THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor.

CASE AND COMMENT

INCOME TAX — WHETHER PROFITS OF A TAXPAYER ARE APPORTIONABLE FOR INCOME TAX PURPOSES BETWEEN A MANUFACTURING BRANCH IN ONE TAXING JURISDICTION AND A SELLING BRANCH IN ANOTHER JURISDICTION.—In the case of *The Provincial Treasurer of Manitoba* v. *Wm. Wrigley Junior Co. Ltd.* (1945), 53 Man. R. 213, [1945] 3 W.W.R. 305, the question in issue was whether for purpose of income tax the income of a non-resident company could be apportioned between the manufacturing branch of the company situated outside the Province and a selling branch situate inside the Province. The company had its head office and factory in Ontario and an office and warehouse in Winnipeg from which merchandise was distributed to a so-called Western Division including Manitoba, Alberta and Saskatchewan. The total cost of manufacturing the merchandise varied from 19.18 cents to 22.23 cents per unit during the four years in question, but in every year the company charged the selling division at Winnipeg a flat arbitrary rate of 28 cents per unit for all merchandise shipped to that division. The Province claimed that the profits arising from the business in Manitoba were the net profits from the sales in Manitoba after due allowance for cost of manufacture, cost of sale and a proportion of general administrative expense, and its assessment taxed the company on the entire net profit received from sales through the Winnipeg branch, that is, on the difference between the actual cost price and the actual selling price, ignoring for income tax purposes the arbitrarily fixed figure of 28 cents. The company claimed that Manitoba should tax it only on the difference between 28 cents and the amount for which it later sold the goods. The company contended that the profit

made from merchandise sold in Manitoba did not arise solely from the sale in Manitoba, but in part from the manufacturing process carried on in Ontario and in part from the sale in Manitoba and that such profit should therefore be apportioned and that, under sec. 24 of the Manitoba Act, only the part arising from the sale in Manitoba should be subject to taxation in that Province. Sec. 24 reads:

> **The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba,** either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

It also contended that the principle of apportionment was recognized in secs. 23 and 26 of the Act. These sections read in part as follows:

> 23. Where any corporation carrying on business in Manitoba purchases any commodity from a parent, subsidiary, or associated corporation at a price in excess of the fair market price, or where it sells any commodity to such a corporation at a price less than the fair market price, the minister may, for the purpose of determining the income of such corporation, determine the fair price at which such purchase or sale shall be taken into the accounts of such corporation.
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> 26. Where a non-resident person produces . . . manufactures . . .or constructs, in whole or in part, anything within Manitoba and exports the same without sale prior to the export thereof, he shall be deemed . . . to earn within Manitoba a proportionate part of any profit ultimately derived from the sale thereof outside of Manitoba.

The majority of the Court reinstated the original assessment by the Minister, and following *Erichsen* v. *Last* (1881), 8 Q.B.D. 414, *Lovell* v. *Commissioner of Taxes*, [1908] A.C. 45 and *Commissioner of Taxes* v. *British Australian Wool Realization Association*, [1931] A.C. 224, held that the business which yields the profit is the business of selling the goods, and following *Laycock* v. *Freeman*, [1939] 2 K.B. 1, that a manufacturer, who sells at retail only, does not make two profits, a wholesaler's or manufacturer's profit and a retailer's profit, but one profit only and that such profit is made when and where the goods are sold. There is not such thing at common law for income tax purposes as apportionment between different departments of a taxpayer's business or as between taxing jurisdictions. Secs. 23 and 26 are special provisions for special conditions and do not indicate that any principle of apportionment is applicable generally or to the circumstances of this case. The taxing section is sec. 9, which reads:

> 9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person . . . (d) who, not being resident in Manitoba, is carrying on business in Manitoba during such year; . . . a tax at the rates applicable.

Sec. 24 is not a taxing section but rather, as the Crown contended, an exempting section. It neither provides for nor contemplates any apportionment of profit. Where apportionment is intended the intention has been expressed in clear and unambiguous language.

Dysart J., sitting as a Justice of Appeal *ad hoc*, in a dissenting judgment, held, that by expressly confining in sec. 24 "the taxable income to the net profit arising from business carried on inside Manitoba by non-residents, the Act impliedly excludes from that taxation any profits arising from the business of such persons carried on outside Manitoba," and that the "express inclusion of one sort of income as taxable, is the implied exclusion of the other." Secs. 23 and 26 recognize that profits may be earned by processes through which goods passed before they came to Manitoba to be sold, and that profits do not arise only at the time and place of sale. Statements in other cases that profits on goods arise wholly or solely at the time and place of sale must be read in the light of the particular facts of those cases. He points out that our highest Courts have declared that the question of what profits actually arise from the business in Manitoba is a question of fact and not of law. See *International Harvester Company* v. *The Provincial Tax Commission*, [1941] S.C.R. 325 and *Commissioners of Taxation* v. *Kirk*, [1900] A.C. 588.

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ACTION BY PRIVATE PERSON TO ESTABLISH A PUBLIC RIGHT—A Correspondent writes:—In the June-July number of the CANADIAN BAR REVIEW, Mr. R. R. Jordon (Ottawa) makes some comments on the case of *Wright* v. *The City of Sydney* (1944), 18 M.P.R. 20. His statements of elementary law call for no remark, but when he states that "it would seem that the Court en banc had. . . . overlooked the fact that the plaintiff had no standing to bring an action as a private individual to restrain the infringement of a public right"; that "it would seem from the evidence adduced that the plaintiff had no such private interest

as to entitle her to special damages;" and that "a conflicting precedent has been permitted in Canada which should be rectified so as to avoid confusion", his observations need to be corrected.

The only confusion that has arisen from the decision is that Mr. Jordon has not taken the trouble to acquaint himself with the facts of the case. If he had studied the evidence, he would not have made the comments above quoted. As pointed out by the trial judge, the plaintiff's building covered her entire lot, and on its north side facing the right-of-way there was a door that for over thirty years had been used by the plaintiff for receiving and delivering goods. If the land used as a right-of-way were sold and delivered in fee simple to a purchaser access to this means of receiving and delivering goods would have been cut off with serious, particular injury to the plaintiff. The Court of Appeal distinctly held that by reason of her personal interest in the matter, she had a right to bring the action, and that it was not a case where the Attorney-General suing on behalf of the public had alone the right to sue. "A conflicting precedent" has not been made in Canada," which should be rectified so as to avoid confusion." A closer study of the material facts would have satisfied the critic that the decision commented upon is not of so disturbing a nature as he represents.