in 1965 that he was going down this part of the River as the pilot of a ship;

(*e*) in neglecting to use his radio telephone. (See pages 20 (top), 7 and 8 of the Report).

7. Bearing in mind that, under winter navigation conditions, buoy 51L was not in place, the foregoing findings of the Commissioner are substantially the allegations of fault made by the Respondent in this action against Pilot Bélisle.

8 On the appeal of Pilot Bélisle from the suspension pronounced against him by Mr Justice Cannon, the Court, composed of the President, Mr. Justice Noel and Mr Justice Dumoulin, considered the above allegations as well as some of the other issues of fact raised by the pleadings herein and expressed their opinion thereon, as appears from the Reasons for Judgment delivered by Mr. Justice Noel and concurred in by the other two members of the Court.

9. More particularly, as regards the allegations referred to in paragraph 4 (*a*), (*b*) and (*c*) hereof in regard to the speed of the *Hermes* in the circumstance of time and place, the said Reasons at pages 5 and 6 contain the following findings:

> With respect to the finding that Bélisle was imprudent in deciding to meet the *Transatlantic* as he did there appears from the evidence to have been no good reason why the *Hermes*

coming downstream should have stopped or reduced her speed in order to meet the *Transatlantic* in the anchorage section of the Yamachiche bend rather than in the bend in the dredged channel.

...The Commissioner held Bélisle blameworthy for going full speed into a narrow part of the channel when he had to meet a ship in it. The evidence discloses that the speed of the *Hermes* was 15 knots which is not full speed but full manoeuvring speed and which, under the favourable weather conditions which prevailed at that time, does not appear to have been excessive.

10 It is alleged in paragraph 43(*f*) of the Defence that Bélisle failed to make use of the winter buoys as an aid to navigation.

Mr. Justice Noel states on page 5 of his Reasons that "Pointe du Lac beacons were Bélisle's only aids to navigation".

11. It is alleged in paragraph 43(*g*) of the Defence that Bélisle was at fault in relying on the Pointe du Lac beacons which he knew to be "inexacts et imprécis".

The Reasons, on page 6, state that Bélisle "was entitled to rely" on this range and add, on page 9, that:

> Under the above circumstances, this Court cannot see how the appellant (Bélisle) can be held blameworthy for the displacement of the lower range of Pointe du Lac or in proceeding at full manoeuvring speed in a channel relying on the line given by the Pointe du Lac ranges which he had no reason to believe had moved beyond the position they were in in the fall of 1964 nor can he be blamed for proceeding downstream at manoeuvring speed even if he was going down this part of the river for the first time in 1965.

...

12 It is alleged in paragraph 39 of the Defence that every pilot entering the Yamachiche Anchorage knows or should know that he will have to re-enter the narrow part of the channel and that this manoeuvre required more care during the winter season when only winter buoys are in place

The Reasons above say on page 6 that this part of the channel "was still of a breadth of 550 feet, which allowed ample room for navigation having regard to the size of the two ships involved", and on page 7, the finding is that Bélisle was entitled to rely on the Pointe du Lac ranges "to navigate through the channel at this point regardless of the presence or absence of any floating aid to navigation".

13 It is alleged in paragraph 43(*i*) of the Defence that Bélisle was at fault in having failed to use his radio-telephone. The Reasons find at page 9 that Bélisle was not at fault in this respect:

> The evidence discloses that no signal was given prior to the collision because both ships were too close by then and the collision had then become inevitable. As a matter of fact, the appellant being in no position that would cause him to anticipate any danger, it is difficult to understand why the appellant should have used the radio-telephone, how he could have done so and in what manner it would have prevented the collision. There is no suggestion that it occurred to the pilot on the other ship involved to use that instrument to warn the appellant of the apprehensions that he says that he had as a result of his observa-

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tions and no finding or evidence upon which a finding could have been made that he could have communicated anything to the appellant that would have avoided the collision.

14. The gist of the Crown's Defence in this case is that the acts and omissions of Pilot Bélisle were the cause of the collision between the two ships.

Mr. Justice Noël says on page 11, that even if the pilot was guilty of the acts or omissions which the Court of Investigation found him to have been guilty of, it was not established "that these acts or omissions were a cause or even a contributing cause of the collision".

15. Having considered the considerable evidence adduced in the Formal Investigation relating to, and expressed their opinion on, some of the principal questions in issue in this action it is not in accordance with the principles of natural justice that any of the judges who sat on the said appeal should now preside at the trial of this action.

The position taken on the motion is that, as a matter of law, judges who have had occasion in the course of their judicial duties to come to a conclusion as to the proper findings of fact on the evidence given in one proceeding are precluded from taking part in another proceeding where findings will have to be made with reference to the same facts.

There is no suggestion that there is any other ground for the motion than the fact that, in the due course of their judicial duties, the judges concerned have expressed their conclusions as to the effect of the evidence before them concerning the questions of fact that were material to the determination of the cause that they were duty bound to determine. I do not understand that there is any other ground for the application than that the conclusions so reached have given the advisers to the Crown a reasonable apprehension of "bias" on the part of such judges, it being made clear by counsel for the Attorney General that the word "bias" was not being used in any invidious sense.

There is, as far as I am aware, no provision in the statute law or rules of court having special application to this Court that deals with recusation or disqualification of a judge. In the circumstances, resort might be had to Rule 2 of the General Rules and Orders of the Exchequer Court of Canada, which reads as follows:

> In any proceedings in the Court where any matter arises not otherwise provided for by any provision in any Act of the Parliament of Canada (except section 34 of the *Exchequer Court Act*) or by any

general rule or order of the Court (except this rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy

(*a*) to the other General Rules and Orders of the Court, or

(*b*) to the practice and procedure in force for similar proceedings in the Courts of that province to which the subject matter of the proceedings most particularly relates,

whichever is, in the opinion of the Court, most appropriate in the circumstances.

The *Quebec Code of Civil Procedure* deals with "Recusation" in Chapter Five. Articles 234 and 235 deal with the grounds for recusation and read as follows:

234. A judge may be recused:

1. If he is related or allied to one of the parties within the degree of cousin-german inclusively;

2. If he is himself a party to an action involving a question similar to the one in dispute;

3 If he has given advice upon the matter in dispute, or has previously taken cognizance of it as an arbitrator, if he has acted as attorney for any of the parties, or if he has made known his opinion extra-judicially;

4. If he is directly interested in an action pending before a court in which any of the parties will be called to sit as judge;

5. If there is mortal enmity between him and any of the parties, or if he has made threats against any of the parties, since the institution of the action or within six months previous to the proposed recusation;

6. If he is tutor, subrogate-tutor or curator, presumptive heir or donee of any of the parties;

7. If he is a member of a group or corporation, or is manager or patron of some order or community which is a party to the suit;

8. If he has any interest in favouring any of the parties;

9. If he is related or allied to the attorney or counsel or to the partner of any of them, either in the direct line, or in the collateral line in the second degree.

235. A judge is disqualified if he or his wife is interested in the action.

It was not suggested that either of these articles lend support for the present application, but it was contended that the grounds set out therein are not exclusive. For this proposition, reliance was placed on *Bourdon v. Cité de Montréal*[4]. I do not propose to express any opinion as to whether that proposition is correct, but I shall assume for the purpose of these Reasons that it is correct.

[4] (1918) 54 S.C. (Que.) 193; 20 P.R. 70.

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Reference was also made by counsel for the Attorney General to other authorities, mainly from common law jurisdictions, but it was not suggested that any of them lent support to the application.

The principle that no man shall be judge in his own cause is, it would appear, based upon an incompatibility between "bias" and the exercise of the judicial function. Not only does this apply automatically when a person is a party to an action, but it applies automatically when a person has a financial interest in the outcome of an action.[5] "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as judge in the matter;...". [6] Furthermore, "a real likelihood" that a person would "from kindred or any other cause" have a "bias" in favour of a party would make it "very wrong" for him to act as a judge,[7] and would probably result in his decision being quashed, in the case of an inferior court upon *certiorari,* or upon appeal. There are many decisions in this country and in England where a justice of the peace or magistrate has had something to do with launching the proceedings, has been a member of or otherwise associated with the body by whom the proceedings were launched, or has been personally related to one of the parties, where one or other of these principles has been applied.[8] In all of that class of case, the disqualification is based upon "a real likelihood" of "bias" arising from the character of the judge's relationship to the cause and not upon a finding of actual bias. None of these situations are suggested in support of this motion and I mention them only to indicate how, as I see it, the authorities on the subject of disqualification are to be regarded.

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[5] *Dimes v. Grand Junction Canal,* (1852) 3 H.L.C. 759, where it was held that a decision of a Lord Chancellor was voidable because he owned shares in a company that was a party to the cause.

[6] *The Queen v. Rand,* L.R. 1 Q.B. 230, per Blackburn J. at pages 232-3.

[7] *The Queen v. Rand,* L.R. 1 Q.B. 230 per Blackburn J. at pages 232-3.

[8] See, for example, *Regina v. Langford,* (1888) 15 O.R. 52, *Regina v. Steele,* (1895) 26 O.R. 540, *Frome United Breweries Company, Limited v. Bath,* [1926] A.C. 586, the authorities reviewed in *Regina v. Camborne Justices,* [1955] 1 Q.B. 41, and *Boudreau v. The Queen,* (1960) 45 M.P.R. 45. Another type of case is where the judge is a member of a restricted class each of the members of which has a special interest in the outcome of the cause. See *The Queen v. Huggins,* [1895] 1 Q.B. 563, and *The Judges v. Attorney-General for Saskatchewan,* (1936-7) 53 T.L.R. 464.

While counsel for the Attorney General may not have put the matter that way, the motion is really based upon the view that the judges who dealt with the pilot's appeal are biased in sense that they have pre-judged some of the issues to be tried in this case.

Counsel referred me to *Hall v. Brigham*,[9] a decision of the Quebec Court of Queen's Bench (Coram: Duval C.J., Caron J., Drummond J., Badgley J., Monk J.), the effect of which is expressed in a headnote reading as follows:

> Held:—That a judge having in another Court in similar suit between the same parties expressed his opinion and delivered judgment in accordance therewith upon the pretensions of the parties which pretensions were to be urged before this Court, should refrain from sitting in the cause.

The report says that the only difference between the two causes was that a different quarter's rent was claimed, but it does not report what was said by the Court. In citing the case, counsel did not put it forward as having application to resolve the problem before me and I do not understand the note as indicating that the Court took the position that a judge was recused or disqualified under the circumstances indicated. Rather the view seems to have been that he "should refrain from sitting", it presumably being possible to arrange matters so that he might do so without interfering with the due administration of justice. Indeed, a recalcitrant renter might force his landlord to sue him for every instalment of rent and take each case to the Court of Appeal, and it seems improbable that the due administration of justice requires that he have a new quota of judges on each appeal even though each appeal involves exactly the same questions of fact and law as all previous appeals on which the judges will have had to pronounce themselves in disposing of those previous appeals.

Counsel for the Attorney General also cited *Healey v. Rauhina et al.*,[10] again without suggesting that it applied a principle that could be used to support his motion. In that case, a magistrate's decision was attacked by reason of his utterances during the course of the hearing. Hutchison J. held as a fact that the evidence did not establish a "real likelihood of bias" but did establish a failure of natural justice "because of a view prematurely formed by the

[9] (1869) 13 L.C.J. 252.

[10] [1958] N.Z.L.R. 945.

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magistrate adverse to the third party".[11] This finding was based upon things said by the magistrate, some of them very early in the hearing.

I have no difficulty in appreciating the finding made by Hutchison J. in *Healey v. Rauhina et al.* and the principle upon which the decision was based. Put in other words, the third party in that case was not given a fair hearing.

The decision that comes closest to the matter that I have to decide is *Barthe v. The Queen.*[12] In that case, an accused person had been refused the issuance of a writ of prohibition to prevent a judge of the Court of Sessions from continuing with the hearing and adjudication of a charge against him of fraud, and he appealed to the Court of Appeal. Very briefly, his complaint was that, in disposing of a related charge arising out of the same facts against a co-accused, the judge had indicated that he had formed the view that the applicant was guilty of the offence with which he was charged. His appeal was dismissed. Choquette J. held simply that the applicant had waived the objection by his participation in the proceedings. Rivard J. (dissenting) would have granted the issuance of the Writ for reasons that seem to involve the extension of the concept of "real likelihood" of bias to cases where the sole ground for such a finding is opinions expressed by the judge in the due performance of his judicial duty. He was of the view that the whole of the record should be examined to see whether the probability of prejudice really existed. The third judge, Hyde J., expressed his conclusion as follows:

> Bias in a judge is a pre-disposition in favour of one of the parties. It may be inferred from financial or other interest where it offends

[11] This finding would appear to be the basis for the way in which the motion that I am dealing with was formulated. Counsel endeavoured also to apply it to the circumstances here during argument. I see no basis for the application. As I understand Hutchison J., he finds that the magistrate in that case had from very early in the trial formulated his conclusion against the third party. Having reached his "view... adverse to the third party" prematurely (without giving the third party a chance to be heard), there was a classic case of "a failure of natural justice". The view so "prematurely" formed in that case was the view upon which the magistrate acted in delivering the judgment that was being attacked. That was not a case of disqualification of the judge or bias but of a failure of a qualified judge to conduct a proper trial. It must not be overlooked that the judge rejected the case based on a "real likelihood of bias".

[12] (1964) 41 Criminal Reports (Canada) 47.

the principle that a person cannot be both judge and prosecutor at the same time. This bias may be sometimes inferred from extra-judicial opinions expressed by the judge, which, I presume, is the basis on which appellant attacks Judge Gaboury's jurisdiction in the present instance.

It is wrong, however, in my opinion, to make any such deduction from the statements made by the learned judge in the *O'Connell* judgment. He clearly recognizes, in the extract cited, that the appellant testified under the protection of the Court. That being the case, the judge is in no different position from that of any judge who hears evidence on a *voir dire* and after excluding the evidence objected to, proceeds with the hearing and adjudication of the case. In the course of the *voir dire* the judge may hear extensive evidence against the accused which he must ignore in disposing of the merits of the case.

The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process. Appellate Courts are frequently called upon to hear appeals from new trials which they have ordered on appeal from a previous trial. The evidence in one may be substantially different from evidence considered in the other.

I see nothing in the judgment of Judge Gaboury indicating that he proposes to ignore the protection which he recognized must be given to the appellant when he testified in the *O'Connell* case. In my view, appellant has failed to establish that Judge Gaboury is biased against him or has prejudged his case.

I think the petition for the issuance of a writ of prohibition was properly refused by the Court below and I would dismiss this appeal.

In my view the correct view of the matter is that which, as I understand it, was adopted by Hyde J. in *Barthe v. The Queen,* when he said that "The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process". In my view, there can be no apprehension of bias on the part of a judge merely because he has, in the course of his judicial duty, expressed his conclusion as to the proper findings on the evidence before him. It is his duty, if the same issues of fact arise for determination in another case, to reach his conclusions with regard thereto on the evidence adduced in that case after giving full consideration to the submissions with regard thereto made on behalf of the parties in that case. It would be quite wrong for a judge in such a case to have regard to "personal knowledge" derived from "a recollection of the evidence" taken in the earlier cause.[13] It is not reasonable to apprehend that there is "a real likelihood" that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case.

[13] Compare *Van Breda v. Silberbauer,* (1869) L.R. 3 P.C. 84 per Sir James W. Colvile at page 99.

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If I may be permitted to say so, it seems to me that the real apprehension is that the judge who hears a case in which the same issues of fact arise as have recently been decided in the same court can hardly ignore the existence of the earlier decision for he cannot be unconscious of the possibility of apparently conflicting decisions creating an atmosphere of lack of confidence in the administration of justice. I should have thought, however, that a judge who participates in both of two such matters is more likely to appreciate and explain different results flowing from different bodies of evidence or differences in presentation and argument than a judge who had no part in the earlier case. I do not say this to indicate that I have a view that the same judge should always try two such cases, but to indicate that, in my view, it is not necessarily prejudicial to the party who assumes the burden of producing a result in the second case that is apparently in conflict with the earlier decision.

While I have dealt at some length with the submissions that have been put forward in support of this motion, and I have examined, as carefully as time permitted,[14] all the authorities that have been cited to me and that I have been able to find myself on the subject of recusation or disqualification of judges, I do not want to create the impression that I have found the particular point that has been put up for decision to be a difficult or doubtful one. In my experience in the courts, and reading authorities, the same question of law comes before the same judge for decision many times and, in the interests of the orderly administration of justice, he must try to be consistent until he is corrected by a higher tribunal, and, similarly, from time to time, causes arise, both in trial courts and courts of appeal, out of the same facts, and judges must, and do, make their findings on the evidence that has been adduced in the particular case. If the fact that a judge had had occasion to pronounce on either a question of law or a question of fact were a ground for recusation or disqualification, it would, as it seems to me, have been a ground for a new hearing in a very substantial number of

[14] By order made last May, this case was set down for trial to commence on November 27, 1967. This motion was brought on before me on November 6. I deem it a matter of urgency to clear up any doubt the motion may have created as to whether the trial will proceed as arranged.

cases in our superior courts. As far as I can remember or have been able to find, the point has never been taken before.

The result, if the Attorney General is correct in his submission that a judge cannot *as a matter of law* preside in the trial of a case where questions of fact arise that have arisen before him previously, would be to make it very difficult, indeed, to arrange for the due administration of justice in a relatively small court, such as this is. I can illustrate the difficulties that would arise by reference to the particular case. This is one of many claims against the Government of Canada that arise out of the same accident and that are the subject of different proceedings in this Court.[15] I am informed by counsel for the Crown that a substantial part of the evidence will be in French. As a practical matter, the only judges in the Court who are qualified to preside at a trial where there is a substantial body of evidence in French (leaving aside one who is on the verge of retirement) are among those who are the subjects of this application. If none of them is qualified to preside at the trial, it will not be possible to proceed with the trial of this action against the Government of Canada[16] unless a deputy judge who is qualified is appointed for the particular case by the Governor in Council under section 8 of the *Exchequer Court Act*, a solution that might be open to misinterpretation. I hope I have not been influenced in my conclusion in this matter by this practical consideration, but I cannot pretend that I have not had it in mind.

Having regard to the conclusion that I have reached, I do not have to consider whether it would have been proper to make the order sought if my conclusion had been that the judges in question are disqualified. It is not the practice of this Court, or any other with which I am familiar,

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[15] If the principle contended for upon this application is sound, a judge who decided any of such cases would be disqualified from deciding any of the others in which the Crown put the claimant to the proof of a fact found against the Crown in the earlier case, or in which the suppliant attempted to establish some fact that the suppliant in the earlier case failed to establish.

[16] If I had come to the conclusion that the Attorney General was otherwise correct, I should have had to consider whether there is an exception where it is dictated by the exigencies of the situation. Consider *Thellusson v. Rendlesham*, (1858) 7 H.L.C. 429, and *The Judges v. Attorney General for Saskatchewan*, (1937) 53 T.L.R. 464 at page 465.

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to entertain applications from the parties concerning the judge who will be assigned to a particular case. This is a matter that has to be decided as a matter of the internal management of the work of the Court and an impossible situation would, in my view, arise, if parties were encouraged to think that they could directly or indirectly play a part in the "picking" of a judge. On the other hand, I am conscious of the fact that there is a procedure in the Superior Court of Quebec for the recusation of a judge and that, in a proper case, that procedure may, I do not say it does, apply in this Court. It must be understood that I am not, because I find that this motion calls for serious and careful deliberation, inviting applications in the future as an indirect way of influencing the appointment of judges.[17]

Having said that, I must also emphasize that the judges of the Court are, of course, anxious that counsel draw to their attention any circumstances that might conceivably constitute a ground why a particular judge should recuse or disqualify himself. This can ordinarily be done by a letter to the Registrar with a copy to the opposing solicitor and should be done as long before trial as the circumstances permit.

The motion is dismissed with costs to the suppliant and third party in any event of the cause.

[17] Compare *Reg. v. Tooke,* (1884) 32 W.R. 753 per Grove J. at page 754.

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Nov. 16

BETWEEN:

ELECTRIC POWER EQUIPMENT LIMITED ..... APPELLANT;

AND

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

Income tax—Associated companies—Income Tax Act, s. 39(4)(d)—Group of companies—Construction of enactment.

Appellant company was controlled by the four children of B. B controlled a second company. The second company controlled a third company. The third company was a shareholder of appellant company.

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Sec. 39(4)(*d*) of the *Income Tax Act* provides:

> "... one corporation is associated with another ... if ... one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations ...".

Held, appellant company was associated with the third company within the meaning of such enactment. The phrase "one of those persons" therein refers not merely to the "group of persons" that controls one of the corporations but to all persons referred to, including the person controlling the other corporation; and the word "person" therein includes a corporation.

INCOME TAX APPEAL.

Allan D. McEachern for appellant.

D. G. H. Bowman for respondent.

SHEPPARD D.J.:—This appeal is by Electric Power Equipment Limited as appellant from an assessment for the taxation years 1964 and 1965 by the Minister, who held that the appellant and two other corporations, namely, Grassington Estates Limited and Bartholomew Engineering Limited, were associated with each other and therefore taxable as associated under section 39 of the *Income Tax Act*, R.S.C. 1952, c. 148 and amendments.

The appellant contends that it was not associated with those companies and therefore the assessment was in error. That is the issue.

The facts follow.

In Electric Power Equipment Limited (the appellant) four sons and daughters of F. J. Bartholomew held 133 of the voting common shares out of 191 issued, therefore that group controlled the corporation; Bartholomew Engineering Limited held 6,958 non-voting common shares out of 18,909 issued.

In Grassington Estates Limited, Bartholomew Engineering Limited held 2,498 voting common shares out of 2,500 issued and in Bartholomew Engineering Limited, F. J. Bartholomew held 51 of the voting common shares out of 100 issued.

After the appellant had filed returns for the taxation years 1964 and 1965, the Minister made a re-assessment holding that the appellant was deemed to be associated

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within section 39 and assessed accordingly. The appellant then filed a notice of objection and the Minister confirmed the re-assessment. Eventually there was an appeal to this Court.

The parties have agreed that if the appellant and Grassington Estates Limited were held to be associated, then Bartholomew Engineering Limited would be associated, hence the sole question is whether the appellant and Grassington Estates Limited are associated, and that turns upon the meaning of section 39(4)(*d*) of the *Income Tax Act* which reads as follows:

> 39.
>
> * * *
>
> (4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,
>
> * * *
>
> (*d*) one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations,...

The issue turns upon the meaning of the words "one of those persons" appearing in section 39(4)(*d*). The appellant contends that those words refer to "each member of a group of persons" so that the true meaning is that one of the group of four sons and daughters of F. J. Bartholomew who controlled the appellant corporation must also hold shares in Grassington Estates Limited, and as no member of that group held shares in Grassington Estates Limited, therefore the appellant and the Grassington Corporation were not associated.

On the other hand, the Minister contends that the phrase to be construed "one of those persons", means that the "one" may be selected from all those "persons" previously referred to in section 39(4)(*d*) as "one person", "that person" and "each member of a group of persons", and further that in each instance the person or persons may be a natural person or a body corporate.

The appellant supports its contention on the grounds:

(a) that the words "those persons" appearing in section 39(4)(*d*) should be taken to refer back to the nearest possible antecedent, and that is "a group of persons", and

(b) that a taxing statute should be clear in imposing a tax and there is at least an ambiguity as to whether the antecedent referred to by the words "one of those persons" is one of the group or all of the persons which are referred to previously in that subsection.

Therefore, as the group does not hold shares in the Grassington Estates Limited the two corporations are not associated and the appeal should be allowed.

That contention fails for various reasons.

(1) The intention of the section is apparent that "one of those persons" who by the subsection is to own one or more shares in each of the corporations is not necessarily one of the group.

(a) "One of those persons" need hold only "one or more shares"—of each of the corporations. That does not require the holding of shares as one of the group having control.

(b) "One person" referred to in the first part of the subsection and again referred to as "that person" is described as "related to each member of a group", hence he need not be one of the group, otherwise being related to each member of the group, he would be related to himself. Being related to oneself can only occur where permitted by statute, as in section 139(5d)(*c*) referred to in *Motivair Ltd. v. M.R.N.*[1], but is not a usual meaning of being related.

It follows that there is some difficulty in construing "one of those persons" as referring back to "a group of persons" so as to exclude "one person" and "that person", also previously mentioned in section 39(4)(*d*).

(2) In effect section 39(4)(*d*) deals expressly with two corporations of which

(a) one corporation is controlled by one person who is related to each member of a group of persons;

(b) another corporation which is controlled by that group of persons, and the section requires;

(c) that "one of those persons" holds one or more shares of each of the *two* corporations.

[1] 66 DTC 77 at p. 81.

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The words "each member" and "group" are here distinctive as readily identifying certain persons and if the words in question, "one of those persons" were intended to be restricted to that group, that could have been done clearly by using such distinctive terms as "member" or "group". In place of doing so, Parliament has chosen other words, namely, "one of those persons", and the word "persons" is different:

(a) as a word capable of including all who have been previously referred to in that subsection as "one person", "that person" or "each member of a group of persons", in that the plural includes the singular: *Interpretation Act,* R.S.C. 1952, c. 158, section 31(*j*);

(b) as the word "persons" has been expressly defined as extending to include a body corporate (section 139(1)(*ac*)).

In a proper construction due effect may be given to that difference: *Hurlbatt v. Barnett*[2], Lord Esher M.R. at p. 79 and Lopes L.J. at p. 80; *Bradlaugh v. Clarke*[3], the Earl of Selborne L.C. at p. 368, and that may be done here by construing the words in question, "one of those persons" as intending to select one from that class of persons which includes all those previously designated as "person" or "persons". Such implied intention is against construing "one of those persons" as equivalent to "each member of a group of persons", and thereby restricting "persons" to a member of that group.

(3) However much could be said for the contention of the appellant, if the words "person" or "persons" were to be construed as referring only to a natural person, that is not the case here.

Under the statute a natural person is defined as an individual (section 139(1)(*u*)) but "person" includes a body corporate (section 139(1)(*ac*)), also the plural includes the singular: *Interpretation Act,* (*supra*), section 31(*j*). Therefore wherever "person" or "persons" appears

[2] (1893) 1 Q.B. 77.

[3] (1882) 8 A.C 354

in the section that word must be read as including an individual and a body corporate and when so construed, section 39(4)(*d*) may be read as follows:

> (*d*) one of the corporations (Grassington Estates Limited) was controlled by one person (which could include Bartholomew Engineering Limited) and that person (Bartholomew Engineering Limited) was related to each member of a group of persons (which may be individuals or corporations, and here contended by the Minister to be the four sons and daughters) that controlled the other corporation (Electric Power Equipment Limited), and one of those persons (which may be a corporation, and hence Bartholomew Engineering Limited) owned directly or indirectly one or more shares of the capital stock of each of the corporations (that is capital stock of Electric Power Equipment Limited and of Grassington Estates Limited), ...

As Bartholemew Engineering Limited held 6,958 non-voting shares in the appellant company and 2,498 shares of the Grassington Estates Limited, therefore Bartholomew Engineering Limited held "one or more shares of the capital stock of each of the corporations" as required by the subsection, namely, in the appellant and in Grassington Estates Limited.

Further, Bartholomew Engineering Limited was "related to each member of a group of persons that controlled the other corporation" (Electric Power Equipment Limited), that is, was related to the four sons and daughters who controlled the appellant company. That is admitted (Agreement, Exhibit 1, Clause 6) and appears from the *Income Tax Act*, section 139(5a) (made applicable by section 39(4a)(*a*)) as follows:

F. J. Bartholomew controlled and therefore was related to Bartholomew Engineering Limited (section 139(5a)(*b*)(i)) and the four sons and daughters who controlled the appellant being related to their father, F. J. Bartholomew, (section 139(5a)(*a*)) who was related to Bartholomew Engineering Company (section 139(5a)(*b*)(i)), were also related to Bartholomew Engineering Limited (section 139(5a)(*b*)(iii)). Therefore Bartholomew Engineering Limited, the person which controlled Grassington Estates Limited, "was related to each member of the group of persons" (the four sons and daughters) "that controlled the other corporation" (Electric Power Equipment Limited). Hence all is as required by section 39(4)(*d*).

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Under section 39(4)(*d*) "one of those persons" must be read as capable of referring to a natural person or to a corporation, and therefore cannot necessarily be confined to that group of individuals who controlled the appellant. Again, the contention of the appellant does not include those instances clearly within section 39(4)(*d*) where one corporation is controlled by another corporation ("a person") and that controlling corporation (described as "that person") is related to each member of the group of individuals who control the other corporation and has the requisite share in the two controlled corporations. That is a meaning which is here contended for by the Minister and should be accepted.

In conclusion, the re-assessments are affirmed and the appeal is dismissed, with costs to the Minister.

Saint John 1967

Oct. 4-5

Nov. 27

BETWEEN:

GERALD J. RYAN .....APPELLANT;

AND

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

Income tax—Capital cost allowance—Non arm's length sale of depreciable property—"Depreciable property", meaning of—Income Tax Act, ss. 6(1)(j), 20(4), 20(6)(b).

In August 1962 appellant's mother bought for $11,200 a 75-acre parcel of land outside Saint John which contained three cottages and a sand pit. Her intention was to build a home for herself thereon and to sell the remainder for building lots or sell sand from the pit, and she forthwith sold two of the cottages for $7,000 and authorized a company to remove sand from the property; the company (which after commencing operations found gravel in the pit) paid her some $4,000 for material removed between November 1962 and March 1963. Appellant's mother could not build a home on the parcel because it was zoned for industrial use, and on April 1st 1963 she sold the remainder of the parcel to appellant for $45,000 payable in 10 equal annual payments. Appellant, who was in the sand and gravel business, claimed a capital cost allowance in respect of the gravel pit on the basis that its capital cost was $45,000, but the Minister applied s. 20(4) of the *Income Tax Act* and fixed his capital cost at $11,100 (being its cost to his mother less $100 for the two cottages).

Held, appellant's appeal must be dismissed.

It is not essential to the application of s. 20(4) of the *Income Tax Act* that the property be "depreciable property" when owned by the transferor. *Caine Lumber Co. v. M.N.R.* [1959] S.C.R. 556, per Mart-

land J. at p. 561, followed. But in any event the property was "depreciable property" in the transferor's hands, since part of her purpose in acquiring it was to deal in any feasible way with the property, whose character made it suitable for such purpose, and it was therefore a capital asset of a business which she carried on. Even if she was not engaged in a business her receipts from the sale of material from the pit were income from property under s. 6(1)(*j*) of the *Income Tax Act*, and therefore the cost of the property, from the time when she authorized the sale of the material, was "depreciable property" by reason of the provisions of s. 20(6) of the *Income Tax Act*. Finally, if s. 20(6)(*b*) of the *Income Tax Act* applied and the property became depreciable property at its fair market value at a time subsequent to its purchase by appellant's mother the evidence did not establish that its fair market value at such time exceeded $11,100.

Income tax—Capital cost allowances—Increasing amount of—Income Tax Act, s. 20(5)(e)—"Allowed", meaning.

Appellant in his 1962 income tax return reported a net income of $3,900 and exemptions of $3,900, and thus no taxable income. In computing his net income he deducted $4,451 for capital cost allowances which was less than the maximum In 1965 it appeared that the Minister would compute appellant's taxable income for 1962 at $3,900. Appellant therefore requested the Minister by letter to increase his capital cost allowance for 1962 by an offsetting amount and though no assessment for 1962 was issued, the notices of assessment for 1963 and 1964 were computed on the basis of the appellant having been entitled to the increased allowance in 1962. Appellant objected to the 1963 and 1964 assessments and on this appeal contended that the effect of such objection was to countermand his request for an increased capital cost allowance for 1962.

Held, rejecting appellant's contention, the increased amount of capital cost allowance requested by appellant had been "allowed" him for 1962 within the meaning of s 20(5)(*e*) of the *Income Tax Act* and such amount must be excluded in computing his capital cost allowance for 1963 and 1964 under Regulation 1100(1)(*a*)

INCOME TAX APPEAL.

E. Neil McKelvey, Q.C. and *J. Ian M. Whitcomb* for appellant.

M. A. Mogan and *M. J. Bonner* for respondent.

THURLOW J.:—This is an appeal from re-assessments of income tax for the years 1963 and 1964. There are two issues, the first and more important of which is the extent of the deductions to which the appellant is entitled, in computing his income, in respect of the capital cost of a gravel pit used in his business. It is common ground that the gravel pit is an "industrial mineral mine" within the meaning of section 1100(1)(*g*) of the Income Tax Regulations and that the appellant is entitled to the deduction

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provided by the regulations in respect of such property. The appellant, however, claims the deduction on the basis of a capital cost of $45,000 while the Minister bases his computation on a capital cost of $11,100.

The other issue is concerned with the capital cost allowances to which the appellant is entitled in respect of certain automotive equipment falling within class 10 of Schedule B of the Income Tax Regulations. This equipment had been partially depreciated in 1962 and the dispute is as to the correct amount to be taken as the undepreciated capital cost of this equipment at the beginning of the 1963 taxation year. This the appellant contends was $3,905.77 greater than the undepreciated capital cost thereof which formed the basis of the Minister's calculation. The details of how this issue arose will be outlined when dealing with it later in these reasons.

The appellant lives at Saint John in the Province of New Brunswick and in 1962 and earlier years he was engaged in a general trucking business which included the supplying of trucks and construction equipment to others on a rental basis. In 1963 his business was expanded to include the supplying of sand and gravel which he obtained from a pit situate on a parcel of land which he had purchased from his mother, Eunice Ryan, by an agreement in writing dated April 1, 1963. The consideration expressed in the agreement was $45,000 payable in ten equal yearly payments and it is this amount which the appellant contends should be taken as the starting point for the purpose of calculating capital cost allowance on the gravel pit.

The property in question was, however, a part of a somewhat larger property which had been acquired by the appellant's mother in the summer of 1962 from the trustee of a bankrupt estate for $11,200. The trustee had endeavoured to interest the appellant in the property, apparently without success, and had twice called for tenders for it. On the second occasion Eunice Ryan had a solicitor put in a tender for her and she was advised some time later that her tender had been accepted. The property was conveyed to her shortly afterwards by a deed dated August 13, 1962.

The property so purchased consisted of some 75 acres of land situated on the southern side of Grandview Avenue to

the eastward of the City of Saint John and across the road from the site of a large oil refinery. The land was zoned for industrial purposes but there were three cottages on it fronting on Grandview Avenue. These had apparently been there for some years and may have been erected before the zoning of the land for industrial purposes came into effect. More than half of the Grandview Avenue frontage, however, was undeveloped, part of this lying between the cottages and the western boundary of the property and a much larger portion lying between the cottages and the eastern boundary of the property.

Near the western boundary line of the property a driveway led southwardly to an abandoned sand or gravel pit located between Grandview Avenue and a stream which crossed the property and thence across the stream to a second sand or gravel pit located to the southward of the stream. The stream itself flowed through a ravine said to be about a hundred feet deep. The previous owner had used the property to some extent as a source of supply for its business of dealing in sand and gravel.

Mrs. Ryan stated in evidence that she bought this property "for building a home" for herself on the particular portion of the Grandview Avenue frontage which lay between the cottages and the western boundary of the property but that she was unable to proceed with this plan because the property was zoned for industrial use. She did not know of the zoning restriction when she bought the property but learned of it some time later. She also said, when asked in cross-examination what she intended to do with the rest of the property, that she thought she might sell it for building lots or sell sand from the pit.

After being advised of the acceptance of her tender but before receiving her deed and without having so much as entered any of the buildings on the property Eunice Ryan by agreements in writing dated July 26, 1962 sold two of the three cottages with, in each case, the lot of land fronting on Grandview Avenue on which it stood, one for $2,500 and the other for $4,500. These transactions were completed by deeds dated October 1, 1962. In both cases the purchaser had been referred to her by the appellant. At about that time or shortly afterwards Mrs. Ryan gave her permission to Universal Constructors Limited to remove sand from the property and in a period commencing in

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November 1962 and terminating in March 1963 that company removed from the property material for which she received a sum in the vicinity of $4,000 calculated on a yard or ton basis. The company had been referred to Mrs. Ryan by the appellant who had also advised her on the price she should charge. In the course of these operations it was discovered that in the pit south of the stream there was a considerable amount of material in which the proportion of gravel to sand was such that it was useful without screening for making concrete.

In March 1963 Mrs. Ryan agreed to give to J. C. Van Horne an option exercisable at any time prior to September 1, 1963 for the purchase of the remaining property for $75,000. She received $500 for the option but it was not exercised. Late in 1962 plans had been announced for the construction of a pulp and paper mill on a site about a mile to the westward of the property and it was said that this had stimulated the interest of speculators in land in the neighborhood and that Mr. Van Horne had taken options on this and other properties on the basis of $1,000 per acre.

The proposal for this option was made by the optionee to the appellant who communicated it to his mother and later passed over to her the $500 which the optionee had paid to him. According to the evidence of the appellant and his mother it was after this option was arranged that they discussed the subject of the appellant buying the property if the option was not exercised, and agreed on the price of $45,000. This price was set without obtaining advice or assistance from anyone but Mrs. Ryan's other two sons neither of whom was in the real estate business. There is, however, evidence that following a lack of interest in land in that neighborhood, which had persisted for about 14 months prior to November 1962, the announcement of the construction of the pulp and paper mill had stimulated speculative interest and had caused the acreage value of land to rally from the low point it had reached in the sale to Mrs. Ryan to something nearer the $500 per acre point it had reached some years earlier and to go on to increase somewhat further in 1963. None of the sales cited in support of this view, however, occurred in 1962 and only one other than the sale by Mrs. Ryan to the appellant occurred in 1963. I do not therefore attribute much weight to this evidence. On the other hand there is evidence that

the third cottage and the lot on which it stood was sold by the appellant in September 1963 and netted him $6,524.26 and that in 1963 and 1964 alone he removed sand and gravel from the property to the value of from $20,000 to $25,000 calculated on the basis of 10 cents a yard for it before moving it from its natural site. As the presence of useful gravel had been discovered before the sale of the property to the appellant I do not think it can be taken that a more cautious owner or purchaser would not have known of it or gone to the trouble of testing to ascertain some measure of the quantity of gravel present before concluding a sale, in which event the price might well have been even higher. On the whole, therefore, I would not regard the amount agreed upon, that is to say, $45,000 payable over a ten year period without interest, as being off the mark as an estimate of the fair market value of the property. As will appear, however, this, in my opinion, has no effect on the result of the appeal. Nor does either the fact that the appellant has so far paid nothing on account of the $45,000 or the fact that he has in the meantime built a house have any effect on the result.

Mrs. Ryan filed no income tax returns for either year in which she owned the property and never claimed capital cost allowance in respect of the gravel pit.

In assessing the appellant the Minister took the position that as the transaction by which the appellant acquired the property was one between parties not dealing at arm's length the capital cost of the property to the appellant for the purpose of calculating capital cost allowance in computing his income must be the capital cost thereof to Mrs. Ryan. After deducting from the $11,200 which she had paid for the whole property an amount of $100 in respect of the two cottages which she had sold for a total of $7,000 the Minister adopted $11,100 as the capital cost to her of the portion of the property which she later sold to the appellant and this amount was then used as the basis for the Minister's calculation of the appellant's deductions of capital cost allowance in respect of the sand and gravel pit. The statutory foundation for this course is found in sections 20(4), 20(5)(*a*), 139(5)(*a*), 139(5a)(*a*) and 139(6)(*a*) of the Act the relevant portions of which read as follows:

> 20(4) Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the

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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;

20(5) 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;

139(5) For the purposes of this Act,

(*a*) related persons shall be deemed not to deal with each other at arm's length;

139(5a) For the purpose of subsection (5), (5c) and this subsection, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or adoption;

139(6) For the purpose of paragraph (*a*) of subsection (5a),

(*a*) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

The appellant's first position on these provisions was that section 20(4) does not apply unless the property in question was "depreciable property" when owned by the transferor, and that the property transferred by Eunice Ryan to the appellant was never "depreciable property" while she owned it. Alternatively it was urged that if the property was "depreciable property" while owned by Eunice Ryan it did not become "depreciable property" until she commenced to use it for the purpose of income—since her purpose in acquiring it was to obtain a site for a residence—that accordingly under section 20(6)(*b*)[1] she is deemed to have acquired the property at its fair market value at the time when she commenced to use it for the

[1] 20(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply

. .

(*b*) Where a taxpayer, having acquired property for some other purpose, has commenced at a later time to use it for the purpose of gaining or producing income therefrom, or for the purpose of gaining or producing income from a business, he shall be deemed to have acquired it at that later time at its fair market value at that time;

purpose of earning income, that by that time its fair market value was $45,000, and that that amount is therefore to be taken as the capital cost of the property to her for the purpose of section 20(4)(*a*).

Turning to the first of these submissions there is, in my opinion, nothing in the wording of section 20(4) which requires that the property referred to be "depreciable property" while owned by the transferor. The subject matter with which the subsection is concerned is the capital cost of depreciable property of a taxpayer who has acquired it through a non arm's length transaction and what the subsection does is to prescribe what is to be taken as the capital cost of the property to that taxpayer. I can see no reason of substance why in making such a provision it would have been desirable or necessary to limit its operation to situations in which the property had been used by the former owner to earn income and had thus been depreciable property while in the former owner's hands and the language used does not appear to me to warrant such a limitation. Reference was made to the word "did" as supporting the appellant's position but when the subject to which the verb applies is considered as referring to property of the taxpayer whose assessment is under consideration the contention appears to me to be untenable. Nor does the scheme of the subsection appear to require such a limitation since what the subsection prescribes is that the former owner's capital cost is to be taken as the capital cost of the taxpayer and this would be the same amount whether the former owner had been allowed capital cost allowance in respect of it or not. The most persuasive point made was that if Mrs. Ryan had given the property to the appellant instead of selling it to him he would have been entitled under section 20(6)(*c*) to calculate capital cost allowance on the basis of fair market value at the time he commenced to use the property to earn income. This may appear to indicate some lack of equity in the rules prescribed but the transaction by which the appellant acquired the property does not fall within section 20(6)(*c*) and the result which might have ensued if it had, as I see it, cannot affect what I think is the plain meaning of the wording of section 20(4)(*a*).

I reach this conclusion on my own view of what I take to be the ordinary meaning of the language used in section

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40(4) but I would in any case have regarded the point as concluded in this Court by the opinion expressed by Martland J. (Cartwright J. as he then was, concurring) when he said in *Caine Lumber Co. Ltd. v. Minister of National Revenue*[2] at page 561:

> I agree with the conclusions of my brother Locke and merely wish to add that, in my opinion, the result of this appeal would be the same even if the definition of "depreciable property of a taxpayer" in subs. (3) of s. 20 of the *Income Tax Act* were to be applied in construing the meaning of the words "depreciable property" in subs. (2) of that section. It seems to me that subs. (2) applies if the property in question constitutes depreciable property vested in the taxpayer who claims the allowance provided under s. 11(1)(*b*) irrespective of whether or not the property was "depreciable property" in the hands of the person from whom the taxpayer acquired it by a transaction not at arm's length.

This conclusion is sufficient to dispose of the appellant's first position on the issue but as the conclusion I have reached on the other submission, that is to say, that the property was not at any time depreciable property while Mrs. Ryan owned it, bears on the appellant's alternative position I shall express my view on it as well.

On the evidence it is, I think, plain that the property in question was "depreciable property" while it was owned by Mrs. Ryan. While I accept the evidence that when she bought the property she intended to build a residence thereon for her own use that to my mind was but a part of her purpose in acquiring the property. In my view she also intended to sell the remaining frontage for building lots and to sell sand and this is what she proceeded to do. It is clear that she had no intention of making any personal use of any of the cottages on the property and that she proceeded at once to dispose of two of them with the lots on which they stood without so much as having entered them. It is also clear that within a few months of acquiring the property she carried out her purpose to sell sand. To my mind it is apparent both from her evidence of her intention and from what she actually did that, saving her intention to use a particular part of the land as a site for a residence, she had no personal use for any of the property and that her purpose in acquiring it was to deal with it in any way

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[2] [1959] S.C.R. 556. The reference to s. 11(1)(*b*) seems to have been intended as a reference to s. 11(1)(*a*) which the judgment of Locke J. shows to have been the provision under consideration.

that might be feasible whether by selling lots with or without buildings thereon or by selling sand from the pits or by selling the property itself. With this is I think to be considered the nature of the property itself which, in her hands, did not have the characteristics of an ordinary investment but on the contrary was suited to the carrying out of a scheme for profit making by selling off the cottages and the Grandview Avenue frontage and selling material from the pit if no better way of disposing of it to advantage appeared. I would accordingly conclude that while in her hands the land was an asset of a business in which she engaged, whether on the prompting of the appellant or some other person or on her own initiative, and that the sand and gravel pit by the exploitation of which she realized income was an asset used in that business in respect of which she was "entitled to" capital cost allowance under section 11(1)(*a*) and the regulations within the meaning of that expression in section 20(5)(*a*). Moreover even if, as I think, the definition of "depreciable property" in section 20(5)(*a*), as amended since the decision in the *Caine Lumber* case, is inapplicable to that expression in section 20(4) when the nature of the property while in the hands of the "original owner" is under consideration the reasoning of Locke J., in the *Caine Lumber* case appears to me to indicate that the sand and gravel pit, being a wasting asset when used for that purpose, is to be regarded as "depreciable property" in the ordinary sense of that expression.

To my mind a similar conclusion also follows even if Mrs. Ryan is not considered as having been engaged in a business venture but as having simply carried out with respect to the sand and gravel pit her purpose to sell material therefrom. It was submitted that the sums which she received from Universal Constructors Limited while taxable as income under section 6(1)(*j*)[3] of the Act were not income in fact, that Mrs. Ryan's intention to sell sand

[3] 6(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

. . .

(*j*) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph;

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at the time when she acquired the property was therefore not an intention to use it for the purpose of gaining or producing income and that accordingly capital cost allowance could not be claimed because of Regulation 1102(1)(*c*)[4]. However, having sold material from the property for a consideration the amount of which was dependent upon the extent of use of or production from her property and which she was, as I see it, required by section 6(1)(*j*) to include as receipts in computing her income and having thus put the property to a use which would result in the receipt of amounts which she was required to include in computing her income she was, in my opinion, at least from the time when she gave the permission, using the property "for the purpose of gaining or producing income therefrom" within the meaning of that expression in section 20(6)(*b*)[5] of the Act. I am accordingly of the view that the sand and gravel pit was in fact depreciable property of Mrs. Eunice Ryan throughout the time she owned it on the basis that it was property used in her business and in any event from the time she gave permission to Universal Constructors Limited to take material from the sand pit if not earlier, on the basis of her having used it to produce receipts taxable as income under section 6(1)(*j*) of the Act.

I turn now to the alternative argument. This is based on the contention that the sand and gravel pit was not in any event depreciable property of Mrs. Eunice Ryan until she gave permission to Universal Constructors Limited to enter and take sand from it and that section 20(6)(*b*) came into play and fixed the capital cost to her of the property at its fair market value at that time.

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[4] 1102(1) The classes of property described in this Part and in Schedule B shall be deemed not to include property

. . .

(*c*) that was not acquired by the taxpayer for the purpose of gaining or producing income,

[5] 20(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:

. . .

(*b*) Where a taxpayer, having acquired property for some other purpose, has commenced at a later time to use it for the purpose of gaining or producing income therefrom, or for the purpose of gaining or producing income from a business, he shall be deemed to have acquired it at that later time at its fair market value at that time;

I do not think it should be taken as settled that section 20(6)(*b*), which states a rule for determining on a fictional basis in a particular situation the capital cost of property to a taxpayer upon which the extent of his entitlement to capital cost allowance deductions would depend, would necessarily also apply in determining under section 20(4) the capital cost of the same property to a different taxpayer but it does not appear to me to be necessary for the purposes of this case to decide the question and I therefore express no opinion on it. Assuming that on appropriate facts section 20(6)(*b*) would apply to fix the capital cost to the original owner within the meaning of section 20(4) and thus also to the taxpayer referred to in that subsection there are, in my view, two answers to the appellants submissions.

The first of these is the conclusion which I have already expressed that the property purchased by Mrs. Ryan was from the time of its purchase an asset of a business venture in which she engaged and was depreciable property throughout the time she owned it. In this view section 20(6)(*b*) can have no application.

The other answer is that on the evidence I am unable to conclude that the market value of the property was greater than $11,100 either at the time when permission was given to Universal Constructors Limited to take sand or at the time when that company in fact entered the property for that purpose. It is admitted that the operation commenced in November 1962 but neither the date when permission was given nor the date of commencement of the operation was precisely established and it seems clear that the discovery of the valuable deposit of gravel was not made until after the commencement of the operation. Nor is it clear on the evidence that the announcement of construction of the pulp and paper mill, which was said to have been made in the fall of 1962 and to have excited speculative interest in land in the neighborhood, occurred prior to either the giving of permission to Universal Constructors Limited or the commencement of their operations on the premises. Moreover the general evidence of renewed interest in land in the neighborhood is not supported by evidence of any sale at or about the material time indicating a market value greater than the amount taken by the Minister as the basis for his calculation.

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The appeal on this issue accordingly fails.

The other issue was presented on an agreed statement of facts filed during the course of the trial and since amended by the addition of a further paragraph and the filing of a copy of the appellant's 1962 income tax return. The return showed a net income of $3,900 for the year and exemptions equal to that amount. There was thus no taxable income shown. The computation of $3,900 as the appellant's net income included *inter alia* a deduction of $4,451.60 for capital cost allowance in respect of class 10 assets having an undepreciated capital cost of $41,163.21. In respect of these assets the appellant was entitled under Regulation 1100(*a*)(x) to a deduction in computing his income equal to such amount as he might claim in respect of the property not exceeding 30 per cent. of its undepreciated capital cost and no question arose as to the deduction so claimed and made. It has been agreed, however, that "by reason of adjustments made by the respondent in 1965 with respect to the appellant's 1962 taxation year, it appeared that the appellant would have a taxable income of approximately $3,900 for 1962" and that by a letter dated August 23, 1965, "the appellant requested the respondent to increase capital cost allowance on class 10 assets to offset the aforementioned adjustments for the year 1962".

Thereafter when giving notice of the re-assessments under appeal the Minister forwarded to the appellant a compilation entitled "Revised Capital Cost Allowance Schedule" which showed capital cost allowances in respect of assets of various classes for the years 1961 to 1964 inclusive and included a summary which *inter alia* showed capital cost allowance in respect of class 10 assets for 1962 as having been claimed at $4,451.60 and allowed at $8,357.37. It is agreed that the latter amount "reflects the amount ($4,451.60) claimed by the appellant when filing his return plus the additional amount ($3,905.77) calculated by the respondent to offset the adjustments" referred to above.

The effect of this was to leave no taxable income for 1962 and no assessment for 1962 appears to have been made, but on receiving the 1963 and 1964 reassessments the appellant objected thereto "and stated that he could not be required to take a deduction in any particular taxation year". This, if maintainable, represented a relevant

objection to the 1963 and 1964 re-assessments since the effect of using the deduction in 1962 was to reduce his entitlement to capital cost allowance in respect of the assets in question in subsequent years. It seems likely that it may also have been to his advantage to have the additional deduction available in 1963 and 1964 when his income was much higher and thus attracted tax at higher rates than would have applied in 1962 on a taxable income of about $3,900.

The appellant's position on this issue, as I understand it, is that since the Minister issued no notice of assessment for 1962 and since the appellant's notice of objection to the 1963 and 1964 re-assessments was given at a time when it was still open to the Minister to make an assessment for 1962 the appellant was entitled at that time to countermand the request of his letter of August 23, 1965 and by his notice of objection did countermand it and elect not to claim additional capital cost allowance of $3,905.77 in respect of the class 10 assets for 1962. The Minister's position on the other hand is that there was in the first instance a nil assessment for the year 1962 which notwithstanding the adjustments in respect to the appellant's 1962 taxation year made by the Minister in 1965 remained in effect by reason of the appellant's request for additional capital cost allowance to offset the adjustments, that the additional $3,905.77 had therefore been claimed by the appellant and allowed by the Minister in the 1962 taxation year and that the claim could not thereafter be cancelled.

In my view, the positions of both parties overstate to some extent the effect of what is in the agreed statement of facts with respect to assessment for the year 1962. There is simply an absence of information on that subject and from such information as does appear with respect to what transpired and the positions taken by counsel I can infer nothing as to what the Minister did at any stage with respect to the appellant's 1962 taxation year beyond the fact that he does not appear to have claimed tax in respect of it.

For my part, on such facts as are before me, I am somewhat at a loss to understand why effect was not given to the taxpayer's objection[6] since the claim itself for addi-

[6] No notification under section 58(3) with respect to the objection appears to have been given

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tional capital cost allowance had been made informally and the Minister had taken no irreversible step but I think it is impossible for the appellant to avoid at this stage the consequences of his earlier request and the Minister's action thereon. It must be borne in mind that what is before the Court is the correctness of the assessments for 1963 and 1964 and that the deductions to which the appellant is entitled for capital cost allowances for those years are, under Regulation 1100(1)(*a*), to be calculated on "the undepreciated capital cost to him as of the end of the taxation year". "Undepreciated capital cost" is defined in part as follows in section 20(5)(*e*):

> (5) In this section and regulations made under paragraph (*a*) of of subsection (1) of section 11,
>
> (*e*) "undepreciated capital cost" to a taxpayer of depreciable property of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of
>
> (i) the total depreciation allowed to the taxpayer for property of that class before that time,

There appear to be two conceivable interpretations of the word "allowed" in this definition, one as corresponding to the meaning of the same word in section 11(1)(*a*)[7] of the Act and in Regulation 1100(1)[8], and the other as having been consecrated by some act on the part of the Minister signifying his approval of the deduction that has been claimed, but in either case it appears to me that the conditions of the definition have been met and that the

---

[7] 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;

[8] 1100 (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(*a*) such amount as he may claim in respect of property of each of the following classes in Schedule B not exceeding in respect of property

. . .

(x) of class 10, 30%

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

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$3,905.77 in question was "allowed" in respect of the year 1962. The additional deduction was within the limits of what might be claimed for the year 1962 and was in fact claimed by the appellant for that year by his letter of August 23, 1965. Moreover, it does not appear that that claim was ever formally withdrawn by any communication to the Minister pertaining specifically to the 1962 taxation year. In this respect the appellant has thus been just as non-committal as the Minister has been in not notifying him formally of where he stood with respect to the 1962 taxation year. The first mentioned interpretation of "allowed" in section 20(5)(*e*) was thus completely satisfied when the appellant sent his letter of August 23, 1965. The second sense as well appears to have been satisfied at the time of the issuance by the Minister of re-assessment notices for 1963 and 1964 based on the allowance in question having been made for 1962 and containing a statement to that effect. In my view there was accordingly no right left in the taxpayer at that stage to change his mind and demand the cancellation of his earlier claim. For the purposes of the 1963 and 1964 computations the deduction had been allowed in 1962.

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

Vancouver
1967
Nov. 27
Nov. 30

BETWEEN:

HELEN E. MITCHELL, Executrix of the Estate of the late Angus A. Mitchell ..... APPELLANT;

AND

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

Income tax—Deductions—Tuition fees of university student—By whom deductible—Income Tax Act, s. 11(1)(qb), am. 1961, c. 17, s. 2(1).

Section 11(1)(*qb*) of the *Income Tax Act* provides that "where a taxpayer was ... a student ... at a university ... the amount of any fees for his tuition ..." may be deducted in computing a taxpayer's income.

Held, only a student who pays his tuition fees may claim the deduction; it may not be claimed by a person who paid the student's fees.

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INCOME TAX APPEAL.

P. N. Thorsteinsson and *M. J. O'Keefe* for appellant.

T. E. Jackson for respondent.

SHEPPARD D.J.:—This appeal raises only a point of law, namely, the meaning of section 11(1)(*qb*) of the *Income Tax Act*, R.S.C. 1952, c. 148 as amended.

In 1963, a father paid his daughter's tuition fees and his Executrix, the appellant, claims to deduct that payment from the father's income by virtue of section 11(1)(*qb*). The Minister contends that the section applies only to cases where the taxpayer is a student and the payment and deduction are by a student. The subsection then in force (1960-61, c. 17, sec. 2(1) enacting section 11(1)(*qb*)) reads as follows:

> (*qb*) where a taxpayer was during the year a student in full-time attendance at a university in a course leading to a degree, or in full-time attendance at a college or other educational institution in Canada in a course at a post-secondary school level, the amount of any fees for his tuition paid to the university, college or other educational institution in respect of a period not exceeding 12 months commencing in the year and not included in the calculation of a deduction under this paragraph for a previous year (except any such fees paid in respect of a course of less than 13 consecutive weeks' duration);

The appellant contends:

(1) That "a taxpayer", the second and third words, should be read as "a person" or "any person" because the definition of a taxpayer reads:

> "taxpayer" includes any person whether or not liable to pay tax; (section 139(1)(*av*))

and

(2) That "by him" is implied after the word "paid" as meaning that the sum to be deducted must be paid by the father, the taxpayer.

In support of her contention the appellant also referred to numerous subsections of section 11 where the words "the taxpayer" are used which necessarily refer to "a taxpayer" mentioned in the preliminary words of section 11(1) as the one whose income is being computed for a taxation year: see section 11(1)(*a*), (*cb*), (*cd*), (*e*), and

when "a taxpayer" is used in section 11 there are other words which indicate they relate to "a taxpayer" mentioned in the preliminary words of section 11(1) as the one whose income is being computed. Therefore the appellant contends that as such other words are not to be found in subsection (*qb*) "a taxpayer" should be read as "any person", and in the result the section should be construed to mean that where "any person was during the year a student...the amount of any fees for his tuition paid by him (the taxpayer, here the father) . . .".

That contention fails for various reasons. "A taxpayer" is not defined *simpliciter* as "a person", and the definition merely means that a "person" to be a taxpayer need not be a payer but that definition does not excuse such "person" from having the other incidents of a taxpayer, which in this instance would include the considering of what "may be deducted in computing the income of a taxpayer", the preliminary words of section 11(1). Hence the definition does not permit the substitution of "any person" for the words "a taxpayer" in section 11(1)(*qb*).

Further, where the words "the taxpayer" are used in section 11(1) they refer to "a taxpayer", which is the precise term in the preliminary words of section 11(1). Therefore, whether he be described as "the taxpayer" or "a taxpayer" the words equally refer to the same person mentioned as "a taxpayer" in the first part of section 11(1), that is, the one whose income is being computed. Here "the taxpayer" and "a taxpayer" are equivalent. In *In re National Savings Bank Association*[1], Turner L.J. at p. 550 said:

> ... I am quite satisfied that no sufficient reason can be assigned for construing the word "contributory" in one part of the Act in a different sense from that which it bears in another part of the Act.

(36 Halsbury (3rd Ed.) p. 396, para. 595.)

The words "by him" which the contention implied after "paid" in section 11(1)(*qb*), must refer to the nearest antecedent to which they could reasonably refer and here to "student", particularly as the preceding words "for *his* tuition" necessarily refer to "student". Such construction defeats the contention of the appellant, as it would only permit a deduction to a student for his tuition paid "by

[1] (1866) L.R. 1 Ch. App. 547.

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him". To avoid such construction the contention must add after "paid" some additional words such as those following; "by the taxpayer referred to as 'a taxpayer' in the preliminary part of section 11(1)". However, that is adding words to the section, which is not permissible (36 Halsbury (3rd Ed.)) p. 382, para. 570. The additional words qualify "paid" in a way that is not found in the section and is required only by the appellant's contention.

That contention of the appellant would lead to unreasonable meanings as follows:

(1) "Any person" could pay the whole of his taxable income to universities for students' tuition and thereby claim the right to deduct under section 11(1)(*qb*) the amount so paid even to escape the paying of any income tax. It is rather difficult to see what interest a "person" could have in paying the tuition fees of complete strangers, or the intention of the statute to protect such non-existing interest of the taxpayer.

(2) That contention would conflict with the payments for a child that may be deducted under section 26(1) which requires that the child be a dependent of the taxpayer. There seems to be no reason why the intention should be inferred that the taxpayer under section 26(1) should have a restricted right to deduct for his own children only if they be dependent but have as "a person" under section 11(1)(*qb*) an unrestricted right to pay the tuition for his children and for strangers. It is not permissible to give one section its full meaning and to compress the remainder of the statute into any gaps that may remain, but the whole statute must be read, that is, construed together to avoid such conflicts: 36 Halsbury (3rd Ed.) p. 395, para. 594. In *Ebbs v. Boulnois*[2], James L.J. at p. 484 said:

> Common sense must be applied to reconcile the two enactments It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other.

The words of section 11(1)(*qb*) contain an express and clear meaning. The following sections should be read together as being contiguous and being then current sub-

[2] (1875) L.R. 10 Ch. App. 479.

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sections of the statute. Section 11(1)(*q*) (enacted 1956, c. 39, section 3(5)) provided, "where a taxpayer is a member of the clergy..."; section 11(1)(*qa*) (enacted 1956-57, c. 29, section 4(3)) provided, "where a taxpayer is a teacher..."; section 11(1)(*qb*), the section in question (enacted 1960-61, c. 17, section 2(1)) provided, "where a taxpayer was during the year a student . . .".

These subsections are evidently intended to authorize specific deductions to specific groups; by section 11(1)(*q*) to clergymen for their residence, by section 11(1)(*qa*) to teachers for certain contributions, and by section 11(1) (*qb*) to students for certain tuition. The maxim *noscitur a sociis* applies and therefore the subsections should be uniformly construed as providing for the allowance to a special group of taxpayers, and under such maxim, section 11(1) (*qb*) can be construed as the words explicitly state, in permitting an allowance to a taxpayer who is a student within that subsection, for the tuition fees therein specified.

It follows that the contention of the Minister should be accepted and the appeal dismissed.

Edmonton
1967
Oct. 31
Dec. 6

BETWEEN:

ARCTIC GEOPHYSICAL LTD. .....APPELLANT;

AND

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

Income tax—Associated companies—Whether shareholders of one company "in a position to control second company"—Right of directors to redeem preferred shares—Effect of—Income Tax Act, ss. 39(4)(e); 139(5d)(a) and (b).

A husband and wife held all the issued shares of one company and 1,000 common shares, being all the issued common shares, of appellant company, and were its only directors. Appellant company had in addition issued to other persons 1,000 class B shares which had full voting rights and were redeemable by the directors on any dividend date.

Held, the two companies were not associated within the meaning of s 39(4)(*e*) of the *Income Tax Act.*

(1) The husband and wife were not "in a position to control" appellant company within the meaning of s. 139(5d)(*a*) of the *Income Tax Act.*

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That phrase refers to an existing ability to control by voting power attached to share ownership. Moreover the redemption of shares is not the act of the directors but of the company even though instigated by its directors.

(2) The husband and wife had no right to or to acquire the class B shares or to exercise any control over their voting rights, one of which is a condition essential to the application of s. 139(5d)(*b*).

INCOME TAX APPEAL.

Ronald D. Bell for appellant.

F. J. Cross for respondent.

CATTANACH J.:—This is an appeal from a decision of the *Tax Appeal Board*[1] whereby the appellant was held to be associated with another corporation, namely, Heiland Exploration Canada (1959) Limited and therefore taxable as associated under section 39 of the *Income Tax Act*, R.S.C. 1952, chapter 148 and amendments, for the appellant's 1961, 1962 and 1963 taxation years.

At the outset of the hearing the appellant abandoned its appeal from the Board's decision with respect to the assessment for its 1961 taxation year so that the present appeal relates only to the assessments by the Minister for the appellant's 1962 and 1963 taxation years.

For the purpose of this appeal the parties reached an agreement as to the issue and facts which reads as follows:

> 1. The issue to be decided in each of the several appeals is whether the Appellant was or was not associated with Heiland Exploration Canada (1959) Limited (herein referred to as "Heiland"), in the relevant taxation year within the definition contained in subsection (4) of section 39 of the *Income Tax Act*.
>
> 2 The following facts relative to the issue to be decided are admitted.—
>
> (a) Heiland was incorporated under the Companies Act of the Province of Alberta on 1 June, 1954 and its fiscal period ended on 31 May in each year.
>
> (b) The Appellant was incorporated under the Companies Act of the Province of Alberta on 19 December, 1960 and its fiscal period ended on 31 March in each year
>
> (c) At the date of the Appellant's incorporation and throughout the period from that date until 21 July, 1962 all of the issued and outstanding shares of the capital stock of Heiland were owned by Mr Ira C Mayfield and his wife, Loma B Mayfield, in the following portions:
>
> Ira C Mayfield ..... 19 shares
> Loma B. Mayfield ..... 1 share.

[1] (1965) 39 Tax A B C. 346.

(d) Annexed hereto and marked as Appendix "A" to this agreement is a true copy of the Appellant's Memorandum of Association as it read at all times material to these appeals.

(e) On the day following the date of the Appellant's incorporation, Mr Ira C Mayfield and his wife, Loma B. Mayfield, were named as Directors of the Appellant and they continued to be the only Directors of the Appellant at all times material to these appeals.

(f) On 21 December, 1960, Mr. Ira C. Mayfield and his wife, Loma B. Mayfield, each became the owner of 500 common shares of the capital stock of the Appellant and up to and including the 29th day of December, 1960, Mr. and Mrs. Mayfield were the only shareholders of the Appellant.

(g) On 30 December, 1960, 500 Class "B" shares of the capital stock of the Appellant were allotted to Mr. J. C. Fuller and 500 Class "B" shares were allotted to Mr. V. Van Sant, Jr., neither of whom was related to Mr. Ira C. Mayfield or to his wife, Loma B Mayfield.

(h) Throughout the period commencing on 30 December, 1960 and ending on 20 July, 1962, the only issued and outstanding shares of the capital stock of the Appellant were owned as follows:

Name of Owner	Common Shares	Class "B" Shares
Ira C. Mayfield	500	NIL
Loma B. Mayfield	500	NIL
J. C. Fuller	NIL	500
V. Van Sant, Jr	NIL	500
Total Shares	1,000	1,000

3. If it be decided that the Appellant was associated with Heiland in a taxation year, the appeal from the assessment for that taxation year of the Appellant should be dismissed.

4. If it be decided that the Appellant was not associated with Heiland in a taxation year, the appeal from the assessment for that taxation year of the Appellant should be allowed and the matter should be referred back to the Respondent to reassess the Appellant for that year at the rates of tax prescribed in subsection (1) of section 39 of the *Income Tax Act*.

As recited in paragraph 2(d) there is appended to the agreement as to issue and facts a true copy of the appellant's Memorandum of Association. The portions of the Memorandum pertinent to this appeal are those reciting the rights and conditions attaching to the common shares and Class "B" shares which read as follows:

> The said Class "B" shares shall confer the right to notice of all meetings of the Company and the right to vote with the ordinary (common) shareholders and to have one vote for each Class "B" share held by them.

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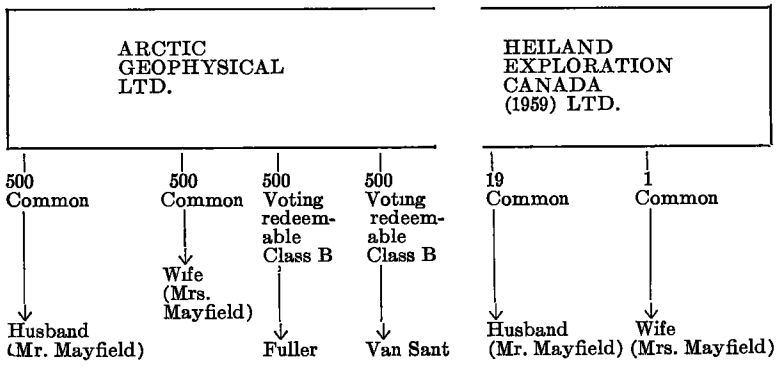
The said Class "B" shares shall be redeemable in whole or in part thereof at the option of the Directors upon any dividend date upon the company giving sixty days notice in writing of such redemption and shall be redeemable at par plus a sum equal to all unpaid preferential dividends in full to the date of redemption. In the event of such redemption being in part the same shall be by lot.

By agreement a true copy of the appellant's Articles of Association as they read at all times material to this appeal were introduced in evidence. During argument reference was made to paragraphs 9 and 49 thereof reading as follows:

> 9. The shares shall be under the control of the Directors who by unanimous resolution and not otherwise may allot or otherwise dispose of the same to such persons and upon such terms and conditions and at such times as the directors think fit.
>
> 49. In the case of an equality of votes, either on a show of hands or on a poll, the Chairman of the meeting at which the show of hands takes place or at which the poll is demanded, as the case may be, shall not be entitled to a further or casting vote.

The shareholdings in the appellant and Heiland are illustrated in graphic form as follows:



The sole issue in the present appeal is, as stated in the agreement as to issue and facts, whether the appellant was or was not associated with Heiland in the appellant's 1962 and 1963 taxation years.

Section 39(1) provides that the tax payable by a corporation under Part I of the *Income Tax Act* is 18 per cent of the first $35,000 taxable income and 47 per cent of the amount by which the income subject to tax exceeds $35,000. However, subsections (2) and (3) of section 39 provide that when two or more corporations are associated with each other the aggregate of the amount of their incomes taxable at 18 per cent is not to exceed $35,000.

Section 39(4) defines the circumstances under which a corporation is associated with another and reads as follows:

> 39. (4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,
>
> (*a*) one of the corporations controlled the other,
>
> (*b*) both of the corporations were controlled by the same person or group of persons,
>
> (*c*) each of the corporations was controlled by one person and the person who controlled one of the corporations was related to the person who controlled the other, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations,
>
> (*d*) one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations, or
>
> (*e*) each of the corporations was controlled by a related group and each of the members of one of the related groups was related to all of the members of the other related group, and one of the members of one of the related groups owned directly or indirectly one or more shares of the capital stock of each of the corporations.

The word "controlled" as used in the above subsection has been held by the President of this Court in *Buckerfield's Limited et al. v. Minister of National Revenue*[2] to mean the right of control that rests in the ownership of such a number of shares as carries with it the right to a majority of the votes, i.e. *de jure* control and not *de facto* control. This interpretation by the President was adopted with approval by the Supreme Court of Canada in *Minister of National Revenue v. Dworkin Furs (Pembroke) Ltd. et al.*[3]

The contention on behalf of the Minister is, as I understood it, that each of the corporations here involved, namely, the appellant and Heiland, was controlled by a "related group" and are accordingly associated within the meaning of section 39(4)(*e*). It was conceded by counsel for the appellant that (*e*) is the applicable paragraph of subsection (4) of section 39 but he did not concede that the appellant was controlled by a related group.

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[2] [1965] 1 Ex C.R. 299.

[3] 67 DTC 5035 at p. 5036.

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It is not disputed that Mr. and Mrs. Mayfield, by virtue of their ownership of all the issued and outstanding shares of Heiland in the respective numbers of 19 and 1, controlled that corporation.

If the test propounded in the *Buckerfield* (*supra*) case was the test here applicable then there would be no question that the appellant was not controlled by Mr. and Mrs. Mayfield because between them they owned only 50 per cent of the issued and outstanding voting shares of the appellant and therefore did not command a majority of the votes.

There is no question between the parties that Mr. and Mrs. Mayfield constituted a "related group" within the meaning of those words as defined in the *Income Tax Act*.

Subsection (4a) of section 39 reads as follows:

> (4a) For the purpose of this section,
>
> (*a*) one person is related to another person if they are "related persons" or persons related to each other within the meaning of subsection (5a) of section 139;
>
> (*b*) "related group" has the meaning given that expression in subsection (5c) of section 139; and
>
> (*c*) subsection (5d) of section 139 is applicable *mutatis mutandis*.

Subsection (5) of section 139 reads as follows:

> (5) For the purposes of this Act,
>
> (*a*) related persons shall be deemed not to deal with each other at arm's length; and
>
> (*b*) it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.

Relationship is defined in subsection (5a) of section 139 reading in part as follows:

> (5a) For the purpose of subsection (5), (5c) and this subsection, "related persons", or persons related to each other, are
>
> (*a*) individuals connected by blood relationship, marriage or adoption;

Subsection (5c) of section 139 reads in part as follows:

> (5c) In subsection (5a), (5d) and this subsection
>
> (*a*) "related group" means a group of persons each member of which is related to every other member of the group;...

The contention of the Minister is that Mr. and Mrs. Mayfield are a related group of persons who are deemed to have controlled the appellant by virtue of paragraph (*b*) of subsection (5d) of section 139 or alternatively that the appellant was controlled by a related group of persons

comprised of Mr. and Mrs. Mayfield because at all material times they were in a position to cause all or part of the Class B shares of the appellant to be redeemed and thereby become the majority shareholders. He contends that by virtue of paragraph (*a*) of subsection (5d) of section 139, where a related group is in a position to control a corporation, that group shall be deemed to be a related group that controls the corporation.

Section 139(5d) reads in part as follows:

> (5d) For the purpose of subsection (5a)
>
> (*a*) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by whom the corporation is in fact controlled;
>
> (*b*) a person who had a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acqure, shares in a corporation, or to control the voting rights of shares in a corporation, shall, except where the contract provided that the right is not exercisable until the death of an individual designated therein, be deemed to have had the same position in relation to the control of the corporation as if he owned the shares;

In my view paragraph (*b*) of subsection (5d) of section 139 has no application in the facts of the present appeal. Under that paragraph a person in order to be deemed to be in the same position in relation to control of a corporation as if he owned the shares, that person must have a right under a contract, in equity or otherwise (1) to the shares, (2) to acquire the shares, or (3) to control the voting rights of the shares. The only conceivable right which Mr. and Mrs. Mayfield may have had under the redeemable feature attaching to the Class B shares in the appellant would be to bring about, by corporate action, the cancellation or elimination of those shares which is a right entirely different from a right to those shares or to acquire those shares. The voting rights attaching to the Class B shares were vested in the holders thereof, namely, Mr. Fuller and Mr. Van Sant, Jr. who were strangers, in the tax sense, to Mr. and Mrs. Mayfield. There is no suggestion in the agreed statement of facts, nor was any evidence adduced to suggest, that Mr. and Mrs. Mayfield had any right by contract, in equity or otherwise to exercise any control over the voting rights of the Class B shares. The clear implication is that the voting rights of those shares were the sole prerogative of the holders thereof. Therefore none

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of the conditions precedent to a person being deemed to be in the same position in relation to control of a corporation as if he owned the shares as contemplated by paragraph (*b*) of subsection (5d) of section 139 is present here.

With respect to paragraph (*a*) of subsection (5d) of section 139, counsel for the Minister points out that immediately following the incorporation of the appellant, Mr. and Mrs. Mayfield were the only shareholders, each of whom held 500 common shares and, being the only shareholders, they became the only directors. As directors and by virtue of the authority vested in them by paragraph 9 of the Articles of Association, they caused to be issued 500 Class B shares to Mr. Fuller and 500 Class B to Mr. Van Sant, Jr. Because of the equality of votes so resulting, Mr. and Mrs. Mayfield could perpetuate themselves in the positions of directors. As directors they could issue additional shares to themselves or redeem Class B shares and so ensure control in themselves by reason of holding the preponderance of voting power. From these circumstances counsel for the Minister submits that while Mr. and Mrs. Mayfield are a related group, with equal voting power to the other shareholders, and so are not in control of the appellant, nevertheless by virtue of the authority vested in them by the Memorandum of Agreement and Articles of Association as directors, from which position they could not be ousted, they could change the balance of voting power should they so desire and accordingly they are "in a position to control" the appellant within the meaning of those words where they appear in section 139(5d)(*a*). Therefore, he contends, Mr. and Mrs. Mayfield are deemed to be a related group that controls the appellant.

After giving careful consideration to the argument of counsel for the Minister I cannot accede to the correctness of the proposition upon which his contention is based. In my view the words "in a position to control" must refer to a presently existing ability to control by voting power attached to ownership of shares, rather than being in a position to acquire or obtain such control predicated upon some future act such as the redemption of Class B shares.

Furthermore, the act of redeeming Class B shares is the act of the corporation even though that action could be instigated by Mr. and Mrs. Mayfield in their capacity as directors.

To me the language of section 139(5d)(*a*) contemplates the circumstance where a group of persons each of which is related to the other by blood relationship, marriage, adoption or otherwise as outlined in section 139(5a) is in a position to control a corporation by reason of their collective holding of a majority of the voting power in shares, even though they might be part of a larger group of persons who are also so related and who, in fact, exercise control of the corporation. Such a related group, which is part of a larger related group, being in a position to control a corporation by ownership of a majority of the voting shares, is deemed to be a related group that controls the corporation even though the members thereof do not, in fact, do so to the exclusion of others to whom they are also related.

It follows therefore that the appellant and Heiland were not associated and that the appeal with respect to the appellant's 1962 and 1963 taxation years is allowed. The matter is referred back to the Minister for reassessment accordingly. The appellant is entitled to its costs to be taxed in the usual way.

BETWEEN:

GEORGES CUISENAIRE .....PLAINTIFF;

AND

SOUTH WEST IMPORTS LIMITED .....DEFENDANT.

Ottawa
1967
Oct. 23-25
Dec. 7

Copyright—Infringement—Coloured rods used for teaching arithmetic—Whether subject to copyright—Whether "artistic work" or of "artistic craftsmanship"—Whether copyrightable as "original production in scientific domain"—Presumptions in favour of copyright and author's ownership—Extent of—Copyright Act, R.S.C. 1952, c. 55, ss. 2(b) and (v), 4(1), 20(3).

Plaintiff sued for infringement of copyright in sets of coloured rods of different lengths used for teaching arithmetic to children. (Plaintiff was also author of a book which set out a teaching system employing such rods)

Held, dismissing the action, the rods were not subject to copyright in Canada.

1. The rods were not an "artistic work" within the definition of s. 2(*b*) of the *Copyright Act* for although coloured in a manner to please children they were never intended primarily as artistic articles but as tools for a particular purpose and as such were not entitled to

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protection. Nor were they works of "artistic craftsmanship" within the meaning of s. 2(*b*) since no craftsmanship was involved in their production. Nor were they "plastic works relative to science" within the meaning of s. 2(*v*) since, being wood, they were not mouldable or pliable.

2. The rods were not subject to copyright under s. 2(*v*) as an "original production in the ... scientific ... domain". The inclusion of these words in s. 2(*v*) is not to be construed as altering the ambit of copyright in any substantial way; the work must still be "an original literary, dramatic, musical or artistic work" as required by s. 4(1) in the normal meaning of those words and in the light of the definitions in s. 2.

3. Notwithstanding the presumptions in favour of copyright and of the author's ownership thereof which arise under s. 20(3) in an infringement action where the defendant disputes the existence of copyright or the plaintiff's title thereto the plaintiff must still establish that the work is within the definition of s. 4 as further defined by s. 2 and so subject to copyright.

4. An article does not cease to be subject to copyright because it is functional or utilitarian or because it is patentable.

Cuisenaire v. Reed [1963] Vict. R. 719 discussed; *Baker v. Selden* (1879) 101 U S 99, *Gelles-Widmer Co. v. Milton Bradley Co.* (1966) 136 USPQ 240, *King Features Syndicate, Inc. v. O. and M. Kleeman, Ltd.* [1941] A.C. 417, referred to.

ACTION for infringement of copyright.

Christopher Robinson, Q.C., James D. Kokonis and *G. Hazlewood* for plaintiff.

J. C. Osborne, Q.C. and *Rose-Marie Perry* for defendant.

NOËL J.:—This is an action for infringement of copyright. The plaintiff alleges that he is the author of the following works: (1) a set of ten coloured rods (known as "réglettes") and (2) a set of 241 coloured rods, of different lengths, for the teaching of the science of arithmetic in primary school grades and claims that he is the owner of any copyright that subsists in Canada in either of these works. He therefore requests relief by way of (1) a declaration that he is the owner of such copyright and that the defendant has by its acts infringed his copyright therein; (2) the issuance of an injunction restraining the defendant from further infringing his copyright; (3) damages in respect of the infringement; (4) such part of the defendant's profits as he has made from such infringement; (5) delivering up of all infringing copies of the said work; (6) damages for the conversion of such infringing copies as are

no longer in the defendant's possession, and (7) a reference to inquire into and report upon the amount of the damages and profits.

This is one of a number of actions by the plaintiff in this Court against the following defendants: The Board of School Trustees of School District No. 39 (Vancouver), (No. A-661); Columbia Plastics Ltd., (No. A-673) and Benjamin W. Sutherland, carrying on business under the firm name and style of B-Wys Sales Co., also known as B-Wys Nissen Sales Company, *et al.* (No. A-675).

Upon defendant's motion by notice, dated August 11, 1967, for an order to consolidate this action and the three above actions and to try as a special case (pursuant to Rule 149 or 155C) in advance of the trial the issue as to whether the copyright subsists in the works in which it is alleged by the plaintiff to subsist and for such further and other order as this Court might make, the President of this Court on August 15, 1967, ordered that the four actions proceed in accordance with the following directions:

> that the said actions come on for hearing before the Court and be heard together on the same evidence on the 23rd day of October, 1967, at 10:30 o'clock in the forenoon or so soon thereafter as the same may be heard, subject to the following conditions:

(a) that counsel for the parties agree on one Statement of Issues of Fact in Dispute in the four actions;

(b) that one set of counsel appear for the defendants in all of the said actions;

(c) that the hearing referred to in this order be with reference to all issues except the issue of infringement. (After the hearing has been conducted, counsel for the plaintiff or counsel for the defendants may apply to the Court for further directions with respect to the hearing of any issue or issues that remain outstanding;)

(d) that the Court will pronounce its decision with reference to action A-674 but counsel for either the plaintiff or the defendants in the other three of the said actions may move to have the decision made applicable with respect to any such action or actions or may move for judgment in any such action or actions if so advised.

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Pursuant to subparagraph (a) above, counsel for the parties, for the purposes of these actions only, agreed on a statement of issues of fact in dispute in the four actions as follows:

AGREED FACTS

For the purposes of these actions only, the parties agree:

(1) That the plaintiff resides in the City of Thuin, Belgium.

(2) That Belgium is a country which has adhered to the Convention and the additional protocol set out in the Second Schedule of the Copyright Act and that the statements contained in the letter dated August 31st, 1967 (Exhibit 1 hereto) are admitted as facts.

(3) That the statements contained in the leaflet entitled "The Colour-Factor Set in Historical Perspective" (Exhibit 2 hereto) are admitted as facts.

(4) That the box labelled "The Colour-Factor Set" (Exhibit 3 hereto) contains a sample of the colour-factor set referred to in the leaflet Exhibit 2 hereto and that such colour-factor sets are sold in England.

(5) That the box marked "HABA Spiele" (Exhibit 4 hereto) contains a sample of the Froebel sticks referred to in the leaflet Exhibit 2 hereto as sold in Canada, and that the following is the English translation of the German language markings on the said box:

On the Front:

"While playing, count with multi-coloured sticks"

Yellow End:

"Counting sticks" "Highly recommended for school use for learning to count"

(6) That the box labelled "Nombres en couleur—Cuisenaire—Numbers in Colour" (Exhibit 5 hereto) contains a sample of the alleged work described in paragraph 3 of the statements of claim (paragraph 3(2) in Action No. A-674) as sold in certain parts of Canada.

FACTS IN DISPUTE

The facts in dispute between the parties are:

(1) Whether the plaintiff is a citizen of Belgium.

(2) Whether the plaintiff was the author of the alleged work, or works in Action No A-674, described in paragraph 3 of the statements of claim.

(3) Whether the plaintiff was a citizen of Belgium in 1947 at the date of the alleged making of the alleged work, or works in Action No. A-674 described in paragraph 3 of the statements of claim.

(4) Whether the alleged work, or works in Action No. A-674, described in paragraph 3 of the statements of claim was first published in Belgium by the issue of copies thereof to the public in Belgium in 1952.

(5) The alleged facts set out in paragraph 7 of the statements of claim. (i.e. that the making of the works involved the skill and labour both of selecting the colours for the rods and of selecting the relationship between length and colour of the rods and the work of the set of

241 rods involved in addition to the skill and labour of selecting the number of rods of each different length and colour to be included in the set).

(The words in brackets are mine).

(6) Whether the plaintiff is the owner of any copyright that may subsist in Canada in the alleged work, or either of the alleged works in Action No. A-674, described in paragraph 3 of the statements of claim.

All the issues are therefore before this Court except the issue of infringement and they can be briefly set out as follows: (1) is there copyright in the plaintiff's works; (2) who is the author and (3) who owns the copyright.

Counsel for the parties further agreed that neither of them would adduce any evidence at this stage beyond what has already been adduced, nor would they put it in anything from discoveries.

The decision of this Court will, therefore, be rendered on the basis of the above statements of agreed facts and facts in dispute between the parties together with the evidence of the plaintiff, Cuisenaire, which was taken on commission on the eighth day of April, 1964, in London, England, and the exhibits produced during the taking of the evidence.

In order to deal properly with the issues involved herein, it will be helpful to describe briefly the manner in which the plaintiff produced his rods (réglettes) and the use made of them.

The plaintiff developed a new method of teaching arithmetic in primary schools with the aid of these wooden rods which are uniform cross-sections being 1 centimeter square of varying colours and lengths and which he described in a book published in 1952. Included in this book (Ex. 5 of Cuisenaire's examination) is a table which sets out the respective numbers of the rods, their length and colour.

He stated that he was born at Quaregnon, near Mons, Belgium, on September 7, 1891, that his father was a Belgian, that he has lived in Belgium all his life and that he is a Belgian national or citizen. He studied music at the Conservatoire de Mons from 1903 to 1907 and between 1907 to 1911 received instruction at the Training College for Teachers at Mons. In 1911, he started teaching at Thuin, in Belgium, and in 1920 was awarded, at Mons, a diploma for the teaching of music. In 1937 he became

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director of education at Thuin and in 1947 retired on pension but retained the honorary post of inspector of schools.

During his teaching career, Cuisenaire states that he encountered difficulties with pupils learning arithmetic and his idea was to produce a set of physical things which would each differ in size and in colour from the others and represent numbers because he found that children had difficulty in grasping the abstract idea of the difference between numbers. In 1925 he first started using buttons without colours to teach arithmetic to children and this produced no reaction. He then observed that if the same buttons of the same size were coloured in the same colour, they produced a reaction. He also observed that if buttons of different sizes and different colours were used, he obtained better results. He found that children were attracted by colour and that they usually have a preference for red. The colours, according to Cuisenaire, have a relationship and a certain wave length adding "we go into yellow which is less strong than red and then green, which are the basic colours with blue, of course". He then realized that there was a relationship between colour and sound and using a sketch of notes and colour strips (produced as Ex. 1 at his examination) he explained that there was some relationship between numbers and musical notes in that to produce a musical note one octave lower than another note, a pipe twice the size of that used to produce the first note would have to be used and that the same would apply to a series of numbers in geometrical progression.

As he saw that the coloured strips could translate the musical idea, he got his pupils to make some coloured strips of paper with the same colours as those which appear on the above mentioned sketch. He then had the children colour these strips first on one side and then on both sides, the colours being chosen from those on the musical chart or sketch. He claims that it took him more than twenty years to obtain the desired colours.

The rods made in accordance with Cuisenaire's system are ten (10) in one case and two hundred and forty-one (241) in the other. They are cut from lengths of wood one square centimeter in cross-section and in length ranging in centimeters from one centimeter to ten centimeters. Each

of the ten rods has a characteristic colour according to its length. They fall into three families based upon the primary colours, yellow, red and blue, together with white and black. The smallest rod, namely, the cm cube, is a sub-multiple of all the numbers and is white. The seven centimeter rod is black, the five and ten centimeter rods are respectively yellow and orange. The three centimeter, six centimeter and 9 centimeter rods are respectively light green, dark green and blue. The series 2, 4 and 8 are red, crimson and brown. The colours in these family groups deepen as the lengths increase, and this together with other features of the rods, according to Cuisenaire, result from the fact that the latter was impressed with the musical relationship of varying depths in pitch.

Cuisenaire states that in 1947 he made the first rods, presumably the ten rod set. Ex. 3, and that "three sets were made by a carpenter in the town". There were 241 rods in one set and although the first set was made by a carpenter, Cuisenaire states that he did help him. He told the carpenter what to do and indicated the length of the rods to him. As for the coloring, he consulted a specialist in colours. The carpenter worked under his direction and the rods were coloured in accordance with the colours discovered by Cuisenaire. In cross-examination, although he stated that the sets of rods were made by a carpenter by the name of Corlte, he added that "It is quite possible that I put my hand to it. He was making them to please me. I did not pay for them." In re-examination he explained that he was present during the operation and told the carpenter what to do. He also admitted, at p. 29 of the examination, that it may have been that these three sets of rods numbered 291, instead of 241, because "at the beginning there were 100 pieces of these 1 centimeter (uncoloured) ones". It was only later, or probably in 1952, that it was realized that 50 of these were sufficient. Asked as to whether it was of any importance what the finished rods looked like, he answered "as a teacher, from the teaching point of view, it was very important to me to see if the results were good or bad . . . . They had to be attractive. It has been proven, and still proven in the whole world, that children everywhere are attracted by beautiful colours." Re-examined by his counsel, Cuisenaire stated with respect to the colouring of his rods that they were coloured by experts in the application

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of colours to wood who were artists. He added that the final decision as to the shades of colour was his but that he was not capable of realizing that artistically.

He used the three sets of rods made in 1947 for about five years and then in 1952 they were sold commercially. In order to do this, he had to obtain a publisher and a manufacturer and on March 15, 1952, Duculot-Roulin of Tamines, Belgium, province of Namur, was chosen to manufacture and manufactured his rods. A box of rods (Ex. 4 of the examination) was produced as one of the first editions of the rods manufactured under a contract with the above manufacturer.

Cuisenaire's explanatory book (Ex. 5 at the examination) dealing with his teaching system was also published in 1952 at the same time as the rods were sold by Duculot-Roulin in Belgium. He also stated that the rods were not sold in Belgium before 1952 nor was the book or work published before that date and that he was the author of all the material in his book.

He declared at p. 177 of the examination, that at no time had the Belgian Government or the Belgian Ministry of Education ever claimed rights in his system adding "I would like to see that, they have no right to it . . . . This would be incredible".

At p. 25, Cuisenaire states that he does not claim that any part of his book *Les nombres en couleurs* was being infringed by any of the defendants but that the latter were using his book to demonstrate their rods.

Asked by Mr. Osborne at p. 25 whether he considered that any defendant in Canada has infringed any part of the work entitled *Les nombres en couleurs* he answered:

> A They are manufacturing part of my system. I think they are infringing upon my invention.
>
> Q Do you claim that any defendant in Canada has produced or reproduced the whole or part of the work entitled "Les nombres en couleurs"?
>
> A. Yes, definitely, a certain part of it by producing those rods without my permission.

He then, lower down, was asked by counsel for the defendants

> Q. Am I right in believing that the literary and/or artistic work referred to in paragraph 4 is in fact the set of rods illustrated by Exhibit No 4?

and answered

> A. Why ask me this question when I have already proved this morning that this is a literary, artistic and pedagogic work

He then finally admitted to the Commissioner at p. 26 of the examination that the rods, Ex. 4, are those referred to in paragraph 4 of the statement of claim. He also later stated that the "literary compilation and/or artistic work" referred to in paragraph 5 is the set of rods illustrated by Ex. 4.

He was then asked by counsel for the defendants whether his only complaint in the Canadian litigation is that one or more of the defendants have copied the rods illustrated by Ex. 4, and he answered as follows:

> A. I think so, but once again you must know that better than I do.

He agreed on p. 35 that his purpose in designing the rods was to help educate children and that the colour of the rods performs a function in teaching the children and is of capital importance. He stated at p. 36, in answer to the question whether his work in developing his theory to assist in the education of children had been part of his educational work for the Belgian Government, that nobody had helped him and that on the contrary "lots of people try to fight me". Asked whether this work he was doing with regard to his system was part of his duties as an employee of the Government, he answered that he was not made to do research. He was further examined in this respect as follows:

> Q. You had no agreement with the Belgian Government or Department of Education with respect to copyright in your work?
>
> A. I have deposited, as it is requested by law in Belgium, at a certain date, my invention, that is, my book and all the material relevant to my system.
>
> Q. I just asked simply this, am I right that in 1947 you did not have any agreement with the Belgian Government or Department of Education with respect to copyright in any of your work?
>
> A. No. There is no contract, one never has a contract and one is completely free. In 1947 I had not published anything, yet I had spent a little fortune in my work and in my research.

The plaintiff herein had a rather difficult task in that he was faced by a decision in Australia in *Cuisenaire v. Reed*[1] where Pape J. held that his rods could not be the subject of copyright because the Australian *Copyright Act* (based on

[1] [1963] V.R. 719.

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the *Imperial Copyright Act* of 1911) did not protect works of craftsmanship *per se*, but only of artistic craftsmanship and that his rods were not artistic. Pape J. also held that as no special skill or training was required to cut the strips of wood in predetermined lengths, and to colour them, no craftsmanship was involved in their production and they were not works of "artistic craftsmanship" within the definition of the Act.

The allegation in the Australian case was that the defendant, by making the rods, had infringed the plaintiff's book or books by constructing in three dimensions articles in accordance with the directions in the tables in the book and that, therefore, these rods were part of the work.

The plaintiff, in the present instance, has taken a different position and claims that these rods, considered by themselves, are a work in which copyright subsists as an artistic work or as a work of artistic craftsmanship, although they must be considered against the background of their development and are part of a larger overall work, his book.

As a matter of fact, the plaintiff, by the amended statement of facts, deliberately excluded, in describing the works on which he relies, his literary work *Les nombres en couleurs* as well as any reference to the system, relying only on two single works, the two sets of rods, one of 10 and the other of 241 pieces, and merely mentioning that the rods are "for the teaching of the science of arithmetic in primary school grades". Pape J. in the Australian case held that the rods were not artistic on two main grounds which were (1) that the definition of "artistic" in section 2(*b*) is an exhaustive definition and although it uses only the word "includes" it means "means and includes" and, therefore, the artistic works contemplated are restricted to "painting, drawing, sculpture" even if "artistic" here is a generic label which was intended to include subject-matters possessing no elements of artistic quality at all and (2) that "artistic" with the word craftsmanship has a narrower meaning, does not fall within the wider scope of artistic as defined above and must have an artistic element. He also held that the plaintiff's works were not works of craftsmanship.

I should point out here that the definitions of "artistic work" and "literary work" as set out hereunder are exactly

the same in the Canadian statute as they were in the Australian statute that Pape J. had under consideration. They are:

> 2. In this Act,
>
> . . .
>
> (*b*) "artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;
>
> . . .
>
> (*n*) "literary works" includes maps, charts, plans, tables and compilations;

There is, however, a difference between the Australian Act and the Canadian Act in that the latter, since 1931, contains section 2(*v*) which appears to have been taken from article 2 of both the Berne (1908) and Rome (1928) Conventions (although the Canadian legislation, in addition to the words literary and artistic, added the words "dramatic" and "musical") and thrown into the Canadian Act in an attempt to comply with its international commitments when it adhered to the Convention on the basis that since Canada had undertaken to protect works defined in that way, it was essential that our statute should so define them. Canada did not adopt the definition which is contained in both the Berne Convention of 1908 and the Rome Convention in 1928, until 1931 because the effect of the requirement of registration under the Act of 1906 was to deny to Canada membership in the International Copyright Union of Berne.

Section 2(*v*) of the Canadian *Copyright Act* reads as follows:

> 2. In this Act,
>
> . . .
>
> (*v*) *"every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression,* such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science.

(The emphasis is mine).

The plaintiff's position with regard to the Australian decision is that, as the Australian Act did not have a comparable section 2(*v*), Pape J. could only inquire as to whether the rods were an artistic or literary work within the restrictive definitions of these terms in that Act and

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that all he had decided, therefore, was that they could not fit into either category. Counsel for the plaintiff also submits that Pape J. came to the conclusion that proof of compliance with some of the conditions required in Australia for a foreign author to obtain copyright (the equivalent of our section 4 of the Canadian Act) had not been sufficient. He urges that another reason for the failure in the Australian case was because the presumption sections (of the existence of copyright, of authorship and ownership) are not nearly as strong in Australia, where they disappear once the question of copyright or authorship has been put in issue, as they are in Canada where they subsist even when the question of copyright or authorship is put in issue.

He submits that even assuming Mr. Justice Pape was right, and that the works do not fall within the definition of an artistic or literary work, they do fall within the definition of section 2(*v*) of the Canadian Act and, therefore, the presumption of section 20(3) of the Act applies and they are presumed to be works in which copyright subsists and the plaintiff is presumed to be the owner of such copyright.

The plaintiff, moreover, takes the position that Pape J. was wrong in holding that his rods did not fall within the definition of an artistic work or that they are not works of artistic craftsmanship and that in any event they do fall within section 2(*v*) which encompasses the definition of artistic work as defined in section 2(*b*), of literary work as defined in section 2(*n*) as well as musical and dramatic works and gives a further real meaning and significance to all of these terms.

It is also submitted on behalf of the plaintiff that all the evidence points toward the plaintiff having fulfilled the condition of citizenship and publication which entitles him to ownership of copyright in Canada of his rods. Furthermore, the plaintiff claims that the evidence is that at the time he made his rods he had no intention of multiplying the design (if one can assume these rods are valid designs) and, therefore, they cannot fall within section 46(1) which would have the effect of taking them out of the *Copyright Act*. This section reads as follows:

> 46. (1) This Act does not apply to designs capable of being registered under the *Industrial Design and Union Label Act*, except

designs that, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

The position of counsel for the plaintiff is that it is not even necessary to say whether the works are artistic, literary, musical or dramatic because as long as such works are *original productions in the scientific domain,* they are within the expression "every original literary, dramatic, musical and artistic work". He, in other words, takes the position that he does not have to say any more than that these works are an original production in the scientific domain and need not say whether they are artistic, literary, dramatic or musical.

The defendant, on the other hand, submits that section 2(*v*) should be interpreted as if the words "in one or other of these categories" were inserted therein to read as follows: "every original literary, dramatic, musical and artistic work includes every original production" *in one or other of these categories* "in the literary, scientific or artistic domain" even if in order to do so one must make a repetition and read into the text of the section additional words.

There was apparently nothing novel in saying that copyright could subsist in scientific works as there were areas under the law prior to 1931 in which scientific works were protected. As a matter of fact, a literary work in the scientific domain was always protected as a literary work as well as certain artistic works in the scientific domain such as charts and the question here is whether the inclusion of section 2(*v*) into our Act in 1931 with the words *"includes every original production in the literary, scientific or artistic domain whatever may be the mode or form of its expression..."* (which are of a descriptively wide scope) has extended the classes of matters that can be the subject of copyright under the Act to a point where it could comprise any original production in the scientific field.

Before dealing with this question, it may be useful to mention at this stage that the *Copyright Act* protects an original work which must be original, not in the sense that it was not thought of before, but in the sense that it originated with the author who must, in addition, have exercised skill and labour in producing it. With regard to such skill and labour, the emphasis is upon the object of

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the author in creating the work rather than on the reaction of the viewer to the completed work, for it is commonplace in copyright law that it is immaterial whether the work has any merit at all (cf. *Walter v. Lane*[2]). It is also commonplace in copyright law that the protection given by the *Copyright Act* is only to the expression of an idea or an art and not to the idea or art itself.

This was clearly set out in *Baker v. Selden*[3] by Mr. Justice Bradley who delivered the opinion of the Court. In this case, a claim to the exclusive property in a peculiar system of bookkeeping by the author of a treatise in which that system is illustrated and explained was rejected for the reasons stated by Bradley J. at p. 102:

> . . . there is a clear distinction between the books as such, and the art which it is intended to illustrate . . . A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective,—would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described herein.

Copinger and Skone James on the Law of Copyright, 8th edition, express the same idea at p. 42 of their treatise where they say that:

> Copyright protection is given to literary, dramatic, musical and artistic works and not to ideas, and therefore it is original skill or labour in execution, and not originality of thought which is required.

Although there are some old decisions, such as *Baker v. Selden* (*supra*) referred to by Pape J. in *Cuisenaire v. Reed* (*supra*) which refuse the protection of copyright to objects which have a functional use or which could form the subject of a patent or invention, there is nothing that I can see in the *Copyright Act* to support the argument that intended use or use in industry of an article or its patentability otherwise eligible for copyright bars or invalidates registration or protection and I cannot read such a limitation into the *Copyright Act.* I could not, therefore, hold on the basis that the plaintiff's rods are not capable of being the subject of a copyright merely because they are partly functional or utilitarian in the sense that they are tools or counters, or because they could have been the subject of a

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[2] [1900] A.C. 539.

[3] (1879) 101 U.S. 99.

patent. I could not, moreover, deal with them as being industrial designs because in my view they are not proper subject matter for an industrial design as they are not ornamentation applied or to be applied to an industrial article.

There must, on the other hand, I believe, be some limitation to what is protected by copyright as it cannot conceivably have been the intention of Parliament to protect by way of copyright, material of any kind or any type of object. Nor must it have been intended that all original productions in the scientific field be given protection for the life of the author and 50 years thereafter when they can also be patented as inventions and given protection for 17 years only even if the rights of a patentee are not entirely similar to those of a holder of a copyright.

The plaintiff's sets of rods will, therefore, have to be considered in the light of and against the above background and their "copyrightability" determined on a proper interpretation of the *Copyright Act* and particularly those sections which deal with the works contemplated therein.

I should, however, before determining whether plaintiff's rods are covered by our *Copyright Act* deal with his submission with regard to the presumptions of section 20(3) of the Act which reads as follows:

> (3) In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,
>
> (*a*) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
>
> (*b*) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;

The statute does not define *work* except to say in section 2(*v*) that "work" includes the title thereof when such title is "original and distinctive". Section 4, on the other hand, states that:

> 4 (1) Subject to the provisions of this Act, copyright shall subsist in Canada for the term hereinafter mentioned in *every original literary, dramatic, musical and artistic work, if* . . .

(The emphasis is mine).

The defendant submits that section 20(3) of the Act should be restricted to the works listed in section 4(1) otherwise they cannot benefit from the presumptions therein contained. Counsel for the plaintiffs on the other

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hand, takes the position that all this section 4(1) says is that copyright will subsist in every work which is an original literary, dramatic, musical or artistic work, if certain conditions are complied with adding that in section 20(3) of the Act, the term work is not qualified at all and that it should in no way be restricted to the works listed in section 4(1) of the Act. He claims that it is deliberately not qualified because if it were qualified, it would reduce the area of the presumptions.

This area of presumptions, according to the plaintiff, provided in section 20(3) extends to everything that is necessary to make a work one in which copyright subsists and he submits that if one comes into Court with a work, then it is assumed that that work is a work in which copyright subsists unless the defendant establishes that it is not. He contends that if in an action for infringement of a copyright in a work, the defendant in his defence merely contests that there is copyright in such work that the plaintiff is not the owner and there is no evidence on the subject and no argument addressed to it, then that is the end of the matter and the work is one in which copyright subsists and the author is the owner.

He indeed takes the position that it is not legitimate to qualify the unqualified word "work" in section 20(3) by a so-called definition of that word appearing in section 4(1) there being here no definition of work but merely a qualification as there is no definition of the word "work" in the Act. The Act, according to counsel for the plaintiff, merely uses the term in its ordinary signification and in some places qualifies the work in a different way.

He, therefore, concludes that as the plaintiff's works are works which are either artistic works or of artistic craftsmanship and, in any event, a production in the scientific domain, the presumptions of section 20(3) come into play and his works "are presumed to be works in which copyright subsists" unless the contrary is proved and he (as the author of the works) is presumed to be the owner of the copyright unless the contrary is proved.

I am afraid that I cannot agree with this submission as I must, I believe, hold that the words in section 20(3) "In any action for infringement of copyright in any work..." do refer to works as listed in section 4(1) of the Act, namely, "...every original literary, dramatic, musical and

artistic work" and the presumptions, therefore, only operate if the action is one for infringement of a work which is clearly within the above categories as defined, however, by sections 2(*b*), (*g*), (*n*) and (*p*) and as extended, if at all, by a proper interpretation of section 2(*v*) of the Act. If the works involved do not clearly fall within such provisions then, in my view, section 20(3) does not come into play and, therefore, the presumptions of the provision do not apply. It, therefore, follows that plaintiff can find assistance in the presumptions contemplated in the Act only after he has otherwise established that his rods are works of a class entitled to protection under the Act.

This he attempted to do on the basis that his rods are artistic or of artistic craftsmanship, or both, and that, in any event, even if they are not any one of those, they are a mode or form of expression of an original production in the scientific domain under section 2(*v*) of the Act even if it is not possible to relate them specifically to any one of the four categories mentioned therein.

I will first deal with plaintiff's submission that any production in the scientific domain under section 2(*v*) can be a proper subject matter of copyright and that this is what his rods are as they are at least a partial expression of his scientific work which is his book *Les nombres en couleur*.

I believe that in order to deal properly with section 2(*v*) of our Act, some consideration should be given to the manner in which it came into the Act as well as to its wording and the inclusion therein of the word scientific which I must say is somewhat confusing. I should mention that the word scientific was in the Canadian Act as far back as the year 1875 and remained therein until the year 1924 when that statute was repealed (cf. *Revised Statutes*, 1875-1886 and 1906 chapter 70). The expression used in those statutes was "literary, scientific and artistic works". The statute from 1924 to 1931 did not have the word "scientific" in it and this word returned in 1931 when, as already mentioned, section 2(*v*) was taken from the Rome Convention of 1928, the words "musical and dramatic" were added to the term "artistic and literary works" and the whole was inserted in the interpretation section of the Act probably, as I have already indicated, in an attempt to comply with the obligations undertaken by Canada as a member of the Convention.

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The manner in which the addition of section 2(*v*) came about and the somewhat confusing language used therein (by which I refer to the word "scientific" between the words literary and artistic) indicate, I believe, that not too much thought could have been given at the time to its possible effect on the subject matter of copyright in this country.

It therefore is at least an ambiguous section and considerable caution should, I believe, be exercised as a matter of construction in interpreting the language used so as to avoid absurd results and so as to avoid concluding that it involves a substantial change in the law that could not have been intended by Parliament.

Before an interpretation is given to this section which would lead to an absurdity or to a construction which would produce impractical or incongruous results (such as that products such as penicillin or tetracyclin, or IBM computers or telephone switchboard with complicated wirings with a colour code in the wiring that are ordinarily proper subject matters of inventions could, in addition to being patented be also copyrighted, and thereby given a longer life) a very close look should, I believe, be taken at this section with a view to restricting it to reasonable proportions and to giving it a meaning in conformity with the object of the *Copyright Act* and in accordance with the general accepted scheme of the protection that is to be given to industrial rights in this country. Indeed, when words used are ambiguous and uncertain, one must resist an interpretation which would lead to a very substantial change in the character of the subject matter involved.

Should I give this section the wide interpretation claimed by the plaintiff so that it covers everything that can be described, as an original production in the scientific field or as purely utilitarian which would indeed involve giving protection under our *Copyright Act* to objects which have been held in the past not to be the proper subject of a copyright (such as in *Hollinrake v. Truswell*[4] where a cardboard pattern sleeve containing upon it scales, figures and descriptive words for adapting it to sleeves for any dimensions was held to be not "copyrightable" although it might be the subject of a patent as an instru-

[4] [1894] 3 Ch D 420

ment or tool) and would considerably expand the law in this regard. I must, I am afraid, hold after a careful consideration of this matter, that the law cannot be extended in this manner by such an ambiguous provision.

I am also of the view that the subject matter of copyright must remain in line with the general nature of the works defined in sections 2(*b*) and 2(*n*) and with the examples given therein as well as in section 2(*v*) which all put a limitation on the meaning that would otherwise be given to them and I should add that plaintiff's rods do not fall into any class illustrated by these examples.

I must, therefore, conclude that section 2(*v*) of the Act has not altered the law in any substantial way, if at all, and that it is still necessary to find that the work in which copyright is claimed is an "original literary, dramatic, musical or artistic work" in the normal meaning of those words and in the light of the definitions in section 2 of the Act.

Indeed the only reasonable solution I can arrive at is that the Act only protects those original literary, dramatic, musical and artistic works referred to in section 4(1) of the Act and it therefore follows that it is still necessary before section 2(*v*) comes into operation to find that the work falls in one or the other of these four categories.

If such is the case, the question may well be asked what section 2(*v*) can mean as it should not be presumed that Parliament has spoken uselessly. I should think that the most that it can mean is that it may, within any one of those four categories, give a more extended meaning to the works included therein because of the words "whatever may be the mode or form of its expression" or because of the examples given in the subsection, than was considered right under the statute as it stood immediately before section 2(*v*) was put in.

Whatever such an extended meaning may be, it cannot, in any event, assist the plaintiff here as his rods clearly do not fall in the category of a dramatic or musical work nor of a literary work nor even in the category of an artistic work with which I will deal later.

I should add that by going to France which, as a member of the convention, has adopted the Berne definition of literary and artistic works by a provision that is very

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similar to our section 2(*v*), I find some support for the conclusions I have reached with regard to the construction to be given to our own section 2(*v*).

Although the Berne definition, in addition to the enumeration in section 2 of the Rome Convention, has been amended by additions adopted at the Geneva Convention of 1952 of cinematographical and photographical works it still contains those words which have given some difficulty of interpretation in the present instance as appears from a reproduction of the said section hereunder:

> 123.—Selon l'article 2, alinéa 1er:
>
> Les termes «œuvres littéraires et artistiques» comprennent *toutes les productions du domaine littéraire, scientifique et artistique, quels qu'en soient le mode ou la forme d'expression,* tels que: les livres, brochures et autres écrits; les conférences, allocutions, sermons et autres œuvres de même nature; les œuvres dramatiques ou dramatico-musicales; les œuvres chorégraphiques et les pantomimes dont la mise en scène est fixée par écrit ou autrement; les compositions musicales avec ou sans paroles; les œuvres cinématographiques et celles obtenues par un procédé analogue à la cinématographie; les œuvres de dessin, de peinture, d'architecture, de sculpture, de gravure, de lithographie, les œuvres photographiques et celles obtenues par un procédé analogue à la photographie; les œuvres des arts appliqués, les illustrations, les cartes géographiques, les plans, croquis, et ouvrages plastiques, relatifs à la géographie, à la topographie, à l'architecture ou aux sciences.

The comments in French *Juris classeur commercial—Propriété littéraire et artistique,* fasc. 23, N° 124, p. 33, are of some assistance in appraising the significance of the word scientific which appears in both our section 2(*v*) and in the Berne or Brussels definition of "literary and artistic works" adopted by France:

> 124.—De prime abord, ce texte appelle une observation. Le domaine des œuvres littéraires et artistiques est indiqué par une longue énumération, mais la notion juridique d'œuvre littéraire et artistique n'est pas définie.
>
> L'ensemble des mots précédant l'énumération ne constitue pas une définition suffisante. Les mots: «toutes les productions du domaine littéraire, scientifique et artistique» ne font que reprendre les qualificatifs littéraire et artistique; de plus, ils introduisent une certaine ambiguïté avec le qualificatif scientifique; il faut entendre par là que les écrits, plans, conférences ayant pour objet les questions scientifiques sont protégés au titre du droit d'auteur; il ne s'agit pas de la protection du travail scientifique, mais seulement de l'expression qui en a été donnée. (V. Ladas, 92—*Marcel Plaisant et Olivier Pichot,* p. 39—*Raestadt,* p. 55).

It is also interesting to note the comments which follow immediately after the above quotation on the same page

and which state that countries adhering to the Convention, in view of the generality of the above definition, are entitled to qualify their own legislation insofar as the Convention does not impose a definition:

> En raison de l'insuffisance de la définition conventionnelle certaines divergences peuvent apparaître entre les solutions données par les juridictions nationales; celles-ci qualifieront leurs législations nationales respectives dans toute la mesure où la convention n'impose pas une définition. Il faut constater qu'il est difficile qu'il en soit autrement étant donné l'extrême généralité de la nation (V. *Raestadt*, p. 70).

I find additional comments on this matter in the same *Juris classeur* at fasc. 24, p. 33, with respect to the convention held in Geneva in 1952 where at p. 153, dealing with the words "scientific works" the commentator says:

> 153.—La question de savoir si par «œuvre scientifique» il ne fallait pas entendre les découvertes ou inventions qui devraient faire l'objet d'un éventuel «droit du savant» a été nettement résolue en sens contraire (Doc. DA/SR/5, p. 9). Il a été établi que, par œuvre scientifique, il *fallait entendre la littérature scientifique en soi et non pas l'activité, les idées ou les créations des savants, incorporées ou non à un texte écrit. C'est la raison pour laquelle les termes de l'énumération contenue dans l'avant-projet (œuvres littéraires, artistiques et scientifiques) ont été renversés afin de permettre de faire figurer le mot «scientifique» à côté du mot «littéraire»*. (Doc. DA/SR/17, p. 2).

(The emphasis is mine).

I now turn to plaintiff's contention that if his rods are not original productions in the scientific domain, as contemplated by section 2(*v*) of the Act, they are either artistic works or works of artistic craftsmanship under section 2(*b*) of the Act. This section reads as follows:

> 2. In this Act,
>
> . . .
>
> (*b*) "artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;

Here again I must disagree with this submission. In my view, plaintiff's rods are physically little more than tools or counters to be used for a particular purpose. Although they are coloured in a manner such as to interest or please children, the same as blocks for instance, they were never intended primarily as an article regarded as artistic or beautiful in itself even if the artistic requirements required here are not too great. Indeed, even if artistic merit is not a matter of importance in copyright law, the word artistic

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must still be given its ordinary meaning although, may I add, there could be considerable debate as to the merit of a particular work.

It is true, as pointed out by counsel for the plaintiff, that there is originality in the colouring and size, selection and arrangement within the sets and the choice of the colours may well have been arrived at with a view to applying the method he conceived to teach children arithmetic. It is, however, the artistic work itself which is entitled to protection and not the idea behind it. These rods indeed are tools and nothing more, the same as colours, for instance, are tools in teaching children how to paint. They can take on meaning only when considered and integrated with a concept itself which in itself is not entitled to protection. The only relationship between the rods which exists here is by reference to Cuisenaire's theory where it can be seen that there is a connection between the colours denoting certain families of significantly related mathematical values which, however, cannot really be considered as an artistic arrangement. Furthermore, although these coloured rods set out orderly in a box could be considered as an artistic arrangement, there is no claim to such arrangement here and it is difficult to see how colour through these rods could confer copyright on the works even if all these things are claimed in combination.

An artistic work, in my view, must to some degree at least, be a work that is intended to have an appeal to the aesthetic senses not just an incidental appeal, such as here, but as an important or one of the important objects for which the work is brought into being. The plaintiff's rods may have a certain attraction to children, but this, in my view, is a very secondary purpose which, I am afraid, is not a sufficient basis for a finding that the rods are artistic.

I must, therefore, conclude that plaintiff's rods are not and cannot be held to be artistic works under the Act.

Neither can they be held to be works of artistic craftsmanship because they are not artistic and for the additional reason given by Pape J. in *Cuisenaire v. Reed* (*supra*) in that no craftsmanship was involved in their production.

Neither are these rods plastic works relative to science under section 2(*v*) as although plastic here is not used in the scientific or polyethylene sense all the definitions of plastic suggest that it must be something that is or has

been mouldable or pliable material and, of course, wood is not of that nature. Nor can these rods be assimilated in any way with the artistic meaning of plastic, which involves the art of shaping or modeling such as in the art of sculpture or ceramics.

It follows that plaintiff's rods are not a proper subject matter of copyright under the Act and his action must, therefore fail.

In view of the conclusion I have reached with respect to the "uncopyrightability" of plaintiff's rods, it is not necessary for me to deal with a number of other matters raised, such as the question whether any skill or labour were put into the works by the plaintiff and whether he actually executed the design or whether he actually coloured the rods except to say that I would have had some difficulty in reaching the conclusion that he had, in view of the fact that he had these rods made by somebody else and admitted that he was not even capable of realizing the colours artistically; I would even have some difficulty in concluding that he even made the 10 rod set, the evidence on this point being of a sketchy nature or that the works were as required by the Act, ever published. Even the matter of what are the essential elements of his works is not too clear and it is also not too clear whether his sets, for instance, consist of 291 pieces or 241 pieces. The question as to whether he was a Belgian citizen at the relevant time was also queried although here, I would hold that he has sufficiently established this point in his evidence taken on commission.

It will not, moreover, be necessary to deal at any length with the matter raised by defendant that under section 12(3) of the Act, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner otherwise than to say that although Cuisenaire was employed by the State of Belgium as a teacher, he was so employed only until 1947, when he took his pension and as his works were produced after 1947, section 12(3) of the Act does not apply.

I feel that I should not part with this case, however, without stating that I have not reached the conclusion that plaintiff's rods are not "copyrightable" under our Act and that he cannot find protection under our law for what can, at least, be called a partial expression of a very impor-

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tant and popular scientific method of teaching arithmetic to children throughout the world, without some hesitation. My apprehension in this regard was due mainly to the all embracing words used in section 2(*v*) of the Act when describing the original productions contemplated in that they cover "whatever may be the mode or form of its expression". I was also somewhat concerned when I ran across an American decision rendered in 1966 in *The Gelles-Widmer Company v. Milton Bradley Company et al*[5] where the subject matter dealt with was not too different from the one involved in the instant case.

It was indeed held in that case that a flash card set that was solely utilitarian inasmuch as the cards were designed specifically for use by children in the home as educational aids, was not for that reason incapable of being the subject matter of copyright. These flash cards bore words, numbers and pictures to be shown in school drills to stimulate observation or as an aid in teaching, reading and arithmetic.

I should also point out that in addition to these flash cards containing the arithmetic fact problems, the plaintiff, in this American case, had also drafted testing sheets which could be used for determining the development and progress the child was making as well as explanations and instructions for the child and the parents explaining the proper use of both the flash card and the progress testing sheets.

The cards in the above case were, however, a literary or graphic work and, of course, there is that difference with the instant case where plaintiff's rods could not be related to either an artistic or literary work unless they could be said to be reproductions of the written instructions contained in plaintiff's book *Les nombres en couleur* which contains a table, and in another case, a series of plain and coloured circles which are numbered and set out in the form of a chart. This, however, they cannot be as these rods are not in the nature of a table or compilation and, therefore, do not reproduce the written instructions in his book.

I should also add that the plaintiff in this case took the position that his rods, although related to his teaching

[5] 136 USPQ 240.

system, must be taken as an artistic work or work of artistic craftsmanship and did not base his action on the allegation that his rods were an expression of his book, and, for that reason alone, the above case can be of no assistance to him.

It is rather interesting to note, however, that the American decision held these cards "copyrightable" even if such a finding had the effect of protecting not only the expression of the author's idea or system, but also the very idea or system itself and one may well wonder whether there has been an enlargement of the subject matter of copyright in that country.

I should also mention a decision referred to by plaintiff in support of his contention that literary works can be protected from infringement by three dimension objects reproducing them in *King Features Syndicate, Incorporated, and another v. O. and M. Kleeman, Limited*[6] where defendants were held to have infringed the plaintiffs' copyright in their comic strips published in newspapers embodying as their central figure a grotesque figure dressed in a nautical costume popularly known as "Popeye the sailor", by importing and selling three dimension dolls, mechanical tops, brooches and other articles featuring the figure Popeye. The House of Lords also held:

> . . . that the defendants' dolls and brooches were reproductions in a material form of the plaintiffs' original artistic work and were not the less so because they were copied, not directly from any sketch of the plaintiffs, but from a reproduction in material form derived directly or indirectly from the original work, and that s. 22 of the Copyright Act, 1911, did not operate to bring an existing copyright to an end or to absolve pirates from the offence of piracy.

Although the above dolls can be considered as reproductions of the plaintiffs' artistic work in the above case, plaintiff's rods, however, cannot be considered as reproductions of his written text (even if the all embracing words in section 2(*v*) are considered) for the very reasons set down by Pape J. in *Cuisenaire v. Reid* (*supra*) at pp. 735 and 736 which I adopt unreservedly:

> . . . Where, as here, you have a literary copyright in certain tables or compilations, there is in my view no infringement of the copyright in those tables or compilations unless that which is produced is itself something in the nature of a table or compilation which,

[6] [1941] A C. 417.

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whether it be in two dimensions or three dimensions, and whatever its material form, reproduces those tables. Were the law otherwise, every person who carried out the instructions in the handbook in which copyright was held to subsist in *Meccano Ltd. v. Anthony Hordern and Sons Ltd.* (1918) 18 S.R. (N.S W.) 606, and constructed a model in accordance with those instructions, would infringe the plaintiff's literary copyright. Further, as Mr. Fullagar put it, everybody who made a rabbit pie in accordance with the recipe of *Mrs. Beeton's Cookery Book* would infringe the literary copyright in that book.

I agree with Pape J. in *Cuisenaire v. Reed* (p. 733) that "there can be no doubt now that copyright in a work in two dimensions may be infringed by the production and sale of an article providing they are in the nature of the things they reproduce. The plaintiff's rods, however, cannot, I repeat, be considered as a reproduction of the tables or compilations in his book and the words of Pape J. in the above case at p. 734 are sufficiently convincing in this regard:

> . . . what the defendants have done does not amount to a reproduction of the plaintiff's tables or compilations. Each of the cases referred to was a case in which there was a clear visual resemblance between the alleged infringement and the work in which copyright was alleged to subsist, sufficient to warrant the conclusion that one had been copied from the other. In this case there is no such visual resemblance between either the table referred to in paragraph 1B of the statement of claim, or the chart or compilation referred to in paragraph 1C of the statement of claim.

and at the bottom of the same page he added:

> . . . in my view, a set of written directions is not "reproduced" by the construction of an article made in accordance with those directions. A reproduction must reproduce the original, and here the original is in one case a set of words in the form of a table and in the other case a series of plain and coloured circles which are numbered and which are set out in the form of a chart. In my view, the defendants' rods reproduce neither.

I must, therefore, conclude that plaintiff's rods are not a proper subject matter of copyright in this country and that he cannot, therefore, own copyright in them.

BETWEEN:

CURTISS-WRIGHT CORPORATION .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Ottawa
1967
Nov. 28-30
Dec. 11

Crown—Patents—Compensation payable for use of patent on Crown's indemnity—Defence Production Act, R.S.C. 1952, c. 62, s. 20—Whether Crown precluded from disputing patent's validity.

Contracts—Licence to use patents—Acknowledgment of patent's validity and undertaking not to contest—Whether binding after termination of agreement—Estoppel in pais and promissory estoppel.

Suppliant applied to the Commissioner of Patents to fix the compensation payable by the Crown under s. 20(3) of the *Defence Production Act*, R.S.C. 1952, c. 62 for the infringement or use of certain patents relating to flight training apparatus by a company which the Crown had in 1958 contracted to relieve from payment of royalties therefor. The Crown denied validity of the patents and the Commissioner suspended proceedings on the claim until the matter was decided by a court. Suppliant filed a petition of right in this court.

In 1952 suppliant had licensed the same company to use the patents for five years subject to termination by either party after two years. The licensing agreement provided that on its expiration the parties should be in the same position with respect to the apparatus as before the agreement and in clause 16 thereof the licensee acknowledged the validity of the patents and agreed not to be an adverse party to any suit disputing their validity.

Certain questions of law were set down for hearing before trial.

Held, the licensee was not precluded by clause 16 of the licensing agreement from denying the validity of the patents in infringement proceedings brought by the suppliant after expiration of the agreement. It could not be concluded that the parties to the agreement must have intended as a matter of business practicality that the licensee so bound itself by clause 16 (*The Moorcock*, (1889) 14 P.D. 64; *Campbell v. G. Hopkins & Sons (Clerkenwell) Ld.* (1931) 49 R.P.C. 38, distinguished). Neither was clause 16 a representation of fact by the licensee which induced the licensor to enter into the agreement so as to raise an estoppel in *pais* against the licensee; nor was it a representation of the licensee's state of mind so as to give rise to the doctrine of promissory estoppel.

Held also, even if the licensee was precluded as aforesaid the Crown was not precluded from disputing the validity of the patents by way of defence to a claim under s. 20(3) of the *Defence Production Act*.

ARGUMENT of questions of law before trial.

I. Goldsmith and *R. S. Caswell* for suppliant.

Keith E. Eaton and *G. A. Macklin* for respondent.

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JACKETT P.:—Certain questions of law that were set down for hearing and disposal before the trial of this Petition of Right have been argued and are ready for disposition.

The Petition of Right is based on a right to compensation that the suppliant asserts by virtue of section 20 of the *Defence Production Act*, R.S.C. 1952, chapter 62, which reads as follows:

> 20 (1) The Minister may, on behalf of Her Majesty, contract with any person that Her Majesty will relieve that person from any claims, actions or proceedings for the payment of royalties for the use or infringement of any patent or registered industrial design by that person in, or for the furnishing of any engineering or technical assistance or services to that person for, the performance of a defence contract.
>
> (2) A person with whom the Minister has contracted under subsection (1) is not liable to pay royalties under any contract, statute or otherwise by reason of the infringement or use of a patent or registered industrial design in, or in respect of engineering or technical assistance or services furnished for the performance of a defence contract and to which the contract under subsection (1) applies.
>
> (3) A person who, but for subsection (2), would have been entitled to a royalty from another person for the infringement or use of a patent or registered industrial design or in respect of engineering or technical services for which a royalty would be payable but who by reason of subsection (2) is not so entitled, is entitled to reasonable compensation from Her Majesty for the infringement, use or services and if the Minister and that person cannot agree as to the amount of the compensation, it shall be fixed by the Commissioner of Patents and any decision of the Commissioner under this section is subject to appeal to the Exchequer Court of Canada under the provisions of the *Patent Act*.

This section should be read with the following portions of section 2 of the same Act:

> 2. In this Act,
>
> . . .
>
> (*m*) "Minister" means the Minister of Defence Production;
>
> . . .
>
> (*p*) "royalties" includes licence fees and all other payments analogous to royalties, whether or not payable under any contract, that are calculated as a percentage of the cost or sale price of defence supplies or as a fixed amount per article produced or that are based upon the quantity or number of articles produced or sold or upon the volume of business done, and includes claims for damages for the infringement or use of any patent or registered industrial design; and
>
> . . .

According to the allegations in the Petition of Right:

(a) by a letter dated July 8, 1958, the Department of Defence Production agreed, on behalf of the Minister

of Defence Production, to relieve and indemnify Canadian Aviation Electronics Limited (otherwise known as "CAE") from and against claims for payment of certain "royalties";

(b) CAE has, since that date, among other things, made use of inventions embodied in patents of which the suppliant is the owner or exclusive licencee without the licence or consent of the suppliant;[1]

(c) the suppliant applied to the Commissioner of Patents for compensation under section 20 of the *Defence Production Act;*

(d) the respondent denied the validity of the patents and the use of the inventions embodied therein; and

(e) the Commissioner suspended proceedings on the suppliant's claim until the matter is decided by a court of competent jurisdiction.

In these circumstances, this Petition of Right to determine the suppliant's right to compensation is presumably based on principles established by *The King v. Bradley.*[2]

The questions of law that have to be disposed of were set down for hearing before trial by an order dated October 6, 1967, which provided that the questions are to be disposed of (a) on the basis that the facts alleged in the Petition of Right and Reply shall be assumed to be correct for the purposes of such hearing only (excluding any pleading as to the effect of certain agreements referred to as the "Licensing Agreement" and the "Know-How Agreement" respectively), and (b) on the basis of the "Licensing Agreement" and the "Know-How Agreement". Accordingly, I will, in these reasons, discuss the facts as though the allegations of fact in the suppliant's pleadings had been established.

While the claim under section 20 of the *Defence Production Act* is based on an agreement entered into between

[1] The other things that CAE is alleged to have done as a consequence of the letter of July 8, 1958, are not material to the questions of law that have to be determined, although claims for compensation under section 20 of the *Defence Production Act* based on them are contained in the Petition of Right.

[2] [1941] S.C.R. 270.

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the Crown and CAE in 1958, an understanding of the questions of law that have to be disposed of depends on a knowledge of the earlier contractual relations.

It appears that the suppliant was a United States manufacturer of equipment used in the training of flyers variously referred to as "Flight Simulators" or "Flight Training Apparatus" and that, in order that CAE could manufacture such equipment in Canada for defence purposes, CAE and the suppliant on December 3, 1952, entered into the "Licensing Agreement", under which CAE obtained a licence to use certain patented inventions and was to be provided with technical information and assistance, and the Crown and the suppliant on December 31, 1952 entered into the "Know-How Agreement", under which the suppliant agreed with the Crown that it would provide technical assistance to CAE. Each agreement was for a five-year period.[3] Under the "Know-How Agreement", the Crown was to pay as consideration to the suppliant two amounts of $50,000, and, under the licensing Agreement, CAE was to pay to the suppliant "Licensor's cost, plus...twenty ...percent" for the technical assistance and royalties of $7\frac{1}{2}$ per cent. of selling price on the apparatus made under the agreement.

No question arises, at this stage in any event, as to the legal effect of these agreements in respect of things that were done during their respective terms, but there is a sharp difference between the parties as to the legal effect of the "Licensing Agreement" in respect of things done after the expiration of the term of that agreement. The clauses that must receive particular attention in that connection are the following:[4]

X—CANCELLATION OF AGREEMENT

(a) Licensor may cancel and terminate this Agreement if Licensee fails or refuses to comply with any of its obligations or covenants hereunder for any reason and does not remedy and make good such failure within sixty (60) days of the date of the receipt by Licensee from Licensor of written notice of such failure or refusal.

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[3] One of the agreements was extended in a limited respect but it is agreed that this extension does not affect the matters that I have to decide at this time

[4] Paragraph XVII provides that the agreement must be interpreted under the law of the State of New York, but it is common ground that this must be assumed to be the same as the law of Ontario.

(b) Licensee may at any time after two (2) years from date hereof, terminate this Agreement by written notice delivered to Licensor at least six (6) months prior to the date such termination is to become effective.

(c) If in any year after the two (2) year period mentioned above payments by Licensee to Licensor of royalties under this Agreement are less than a total of thirty-thousand ($30,000) dollars, Licensor may then and in that event by notice in writing to Licensee cancel or terminate this Agreement, such termination to be effective sixty (60) days after the date of delivery of such notice, unless Licensee within said sixty (60) days pays to Licensor an amount equal to the difference between the total of all amounts both accrued and paid during the said year and the said sum of thirty-thousand ($30,000) dollars.

(d) Licensee further agrees that it will not, after the expiration or termination or cancellation of this agreement (1) manufacture, sell, lease or otherwise dispose of the flight training apparatus licensed hereunder or any part thereof embodying any one or more features of the design of said flight training apparatus or any manufacturing methods employed by or peculiar to the design or manufacture of the said licensed flight training apparatus or (2) communicate to any other company or corporation or to any other person or persons any information furnished hereunder to Licensee by Licensor.

XI—RIGHTS UPON EXPIRATION, TERMINATION OR CANCELLATION

It is the intent of the parties hereto that, upon the expiration, termination or cancellation of this Agreement (herein sometimes collectively referred to as "Termination"), Licensor and Licensee shall then be, in respect of the manufacture, use and sale of flight training apparatus, in the same position as that which they occupied prior to the effective date of this Agreement, except that:

(i) Rights of the parties hereto under Article VI shall continue;

(ii) Licensor shall be paid any amounts accruing to it up to the time of termination;

(iii) Any claim which either party hereto may have against the other, at the time of termination, for damages arising out of any prior breach of this Agreement or any obligation either party may have arising out of circumstances and acts prior to termination shall survive such termination, and

(iv) Upon such termination, Licensee agrees forthwith to deliver to Licensor any and all working drawings, blueprints, specifications and/or other papers and data (except data on exclusive Licensee developments) and all copies thereof in its possession or under its control, applicable for use in connection with the manufacture of the licensed flight training apparatus.

. . .

XV—TERM OF AGREEMENT

This Agreement shall continue for a period of five (5) years from the date hereof unless sooner terminated under the provisions of Article X or extended by mutual agreement of the parties.

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XVI—VALIDITY OF PATENTS

Licensee hereby acknowledges the validity of the patents made the subject of this Agreement, and under which Licensee is now or hereafter licensed and agrees not voluntarily to become an adverse party, directly or indirectly, to any suit or action disputing the validity of said patents or any of them.

While the order setting questions of law down for hearing before trial contained three questions that were to be disposed of during the trial, it has been decided, the parties consenting, not to answer the first question.

The two questions that remain to be disposed of have to do with a claim by the suppliant under section 20(3) of the *Defence Production Act* for the use by CAE, after the letter of July 8, 1958, from the Department to CAE, of "inventions" described in "patents" to which the "Licensing Agreement" applies. The suppliant's position is that, by virtue of the "Licensing Agreement", in any infringement action by the suppliant against CAE for a use of any such "invention", after the expiration of the term of the "Licensing Agreement", in respect of which there is no agreement under section 20(1), CAE would be precluded from raising as a defence that the "patent" is invalid, and that it follows that the Crown, in a claim by the suppliant under section 20(3) based on such a use in respect of which there is an agreement under section 20(1), cannot raise the invalidity of the patent as a defence. The relevant part of the Court's order of October 6, 1967, reads as follows:

1. IT IS ORDERED that the following questions of law be set down for hearing and disposal prior to the trial hereof on the basis that the facts alleged in the Petition of Right and Reply shall be assumed to be correct for the purposes of such hearing only (excluding any pleading as to the effect of the Licensing Agreement and the Know-How Agreement) and on the basis of the Licensing Agreement and the Know-How Agreement attached hereto as Appendices "A" and "B" respectively, *viz.*:

. . .

(2) Whether, on the true construction of the Licensing Agreement, as between the Suppliant and CAE, CAE would be precluded in any proceedings by the Suppliant for patent infringement after the expiration of the Licensing Agreement from denying the validity of any patents to which the Licensing Agreement applies.

(3) If the answer to the question raised in paragraph 2 hereof is in the affirmative, whether, on the true construction of s. 20 of the Defence Production Act the Respondent is precluded from raising an issue as to the validity of any of the patents referred to in paragraph 2 hereof by way of defence to the Suppliant's claim

for compensation under that section for the alleged use by CAE of such patents, regardless of whether such alleged use constitutes a breach of the Licensing Agreement.

I shall deal now with the first of these two questions.

Put very briefly, the Crown's basic position on the first question, which revolves around paragraph XVI of the "Licensing Agreement", is that, whatever may be the correct interpretation of that paragraph, it operates only as a contractual provision the operative effect of which is restricted to the term of the agreement, and it can therefore have no application in relation to proceedings for patent infringement alleged to have taken place after the expiration of the term of the agreement. Reliance is placed by the Crown on paragraph XI which makes it clear that the parties intended that, upon the expiration of the agreement, the licensee should then be, in respect of the manufacture, use and sale of flight training apparatus, in the same position as that which it occupied prior to the agreement, and upon the fact that, while there are exceptions to this general intent, of which some are spelled out in paragraph XI and at least one is spelled out specifically in another paragraph (paragraph X(d)), paragraph XVI is not covered by any such specific exception. The Crown's contention is that it follows from the clear words of paragraph XI that it was intended that the licensee should be in exactly the same position after the termination of the agreement if, in the course of "manufacture, use and sale of flight training apparatus", it infringed the patents referred to in the agreement as it would have been had it done the same thing before the agreement, and that position was that it would have been liable for any infringement of one of those patents if, and only if, the patent was valid.

That analysis of the matter would certainly seem to me to be a correct appraisal of the effect of the agreement in so far as that can be gained from a straightforward reading of the agreement giving full effect to the words chosen in drafting what appears to be an attempt to deal explicitly with various eventualities. In particular, it would explain the language used in that part of paragraph XVI whereby the licensee agrees "not voluntarily to become an adverse party, directly or indirectly to any suit or action disputing the validity of said patents or any of them". This language seems to contemplate, primarily if not exclusively,

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an impeachment action—"any suit or action disputing the validity of said patents"—rather than a suit or action for infringement. The licensee would not, of course, be sued, in respect of anything done during the term of the agreement, for infringement of the patents because it was, during that period, a licensee under the patents,[5] and so, if the paragraph was intended to operate only during that term, what the licensor sought was protection against the licensee making use of the information obtained under the agreement to be a party, directly or indirectly, to an attack on its patents. If what was contemplated was protection for the suppliant against the licensee pleading invalidity in an infringement proceeding in respect of something done after the termination of its licence, I should have thought that the language would have been directed to such a plea and would have made express reference, as paragraph X(d) does, to the period after the termination of the agreement. It seems difficult to escape the contention of counsel for the Crown that paragraph XVI is merely an undertaking by CAE not to be a plaintiff in an impeachment action; and, while this is not quite so clear, it would seem that the undertaking relates only to the period during which the agreement was in force. The suppliant had, therefore, as it seems to me, to assume a very heavy burden in any attempt to put some other construction on the effect of paragraph XVI than the one put on it by the Crown. Counsel for the suppliant nevertheless assumed such burden and endeavoured to make his position good by a very skilful argument.

In the first place, the suppliant contended that paragraph XVI, properly understood, is an agreement by CAE, *inter alia*, that it will not in any proceeding, before or after the termination of the term of the agreement, challenge the validity of the patents covered by the agreement. This was referred to by counsel, at times, as contractual estoppel.[6] Whatever it may be correctly called, there is no doubt

[5] A licensee, during the term of the licence agreement, is estopped from disputing the validity of the patent but that estoppel ends upon the termination of the licence. See *Coyle v. Sproule*, [1942] O. R. 307, per Hogg J. at pages 309-10

[6] In this connection he referred to *Manitoba Assurance Co. v. Whitla*, (1904) 34 S C.R. 191, per Sedgewick J at page 207, where, as it seems to me, what was being discussed was an agreement as to an existing state of facts.

that, if a licensee has agreed by a provision in a binding contract that it will not raise a defence of validity to an infringement proceeding, the Court will give effect to such contract and will not permit the defence to be raised. Compare *Campbell v. G. Hopkins & Sons (Clerkenwell) Ld.*[7]

In the second place, the suppliant says, in effect, that there is to be found in paragraph XVI as contained in the Licensing Agreement a common law estoppel *in pais* that operates to prevent CAE from raising a defence of invalidity in any action that the suppliant may bring against it for infringement of one of the patents in question.

In the third place, the suppliant says that, if this is not an example of common law estoppel *in pais*, it is a case of "promissory estoppel", the doctrine which is usually associated with the judgment of Denning J. in *Central London Property Trust Ltd. v. High Trees House Ltd.*[8] Compare *Lyle-Meller v. A. Lewis & Coy. (Westminster) Ltd.*[9] and "Estoppel by Representation" by Spencer, Bower and Turner, Second Edition, chapter IX, on "Promissory Estoppel".

Put briefly, as I understood counsel for the suppliant, his argument for construing paragraph XVI as a promise by the licensee never to raise an issue as to the validity of the patents covered by the agreement, although it is not so worded, was, in effect, that the parties must, as a matter of business practicality, have intended that result even though they did not say so by the words used in the agreement. In support of this contention, counsel submitted, in effect, that no sensible business man in the suppliant's position would have put himself in the position of fully instructing a licensee in the intricacies of working out his complicated patents (and thus of appreciating, as no other third person could, the ways in which they might most effectively be attacked) under an agreement which the licensee could terminate after a period of two years (and therefore before, in the ordinary course of things, the licensee would have had sufficient production to entitle the patentee to any substantial revenue under the agreement for payment of royalties) without, at the very least,

[7] (1931) 49 R P C. 38
[8] [1956] 1 All E R 256n, [1947] K B 130
[9] [1956] R P C. 14.

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protecting himself against the licensee being entitled thereafter to make use of such instruction to use the patented inventions as an infringer relying on a challenge to validity. For that reason, as I understood him, counsel contended that the parties must have intended that the licensee was binding itself not to challenge the validity of any of the patents if it should ever be sued by the suppliant for infringement of one of them.

Attractively as this argument was put, I cannot accept it. The principle involved is put in *The Moorcock*[10] per Bowen L.J., at page 68, as follows:

> The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.

The principle has no application here, in the first place, because it is not necessary to imply the wording contended for in order to achieve the objective of the parties in entering into the agreement, and in the second place, it was not even suggested that both parties must have had in mind that this protective clause would be in the agreement for the protection of the patentee. It is sufficient to contrast the argument put in this case with the decision of Farwell J. in *Campbell v. G. Hopkins & Sons (Clerkenwell) Ld.*[11] where he had occasion to apply the principle laid down by Bowen L.J. in *The Moorcock, supra.* In that case, the whole purpose of the agreement that was under consideration (which was an agreement to resolve disputes between two patentees each of whom was claiming that the other was infringing his patent) would have been defeated, having regard to the way in which the settlement was worked out if an agreement by each not to challenge the validity of the other's patent had not been implied in respect of infringements alleged to have taken place in the period before the settlement agreement was entered into, even though it was not expressly directed to that period.

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[10] (1889) 14 P.D. 64.

[11] (1931) 49 R.P.C. 38.

In my view, paragraph XVI of the Licensing Agreement does not have the effect contended for by the suppliant.

I can dispose of the alternative arguments based on estoppel more shortly notwithstanding the very illuminating arguments on the principles applicable to that doctrine.

Put shortly, the suppliant's contention is that, by the words in paragraph XVI, "Licensee hereby acknowledges the validity of the patents made the subject of this agreement", CAE made a representation of fact intending that the suppliant act on it, that the suppliant did act on it to its prejudice, and that CAE is therefore estopped from denying the correctness of that fact in any litigation between CAE and the suppliant.[12]

In my view, this contention fails at the threshold because the words in question do not constitute a representation of fact (I am putting aside without expressing any view on it, the question whether, if it were a representation, it would be one of fact or law). These words must be read in their context. They are found in an agreement granting a licence to use patented inventions and the licensee says to the licensor that he "hereby acknowledges the validity of the patents". As of that time, having regard to the whole purport of the agreement, there can be no question of the licensee making any representation to the licensor as to the factual situation bearing on the validity of the patents. Presumably, there was nothing that, at that time, the licensee could tell the licensor concerning his own patented inventions. This was not a representation of fact; this was part of a contractual provision concerning the validity of the grantor's title. In my view, paragraph XVI must be read as a whole and comes to this that the licensee says that he acknowledges the validity of the patents and agrees not to become a party to an action attacking their validity. I do not think that the parties can be presumed to have meant anything more than they said. An *acknowledgment* of a fact is not a *representation* of a fact.

The alternative estoppel submission is, in my view, even weaker. That was that the words "Licensee hereby acknowledges the validity..." was a representation of fact as to the state of the licensee's mind. I do not think this is a

[12] See authorities cited in "Estoppel by Representation" by Spencer, Bower and Turner, Second Edition, pages 4-5.

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realistic appraisal of these words in this contract. This was not a recital of facts upon the representation of which one party or the other was induced to enter into the contract. Paragraph XVI is an incidental protective clause and serves no other purpose. The so-called acknowledgment, by its terms, applies to patents not yet in existence and concerning which CAE can have had no knowledge when it entered into the agreement.[13] Notwithstanding its hybrid nature, which I can only attribute to the draughtsman's desire for a little variety of style, paragraph XVI must be interpreted as a whole and is neither more nor less than an agreement by the licensee not to do certain things.

My view that paragraph XVI must be considered as a whole and as being nothing more than an agreement by the licensee that is part of the contract, and is therefore supported by consideration, eliminates any application of the so-called doctrine of promissory estoppel, which is a doctrine that, for limited purposes and for a limited time, gives some effect to a promise that is not supported by consideration. See "Estoppel by Representation" by Spencer, Bower and Turner, Second Edition, chapter XIV, "Promissory Estoppel", at pages 332 *et seq.*

My answer to the first of the two questions (being that raised in the paragraph numbered (2)) is therefore in the negative.

I come to the second question, which I repeat here for convenience:

> (3) If the answer to the question raised in paragraph 2 hereof is in the affirmative, whether, on the true construction of s. 20 of the Defence Production Act the Respondent is precluded from raising an issue as to the validity of any of the patents referred to in paragraph 2 hereof by way of defence to the Suppliant's claim for compensation under that section for the alleged use by CAE of such patents, regardless of whether such alleged use constitutes a breach of the Licensing Agreement.

Assuming that my answer to the first question is correct, the order setting down the questions of law for hearing does not require any answer to this question, and my judg-

[13] Paragraph II of the Licensing Agreement grants a licence in respect of patents and applications for patents "issued or to be issued". Reading the agreement as a whole, it is impossible to escape the conclusion that CAE was acquiring a licence in respect of patents concerning which it was going to be educated by the suppliant under the terms of the agreement.

ment will therefore be to that effect. Nevertheless, it may be more convenient that I set out what my conclusions would be concerning the answer to this question if I had come to the conclusion that the first question should be answered in the affirmative.

In what follows, therefore, I will be assuming that paragraph XVI of the Licensing Agreement contains an agreement by CAE that it will not challenge the validity of any of the patents in question if it should ever be sued by the suppliant for infringement of it, although I have come to the conclusion that it contains no such agreement.

It is important as a preliminary step to indicate the nature of the problem.

The question has to do with a situation where it is necessary that a person use a patented invention[14] for the performance of a defence contract and has, at some previous time, bound himself by contract with the patentee that he will never challenge the validity of the patent.

Clearly the Minister may, by a contract under section 20(1) of the *Defence Production Act*, relieve such a contractor from any liability for damages for infringing the patent if the patent is valid. The first question that has to be considered is whether the Minister can also relieve him from the judgment that can be obtained against him for using the "invention" even though the patent is invalid because he is contractually bound not to raise the invalidity. If the Minister cannot relieve him from the liability for such a judgment, it would seem clear that there can be no claim for compensation in respect of such liability under section 20(3). If, however, the Minister can and does relieve the contractor from such liability, a further question will arise as to whether the patentee can, even so, have any claim under section 20(3) if his patent is, in reality, invalid.

To put in specific terms related to this case the problem that I have endeavoured to describe in general terms:

1. The suppliant has a patent that may or may not be invalid.

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[14] While it may lack precision, the word "invention" is here used, as it frequently is, to include whatever is contained in a claim in a patent whether or not the claim is invalid because it extends to something that does not comply with the requirements of the definition of "invention" so that it is not an invention.

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2. CAE has contracted not to challenge the validity of that patent.

3. The Minister can, under section 20(1), relieve CAE from any liability to the suppliant for infringement of the patent *if it is valid* and if CAE uses the patented invention in carrying out a defence contract; and, if he does so, the suppliant has a claim under section 20(3) for compensation.

4. The first question is whether the Minister can, under section 20(1), relieve CAE from the legal liability to have a judgment go against it for infringement of the patent *if it is invalid* and if CAE uses the patented invention in carrying out a defence contract.

5. The second question is whether, if the Minister can, and does, under section 20(1), relieve CAE from such a liability, *whether or not the patent is valid*, the suppliant has a right to compensation, under section 20(3), in a case where the patent was invalid.

6. If the answer to this second question is in the affirmative, the validity of the patent would be immaterial and, in accordance with the ordinary rules of pleading, the respondent would be precluded from raising the issue of validity of the patents as a defence to the suppliant's claim to compensation in this case so that the second question (the one numbered (3)) would have to be answered in the affirmative.

I apologize for taking so long to set up the question that has to be answered as I understand it, but I find the question difficult to appreciate and to express and, for that reason, I have found it impossible to express it at less length.

Before examining section 20 of the *Defence Production Act* with a view to reaching a conclusion as to the answers to these questions, it may be that some help can be properly obtained from a brief review of earlier provisions that might be regarded as part of the statutory history leading up to these provisions.

In the first place, it is of course clear that, apart from some special statutory provision, the Crown can use a patented invention without infringing the rights of the

patentee (*Feather v. The Queen*[15]), but use by a person who is manufacturing to fill the requirements of the Crown would not fall within such exception to a patentee's monopoly (*Dixon v. London Small Arms Co. Ltd.*[16]) unless he were manufacturing under a contract that made him, as contractor, an agent of the Crown when carrying out the manufacturing process (*Montreal v. Montreal Locomotive Works Ltd.*[17])

The main statutory inroad on this legal state of affairs is a statutory provision under which the Crown's right to use a patented invention is recognized but which, at the same time, confers on the patentee a right to compensation in respect of such user. This is done in Canada, quite succinctly, by section 19 of the *Patent Act*, R. S. C. 1952, chapter 203, which reads as follows:

> 19 The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof, and any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

This section was considered by the Supreme Court of Canada in *Bradley v. The Queen, supra,* in 1941, which decision establishes that section 19 of the *Patent Act* confers a legal right to compensation on the patentee whose invention has been used by the Crown, but makes it quite clear that such right is conferred only "if the patentee has a valid patent".[18]

In England, prior to the Second World War, there was a somewhat broader statutory provision—section 29 of the *Patents and Designs Acts,* 1907 (Imp.), which read:

> 29. A patent shall have to all intents the like effect as against his majesty the king as it has against a subject:
>
> Provided that any government department may, by themselves, their agents, contractors, or others, at any time after the application, use the invention for the services of the crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the treasury, between the department and the patentee, or, in default of agreement, as may be settled by the treasury after hearing all parties interested.

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[15] (1865) 6 B. & S. 257. [16] (1876) 1 App. Cas. 632.

[17] [1947] 1 D.L.R. 161.

See also *Pfizer Corporation v. Ministry of Health,* [1965] A. C. 512.

[18] See the judgment of the Court, delivered by Duff C.J.C., at page 273.

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Early in the war, by Order in Council P.C. 6982 of December 4, 1940, made under the *War Measures Act,* R. S.C. 1927, chapter 206, it was provided that "if the Minister of Munitions and Supply . . . agrees to indemnify . . . any person . . . against any claims for the infringement of any patent . . . based upon use of the invention covered thereby in the production or sale of munitions of war . . . by such person then no claim . . . for the infringement of any such patent . . . based upon such use shall be made . . . against such person . . . ; but His Majesty shall pay to the owner of any such patent . . . which is valid such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention . . . covered by the patent . . . ".

An indemnity agreement under P.C. 6982 could have been so worded as to purport to protect a person indemnified against any action for infringement of a patent but, according to the latter part of the clause, the patentee would only have had a right against His Majesty for compensation in respect of use of an invention covered by a "patent . . . which is valid". In effect, this is the same as the situation under section 19 of the *Patent Act* where the use is by the Crown, and goes as far as any patentee could properly expect it to go. In place of an absolute monopoly, which would give him a right to sue the Crown or the Crown's contractor for infringement in case of use without a licence, he has a qualified monopoly plus a right to compensation for use by the Crown or the Crown's contractor, but such right to compensation, just like the right to compensation for infringement, exists only if his patent is valid.

On December 8, 1942, by Order in Council P.C. 11081 made under the *War Measures Act,* P.C. 6982 was amended *inter alia* to extend the scheme outlined above to include words whereby the Minister could by an agreement with a contractor take away a patentee's right to royalties under a licensing agreement between the patentee and the contractor, and substitute therefor a right in the patentee against the Crown for compensation for use of the invention. As amended, the original Order in Council read in part as follows: " . . . if the Minister . . . agrees to indem-

nify . . . any person . . . against any claims . . . for the infringement of any patent . . . based upon the use of the invention . . . covered thereby in the production or sale of munitions of war or supplies . . . or for the non-payment, in accordance with any contractual obligation, of any royalties for or in respect of such use by such person . . . then no claim . . . for the infringement of any such patent . . . based upon such use or the non-payment, in accordance with any contractual obligation of any royalties for or in respect of such use, shall be made . . . against such person . . . ; but His Majesty shall pay to the owner . . . of any such patent . . . which is valid such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention . . . covered by the patent . . . ".

Here we find explicit words under which the Minister can, by indemnity agreement, deprive a patentee of his right under a contract to payment of royalties for use of a patented invention and which substitute therefor a right to compensation for the use of the invention covered by the patent, but confers such right only on the owner "of any such patent... which is valid". This language seems clearly to have been designed, in this wartime situation, to deprive a patentee of any contractual right to royalties in respect of use of an invention covered by an invalid patent without giving him any right to compensation for being deprived of such right. Furthermore, even in the case of a valid patent, P.C. 6982, as amended by P.C. 11081, quite clearly takes away a contractual right to royalties and substitutes a right to "reasonable" compensation "for the use... of the invention", which compensation might be in an amount that is greater or smaller than the value of the contractural royalty.[19]

What is dealt with then in section 19 of the *Patent Act* and these two wartime Orders in Council may be classified as follows:

(a) acts by Her Majesty that would be infringement of a patent if committed by an ordinary person,

[19] By P.C 449 of January 24, 1944, the scheme of P C. 6982 was further extended *inter alia* to contracts for engineering and other technical assistance but the general scheme does not otherwise appear to have been changed in any relevant particular.

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(b) acts by a Crown contractor that would be infringement of a patent if committed by an ordinary person, and

(c) amounts that would be payable under contract as royalty in respect of use of a patented invention, whether or not the patent is valid, if the person who contracted to pay them was not a Crown contractor.

What I have to deal with must be described, somewhat differently, as acts committed by a Crown contractor that would *not* be infringement of a "patent" if committed by an ordinary person but for which he can be successfully sued as if they were such an infringement by virtue of a contract between him and the patentee. Such a case seems to be covered expressly by P.C. 6982 when attention is directed at words other than those that I have selected above. That Order in Council says that "... if the Minister agrees to indemnify... any person... against any claims, actions or proceedings for the infringement of any patent ... based upon the use of the invention covered thereby... then no claim, action or proceeding for the infringement of any such patent...based upon such use shall be made or instituted against such person". Those words would seem to give express protection to a contractor against being sued at all for infringement based upon the use of the "invention" so that the patentee would never be in the position of invoking the agreement by the contractor not to challenge the validity of the patent. The words that follow are, however, equally specific in that they make it clear that the only patent owner who is entitled to compensation thereunder is one who is the owner "of any such patent... which is valid". The wartime Order in Council seems to have enabled the Minister to protect a contractor such as CAE without having conferred any right on the owner of the patent to compensation for the contractual right of which he would have been deprived, if the patent turns out to be invalid.

If the foregoing survey of other provisions does nothing else, it may at least make it more likely that, in studying section 20 of the *Defence Production Act,* the applicability of the words used to the different classes of case will be more apparent than it might otherwise have been.

I now repeat section 20 omitting words that are clearly unnecessary to the determination of the question and substituting "damages" for royalties where that seems to be warranted by section 2(*p*) of the *Defence Production Act*.[20] Furthermore, inasmuch as what we are concerned with is infringement of a patent, and not "use" of the invention covered by the patent as in the case of a royalty agreement, I omit all references to "use".

> 20 (1) The Minister may ... contract with any person that Her Majesty will relieve that person from any claims, actions or proceedings for the payment of *damages* for the ... infringement of any patent... by that person in ... the performance of a defence contract.
>
> (2) A person with whom the Minister has contracted under subsection (1), is not liable to pay *damages* ... by reason of the infringement ... of a patent ... in ... the performance of a defence contract and to which the contract under subsection (1) applies.
>
> (3) A person who, but for subsection (2) would have been entitled to *damages* from another person for the infringement ... of a patent ... but who, by reason of subsection (2) is not so entitled, is entitled to reasonable compensation from Her Majesty for the infringement ...

One view of the application of section 20 to the problem raised by the second question that I have to decide might be expressed as follows:

(1) the Minister was authorized by section 20(1) to contract with CAE to relieve CAE from any claims, actions or proceedings for the payment of damages for the infringement of the patents in question in the performance of a defence contract;

(2) assuming that there was such a contract, by virtue of section 20(2), CAE is not liable to pay damages by reason of the infringement of any such patents in the performance of the defence contract; and

(3) as CAE is, by virtue of its agreement with the suppliant, bound not to challenge the validity of the patents in question, the suppliant is a person who, but for section 20(2), would have been entitled to damages from CAE for the infringement of the patents in ques-

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[20] It will be remembered that section 2(*p*) provides that, as used in the *Defence Production Act*, the word "royalties" includes, *inter alia*, "claims for damages for the infringement or use of any patent". Section 20 does not distinguish, as the orders in council referred to do, between "infringement" of the "patent" and "use" of the "invention". It would seem that "use" of a "patent" in that section must be taken to mean use of the patented invention.

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tion even though they were invalid, but who, by reason of section 20(2), is not so entitled, and is, therefore, by virtue of section 20(3), entitled to reasonable compensation from Her Majesty for the infringement.

In support of this view of the effect of section 20 in relation to our hypothetical facts, it could be recalled that, in this context "patent" has the meaning in which the word is used in the *Patent Act*, R. S. C. 1952, chapter 203, namely, "letters patent for an invention", that a patent is *prima facie* valid (section 49 of the *Patent Act*) and that, as long as a patent remains unimpeached (section 62), an action may be brought for its infringement (section 56), to which action a plea of invalidity of the patent is a defence. It could therefore be reasoned that, when sections 20(1) and (2) contemplate a contractor being relieved from claims or proceedings for damages for infringement of a patent, it applies just as much to claims based on a patent that ultimately turns out to be invalid as it does to claims based on a patent that ultimately turns out to be valid. Indeed, it might well be thought that, from a practical point of view, that must be what was intended, because the contractor is to tender on the basis that he will pay no royalties for the process or product described in the patent and that he will be faced with no legal proceedings for alleged infringement of the patent. On this view of the matter, therefore, the contractor is given a simple defence to any action based upon alleged infringement of a patent covered by such an agreement, *viz.*—the statute (section 20(2)) says that he is not liable to pay damages for infringement of that patent. On that view, validity would be irrelevant to his defence. Finally, in support of this view, it would have an element of equity in that, while the patentee would be deprived of a right to obtain judgment for "infringement" of its invalid patent by virtue of its contract with CAE as though the patent were valid (a right for which presumably it gave adequate consideration), it would have a right to obtain compensation from Her Majesty for the infringement.

While the above represents the conclusion that I reached on my first consideration of the second question, after further consideration I have concluded that the correct view is that section 20 confers no rights on an owner of an invalid patent.

In the first place, properly considered, section 20(1) does not, in my view, contemplate the Minister contracting with any person to relieve him from claims, actions or proceedings in respect of the infringement of an *invalid* patent. The law does not confer any right on the owner of an *invalid* patent to claim, sue or proceed in respect of the "infringement" of his patent. If it appeared from a statement of claim in an infringement action that the patent sued on was invalid, the statement of claim would be struck out on a summary application because it would disclose no cause of action. What, therefore, section 20(1) authorizes the Minister to contract about is the relief of a person from claims, actions or proceedings in respect of the infringement of a *valid* patent; and what section 20(2) says is that a person with whom the Minister has so contracted "is not liable" to pay damages by reason of the "infringement" of a patent to which the contract under section 20(1) applies. As there are no rights under an *invalid* patent, there can be no "infringement" of an *invalid* patent and section 20(2) only operates to make the person with whom the Minister has contracted "not liable" in respect of what would otherwise be an "infringement" of a *valid* patent.[21] The owner of an invalid patent cannot therefore be "a person who, but for subsection (2), would have been entitled to a royalty (damages) from another person for the infringement . . . of a patent" and cannot, therefore, be a person entitled to compensation by virtue

[21] It is true that the indirect effect of such relief, as embodied in section 20(2), is to deprive a patentee such as the suppliant (who has a contract with an "infringer" that prevents the infringer from challenging the validity of his invalid patents) of the possibility of getting a judgment for infringement of the invalid patents as though they were valid, because, when section 20(1) takes away a patentee's right to proceed for infringement of his valid patents, it makes it impossible for him to get past the commencement point with an action for infringement of his invalid patents so that the time never arrives when he can avail himself of his contractual right that the defendant not challenge the validity of his patents. That contractual right has not been taken away by action under section 20. What is done under section 20 merely makes it impossible for the patentee to use his very limited contractual right—a covenant against a challenge to validity—to obtain indirectly something for which he did not contract—payment for use of the "invention" described in an invalid patent. I am not to be taken as expressing any opinion as to whether section 20 would have applied to a contract for payment for use of the invention described in an invalid patent if there were one. What I do say is that section 20 can not have effect as though there were such a contract when, in fact, no such contract existed.

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of section 20(3). Validity of the patents that are the subject matter of a claim under section 20(3) is therefore an essential element in the claim. It follows that the second question would, if it were to be answered, have to be answered in the negative.

The second reason for coming to the same conclusion is almost a corollary of the first. It has to do with the proper effect of section 20(3). What section 20(3) confers on the person who, by reason of section 20(2), is not entitled to something to which he would otherwise have been entitled is "reasonable compensation . . . for the infringement". The "infringement" in respect of which he is so entitled to compensation is, according to the words used in section 20(3), "infringement" of a "patent" for which he would have been entitled to damages from another person if it were not for section 20(2). But a person cannot be entitled to damages for infringement of an invalid patent because if the patent is invalid, it confers no right and, if there is no right, there can be no infringement. In my view, therefore, section 20(3) only confers a right to compensation for infringement upon the owner of a patent that is valid. That is a second reason why, even if there were an agreement by CAE not to challenge the validity of the suppliant's patents, it is open to the respondent to do so by way of a defence to the suppliant's claim for compensation under section 20(3) for the alleged use by CAE of such patents.

However, for the reason already given, no answer will be given to the second question.

There will be judgment, therefore, answering the question contained in paragraph 1(2) of the order of October 6, 1967 in the negative, and giving no answer to the question contained in paragraph 1(3) thereof. The judgment will further provide that the costs of setting down the questions of law, of the hearing and of the disposition of them are to be dealt with by the trial judge.

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