Correspondence

Assessability and Intention

TO THE EDITOR:

I have read with interest Mr. Thom's comment in your October issue on the *Sutton Lumber Company* case, [1953] 2 S.C.R. 77, particularly his view of its effect upon the doctrine of intention in determining assessability. Mr. Thom says at page 924, "... its effect on the doctrine of intention is uncertain", and later, at page 925: "As already noted, Mr. Justice Locke set himself to determine the business carried on by the taxpayer. The intention which preceded the acquisition of the Nootka Limits is not dealt with."

I suggest that it is possible to find in the decision justification for the argument that the court regarded intention as the principal test and sought to determine that intention. Thus in the conclusion of the judgment Locke J. says:

> In the present case, the Nootka Limits which were sold in 1946 *were assets in which the company had invested with a view to cutting the merchantable timber into lumber*. . . and the sale merely a realization upon one of its capital assets which was not required and did not fit in to the company's plan for the operation of its main property and one which was not made in the course of carrying on the business of buying, selling or dealing in timber limits or leases. [Italics added]

That the learned judge was concerned to discover the intention of the company in acquiring the property seems clear from the following passage at page 91:

> The evidence of Schultheis, . . . and of Fisken and the record . . . demonstrated, in my opinion, that those who controlled this company did not depart from their original intention to utilize these extensive limits for the manufacture of cedar lumber in a location in the Clayoquot District.

He then makes his findings as to the record of the business actually carried on:

> The record however of the activities of the company during this period is consistent only with the view that the intention was to carry on the business of operating a sawmill. . . .

> The question as to whether or not the present Appellant was engaged in the business of buying timber limits or acquiring timber leases *with a view to dealing in them for the purpose of profit* is a question of fact which must be determined upon the evidence. [Italics added]

It is submitted that the test of intention was also applied in *Anderson Logging Company* v. *The King*, [1925] S.C.R. 45:

> The essential conditions of assessability (where a profit proposed to be assessed is the profit derived from a sale of part of the company's property) appear to be that the company is dealing with its property in a manner contemplated by the memorandum of association as a class of operation in which the company was to engage, *and moreover*, that the governing purpose in acquiring the property had been to turn it to account for the profit of the shareholders, by sale if necessary. [Italics added]

The difficulty of course is to apply this test to the facts, particularly when, as with timber, the purchase may have been made many years before the sale. In the *Sutton Lumber* case the court looked at the record of the business actually carried on because the directors, who controlled and directed the company's activities at the time of the purchase, were dead. The problem is not what principles of law should be applied. It is a problem of proof, and the solution varies with the kind of evidence proffered. In the *Anderson Logging* case the lack of any other evidence made the company's objects as contained in its memorandum decisive; in the *Sutton Lumber* case the death of all the directors who could have given direct evidence made the company's record of activities decisive. The Supreme Court of Canada has still to deal with the problem of the comparative weight to be given to statements of the directors in office at the time of purchase as against the company's record of activities. This point was dealt with by the Exchequer Court in *Gairdner Securities Limited* and is presumably an issue in the appeal to the Supreme Court. But again the problem is the weight of evidence and the manner of proof, and the solution will vary with the particular evidence in each case.

J. ALAN BAKER*

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TO THE EDITOR:

Thank you for the opportunity of reading Mr. Baker's letter in which he questions my comment on the Supreme Court judgment in the *Sutton Lumber* case. I am glad to see that Mr. Baker appreciates that I was not attempting to draw any firm conclusions from that judgment. Undoubtedly Mr. Justice Locke referred to the factor of intention, but the gist of my comment was that the

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intention with which he was concerned appeared to be directed to the general operations of the company. The intention in acquiring the Nootka Limits was really not discussed at all and the implication seems to be that it was a pretty casual purchase. It was not until some years later that these limits were found to be unsuited to the company's operations and the decision was then promptly made to sell them.

To the conclusion of the judgment, where it is said that these limits were assets in which the company had invested with a view to cutting merchantable timber, might fairly be added, "sight unseen and subject to being sold if not suitable". If this qualification is valid, then it is fair to suggest that at the time of the purchase there was an intention to sell if the investment turned out to be impracticable, as indeed it did. It was for this reason I suggested that the effect of the judgment on the doctrine of intention is uncertain.

STUART THOM*

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Natural Law

TO THE EDITOR:

I have read with interest Professor W. Friedmann's remarks in your November issue concerning Mr. T. P. Slattery's review of the Notre Dame Institute's volume on natural law. As a result, I should like to offer this brief comment.

Professor Friedmann's chief complaint is that the historic values attributed to natural law are actually formulas designed to support some particular political faith. Furthermore, says Professor Friedmann, natural law represents man's yearning for absolute standards, whereas it should be recognized that political and social faiths constitute "values not of eternal but of human society, subject to changing beliefs, pressures and conflicts".

Considering the latter point first, why does Professor Friedmann distinguish between what is *eternal* and what is *human?* Is not human nature essentially the same always and everywhere? That is, is not man, essentially speaking, a rational, free being who is an end, not a means, and (contrary to Holmes) whose dignity must always be respected? If not, is he sometimes or somewhere a mere animal who may be used or disposed of as such?

Political and social faiths may indeed change. But have we no measure beyond the existent faith? Writing thousands of years ago, Aristotle said some men were by nature slaves. Was he right

*Mr. Thom, since the comment referred to in his letter was published, has joined the firm of Osler, Hoskin & Harcourt, Toronto.

and are we, who condemn slavery, wrong? Naziism was a political and social faith. Was it right, for its own time, or for any time?

This leads to the other point mentioned by Professor Friedmann, namely, that historically natural law has actually been a cloak for some particular political faith. But surely it is more than that. In this respect, I prefer the following statement of Professor Friedmann, which appears in his book *Legal Theory* (1947, p. 18):

> It would be simple to dismiss the whole idea of natural law as a hypocritical disguise for concrete political aspirations and no doubt it has sometimes exercised little more than this function. But there is infinitely more in it.

It is true, of course, that natural law has been abused. So has liberty, so has reason, so has loyalty, and every other good thing. It is the task of the historian to chart the abuse. It is the task of the moralist and of the philosopher to distinguish between the good and the bad, and if he has nothing but the current *mores* to go by, he may as well abandon the task.

The natural law (in the social sphere) prescribes that we seek the common good, or, putting it another way, that we do good to others, harm no one and render to each his own. Surely that is absolute and universal: that is, in no circumstances ought we to seek evil rather than good. And surely we know, in some fundamental respects at least, what the social good is: for example, the right to go on living; the right to be free in certain basic respects, such as in conscience, thought and speech; the right to marry and maintain a home and children; the right to possess one's body and one's reputation free from attack; the right to equality under the law; the fair distribution of the burdens of government; and the maintenance of civil peace and order. And these goods are to be determined by reference to the dignity of *human* nature as contrasted with that of lower forms of life.

It goes without saying that the application of these principles to a particular society through positive laws involves relativity in various degrees, because positive laws must deal with the contingent circumstances of time and place. But, since positive laws should always be designed to achieve the common good, they are rooted and founded in that good, and that good is stable in regard to those aspects of man which characterize him essentially, without regard to time and place.

Being a first principle, the natural law is indemonstrable. For the same reason, it *need not* be demonstrated.

In the preface to his work *Legal Theory*, Professor Friedmann sums up the essence of his legal philosophy by saying, "Ultimate values must be believed, they cannot be proved". My only opposition to that is that it is not a true dichotomy. What is *ultimate* is by its nature incapable of proof. But in this case the alternative is

not faith, it is reason set in motion by the inescapable judgment to do good and avoid evil.

The issue regarding natural law, therefore, must not be decided upon the basis of the abuses or misconceptions of the doctrine or of man's yearning for the absolute. The point involved is the relation of positive law to this ultimate good and the ascertainment of the good by reference to the nature of man. Within the framework of this inquiry, natural law will continue to survive, because, as its name indicates, it is a part of the nature of things.

HAROLD R. MCKINNON*

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Chemical Tests for Alcoholic Intoxication

TO THE EDITOR:

On re-reading my letter beginning at page 1069 of your November issue I noticed for the first time that, in typing it, a number of lines had been omitted in the first part of the fourth paragraph, which will be found on page 1070. The paragraph as it now reads would convey the impression that the chemical principles of all three of the tests for alcohol in the breath—Intoximeter, Alcometer and Drunkometer—are the same. The beginning of the fourth paragraph should read:

> The three types of apparatus now in use are the Intoximeter, the Alcometer and the Drunkometer, but basic to all is the assumption that the alcohol content of a certain amount of alveolar air, that is, the air as it leaves the lungs, corresponds to the alcohol content of one cubic centimeter of blood. In this assumption alone there are possible serious errors, which space does not permit me to discuss here. Large errors may also occur because of the further assumption that the alveolar air contains a fixed percentage of carbon dioxide. The Drunkometer test is subject to a special source of error. Basic, chemically, to it is conversion of the alcohol in the breath into another chemical compound by potassium permanganate, which . . .

This necessary correction, though interesting from the standpoint of the performance of the test, in no way affects the observations in the remainder of the letter.

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