20, 1932

In the Privy Council.

No. 77 of 1931.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA - - - (*Plaintiff*) *Appellant*

AND

B.C. FIR AND CEDAR LUMBER COMPANY LIMITED (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 77 of 1931.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA - - - (*Plaintiff*) *Appellant*

AND

B. C. FIR AND CEDAR LUMBER COMPANY LIMITED (*Defendant*) *Respondent*.

RECORD OF PROCEEDINGS.

In the Supreme Court of British Columbia.

No. 1. Endorsement on Writ, 28th November 1927.

No. 1.

Endorsement on Writ.

No. K. 1500/27.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

Between:

HIS MAJESTY THE KING in right of the Province of British Columbia - - - - - - *Plaintiff*,

and

B. C. FIR AND CEDAR LUMBER COMPANY LIMITED - *Defendant*.

(*Writ issued the 28th* day of November* 1927.)

* *Sic.*

10

The Plaintiff's claim is for payment of $8678.68 for Personal Property and Income Tax, Interest, and penalties under the Statute.

No. 2. Amended Statement of Claim, 12th September 1929.

No. 2.

Amended Statement of Claim.

(*Writ issued 25th* November*, 1927.)

* *Sic.*

1. The Defendant is and has been since prior to 1st January 1921, a corporation duly incorporated under the laws of the Province of British

In the Supreme Court of British Columbia.

No. 2. Amended Statement of Claim, 12th September 1929 —*continued.*

Columbia and has during the period between the said date and the date of the writ herein carried on business as lumbermen at the City of Vancouver and elsewhere in the said Province, its head office being situated at the said City of Vancouver.

2. The Defendant made returns to the Provincial Assessor of its Personal Property and Income under the Taxation Acts of the Province of British Columbia in force from time to time during the said period.

3. On or about the 6th day of October 1925 the Provincial Assessor on behalf of the Plaintiff mailed to the Defendant an amended notice of assessment or new assessment on the Roll of 1925 as for the years 1922, 1923, 1924 and 1925, shewing a balance of Personal Property and Income tax due for these years amounting to - - - - - $3604.87

The said taxes became delinquent on 31st December 1925 and the penalties and interest accrued thereon to the date of the writ herein amount to - - - - - 689.37

$4294.24

4. In the alternative the Plaintiff says that if the Use and Occupancy Insurance money which accrued to the Defendant in 1923 and 1924 is income within the meaning of the Taxation Act, the Income Tax payable by the Defendant for the years up to and including 1924, in addition to amounts already paid and exclusive of interest and penalties, is $3922.86, being $656.92 for personal property tax for 1921 and 1922, and $3265.94 for Income Tax for 1923 and 1924.

5. Further in the alternative, the Plaintiff says that if the said Use and Occupancy Insurance moneys are not income within the meaning of the Taxation Act, the Defendant is not entitled to deduct as an expenditure in computing income, the amount of the premium paid by the Defendant for the Use and Occupancy Insurance.

6. Further in the alternative, the Plaintiff says that in the event the said Insurance moneys are not taxable as income, the Defendant is not entitled to deduct as an expenditure its fixed charges during the period of shut-down (excepting $5034.53 applicable to sales made in the period) on the ground that such expenditure is not an expense necessary to the production of the income being assessed and taxed in terms of the Taxation Act, and also because the Defendant has recovered the amount of these expenses already from the Insurance Companies; and that the amount of Income Tax properly payable by the Defendant in the said event for the year 1923 was $5649.16 and of Personal Property tax for the year 1924, $1068.69.

7. The Personal Property and Income Taxes, interest and penalties before mentioned are due and owing by the Defendant to the Plaintiff and no part of them has been paid.

8. The property and income of the Defendant referred to in the notices of assessment before mentioned was duly assessed by the said Assessor on the several rolls hereinbefore referred to.

9. The Defendant has not appealed from any of the said assessments of Personal Property and Income to the Court of Revision and Appeal.

WHEREFORE the Plaintiff claims:

(a) Payment of the sum of $4294.24.

(b) Costs of this action.

Place of Trial, Vancouver, B.C.

10 DELIVERED this 12th day of September 1929 by George A. Grant of the firm of Grant & McDougall, whose place of business and address for service is 1118 Standard Bank Building, 510 Hastings Street West, Vancouver, B.C.

GEO. A. GRANT,
Plaintiff's Solicitor.

No. 3.

Statement of Defence to Amended Statement of Claim.

No. 3. Statement of Defence to Amended Statement of Claim, 12th September 1929.

1. The Defendant admits the allegations in Paragraph 1 of the Amended Statement of Claim, save the allegation that the Defendant has 20 carried on business as lumbermen since the 1st day of January, 1921, which the Defendant denies.

2. The Defendant denies the allegations in Paragraph 2 of the Amended Statement of Claim.

3. The Defendant denies the allegations in Paragraph 3 of the Amended Statement of Claim and denies that on or about the 6th day of October 1925, the Provincial Assessor, on behalf of the Plaintiff, mailed to the Defendant an amended notice of assessment or new assessment on the roll of 1925 as for the years 1922, 1923, 1924 and 1925, showing a balance of personal property and income tax due for these years amounting to 30 $3,604.87, and denies that the said tax became delinquent on December 31st, 1925, and that the penalties and interest accrued thereon to the date of the writ herein amounts to $689.37 as therein alleged.

4. The Defendant specifically denies the allegations in Paragraph 4 of the amended Statement of Claim.

5. In answer to Paragraph 5 of the Amended Statement of Claim the Defendant admits that it is not entitled to deduct as an expenditure in computing its income for the years 1923 and 1924, the amount of the premium paid by the Defendant for the Use and Occupancy Insurance.

6. By way of reply to the allegations in Paragraph 6 of the Amended 40 Statement of Claim, the defendant admits that in view of the refusal by the Minister of Finance to allow as a deduction from the Defendant's income during the year 1923 its fixed charges during the period of shut-down, that the Defendant is not entitled to be allowed as a deduction such

In the Supreme Court of British Columbia.

No. 3. Statement of Defence to Amended Statement of Claim, 12th September 1929 —*continued.*

fixed charges other than the amount of $5,034.53 applicable to sales made during the period in question and the Defendant admits that the amount of income tax properly payable by the Defendant for the year 1923 was $5,649.16 and of personal property tax for the year 1924 $1,068.69, but the Defendant denies that any portion of the said amounts is due to the Plaintiff, the Defendant having long prior to action brought paid to the Plaintiff the amount of $6,396.00 in respect of the year 1923 and the sum of $1,199.62 in respect of the year 1924.

7. The Defendant denies that the personal property and income taxes, interest or penalties referred to in Paragraph 7 of the Amended Statement of Claim are due or owing by the Defendant to the Plaintiff and denies that the same have not been paid as in the said Paragraph alleged.

8. The Defendant denies the allegations in Paragraphs 8 and 9 of the Amended Statement of Claim and each of them.

9. By way of defence to the whole of the Amended Statement of Claim, the Defendant alleges that the Defendant is and was at all relevant times save as hereinafter referred to engaged in the business of manufacturing and dealing in lumber and lumber products in the Province of British Columbia and owns and operates a lumber mill in the said City of Vancouver in the said Province. During the month of August 1923, the lumber mill of the Defendant and large portions of the Defendant's machinery, equipment and plant appurtenant thereto were destroyed by fire, in consequence whereof the business of the Defendant was suspended for the balance of the year 1923 and for a considerable portion of the year 1924. At the time of the occurrence of the said fire the Defendant was insured under various contracts of insurance (commonly known as Use and Occupancy Insurance) against the loss which would be sustained in the event of the suspension of its said business operations by fire, as more particularly set out in the said contracts of insurance to which the Defendant craves leave to refer at the trial of this action. Under the terms of the said contracts the insuring companies paid to the Defendant the total sum of $95,427.90 in respect of the loss sustained by the fire as aforesaid during the years 1923 and 1924 and the Defendant alleges that no portion of the said sum was income within the meaning of the Taxation Act (Cap. 254, R.S.B.C.) or liable to assessment or taxation under the said Statute. The Defendant alleges that the amounts claimed by the Plaintiff in paragraph 3 of the Statement of Claim other than the sum of $656.92 part thereof are based upon the claim of the Plaintiff that the insurance moneys received by the Defendant as aforesaid were income within the meaning of the Taxation Act aforesaid. In respect of the said sum of $656.92 the Defendant admits that such amount became payable by the Defendant in respect of its personal property tax for the years 1921 and 1922 but the Defendant says that such amount was paid and satisfied by the Defendant prior to action brought.

10. The Defendant alleges that its business operations were suspended pending reconstruction of its lumber mill and equipment during a portion of

the year 1924 and that the operations of the Defendant during the said year resulted in a loss to the Defendant and the Defendant was not in receipt of any income during the said year subject to taxation under the said Act. The Defendant admits that in respect of the operations of the Defendant for the year 1924 that the Defendant became liable to the Plaintiff for personal property tax in the amount of $1,068.69 which amount was paid by the Defendant to the Plaintiff as aforesaid long prior to the commencement of this action.

11. The Defendant alleges that in making the assessments upon the 10 Defendant for the years 1923 and 1924 and in entering the same on the assessment rolls for the years 1924 and 1925 respectively the Province of British Columbia and its assessor acted without jurisdiction and the assessments were in fact nullities and the acts of entering the same upon the assessment rolls as aforesaid null and void and of no effect.

12. The Defendant says that it is not indebted or liable to the Plaintiff in respect of any of the matters set out in the Amended Statement of Claim.

DATED at Vancouver, B.C. this 12th day of September 1929.

W. S. LANE,

Solicitor for the Defendant.

20 FILED and DELIVERED by William Stuart Lane of the firm of Mayers Locke Lane & Thomson whose place of business and address for service is Suite 730 Rogers Building, Vancouver, B.C.

No. 4.

Statement of Facts and Admissions.

No. 4. Statement of facts and admissions, 11th September 1929.

The parties to this action for the purpose of saving expense and obviating the necessity of taking evidence at the trial have agreed upon the following :—

1. The Defendant is a company incorporated under the Companies Act of British Columbia and during the year 1921 and thereafter has carried 30 on its business as manufacturers and dealers in lumber products at the City of Vancouver (with the exception of the interruption of its business hereinafter referred to).

2. In the year 1923 the Defendant was insured by some seventeen fire insurance companies against loss and damage to its plant and property by fire and also by the same companies against the loss or damage which would be sustained in the event of its plant being shut down and business suspended in consequence of fire and damage. Such insurance policies, commonly known as Use and Occupancy Insurance, were all in the form of the endorsement annexed hereto and identified by the signatures of Counsel for the 40 parties. The said policies of Use and Occupancy Insurance insured the

In the Supreme Court of British Columbia.

No. 4. Statement of facts and admissions, 11th September 1929 —*continued.*

Defendant in the total amount of $60,000.00 in respect of loss of net profits and $84,000.00 in respect of fixed charges. The meaning to be assigned to the said expressions is set out in the endorsement.

3. On August 21st, 1923 the plant and premises of the Defendant were destroyed by fire. The Defendant and the adjuster for the insuring companies agreed upon the period of the interruption of the Defendant's business as being 215 business days, this being the length of time agreed upon as being required for the rebuilding of the plant, and the loss was adjusted upon the following basis :—

LOSS OF NET PROFITS : Estimated $317.3263 per day. 10

INSURED FOR AND ALLOWED AT $200.00 per day for 215 days—$43,000.00.

FIXED CHARGES : Estimated at $234.85 per day—insured for $280.00 per day; allowed at the actual estimated loss $243.85 for 215 days—$52,427.90.

The insuring companies paid to the Defendant the said total sum of $95,427.90. The adjustment between the Defendant and the insurance companies was agreed upon prior to the expiration of the time necessary for the actual rebuilding of the plant.

4. The period of the shut-down extended into the year 1924 and if it 20 should be held that the said insurance moneys are taxable as income of the Defendant, the parties agree that such moneys are properly apportioned as between the years 1923 and 1924, as follows :—

1923—August 21st to December 31st—113 business days :—	
Net Profits	$22,600.00
Fixed Charges	$27,555.05
1924—102 business days :—	
Net Profits	$20,400.00
Fixed Charges	$24,872.85

5. The Defendant not having taken legal advice upon the question as 30 to whether such insurance moneys were taxable as income, included in its return of the year 1923 the sum of $41,293.20, of such moneys, and in the year 1924 they similarly included the sum of $33,706.80. The Defendant paid income tax accordingly. The Defendant did not pay tax on the balance of such insurance moneys, which amounted to $20,427.90, which the Defendant then claimed as being exempt, being the amount which the Defendant considered had been received by it from the insurance companies in excess of the actual loss sustained, the rebuilding of the plant having taken a less number of days than estimated by the adjusters.

6. It is agreed between the parties that if the Use and Occupancy 40 Insurance is taxable as income, the tax for the years 1923 and 1924 would aggregate an amount of $3,265.94 in addition to the amounts already paid. The Defendant admits liability on the reassessment of its 1921 and 1922 personal property tax in the sum of $656.92.

In the Supreme Court of British Columbia.

No. 4. Statement of facts and admissions, 11th September 1929 —*continued.*

7. If the Use and Occupancy Insurance moneys are not taxable as income, the Defendant admits that the income tax payable in respect of the year 1923 amounted to $3,703.18, being ten per cent. upon profits of $37,031.82. The Plaintiff contends that the Defendant's profit for the said year amounted to $56,491.66, if the insurance moneys are not taxable, the difference between the parties in this respect being as follows :—

(*a*) The Plaintiff contends that if the insurance moneys are not taxable as income the Defendant is not entitled to deduct as an expenditure in computing its income the amount of the premium paid by the Defendant for the Use and Occupancy Insurance.

(*b*) The Plaintiff contends that if the insurance moneys are not taxable as income the Defendant is not entitled to deduct as an expenditure its fixed charges during the period of the shut-down (excepting $5,034.53 applicable to sales made in the period), on the ground that such expenditure is not an expense necessary to the production of the income that is being assessed and taxed, in terms of the Taxation Act, and that the Defendant has recovered the amount of these expenses already from the insurance companies. If the Plaintiff is correct in both these contentions, the proper tax payable, eliminating the insurance moneys from consideration for the year 1923 is $5,649.16. If the Defendant be correct the amount of the tax for 1923 should be $3,703.18.

8. The Defendant having paid the sum of $6,396.00 as income tax for 1923, is to be allowed to set off a proportionate amount of this sum against whichever amount be found payable under the terms of the next preceding paragraph if the insurance moneys are exempt from taxation.

9. For the year 1924 if the insurance moneys are not taxable as income the parties agree that the Defendant was liable to personal property tax only for the said year in the sum of $1,068.69. The Defendant having paid the sum of $1,199.62 as income tax for the year 1924 is to be allowed to set off a proportionate amount of that sum in satisfaction of the claim for personal property tax if the insurance moneys are exempt from taxation.

10. The penalties sued for are not included in the foregoing figures, and the parties agreed that this matter be reserved for further direction.

11. The right to appeal from the judgment in this action is expressly reserved to each of the parties.

DATED at Vancouver, B.C., this 11th day of September, 1929.

GEO. A. GRANT,
For the Plaintiff.

C. H. LOCKE,
For the Defendant.

In the Supreme Court of British Columbia.

No. 4. Statement of facts and admissions, 11th September 1929 —*continued.*

USE AND OCCUPANCY. THIS POLICY CONTAINS A CO-INSURANCE CLAUSE.

B. C. FIR AND CEDAR LUMBER COMPANY LIMITED.

(As is now or as may hereafter be constituted.)

This policy being for $2,500.00 covers its pro rata proportion, viz. 2500/144000ths of each of the undermentioned amounts, covering the following specified subjects of insurance :

ITEM 1. $60,000.00 on net profits, as hereinafter defined, and

ITEM 2. $84,000.00 on the fixed charges, as hereinafter defined, which it is incumbent upon the assured to provide for during the period of inoperation, partial or total, due to

" Geo. A. Grant,"
FOR PLAINTIFF.

loss or damage by fire of the premises and/or Stock,

" C. H. Locke,"
FOR DEFENDANT.

owned, leased or occupied by the Assured as a Mill Site and/or Lumber Yard, and for other purposes incidental to its business on the south shore of False Creek at the Northeast corner of Laurel Street and Sixth Avenue West, in the City of Vancouver, Province of British Columbia, and shown on Insurance Plan, Sheet 119, Block 631.

(1) " FIXED CHARGES " defined :

It is understood and agreed that the term " Fixed Charges " as used in this contract shall be construed to mean all the standing charges and expenses which must necessarily continue to be paid or incurred by the Assured during the time the said plant shall be inoperative.

(2) " BUSINESS " defined :

The word " Business " wherever used in this contract shall be construed to mean " the production of goods." The word " Stock " wherever used in this contract shall be construed to mean " materials " or " Raw Stock " entering into " the production of goods."

(3) " DAY " defined :

The word " Day," however modified, wherever used in this contract, shall be held to cover a period of twenty-four hours.

(4) " NET PROFITS " defined :

The term " Net Profits " as used in this contract shall be held to mean the net profits that would have accrued had there been no interruption of business caused by fire.

(5) The conditions of this contract are that if the above described premises and/or machinery and/or Equipment and/or stock contained thereon be destroyed or damaged by fire occurring during the term of this policy so as to necessitate a total or partial suspension of business, this Company shall be liable under this policy for the actual loss sustained

consisting of net profits on the business which is thereby prevented, such fixed charges and expenses pertaining thereto as must necessarily continue during a total or partial suspension of business, and such expenses as are necessarily incurred for the purpose of reducing the loss under this policy (as provided in Clause 10 hereof) for not exceeding such length of time as shall be required, with the exercise of due diligence and despatch, to rebuild, repair or replace such part of said premises and machinery and equipment and stock as may be destroyed or damaged, commencing with the date of the fire and not limited by the date of expiration of this policy, 10 SUBJECT TO THE FOLLOWING CONDITIONS AND LIMITATIONS, to wit :

(6) TOTAL SUSPENSION : The per diem liability under this policy during the time of total suspension of business of all the properties described herein shall be limited to the actual loss sustained not exceeding 1/300ths of this company's proportion of its liability under each of the above mentioned items for each business day of such suspension; due consideration being given to the experience of the business before the fire and the probable experience thereafter.

(7) PARTIAL SUSPENSION : The per diem liability under the 20 respective items of this policy during the time of the partial suspension of business shall be limited to the actual loss sustained, not exceeding that proportion of the per diem liability that would have been incurred by a total suspension of business which the actual per diem loss sustained, during the time of such partial suspension, bears to the per diem loss which would have been sustained by a total suspension of business for the same time of all properties described herein, due consideration being given to the experience of the business before the fire and the probable experience thereafter.

Clauses 6 and 7 pertaining to total suspension and partial suspension, 30 shall apply to each of the above items of insurance separately.

(8) The liability hereunder shall not exceed the amount of insurance by this policy, nor a greater proportion of any loss than the insurance hereunder shall bear to all insurance, whether valid or not, and whether collectible or not, covering in any manner, the loss insured against by this policy.

(9) It is a condition of this insurance that the insured shall not be entitled to compensation on account of delay which may be occasioned by any ordinance or law regulating construction or repair of buildings, or by the suspension, lapse or cancellation of any licence, or for any other 40 consequential damage.

(10) It is a condition of this insurance that as soon as practicable after any loss, the insured shall resume complete or partial operation of the premises herein described and shall make use of other property if obtainable, if by so doing the amount of loss hereunder will be reduced and in the event of the insured continuing business (in whole or in part) at some other location,

In the Supreme Court of British Columbia.

No. 4. Statement of facts and admissions, 11th September 1929 —*continued.*

or using other property during the time occupied in repairing or reconstructing the property described herein, the net profits so earned shall be applied to the reduction of the loss (under item 1 hereof) and adjustment shall be made as provided herein for partial suspensions.

(11) It is a condition of this insurance that surplus machinery or duplicate parts thereof, equipment or supplies, and surplus or reserve stock, which may be owned, controlled or used by the insured shall, in the event of loss, be used in placing the premises in condition for continuing or resuming business.

(12) It is a condition of this insurance, (1) that this company shall not be liable for loss on account of damage to or destruction of the finished product, or for the time required to reproduce any finished product which may be damaged (2) that liability for suspension of business due to damage to, or destruction of raw materials shall be limited to that period of time for which the damaged or destroyed raw materials would have furnished operating conditions for the plant; but no liability shall exist on this account unless or until actual suspension of business shall have occurred through the insured's inability to procure suitable materials to take the place of those damaged or destroyed.

It is understood and agreed that the following variations and additions are to be considered as immediately following the Statutory Conditions printed in the policy to which this form is attached.

VARIATIONS IN CONDITIONS:

This policy is issued on the above Statutory Conditions, with the following variations and additions:

These variations are by virtue of the British Columbia Statute in that behalf in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the Company.

(13) It is a condition of this insurance that in case the insured and this company are unable to agree as to any question effecting the amount of loss under this policy, the same shall be determined by appraisers in the manner provided by the policy to which this form is attached, the provisions of which policy shall govern in all manners pertaining to this insurance, except as herein otherwise provided.

(14) WATCHMAN'S CLAUSE.—It is warranted by the Assured that whenever the premises herein described are shut down at night or on Sundays or holidays, or if for any reason are closed or idle or not in operation, or if work has ceased, due diligence will be used to keep one or more watchmen reporting through the British Columbia District Telegraph Company's protective service hourly, constantly on duty, in, on and about the premises during such time.

And it is further warranted by the assured that if the premises herein described are shut down or idle, or if they be not in operation for any reason for a period of more than thirty (30) days at any one time notice must be

given this company by the assured and permission to remain so shut down, idle or not in operation for such time as is necessary, must be endorsed hereon, or this policy shall immediately cease and determine.

(15) PERMIT CLAUSE.—Permission granted for other insurance, to erect new structures, make additions, alterations and repairs without limit of time and without notice to this company, this insurance to cover in or on same according to the wording of the items above; to generate and use steam, gas, electricity, kerosene or crude oil for heat, light, power and fuel; to shut down or cease operations and for the premises to be vacant in whole or in part (subject to Watchman's Clause made a part hereof) for a period not to exceed thirty (30) days at any one time without notice; to work overtime, at night, Sundays or holidays; to let the premises in whole or in part for purposes not more hazardous; to use stove pipes without brick, stone or cement chimneys, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said plant, including those referred to in Clause 14 (f) of the Statutory Conditions, allowing twenty-five (25) pounds weight of gunpowder, anything in this policy to the contrary notwithstanding, subject, however, to certain conditions hereinafter provided; for the traffic, use, stabling or housing of tractors or motor vehicles (the insured's or others), using gasoline as motive power, and also of other vehicles of all kinds, it being warranted by the Assured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on, provided, however, that no gasoline, except that contained in the reservoir of any tractor or motor vehicle, will be kept in the buildings where same are stabled or housed, and that no gasoline will be stored or kept in any building used as an oil house.

Notwithstanding anything herein contained the use, keeping, allowing or storing on the within described premises of dynamite, fire works, Greek fire, or other explosives is prohibited, unless a specific permit therefor is attached to this policy.

(16) BREACH OF WARRANTY CLAUSE.—If any breach of a warranty or condition in this contract or policy of insurance shall occur prior to a loss under this policy, such breach shall not void the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of such loss under this contract or policy. The warranties and conditions contained in this policy are applicable to the specified property affected thereby.

(17) BONDED INDEBTEDNESS CLAUSE.—It is understood and agreed that bonded and/or other indebtedness and/or deed of trust may exist on the property insured hereunder without prejudice to this insurance.

(18) REPUGNANCY CLAUSE.—In case of any repugnancy between the terms and conditions of this policy and above "additional conditions and variations of insurance," it is agreed that the latter shall be deemed to govern in favour of the Assured.

In the Supreme Court of British Columbia.

No. 4. Statement of facts and admissions, 11th September 1929 —*continued.*

(19) SUBROGATION CLAUSE.—It is expressly stipulated that this policy shall not be voidable in consequence of the inability of the assured to subrogate to this company the right of recovery against any railway or transportation company for any loss or damage by fire caused by any act, or neglect of such railway or transportation company or employee.

(20) LIGHTNING CLAUSE.—Except as provided in the Electrical Exemption Clause below this policy shall cover Use and Occupancy loss (as herein provided for) caused by lightning (meaning thereby the commonly accepted use of the term lightning and in no case to include loss or damage by cyclone, tornado, or windstorm) not exceeding the sum insured, nor the interest of the insured in the property, subject to the terms and conditions of this form and the policy to which it is attached. Provided, however, if there shall be any other insurance concurrent with this form, this company shall be liable only pro rata with such other insurance for any such loss by lightning, whether such other insurance be against loss by lightning or not.

(21) ELECTRICAL EXEMPTION CLAUSE.—It is a condition of this policy that this company shall be liable for any Use and Occupancy loss hereunder resulting from any electrical injury, disturbance or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, whether from artificial or natural causes, if and when fire ensues, and then only for such loss (as provided for hereunder) as may be caused by such ensuing fire; this limitation to be operative notwithstanding any provision to the contrary in the lightning Clause (if any) attached.

(22) LOSS PAYABLE CLAUSE.—Loss, if any, subject however to all the terms and conditions of this policy, payable to Assured.

Attached to and forming part of Policy No. 75182 of the St. Lawrence Underwriter Agency.

Agents

No. 5. Reasons for Judgment of Trial Judge, W. A. Macdonald, J., 9th January 1930.

No. 5.

Reasons for Judgment of Trial Judge, W. A. Macdonald, J.

Plaintiff seeks to recover $8,750.68, alleged to be due and payable by the Defendant, for taxes upon its personal property and income. Defendant claims to be entitled to a substantial set off or allowance.

Just prior to the trial, the parties, through their Counsel, in order to save expense, and obviate the necessity of taking evidence, adopted the commendable course of agreeing upon facts and making certain admissions. The result was that the issues were narrowed and Counsel submitted, that there was really only one point to be considered at the trial and which required determination.

It appears, that the Defendant has since 1921 been carrying on its business as manufacturers and dealers in lumber products, at the City of

In the Supreme Court of British Columbia.

No. 5. Reasons for Judgment of Trial Judge, W. A. Macdonald, J., 9th January 1930—*continued.*

Vancouver, saving an interruption caused by fire. In the year 1923 it insured with 17 Fire Insurance Companies, against loss and damage to its plant and property by fire, and also insured with the same companies against loss or damage which might be sustained in the event of its plant being shut down and business suspended, in consequence of fire and damage. The insurance last mentioned is commonly known as "use and occupancy insurance." It was effected by the Defendant under such policies to the total amount of $60,000 in respect of loss of "net profits" and $84,000 in respect of "fixed charges." The plant and premises of the Defendant were 10 destroyed by fire in August 1923 and by adjustment with the Insurance Companies under the last mentioned policies, the Defendant was paid $43,000 for loss of "net profits" and $52,427.90 in respect of "fixed charges," making a total, thus paid by the Insurance Companies to the Defendant of $95,427.90.

It was admitted that the Defendant had, without taking legal advice, upon the question, as to whether these insurance moneys were taxable or not, included in its "return" for the year 1923, the sum of $41,293.20 of such moneys, and in the year 1924 had similarly included the sum of $33,706.80. The Defendant, without at the time questioning its liability, 20 voluntarily paid income tax on these amounts and the allowance or set-off is now sought in respect of such payments.

It was not contended on the part of the Plaintiff, that the Defendant was thus debarred from being repaid or allowed as a set-off or credit the income tax so paid. The Plaintiff, during the argument, apparently conceded that if the Defendant was not liable to pay such taxes that it was not entitled to retain the moneys so paid but should credit them on other taxes admittedly payable. A difficulty, however, arises under the pleadings, as it is alleged in the 12th paragraph of the Statement of Defence that such Returns and payment of taxes by the Defendant was under the "mistaken 30 belief" that liability for taxation existed under the Taxation Act. In other words, it was a mistake of law, as distinguished from a mistake of facts. Then was it intended, notwithstanding the state of the pleadings, that such mistake in law should not affect the question of liability or operate as an answer to Defendant's claim? The proposition, that moneys paid under a mistake of law are not recoverable, is referred to in *Kerr on Fraud and Mistake* 4th Ed. p. 470, as follows:—

> "As a general rule it is well established in equity as well as at law, that money paid under a mistake of law, with full knowledge of the facts, is not recoverable, and that even a promise to pay, 40 upon a supposed liability, and in ignorance of the law, will bind the party. *Bilvie* v. *Lumley*, 2 East 469; *Brisbane* v. *Dacres*, 5 Taunt 143; *Drewry* v. *Barnes*, 3 Russ. 94; *Bate* v. *Hooper*, 5 D. M. & G. 338; *Stafford* v. *Stafford*, 1 D. & J. 197; *Saltmarsh* v. *Barrett*, 31 L. J. Ch. 783; *Rogers* v. *Ingram*, 3 C. D. 351; *Re Hulkes*, 33 C. D. 552. Where money had been paid for many years without deducting the land-tax, no deduction was afterwards allowed out of the subsequent

payments. *Nichols* v. *Leeson,* 3 Atk. 573. So, also, where an executor had paid interest for seventeen years without deducting the property tax, it was held he could not afterwards deduct out of the future interests due the amount of property tax on such precedent payments. *Carrie* v. *Goold,* 2 Madd. 163."

Cf. Colwood Park Ass'n Corp. Dist. of Oak Bay (1928) 2 W. W. R. 593—40 B. C. R. p. 233 following *Cushers* v. *City of Hamilton* 40 O.L.R. 265. In the latter case Osler, J. A., delivering the judgment of the Court, referred to the decisions and fully discussed the law, bearing upon the subject. 10

As the pleadings and admission of fact stand I cannot well ignore the legal position thus created. I think, if it be so intended, that the agreement and admissions of Counsel should go further and clearly state, that it is agreed on the part of the Plaintiff, that the maxim is not applicable or, if applicable, is not intended to be raised as an answer to the Defendant's claim to a set-off or allowance. I think it well, however, to stop at this point and not proceed with my reasons for judgment. I deem it advisable to notify Counsel to appear and present their views upon the situation thus presented.

Counsel in due course appeared and the discussion which ensued is 20 available should occasion arise. Counsel for the Defendant, in concluding his remarks and referring to the set-off of the amount, sought to be allowed as a credit, said, that it should be " fairly agreed that it might be allowed,—that if we had paid the money by mistake—if we had paid the money, when we were not liable, we would receive credit for it. But I can see the difficulty that your lordship raises, that even though it is a matter of agreement between us, your lordship, delivering judgment on a case where there is a point of law involved, might be taken to be deciding that money paid under a mistake of law could be recovered."

After a considerable lapse of time the pleadings have been materially 30 amended.—It would have been more satisfactory, if such pleadings had more clearly outlined the position and indicated the sole issue sought to be determined between the parties.

Considering, however, the discussion and view of Counsel, as shortly outlined, I think I may now assume that the Plaintiff abandons and does not raise as a defence to the alleged set-off, the ground that it constitutes money voluntarily paid by the Defendant to the Plaintiff under a mistake of law and so is not recoverable. In other words it is conceded by the Plaintiff and agreed, that if such payment of taxes arose through a mistake in law, then the Plaintiff will give credit therefor by way of set-off, as 40 against taxes admittedly due to the Plaintiff. I thought it well that this aspect of the case should be clearly stated, aside from the conclusion I might reach upon the main point sought to be decided.

Then to resume consideration of the question as to whether or no the moneys so paid were properly imposed and payable as taxes upon the

income of the Defendant. This involves the determination as to whether the moneys received from the Insurance Companies in lieu of net profits and upon which such taxes were paid come within the definition of "income" in the Taxation Act—R. S. B. C. (1924) Cap. 254. By Section 2 of the Act—

"Income" includes the gross amount earned, derived, accrued, or received from any source whatsoever, the product of capital, labour, industry, or skill; and includes all wages, salaries, emoluments, and annuities accrued due from any source whatsoever . . . and includes all income, revenue, rent, interest, or profits arising, received, gained, acquired, or accrued due 10 from bonds, notes, stocks, debentures, or shares, or from real and personal property, or from money lent, deposited, or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business or profession of any kind whatsoever:"

In construing this definition in a taxing Act, the principle to be followed is that stated by Lord Blackburn in *Coltness Iron Co.* v. *Black*, 6 A. C. 315 at p. 330 and—

> "No tax can be imposed on the subject without words in an act of Parliament clearly showing an intention to lay a burden on him, but when that intention is sufficiently shown it is, I think, 20 vain to speculate on what would be the fairest mode of levying that tax. The object of those framing a taxing Act is to grant to Her Majesty a revenue; no doubt they would prefer if it were possible to raise that revenue equally from all, and as that cannot be done to raise it from those on whom that tax falls with as little trouble and annoyance and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations it is reasonable to put that construction on them which would produce these effects."

When such intention is sufficiently shown, one should also bear in mind, that the charge contained in a taxing Act should be expressed in 30 clear and unambiguous language and that the construction of the Act should generally be resolved in favor of the taxpayer in cases of doubt. Along these lines Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100 at p. 122 appeared to indicate, that special principles were applicable in the construction of taxing Acts as follows:—

> "As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the 40 law, the subject is free, however apparently within the sphere of the law the case may 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."

In the Supreme Court of British Columbia.

No. 5. Reasons for Judgment of Trial Judge, W. A. Macdonald, J., 9th January 1930—*continued.*

And in the case of *Cox* v. *Rabbits*, 3 A. C. 473 at 478 he said :—

" A taxing Act must be construed strictly; you must find words to impose the tax and if words are not found which impose the tax it is not to be imposed."

The intention of the Taxation Act and the property and persons that would be subject to taxation hereunder as indicated in such Act as follows :—

(1) " To the extent and in the manner provided in this Act and for the raising of a revenue for Provincial purposes :—

(*a*) All property within the Province, and all output and income of every person resident in the Province, and the property within 10 the Province and the output produced and income earned within the Province of persons not resident in the Province shall be liable to taxation . . ."

Such being the intention of the Act and the Defendant as a corporation coming within the definition of " person," should the moneys thus received by the Defendant escape taxation, as not being either property or income? Was the Defendant wrong in utilizing the proper schedule for that purpose in making its Returns, and treating these moneys as profits earned in its business? I have not had an opportunity of seeing the books of the Defendant, but from the manner of its Returns, it can be reasonably assumed 20 that such insurance moneys were not entered as a " windfall," but properly credited as profits. They could not be treated as capital as they form a portion of the receipts by the Defendant for those years. They constituted profits which the Defendant had secured to itself, by precautionary measures, in the event of the capital investment, in the shape of its plant and premises, lying dormant, through destruction by fire. " They were profits " based upon and " arising from property " of such a nature as to obtain the insurance. If Defendant has not such capital assets, coupled with its business, it could not by insurance have secured such profits—Notwithstanding these circumstances, Defendant contends, that the moneys thus received are not 30 " income " within the definition of the taxing Act and not taxable. In support of this contention the case of *The Glenboig Union Fireclay Co. Ltd.* v. *The Commissioners of Inland Revenue* 12 Reports of Tax Cases p. 427 H. L. 1922 S. C. (H. L.) 112 was cited. It does not however lend support to the Defendant. Short extracts might be made from the judgment which would give assistance, but considering the case as a whole, it is apparent that the point to be decided was, as to whether certain moneys paid by the Caledonia Railway Company for compensation, constituted profits or capital. If the former, then they had been properly included by the Glenboig Company in its returns for the year 1913, being one of the two 40 pre-war years, upon the average of which, the pre-war standards of profits were to be ascertained, and forms the basis for Excess Profits Duty. It was to the interest of the Appellants in that case to show that the profits of such pre-war years were large, so that the Excess Profits taxable, would thus be lessened. They made their Returns accordingly and paid income tax thereon. The Inland Revenue Commissioners, however, contended

the sums so paid as compensation were not profits, although they had accepted and retained income tax upon them upon the footing that they were profits. The Commissioners held that the compensation thus paid was in lieu of a portion of fixed assets of the Glenboig Company. That it was to replace a capital loss and not a profit arising from trade or business of the Company. The Company was dissatisfied and a stated case was submitted for the opinion of the Court of Sessions and the finding of the Commissioners confirmed. In that Court the Lord President (Clyde), at p. 448, said :—

In the Supreme Court of British Columbia.

No. 5. Reasons for Judgment of Trial Judge, W. A. Macdonald, J., 9th January 1930—*continued.*

"It is I think a fallacy to suppose that 'profits arising from the 10 trade or business' of the Company or the 'annual profits or gains arising or accruing therefrom'—which are the proper subjects both of Excess Profits Duty and of Income Tax—are identifiable with sums received as compensation in respect that parts of the Company's trading assets are, by the force of the railway legislation, struck with sterility and rendered permanently incapable of profitable employment. We know nothing of how the Company dealt with the value of its leasehold property in its books or in framing its balance sheets. But *prima facie the sterilization of parts of them seems to me to imply a capital loss,* and the payment of compensation 20 to repair the injury to the Company's undertaking which flowed from that sterilization *seems to me to be a restoration of capital.* . . . It is a consideration or substitute, *not for profits earned or capable* of being earned, but for profits irretrievably lost and incapable of being ever earned. The *taxing acts deal with profits made, not with profits lost—with actual, not with hypothetical profits*—and it is by the words of the taxing acts that we are bound. As paid to and received by the Company, the compensation was the equivalent of a destroyed portion of one of its *fixed assets : I do not think it was a profit which arose from the Company's trade or business at all.*"

30 While a portion of this citation might, if read in a certain way, lend support to the Defendant's contention still a close perusal indicates that the essential question was whether or no the compensation represented capital assets or profits which arose from the Company's business. On appeal to the House of Lords the judgment of the Court of Sessions was affirmed. The view taken by their Lordships, in thus deciding the appeal, may be shortly outlined, in a portion of the judgment of Lord Wrenbury at p. 465—

"The matter may be regarded from another point of view; the right to work the area in which the working was to be abandoned 40 was part of the capital asset consisting of the right to work the whole area demised. Had the abandonment extended to the whole area all subsequent profit by working would, of course, have been impossible, but it would be impossible to contend that the compensation would be other than capital. It was the price paid *for sterilizing the asset from which otherwise profit might have been obtained.*"

In the Supreme Court of British Columbia.

No. 5. Reasons for Judgment of Trial Judge, W. A. Macdonald, J., 9th January 1930—*continued.*

Then as to the difference between a sterilization or destruction of a portion of the capital assets of the taxpayer and compensation being received therefor, and the case of a taxpayer receiving compensation, on account of assets not being available to produce profits, through their destruction, I am referred to a decision in Vol. 3 of the United States Board of Tax Appeal Reports at 283—*Re the International Boiler Works Co.* There Sternhagen, J., in delivering the judgment of the Court, stated that the taxpayer contended that moneys that it received for "use and occupancy" insurance were not income "because the proceeds of such insurance are in their nature not income." It was submitted that the 10 moneys were merely a replacement of a property right, thus in effect a return of capital. This view, however, did not prevail with the Court and the object of the insurance was discussed somewhat at length. It was pointed out that there were two species of insurance, that is one for the loss of materials and buildings, and another for the loss of net profits, through a business being prevented, by the destruction of the plant. The following portion of the judgment is pertinent to the issue—

> "Such profits (so insured) had they not been lost, unquestionably would have been gross income and there is no reason why an amount received in substitution for net profits should be any more excluded 20 from taxes, *than if received directly in the conduct of the business.*"

This reasoning appears sound and applicable to the present case.

Lord Salvesen in the *Glenboig case* dissented from the other Judges. He considered the compensation paid, as being income and not net capital. Notwithstanding this fact I think I might well, in coming to a conclusion that the insurance moneys were taxable, adopt, and apply with changes, a portion of his judgment at p. 458, as follows :—

> "If its profits are less by reason of outside interference (loss by fire) and it is compensated for the loss of profits caused by such interference *the compensation is just part of its revenue, for its capital* 30 *account* is not thereby *in any way* affected."

The Defendant, by adequately protecting itself, received profits which were properly assessed and taxes duly paid. Differing from the conclusion of Lord Cullen in the *Glenboig case,* at p. 460, I think the "sum so paid &c. can be regarded a fruit or earning of the business or an ingredient in the profits thereof." In my opinion the taxes so paid are not repayable by the Plaintiff by way of set-off to the Defendant. It follows that the amount due by the Defendant for taxes is only a matter of calculation. If the parties cannot agree it may be determined when the order for judgment is being settled. Plaintiff is entitled to costs. 40

9th January, 1930.

W. A. MACDONALD, J.

In the Supreme Court of British Columbia.

No. 6. Formal Judgment, 9th January 1930.

No. 6.

Formal Judgment.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

Between

HIS MAJESTY THE KING in right of the Province of British Columbia - - - - (*Plaintiff*), *Respondent*,

and

B.C. FIR AND CEDAR LUMBER COMPANY, LIMITED (*Defendant*), *Appellant*.

10 Before the Honourable Mr. JUSTICE W. A. MACDONALD. } Thursday, the 9th day of January, 1930.

THIS ACTION coming on for trial on the 12th day of September 1929, in presence of Mr. George A. Grant, Counsel for the Plaintiff, and Mr. C. H. Locke, K.C., Counsel for the Defendants : UPON HEARING READ the pleadings and the Statement of Facts made by the parties, dated the 11th day of September 1929, and filed herein, AND UPON HEARING what was alleged by Counsel aforesaid, AND UPON HEARING Counsel for the parties further on the 18th day of September 1929, AND UPON READING the amended pleadings filed herein by the parties :

20 THIS COURT DOTH ORDER AND ADJUDGE that the Defendants do pay to the Plaintiff the sum of $3922.86.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendants do pay to the Plaintiff his costs of this action forthwith, after taxation thereof.

By the Court,

(Sgd.) H. BROWN,
Dep. District Registrar.

W. A. M., J.

In the Court of Appeal of British Columbia.

No. 7. Reasons for Judgment, 7th October 1930. (a) Macdonald, C.J.

No. 7.

Reasons for Judgment.

30 IN THE COURT OF APPEAL OF BRITISH COLUMBIA.

(*a*) MACDONALD, C.J.

I think the learned trial Judge has arrived at the right conclusion and I would therefore dismiss the appeal.

J. A. MACDONALD,
C.J.B.C.

Vancouver, B.C.
7th October, 1930.

In the Court of Appeal of British Columbia.

No. 7. Reasons for Judgment, 7th October 1930. (b) Martin, J.A.

(*b*) MARTIN, J.A.

Vancouver, 7 Oct., 1930.

During the argument I felt much impressed by the soundness of the reasons advanced by Appellant's Counsel in favour of reversing the judgment below and a further consideration of the matter has strengthened that impression.

If, in short, this fire policy is viewed, as I think it ought to be, as intending to put the insured company in the same position as if it had not suffered a loss by fire, then its loss so suffered is not its net profit, but that profit plus the overhead charges it has disbursed to produce that income; 10 and the payment of the premium did not assist it in making a profit but in obtaining indemnity from forced suspension of operations. The statute provides for no more than taxation on net profit and in ascertaining that profit the Appellant is entitled to set-off the fixed charges necessary to produce it, under sec. 44, the construction of which should not be strained against the tax-payer.

As to the decision of the Exchequer Court of Canada per Maclean, J., in *B. C. Fir etc. Co.* v. *Minister of National Revenue* (1929) Ex. C. R. 59, I need only say that even if the National statute on which it is based were identical in essentials with the Provincial one before us, we should not, 20 I think, with all due respect, give it our sanction.

I would, therefore, allow the appeal.

(Sgd.) ARCHER MARTIN, J.A.

(c) Galliher, J.A.

(*c*) GALLIHER, J.A.

The only question as I take it to be determined by this Court is, were the sums paid the Defendants under what is known as Use and Occupancy Insurance policies for estimated profits during the time the mill was shut down taxable income within the definition of income in the "Taxation Act," R.S.B.C. 1924, Cap. 254.

The learned trial Judge has so held and I am so much in accord with 30 his well-reasoned judgment on this point that I need not add thereto.

In addition to the cases referred to by his Lordship I might refer to the cases of *Gliksten* v. *Green* (1929) 98 L.J., K.B. 363; *Commissioner of Inland Revenue* v. *Newcastle Breweries* (1926) 135 L.T. 618; and *Short Bros.* v. *Commissioner of Inland Revenue* (1927) 136 L.T. 689.

I would dismiss the appeal.

W. A. GALLIHER, J.A.

Vancouver, B.C.
7th October, 1930.

(d) Mc-Phillips, J.A.

(*d*) McPHILLIPS, J.A. 40

My conclusion upon this appeal coincides so completely with the very careful judgment of the learned Judge below, Mr. Justice W. A. Macdonald, that I do not find it necessary to enter into any elaboration of my views. I am content to say that I entirely agree with the learned Judge and am of the opinion that the judgment should be affirmed and the appeal dismissed.

I do wish though to call attention to what Lord Parmoor said in *City of London Corporation* v. *Associated Newspapers Ltd.* (1915), A.C. 674 at p. 704: "I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends." In the present case great reliance was placed by counsel for the Appellant upon *The Glenboig Union Fireclay Co. Ltd.* v. *The Commissioner of Inland Revenue,* 12 Tax cases 427 H.L. (1922) S.C. (H.L. 112). It is to be observed that in Scotland the statute under review gave no definition of "Income Tax," whilst the British Columbia statute does to some extent at least 10 define the nature of the tax. In the case of *Lady Miller* v. *The Commissioners of Inland Revenue* (reported (C. of S.) 1928, S.C. 820 and (H.Y.) (1930) A.C. 222, 15 Tax Cases 25) we have the Lord President (Clyde) saying (p. 49): "The Income Tax Act nowhere defines 'income,' and it follows that this word—which limits and controls the scope of the entire Income Tax system —must be interpreted in its plain and ordinary meaning." Here admittedly that which has been taxed was income, being the amount found by the insurance adjusters to be the net profits that would have been earned had the mill been in operation and over and above all capital loss—and such moneys were received by the Appellant and therefore taxable as income. I 20 would lastly refer to *London County Council* v. *Attorney General* (1901) A.C. 26 at p. 35 where Lord Macnaghten said: "Income Tax if I may be pardoned for saying so is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct . . . . One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit." Here by the exercise of good judgment an eventuality was provided against and moneys received —it was taxable income and taxable under the statute.

In the Court of Appeal of British Columbia.

No. 7. Reasons for Judgment, 7th October 1930. (*d*) McPhillips, J.A.—*continued.*

A. E. McPHILLIPS,
J.A.

30 Vancouver, B.C.,
7th October, 1930.

(*e*) MACDONALD, J.A.

(*e*) Macdonald, J.A.

I would dismiss the appeal.

M. A. MACDONALD,
J.A.

Vancouver, B.C.,
October 7, 1930.

In the Court of Appeal of British Columbia.

No. 8.
Formal Judgment, 7th October 1930.

No. 8.

Formal Judgment.

IN THE COURT OF APPEAL OF BRITISH COLUMBIA.

Before :

The Honourable the CHIEF JUSTICE OF BRITISH COLUMBIA,

The Honourable Mr. Justice MARTIN,

The Honourable Mr. Justice GALLIHER,

The Honourable Mr. Justice MCPHILLIPS,

The Honourable Mr. Justice MACDONALD.

Between 10

HIS MAJESTY THE KING, in right of the Province of British Columbia - - - - - - - *Plaintiff (Respondent),*

and

B. C. FIR & CEDAR LUMBER COMPANY LIMITED *Defendant (Appellant).*

Vancouver, B.C., the 7th day of October, 1930.

Court of Appeal
Seal British Columbia.

THIS APPEAL coming on for hearing at Victoria, B.C., on the 16th and 17th days of June, 1930, in the presence of Mr. C. W. Craig, K.C., of Counsel for the Defendant (Appellant) and Mr. Eric Pepler of Counsel for the Plaintiff 20 (Respondent); upon hearing read the Appeal Book herein, and what was alleged by Counsel aforesaid; and this Court having directed that the said Appeal stand over for judgment and the same coming on this day for judgment;

THIS COURT DOTH ORDER AND ADJUDGE that this Appeal be and the same is hereby dismissed;

AND THIS COURT DOTH FURTHER ORDER that the Defendant (Appellant) do pay to the Plaintiff (Respondent) his costs of and incidental to this Appeal forthwith after taxation thereof.

By the Court, 30

B. H. TYRWHITT DRAKE,
Registrar.

In the Court of Appeal of British Columbia.

No. 9.
Notice of appeal to Supreme Court of Canada, 29th November 1930.

No. 9.

Notice of Appeal to Supreme Court of Canada.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

From the Order of the Honourable Mr. Justice W. A. MACDONALD, dated the 9th day of January, 1930.

Between

HIS MAJESTY THE KING, in right of the Province of British Columbia - - - - - - - - *Plaintiff* (*Respondent*),

and

10 B. C. FIR & CEDAR LUMBER COMPANY LIMITED - *Defendant* (*Appellant*).

TAKE NOTICE that the above named Defendant (Appellant) hereby appeals to the Supreme Court of Canada from the judgment of this Court pronounced herein on the 7th day of October, 1930, whereby it was ordered and adjudged that the appeal of the Defendant (Appellant) from the judgment of the Supreme Court of British Columbia dated the 9th day of January, 1930, be dismissed.

DATED at Vancouver, B.C., this 29th day of November, 1930.

MAYERS, LOCKE, LANE & THOMSON,
Solicitors for the Defendant (Appellant).

20 To the Plaintiff,
And to ERIC PEPLER,
Solicitor and Counsel for Plaintiff (Respondent).

In the Supreme Court of Canada.

No. 10. Factum of B.C. Fir and Cedar Lumber Company, Limited.

No. 10.

Factum of B.C. Fir and Cedar Lumber Company, Limited.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Between

B. C. FIR AND CEDAR LUMBER COMPANY LIMITED
(Defendant) Appellant,

and

HIS MAJESTY THE KING, in right of the Province of British Columbia - - - - - - - *(Plaintiff) Respondent.* 10

I.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Court of Appeal of British Columbia, affirming the judgment of the Supreme Court of British Columbia, in an action by the Crown against the B. C. Fir & Cedar Lumber Company Limited (hereinafter called the Company) for income tax.

The action was tried on an agreed statement of facts, which are these. The Company carries on in Vancouver the business of manufacturing and selling lumber. In the year 1923 the Company had insured itself against loss and damage to its plant and property by fire, and also against the loss 20 and damage which would be sustained by it in consequence of the shut-down of plant and suspension of business in the event of a fire. The policies, seventeen in number, insured the Company to the total amount of $60,000 in respect of loss of net profits and of $84,000 in respect of fixed charges. On August 21st, 1923, the plant and premises of the Company were destroyed by fire. The Company and the adjuster for the insurers agreed upon the period of the interruption of the Company's business as being 215 business days, this being the length of time considered as being required for the rebuilding of the plant, and the loss was adjusted upon the following basis :—

Loss of net profits estimated at $317.32 per day : insured for and 30 allowed at $200.00 per day for 215 days.

Fixed charges : estimated at $234.85 per day : insured for $280.00 per day : allowed at the actual estimated loss.

The Company, not having taken legal advice on the subject returned as income part of the moneys received from the insurers and paid income tax thereon. Subsequently the Company ascertained its position and declined to return or pay tax upon the residue of the moneys received from the insurers. The Crown sued for the tax, and agreed that if it should be held that none of the moneys received from the insurers under the above two heads were income within the definition of the Act, then the Company should 40 be entitled to set off the amount of taxes paid by mistake against other sums admittedly due by the Company to the Crown.

The question before the Court was, therefore, whether the moneys received from the insurers under the two heads of net profits and fixed charges were income within the definition contained in the Taxation Act (Statutes of British Columbia 1922, Chapter 75).

The Honourable Mr. Justice W. A. Macdonald, in the Supreme Court of British Columbia, held that they were, and his decision was affirmed by the Court of Appeal, Martin, J.A., dissenting.

II.

POINTS OF LAW.

10 It is submitted :—

(1) That the question proposed must be decided solely on the construction of the definition in the Act : and (2) that such receipts are not included in that definition.

III

ARGUMENT.

The definition of " income " in the Taxation Act, Chap. 75, Statutes of British Columbia 1922, section 2, reads as follows :—

> " Income " includes the gross amount earned, derived, accrued or received from any source whatsoever, the product of capital, 20 labour, industry, or skill; and includes all wages, salaries, emoluments, and annuities accrued due from any source whatsoever (including the salaries, indemnities, or other remunerations of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies and Municipal Councils, Commissions or Boards of Management, and of any Judge of any Dominion or Provincial Court, whether the said salaries, indemnities, or other remunerations are paid out of the revenues of His Majesty in right of the Dominion or in right of any Province thereof or by any person); and includes all income, 30 revenue, rent, interest, or profits arising, received, gained, acquired, or accrued due from bonds, notes, stocks, debentures, or shares (including the stocks, bonds, or debentures of the Dominion or of any Province of the Dominion, or of any municipality), or from real and personal property, or from money lent, deposited or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business, or profession of any kind whatsoever :

In the *City of London Corporation* v. *Associated Newspapers Ltd.* (1915), AC. at p. 704) Lord Parmoor said : " I do not think that cases decided 40 on other Acts have much bearing on the construction of the Acts or sections on which the present case depends." And this is a fortiori true here, where the Act in question minutely defines what is to be held to be income for the purpose of taxation. It is respectfully submitted that the fundamental error of the reasons for judgment of the learned judge lies in the fact that they all attend so closely to the lines of reasoning adopted in other cases as almost to overlook the definition itself. That definition may

In the Supreme Court of Canada.

No. 10. Factum of B.C. Fir and Cedar Lumber Company, Limited—*continued.*

be conveniently split up into a number of heads. Thus: income includes (1) the gross amount earned, derived, accrued or received from any source whatsoever, the product of capital, labour, industry or skill: (2) and includes all wages, salaries, emoluments and annuities accrued due from any source whatever . . . . . (3) and includes all income, revenue, rent, interest or profits arising, received, gained, acquired or accrued due from bonds, notes, stocks, debentures or shares . . . , or from real and personal property, or from money lent, deposited or invested: (4) or from any indebtedness secured by deed, mortgage, contract, agreement or account: (5) or from any venture, business or profession of any kind whatsoever. 10

Now contracts of insurance fall within the class of aleatory contracts, and a contract of fire insurance is a personal contract with the assured, and is not a contract passing with the property insured. It is thus in its essence nothing but a bet. The insurer engages himself personally with the assured personally that a fire will not happen so as to cause loss or damage to the assured's property. Clearly, therefore, moneys received in respect of such a bet do not fall within the enumerations 2, or 3 of the definition. With regard to 4, there is no indebtedness secured by any document: if no fire occurs during the duration of the policy, no indebtedness ever arises: there is, therefore, no indebtedness which can be secured, 20 and the language of enumeration 4 shows that it includes only existing debts, such as a debt secured by a mortgage: the distinction here is between secured and unsecured debts, and in the case of a policy of fire insurance there is neither debt nor security. With regard to 5, it seems sufficient to say that the business of the Company was that of manufacturing lumber and not that of having destructive fires. There remains only the first enumeration, and of this the important words are these:—" the product of capital, labour, industry or skill." It is submitted that it is impossible to bring these insurance moneys within this language, which evidently contemplates some outlay or expenditure of capital moneys or human 30 efforts for the very purpose and with the hope and intention of producing the return or income. Of course the manufacturer, who insures, hopes there will be no fire and bends all his efforts to prevent one. He knows that, as indeed happened in this case, the money recovered from the insurer will not compensate him for the actual loss sustained. Indeed the insurance moneys are not " produced " by anything except a fortuitous occurrence which takes place against the will and in spite of the efforts of the assured. On the other hand, taking the whole definition together, instead of splitting it into its constituent parts, it is, it is submitted, clear that what the Act contemplates was some deliberate and purposive laying out or investment 40 of capital, rendering of services, lending of money or prosecution of a business, or adventure, directed to the very end of receiving in return the fruits of the disposition of the moneys used or the human activities displayed. It is not without significance that if the submissions hereinbefore made are correct, then the Act has adopted, with some elaboration, the definitions to be found in the standard dictionaries. For instance the New English Dictionary says that income is " that which comes in as the periodical

produce of one's work, business, lands or investments : " while the Century Dictionary says that it is " that which comes in to a person as payment for labour or services rendered in some office or as gain from lands, business or the investment of capital, receipts or emoluments regularly accruing either in a given time or when unqualified annually : the annual receipts of revenue." Nor is it irrelevant to notice that the definition has remained unaltered since 1901 : (Assessment Act Amendment Act 1901, Chapter 56, section 2) : having thus been framed at a time when such forms of insurance as those in question here were probably unknown.

10 The only distinction between a contract of insurance and a bet is that while " a bet is merely an irrational agreement that one person should pay another person something on the happening of an event " (per Rowlatt J. in *Graham* v. *Green* (1925), 2 K.B. at p. 39), on the other hand a contract of insurance is a rational agreement to the same effect. The resulting payment on the happening of the event is not income, because (1) it is not an annual or otherwise periodical payment : (2) it is not an increment of any expenditure : (3) it is not the fruition of any enterprise : (4) it is not the intended or wished for result to which any action or forbearance is directed : (5) there is nothing of which it can be said to be a profit. It is 20 really the finding or picking up of something which helps to reduce a loss.

The learned judges seem to have been deceived by the language of the policies : because the insurance moneys were paid, in part, on account of a loss of net profits, therefore the insurance moneys are net profits. In reality, such a receipt is not a trading profit at all, but its antipodes, compensation for loss of trading profits : it was not a sum received in the course of carrying on a trade, but a sum received because the trade could not be carried on.

As to the other portion of the money received, namely, that in respect of fixed charges, it is truly difficult to see how this could be held to be 30 " income."

Astonishing as it may seem, not one of the learned judges, who delivered opinions, specifies the particular language of the definition, which includes these insurance moneys. The learned trial judge refers to five English, Scotch and American cases, decided under different Acts and on different sets of circumstances : but nowhere, in his opinion, does he descend to a critical examination of what, it is submitted, can be the only justification for the judgment, namely, the particular language in the particular definition of the Act. Even with regard to the decisions considered by the learned trial judge, it would appear that the case of The Glenboig 40 Union Fireclay Co., 1922 S.C. (H.L.) 112 in so far as it is relevant at all, is directly unfavorable to his own decision, but the learned trial judge appears to have preferred to adopt the dissenting judge's reasons in that case.

In the Court of Appeal the learned judges were content to adopt the reasons of the learned trial judge, with the exception of Mr. Justice Martin.

C. H. LOCKE,
Counsel for Appellant.

In the Supreme Court of Canada.

No. 11.
Factum of H.M. the King.

No. 11.

Factum of H.M. the King.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Between

B.C. FIR AND CEDAR LUMBER COMPANY, LIMITED
(*Defendant*), *Appellant*

and

HIS MAJESTY THE KING in right of the Province of British Columbia
(*Plaintiff*), *Respondent*.

PART I.

10

STATEMENT OF FACTS.

This is an appeal from the judgment of the Court of Appeal for British Columbia dated October 7th, 1930 (Record, p. 24), dismissing (Mr. Justice Martin dissenting) an appeal by the Appellant from the judgment of the Honourable Mr. Justice Macdonald of the Supreme Court of British Columbia dated January 9th, 1930 (Record, p. 21).

The Appellant was incorporated on 3rd January, 1910, under the " Companies Act " of British Columbia and during all the time material to this action carried on business as manufacturers and dealers in lumber and lumber products at the City of Vancouver (with the exception of the 20 interruption of its business hereinafter referred to).

In the year 1923 the Appellant was insured by some seventeen fire insurance companies against loss and damages to its plant and property by fire. It was also insured by the same companies against the loss of net profits which the Appellant would suffer and the payment of fixed charges which would have to be met in the event of the plant and property being destroyed or damaged by fire necessitating a total or partial suspension of business, such insurance being known as Use and Occupancy Insurance.

The policies of Use and Occupancy Insurance under which the Appellant was insured were all in the form of the policy set out on page 10 30 of the Record. These policies insured the Appellant in the total amount of $60,000 in respect of loss of net profits and $84,000 in respect of fixed charges (Record, p. 10). The expressions " fixed charges " and " net profits " are defined in the policies (Record, pp. 10 and 11).

On August 21st, 1923, the plant and premises of the Appellant were destroyed by fire. The Appellant and the adjuster for the insuring companies

agreed upon the loss under the Use and Occupancy policies as follows (Record, p. 8) :—

Period of interruption of Appellant's business being the length of time estimated for rebuilding - - -	215 days.
Loss of Net Profits—	
Estimated at $317.23 per day.	
Allowed at $200 per day for 215 days - - -	$43,000.00
Payment of Fixed Charges—	
Estimated and allowed at $234.85 per day for 215 days	52,427.90
Total - - - - - - -	$95,427.90

The insuring companies duly paid the Appellant the said sum of $95,427.90 under the Use and Occupancy insurance policies, but the Appellant only included a portion of this sum, namely, $75,000, in its income-tax returns to the Province for the years 1923 and 1924 and paid income-tax thereon. The balance of said insurance moneys, namely, the sum of $20,427.90, the Appellant claimed was exempt from liability for income-tax, and did not pay income-tax thereon on the ground that this sum was received from the insurance companies in excess of the actual loss sustained, the rebuilding of the plant having taken a less number of days than estimated by the adjusters (Record, p. 8).

On the 28th day of November, 1927, the Respondent brought action against the Appellant in the Supreme Court of British Columbia for payment of income-tax on the said sum of $20,427.90, being the balance of insurance moneys received by the Appellant under the Use and Occupancy policies and not included in the Appellant's income-tax returns, and for arrears of personal-property tax, interest and penalties (Record, p. 3). On the trial it was agreed between the parties that the amount of personal-property tax was not in dispute, and the sole question for the determination of the Court was the liability of the Appellant for income-tax to the Province in respect of the proceeds of the Use and Occupancy insurance policies.

On the 9th January, 1930, Mr. Justice Macdonald gave judgment in favour of the Respondent in the sum of $3,922.86 (Record, p. 21), being $3,265.94, the balance owing by the Appellant for income-tax and the sum of $656.92 for personal-property tax.

From this judgment the Appellant appealed to the Court of Appeal. On the appeal it was admitted by Counsel that there was no dispute as to the Appellant's liability for personal-property tax and that the only question for determination was its liability for income-tax on the proceeds of the Use and Occupancy insurance policies. On the 7th October, 1930, the Court of Appeal by a majority, the Chief Justice, Mr. Justice Galliher, Mr. Justice McPhillips, and Mr. Justice W. A. Macdonald, dismissed the appeal (Record, p. 24), Mr. Justice Martin dissenting.

The present appeal is from the decision of the Court of Appeal.

In the Supreme Court of Canada.

No. 11. Factum of H.M. the King—*continued.*

PART II.

POINTS IN RESPECT OF WHICH THE RESPONDENT ALLEGES ERROR.

Mr. Justice Martin of the Court of Appeal erred :—

(1) In finding that the insurance moneys were not taxable income within the Statute.

(2) In finding that the payment of premium on the insurance policies did not assist in making a profit.

(3) In finding that the Statute provides for no more than taxation on net profit.

(4) In omitting the fact that the Appellant did set off in its income-tax return its fixed charges during the period of suspension of operations as an expense incurred in the production of the income in question, and that the fixed charges were allowed to be so offset against income in the assessment.

(5) In refusing to follow the decision of the Exchequer Court of Canada in B.C. Fir and Cedar Lumber Company, Ltd., *vs.* Minister of National Revenue (1930), Ex. C.R. 59.

PART III.

ARGUMENT.

The only question involved in this appeal is whether the insurance moneys received by the Appellant under the Use and Occupancy insurance policies are taxable as income within the meaning of the "Taxation Act," R.S.B.C. 1924, chapter 254, and amendments thereto. The Respondent relies on the reasons for judgment of the trial Judge and the four Judges of the Court of Appeal who held that these moneys were taxable income within the Statute.

The charging section of the "Taxation Act," s. 4 (1) (*a*) reads as follows :—

"4.—(1) To the extent and in the manner provided in this Act, and for the raising of a revenue for Provincial purposes :—

"(*a*) All property within the Province, and all output and income of every person resident in the Province, and the property within the Province and the output produced and income earned within the Province of persons not resident in the Province shall be liable to taxation."

And income is defined in section 2 of the Act as follows :—

"2. In this Act, unless the context otherwise requires :—

"'Income' includes the gross amount earned, derived, accrued, or received from any source whatsoever, the product of capital, labour, industry, or skill; and includes all wages, salaries, emoluments, and annuities accrued due from any source whatsoever (including the salaries, indemnities, or other remunerations of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies and Municipal Councils, Commissions, or Boards of Management, and of any Judge of any Dominion or Provincial Court, whether the

said salaries, indemnities, or other remunerations are paid out of the revenues of His Majesty in right of the Dominion or in right of any Province thereof or by any person) ; and includes all income, revenue, rent, interest, or profits arising, received, gained, acquired, or accrued due from bonds, notes, stocks, debentures, or shares (including the stocks, bonds, or debentures of the Dominion or of any Province of the Dominion, or of any municipality), or from real and personal property, or from money lent, deposited, or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business, or profession of any kind whatsoever."

The other sections of the " Taxation Act " material to the issue are :—

" 43. Every person shall be assessed and taxed on his income, wherever derived, in the assessment district in which he is a resident or in which his chief place of business in the Province is maintained, except that where any person by writing under his hand, endorsed with the approval of the Surveyor of Taxes, elects to be assessed and taxed in some other assessment district, he shall be assessed and taxed in that other district."

" 44.—(1) The net income of every person shall be ascertained for the purposes of taxation by deducting from his gross income the exemptions provided in section 42, and all expenses incurred in the production of that part of his income which is liable to taxation, and the income-tax thereon payable to the Crown in right of the Dominion; but no deduction by way of expenses shall be made for :—

" (*a*) Rents, interest, wages, salaries, or other remuneration unless the names and addresses of the persons receiving same are given by the taxpayer in his return :

" (*b*) Fees or salaries paid to a person as director, president, vice-president, or general manager of a corporation, where such person is not a resident in the Province, unless a separate return is made therefor and income-tax paid thereon at the rates provided under section 52 :

" (*c*) Interest on moneys borrowed from without the Province, either by way of loan, advance, or through a bond or debenture issue, unless a separate return is made covering the aggregate amount of such interest, and income-tax is paid on that amount at the rates provided under section 52, except that the maximum rate shall not exceed four per centum :

and the following shall not in any case be allowed as expenses incurred in the production of income :—

" (*d*) The domestic or private personal expenses of the taxpayer and his family, including rent of house occupied by him or them :

" (*e*) Any interest on capital :

" (*f*) Any interest on moneys loaned or advanced by a parent, subsidiary, or associated corporation :

" (*g*) Any expense which the Minister may consider to be of

In the Supreme Court of Canada.

No. 11. Factum of H.M. the King—*continued.*

a capital nature or not an expense necessary to the production of the income that is being assessed and taxed :

" (*h*) Any losses or bad debts, other than those arising out of the business from which an income is derived, and which are irrecoverable and actually written off the books of the taxpayer :

" (*i*) Any loss or expense recoverable under any insurance policy or contract of indemnity."

" 48. (1) A return of income as required by this Act shall be made by each taxpayer annually without any notice or demand, and filed with the Assessor of the assessment district in which the income is liable to taxation : Provided that where the taxpayer is an individual whose gross income does not exceed nine hundred dollars he shall not be required to file a return under this section except upon demand of the Assessor.

" (2) In case the taxpayer has a method of accounting fixing a fiscal or business year ending on a day other than the thirty-first day of December, the annual return shall be made and filed within three months from the end of his fiscal or business year, and in all other cases the return shall be made and filed on or before the thirty-first day of March.

" (3) Where the return contains a statement of income derived from any business, the taxpayer shall attach thereto a copy of his certified balance-sheet and profit and loss account relating to that business for the period covered by the return."

" 51. The tax on income shall be assessed, levied, and paid annually upon the net income of the taxpayer during the last preceding calendar year : Provided that where the taxpayer has a method of accounting fixing a fiscal or business year ending on any other day than the thirty-first day of December, the Minister may in his discretion adopt the fiscal or business year of the taxpayer for computing his net income for the purpose of the annual assessment and the levy of income-tax thereon."

It will be seen, therefore, from these sections that the Statute provides for taxation on income and not on net profit as suggested by Mr. Justice Martin in the Court of Appeal. Nowhere in these sections are the words " net profit " used, and it is submitted that the references therein to " net income " are for the purpose of computing the amount of the tax only.

It is further submitted that the insurance moneys in question come clearly within the definition of income in the Statute, as they were " income or profits received, acquired from personal property or from money invested or from indebtedness secured by contract, or from business." Insurance is part and parcel of the business of manufacturing lumber. Without it the Appellant could not secure credit with which to carry on its operations. By a judicious expenditure of money in the form of insurance premiums on the policies in question the Appellant gained a sufficient return from the insurance contracts during the period of suspension of business to pay its fixed charges and maintenance expenses and to provide funds for distribution as profits. This was a business contract (not gambling) entered into by the Appellant involving an expenditure of a considerable amount of money for the purpose of

stabilizing its profits by making a profit from the contract in the event of profits from other sources being cut off. Whether or not the moneys thus received are income in the sense of being a business receipt which should be taken into account in determining profits for purposes of distribution is a question of fact to be ascertained by the tests applied in ordinary business. Unless excluded by the definition of income in the Statute ordinary commercial practice governs.

In the Supreme Court of Canada.

No. 11. Factum of H.M. the King—*continued.*

The statutory definition of income does not exclude anything which is income according to ordinary commercial practice. On the contrary, 10 the definition expressly says that it "includes all income arising, received, gained, acquired from any venture, business of any kind whatsoever." In short, the definition as contained in the Act is an extensive rather than an exhaustive or restrictive definition.

Applying this test to moneys received from the Use and Occupancy policies, it must be admitted that these moneys are under ordinary commercial practice carried to profit and loss account for the purpose of ascertaining profits. In point of fact, the Appellant followed this practice with the major portion of the moneys received as shown by its income-tax returns and what the Appellant did with part of the moneys received should 20 apply to all.

That fire insurance is within the scope of a lumber company's business, and that the proceeds of an ordinary fire insurance policy must be brought into account for the purpose of ascertaining the liability of the company to income-tax, has been decided by the House of Lords in

> *Gliksten (J.) and Son* v. *H. A. Green (H.M. Inspector of Taxes)*, 1929 A.C. 381; 98 L.J.K.B. 363.

Per Lord Buckmaster at p. 365 (L.J. Rep.):

"Ought the total amount of these insurance moneys to be regarded 30 as part of the profits and gains of the trade? In my opinion they ought, and for this reason: What happened has been this, that the timber which the Appellants held has been converted into cash. It is quite true that it has been converted into cash through the operation of the fire, which is no part of their trade but which is protected through the usual trade insurances, and the timber has been realized. It is now represented by money, whereas formerly it was represented by wood. If this results in a gain, as it has done, it appears to me to be an ordinary gain—a gain which has taken place in the course of their trade—none the less because as counsel for the Appellants put it, it is no part of a timber merchant's 40 business to trade in fires."

It is submitted that if the proceeds of ordinary fire policies ought to be regarded as part of trade profits, "a fortiori" should the proceeds of policies insuring the profits themselves (as in the policies in question) be regarded as trade profits.

In the Supreme Court of Canada.

No. 11. Factum of H.M. the King—*continued.*

The proceeds of the policies in question in this action have been held to be income within the meaning of the "Income War Tax Act, 1917" (Can.).

The B.C. Fir and Cedar Lumber Company, Ltd., v. *The Minister of National Revenue,* 1930 Ex. C.R. 59.

The President (Maclean, J.) at p. 63:

"I think such income (amounts derived from the insurance policies on account of net profits) must enter into the revenue accounts of the business like any other income ordinarily earned, or any other receipt incident to the business, and thus enter into the calculations determining 10 what is the net income of the business for taxation purposes. The moneys in question were, I think, a gain or profit connected with and arising from the business of the Appellant. I cannot conceive of it being anything else."

The Respondent also relies upon a decision of the United States Board of Tax Appeals holding that the proceeds of Use and Occupancy insurance policies are taxable as income.

Re The International Boiler Works Co., 1925, 3 U.S. Board of Tax Appeal Reports 283.

Per Sternhagen at p. 290: 20

"The insurance is expressly stated in the policy to be against the loss of net profits on business prevented. Such profits had they not been lost, unquestionably would have been gross income and there is no reason why an amount received in substitution for net profits should any more be excluded from taxes than if received directly in the conduct of the business."

The Appellant in the Court below contended that because it is prevented under clause (*i*) of section 44 (1) of the Statute from deducting as an expense incurred in the production of income "any loss or expense recoverable under any insurance policy or contract of indemnity" it is 30 thereby prohibited from returning as income the moneys received under an insurance policy or contract of indemnity. Counsel for the Appellant referred to the insurance premiums paid and argued that if the Appellant was prevented from showing them as an expense in its income-tax returns it was not obliged to show the proceeds received under the policies. The same point was raised and fully argued in the *Gliksten* case (supra) on a similar clause in the English Statute. The House of Lords overruled the contention.

Per Lord Buckmaster, at p. 364 (L.J. Rep.):

"Further they (appellants) say that by subhead (*k*) under rule 3 40 there is an express provision that there shall not be deductible from the profits and gains any sum recoverable under an insurance or contract of indemnity, and they suggest that that means by implication that there is a prohibition against bringing in on the other side the moneys that are received under such a contract. I am quite unable to take that view. All that (*k*) does is to prevent them from bringing in a loss which they

have incurred that is covered by insurance, when, in fact, the amount of that loss is capable of being covered by the policy moneys that they may receive; it goes no further than that, and so far as it does extend, it is, I think, destructive of that part of the argument of the appellants which consisted in saying that, if they were bound to bring in the moneys that they received from the insurance company on the one hand, they could bring in the equivalent amount of losses on the other; this subsection which is in language not specially ambiguous, has expressly provided that they shall do nothing of the kind."

10 The Appellant also contended in the Court below that since the insurance policies covered " fixed charges " as well as net profits, and it was prevented by the Statute (s. 44 (1) (*i*)) from deducting the " fixed charges " as an expense, it need not show them as income when received. Further, the Appellant contended the contract of insurance in question was indivisible and if the fixed charges were exempt, the net profits were exempt also. Dealing with the first point, it is submitted there is no room for substantial controversy. In point of fact, the Appellant in its income-tax returns and profit and loss statement submitted therewith deducted the " fixed charges " as an expense and these items were so allowed by the 20 Respondent on the condition that the Appellant also showed on the other side of the returns the corresponding amounts received in respect of fixed charges from the insurance companies.

It is submitted that under the Statute the Appellant should not have deducted " fixed charges " as an expense since they were recoverable under the insurance policies, but having done so it must also show the receipts from the insurance companies in respect of same. The items must appear on both sides of the statement or not at all. The assessment was made on that basis, and as a result in the assessment the items in respect of " fixed charges " on the one side of the returns, balanced 30 those on the other for the purpose of ascertaining net income. In reality, therefore, the Appellant was not taxed at all in respect of the fixed charges.

As to the second point, it is submitted that the contract is divisible as the subjects of the insurance—" net profits " and " fixed charges "—are two entirely different risks although contained in the same policy. Whether the proceeds of the policies in respect of " fixed charges " are taxable or not under the Statute, there is nothing to prevent the proceeds in respect of " net profits " from being taxed.

The proceeds of the insurance policies in question if not income must 40 be capital. To call moneys received in respect of " net profits " capital is a contradiction in terms and cannot be seriously entertained. As regards the payment of fixed charges, it is difficult to see how moneys received therefor can under any circumstances be regarded as capital. Nor can the net profits received under these policies be regarded as a mere chance accretion of capital or " windfall." They were moneys received under a contract entered into in the ordinary course of business of the Appellant and taxable as income or profit arising out of that business (*Gliksten* case, supra).

In the Supreme Court of Canada.

No. 11. Factum of H.M. the King—*continued.*

It is submitted that the case principally relied upon by the Appellant in the Courts below—

The Glenboig Union Fire Clay Co., Ltd., v. *The Commissioners of Inland Revenue*, 1922.

12 Tax C. 427; 1922 S.C. (H.L.) 112—

has no application to the facts in the present case. In that case a railway company in the exercise of its statutory powers prevented the fireclay company from conducting its operations in such a way as to interfere with the road-bed of the railway and caused a certain portion of the fireclay company's land to be permanently reserved from operations, paying due compensation therefor. Upon the question whether the compensation so received was capital or income, it was held to be capital on the ground that there was a complete sterilization of a capital asset and the compensation payable therefor was in the nature of a restoration of capital. In the present action there was no sterilization of a capital asset—merely a temporary suspension of business—and the "ratio decidendi" of the Glenboig case does not apply.

It is submitted that the judgments of the Courts below should be affirmed.

ERIC PEPLER,
Solicitor for the Respondent.

No. 12. Reasons for Judgment, Anglin, C.J. (concurred in by Newcombe, Lamont, Smith and Cannon, JJ.), 13th May 1931.

No. 12.

Reasons for Judgment.

ANGLIN, C. J. (concurred in by NEWCOMBE, LAMONT, SMITH, and CANNON, JJ.

We are of the opinion that this appeal should be allowed with costs throughout.

The British Columbia Income Tax Act nowhere provides for taxation of monies paid by way of indemnity for profits not earned, but irretrievably lost.

The monies in question here represent insurance placed by the appellant in order to meet the possibility of destruction by fire of its means of earning profits. That event occurred with the result that the appellant made no profits whatever out of the property in respect of which it had placed the insurance, which could be taxed for the period in question. There are, therefore, no profits to tax and, in the absence of clear language authorizing such a course, I find nothing in the statute to warrant the taxing of money substituted for the profits by way of indemnity for their loss.

No. 13.

Formal Judgment.

In the Supreme Court of Canada.

No. 13.
Formal Judgment, 13th May 1931.

IN THE SUPREME COURT OF CANADA.

Wednesday, the 13th day of May, 1931.

Present :

The Right Honourable F. A. ANGLIN, P.C., C.J.C.

The Honourable Mr. Justice NEWCOMBE, C.M.G.

The Honourable Mr. Justice LAMONT.

The Honourable Mr. Justice SMITH.

10 The Honourable Mr. Justice CANNON.

Between :

B. C. FIR AND CEDAR LUMBER COMPANY, LIMITED (*Defendant*) *Appellant*

and

HIS MAJESTY THE KING, in right of the Province of British Columbia - - - - - - (*Plaintiff*) *Respondent*

The appeal of the above-named Appellant from the judgment of the Court of Appeal for the Province of British Columbia pronounced in the above cause on the 7th day of October, 1930, affirming the judgment of the Honourable Mr. Justice W. A. MACDONALD of the Supreme Court of 20 British Columbia rendered in the said cause on the 9th day of January, 1930, having come on to be heard before this Court on the 1st day of May, 1931, in the presence of counsel as well for the Appellant as for the Respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed : that the said judgment of the Court of Appeal for the Province of British Columbia should be and the same was reversed and set aside, and that the said Judgment of the Honourable Mr. Justice 30 W. A. Macdonald should be also reversed and set aside and the action dismissed.

And THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Respondent should and do pay to the said Appellant its costs incurred in the Supreme Court of British Columbia and in the Court of Appeal for the Province of British Columbia as well as in this Court.

(Signed) J. F. SMELLIE,
Registrar.

In the Privy Council.

No. 14. Order in Council granting special leave to appeal to His Majesty in Council (Extract), 23rd July 1931.

No. 14.

Order in Council granting special leave to appeal to His Majesty in Council (Extract).

AT THE COURT AT BUCKINGHAM PALACE.

The 23rd day of July, 1931.

Present :

THE KING'S MOST EXCELLENT MAJESTY.

* * * * *

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 16th day of July, 1931, in the words following, viz. :— 10

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October, 1909, there was referred unto this Committee a humble Petition of Your Majesty's Attorney-General of the Province of British Columbia in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and B.C. Fir and Cedar Lumber Company Limited Respondents setting forth (amongst other matters)

* * * * *

" THE LORDS OF THE COMMITTEE in obedience to His late 20 Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 13th day of May 1931.

" And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted 30 (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly. 40

COLIN SMITH.

In the Privy Council.

No. 77 of 193

On Appeal from the Supreme Court of Canada.

BETWEEN

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
(*Plaintiff*) *Appellant*

AND

B.C. FIR AND CEDAR LUMBER COMPANY LIMITED -
(*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

GARD LYELL & Co.,
47, Gresham Street, E.C.2.
Solicitors for Appellant.

WHITE & LEONARD,
Bank Buildings,
Ludgate Circus, E.C.4.
Solicitors for Respondent.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C. 4