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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council

**ON APPEAL FROM THE SUPREME COURT OF
CANADA**

IN RE THE TREASURY DEPARTMENT ACT, 1938,

AND

INTERNATIONAL HARVESTER COMPANY OF CANADA, LIMITED,
an Ontario Corporation doing business in the Province of Saskatchewan,

(Appellant) *Appellant*,

AND

THE PROVINCIAL TAX COMMISSION,
THE COMMISSIONER OF INCOME TAX,
THE PROVINCIAL TREASURER, and
THE ATTORNEY GENERAL FOR SASKATCHEWAN,

(Respondents) *Respondents*.

CASE FOR THE APPELLANT

GARD, LYELL & CO.,

Leith House,
47, Gresham Street,
London, E.C. 2,

Solicitors for Appellants.

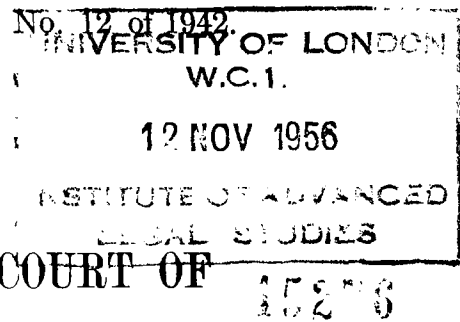
BLAKE & REDDEN,

17 Victoria Street,
London S.W. 1,

Solicitors for Respondents.

In the Privy Council

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— AND —

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LIMITED, an Ontario Corporation doing business in the
Province of Saskatchewan,

10

(Appellant) *Appellant*,

— AND —

THE PROVINCIAL TAX COMMISSION,
THE COMMISSIONER OF INCOME TAX,
THE PROVINCIAL TREASURER, and
THE ATTORNEY GENERAL FOR SASKATCHEWAN,

(Respondents) *Respondents*.

CASE FOR THE APPELLANT

Record

1. This is an appeal of International Harvester Company of Canada, Limited, by special leave of His Majesty in Council, from so much of the judgment of the Supreme Court of Canada dated April 22nd, 1941 as is adverse to the Appellant. The appeal relates to three purported assessments of income tax made against the Appellant on August 23rd, 1938 by the Provincial Tax Commission (or Commissioner of Income Tax) of the Province of Saskatchewan, as follows: P. 31, l. 1-
P. 33, l. 9.

(a) for the taxation year 1934.	\$ 4,382.07
(b) for the taxation year 1935.	11,541.07
(c) for the period of ten months ending October 31st, 1936.	10,136.60
Total.	\$ 26,059.74

Record

P. 1, l. 15-
p. 2, l. 12.

2. The Appellant is a corporation incorporated under The Companies Act of the Province of Ontario, having its head office at the City of Hamilton, Ontario. The Appellant's business is the manufacture and sale of agricultural implements and parts thereof and business incidental thereto. The manufacturing operations of the Appellant are carried on entirely outside the Province of Saskatchewan and its selling operations are carried on partly in Saskatchewan and partly in other provinces and countries. The Appellant has no directors resident in Saskatchewan, no meetings of its Board of Directors are held in Saskatchewan, and its central management and control abide at its head office in Hamilton, Ontario. The Appellant's selling business in Saskatchewan is carried on at branch offices. All monies received by the Appellant in Saskatchewan are deposited in separate bank accounts and remitted in full to the Appellant's said head office, which sends to the Saskatchewan branches such monies as are required for operating and incidental expenses. On these facts it is common ground that, for income tax purposes, the Appellant resides outside of Saskatchewan. This has been assumed in the Courts below.

P. 66, l. 7-22.
P. 91, l. 19-30.
P. 109, l. 11-12.
P. 119, l. 10-14.

3. The Province of Saskatchewan had no income tax statute until The Income Tax Act, 1932, was passed, applying to incomes earned or received after January 1st, 1931. In 1936 The Income Tax Act, 1936, was passed, applying to incomes earned or received in the year 1935 and subsequently, being mainly a consolidation of the 1932 Act, with amendments. Section 7 (3) of the 1932 Act [section 9 (3) of the 1936 Act] requires every corporation resident or carrying on business within the Province to pay a tax upon its income during the preceding year at the rate set forth in the First Schedule of the Act (5%). The fact that the Appellant is a non-resident company is important not only because of the constitutional point raised in the appeal but because both Acts define in a special way what "income" of a non-resident is liable to taxation. Section 21a of the 1932 Act [section 23 of the 1936 Act] reads:

"The income liable to taxation under this Act of every person residing outside of Saskatchewan who is carrying on business in Saskatchewan, 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 Saskatchewan."

"Person" under both Acts includes a corporation. Both Acts also provide that the following income shall not be liable to taxation:

"Profits earned by a corporation or joint stock company, other than a personal corporation, in that part of its business carried on at a branch or agency outside of Saskatchewan."

—section 4 (m) of the 1932 Act, [4 (j) of the 1936 Act].

4. The Appellant's income tax returns for the years 1931, 1932 and 1933 (Exhibits "E", "F" and "G") showed a loss in its total business

Not printed

- everywhere and the Appellant was not assessed for income tax for those three years. The Appellant's return for the taxation year 1934, filed May 28th, 1935, showed a net profit in its total business everywhere but, after deducting therefrom a profit on its manufacturing investment, all outside Saskatchewan, showed a net loss. The Appellant paid no income tax to Saskatchewan for 1934. In its return for the taxation year 1935, filed June 2nd, 1936, the Appellant showed a net profit in its total business everywhere, pointed out that it manufactures in Ontario, and allocated its net Saskatchewan income on the basis of a three-factor formula of tangible property, payroll and sales which "gives reasonable weight both to the manufacturing and selling business and provides a reasonable allocation of net income". On that basis the Appellant allocated 15.9538% of its total net income everywhere as the Saskatchewan proportion of its net income and paid a tax thereon of \$871.42. In its return for the taxation period ending October 31st, 1936, filed May 26th, 1937, the Appellant again showed its total net income everywhere and allocated its Saskatchewan income on the basis of the three-factor formula referred to in its 1935 return, allocating to Saskatchewan 15.0225% of its total net income everywhere and paying an income tax of \$2,835.00.
- 10
- 20 5. The Tax Commissioner did not question the three-factor formula upon which the Appellant paid Saskatchewan income tax for 1935 and the 1936 period, but asked the Appellant for certain information relating to the Appellant's total income everywhere, which was furnished by the Appellant.
- 30 6. On August 23rd, 1938 the Commissioner of Income Tax (or Provincial Tax Commission) made three assessments against the Appellant as set out in paragraph 1 hereof (ante p. 1, lines 21-29). It is common ground that the Tax Commissioner (or Commission), in making these assessments, had no evidence of and did not compute or ascertain any net profit or gain arising from or earned in the Appellant's business in Saskatchewan, but, after computing the net income of the Appellant everywhere, purported to fix the Appellant's "income applicable to Sask." or "net taxable income", by taking such percentage of the Appellant's total income everywhere as its gross sales in Saskatchewan bear to its gross sales everywhere. In so doing the Commissioner relied upon the Regulations, Schedule A3, as admitted in the Admission of Facts and as appears on the face of the said three assessments, Schedules A2, B2 and C3, particularly Regulation No. 2. The "assessment" for 1936 is typical, reading in part as follows:
- 40 "Net income subject to allocation \$ 1,148,239.88
 Gross Sales of Company everywhere 11,489,313.45
 Gross Sales of Company in Sask. 2,128,603.92
 Percentage of Sask. Sales to Total Sales. 18.5268%
 Income applicable to Sask. 18.5268% of \$1,148,239.88 212,732.11"

Record

P. 18, l. 1-
p. 23, l. 23.P. 20, l. 28-
p. 23, l. 21.P. 25, l. 50-
p. 26, l. 10.P. 3, l. 24-
p. 5, l. 43.P. 31, l. 1-
p. 33, l. 9.P. 17, l. 1-
p. 18, l. 15.
P. 2, l. 6-22,
l. 35-42.
P. 3, l. 9-16.
P. 31, l. 1-
p. 33, l. 9.

P. 32, l. 42-47.

Record

The income tax so assessed for the three years amounts to \$23,352.47 more than the tax as computed and paid by the Appellant.

7. On September 3rd, 1938, the Appellant appealed against each of the said three assessments to the Board of Revenue Commissioners, pursuant to section 40(8) (a) of The Treasury Department Act, 1938. On the hearing of that appeal a written admission of facts was filed with the Board, with schedules and exhibits as therein referred to. The Appellant put in the *viva voce* evidence of Arthur Brown, its Branch Manager at Regina, showing the peculiar, difficult conditions under which the Appellant was carrying on business in Saskatchewan and that in 1934, 1935 and 1936 the profit made by the Appellant everywhere would bear no ratio to the costs of business in Saskatchewan. The Appellant also filed an affidavit of its Vice President, Frank M. Morton of Hamilton, Ontario, showing that the cost to the Appellant of doing business in Canada varies greatly in different provinces and sections, depending on crop and credit conditions, and does not bear any fixed proportion to the amount of sales in any province or section. The Respondents put in no evidence apart from the said Admission of Facts and schedules and exhibits thereto. The Board referred to the Appellant's income tax returns for the taxation periods, 1931, 1932 and 1933, and same were filed as Exhibits "E", "F" and "G". The Appellant's grounds of appeal to the Board of Revenue Commissioners are contained in the notices of appeal, Schedules A4, B3 and C4. The Board of Revenue Commissioners, after reserving its decision, gave a written decision on January 27th, 1939, dismissing the Appellant's appeals from all three assessments and affirming same.

P. 1-3.

P. 6-10.

P. 11, l. 1-35.

P. 47, l. 23-28

Not printed.

P. 33, l. 10-
p. 36, l. 32.

P. 40, l. 1-
p. 57, l. 18.

8. On February 25th, 1939 the Appellant appealed to a Judge of the Court of King's Bench of Saskatchewan from the decision of the Board of Revenue Commissioners respecting all three assessments, pursuant to section 41 of The Treasury Department Act, 1938. On the hearing of that appeal the Appellant filed with the King's Bench Judge, Mr. Justice Anderson, under section 41 (6) of the Treasury Department Act, 1938, subject to the Respondent's objection, three affidavits of Clarence B. Munger, General Auditor of the Appellant, of Hamilton, Ontario. The first and third of Mr. Munger's affidavits deal mainly with the question of bad debt reserve, but in the second affidavit Mr. Munger submits two different methods or tests to show that the assessments arrived at by the Saskatchewan Commissioner are excessive and arbitrary and tax manufacturing profit, all arising out of Saskatchewan. Mr. Justice Anderson, after hearing argument, reserved judgment and on August 10th, 1939 delivered a written decision, dismissing the Appellant's appeals with costs.

P. 14, l. 1,-
p. 16, l. 9.
P. 37-39.

P. 64, l. 21-
p. 73.

9. On August 25th, 1939 the Appellant appealed to the Court of Appeal for Saskatchewan from the decision of Mr. Justice Anderson respecting all three assessments, pursuant to section 42 of The Treasury

Department Act, 1938, and before that Court the three appeals were, by consent, treated and argued as one appeal. On the hearing the Appellant's counsel filed with the Court a printed Report of the Committee of the National Tax Association on Allocation of Income, presented at the National Tax Conference held at San Francisco, Cal., U.S.A., on October 16th, 1939. At page 20 of that Report the Committee recommends, in the case of any taxpayer engaged in a manufacturing and mercantile business (after dealing with income from interest, dividends, royalties and sale of capital assets) that—

Record:

- 10 “The remainder of net income, if it does not lend itself to allocation by the separate accounting method, should then be apportioned by the use of the three-factor formula of tangible property, payroll, and sales in the case of mercantile and manufacturing establishments.”

(This Report was referred to on the argument in the Supreme Court of Canada, and was forwarded by the Registrar of the Supreme Court of Canada to the Registrar of the Privy Council along with the original exhibits.) The Court of Appeal reserved judgment and on April 2nd, 1940 delivered judgment holding that it had no jurisdiction to entertain the appeal with respect to the assessment for 1934, but holding that the assessments for 1935 and 1936 were defective in not giving the Appellant a deduction in respect of a reserve for bad debts. The assessments for those two years were set aside and referred back to the Commissioner for re-assessment, with instructions to reconsider the question of bad debt reserve, as stated in the judgment. In other respects the Court of Appeal dismissed the Appellant's appeal, but allowed the Appellant two-thirds of its costs of the appeals to the Court of Appeal and to the Judge of the King's Bench Court.

P. 86, l. 1-
P. 98, l. 44.

10. By special leave of the Court of Appeal, the Appellant appealed to the Supreme Court of Canada from the judgment of the Court of Appeal, except those parts of the said judgment in which the Appellant succeeded. The Respondents cross-appealed to the Supreme Court of Canada against those parts of the judgment of the Court of Appeal upon which the Appellant succeeded. On April 22nd, 1941, the Supreme Court of Canada delivered judgment holding that there was a right of appeal respecting the 1934 assessment and allowing the Appellant's appeal to the extent that the assessment for 1934 was set aside and referred back to the Commissioner and placed in the same position as the said assessments for the year 1935 and the taxation period of 1936. The Supreme Court of Canada dismissed the Respondents' cross-appeal with costs and allowed the Appellant one-half of its costs of appeal to the Supreme Court. In other respects the majority judgment of the Supreme Court of Canada, delivered by Rinfret J., concurred in by Crocket and Kerwin JJ., and Hudson J., held that the Appellant's appeal failed and was dismissed. Sir Lyman Duff, the Chief Justice of Canada, delivered a minority judgment, concurred in by Davis and Taschereau, JJ., holding all three assessments invalid because the regula-

P. 107, l. 34-
P. 108, l. 9.
P. 120, l. 33-44.

P. 116, l. 31-
P. 120, l. 31.

P. 121, l. 1-
P. 124, l. 42.

P. 108, l. 21-
P. 112, l. 37.

Record

tion pursuant to which they were made either does not apply to the Appellant or was beyond the powers of the Lieutenant Governor in Council, the minority judgment being in favour of allowing the Appellant's appeal and setting aside the said assessments, with costs to the Appellant throughout.

11. On February 6th, 1942 the Appellant petitioned to the King's Most Excellent Majesty in Council for special leave to appeal from that part of the judgment of the Supreme Court of Canada dated the 22nd day of April, 1941, wherein the said Court ordered that in all other respects (except as set forth in clauses 1 and 2 of its judgment) the Appellant's appeal to the said Court failed and was dismissed, including the failure by the said Court to allow the Appellant's full costs of its appeal to that Court and of its appeals to the Courts below. The prayer of the said petition was consented to by the Respondents' solicitor. On March 27th, 1942, His Majesty by and with the advice of His Privy Council was pleased to grant special leave to the Appellant to appeal against so much of the judgment of the Supreme Court of Canada as is adverse to the Appellant. 10

P. 125, l. 1-
p. 128, l. 14.

12. Since the Appellant is a non-resident company, section 21a of the 1932 Income Tax Act [section 23 of the 1936 Act] is a special provision cutting down, as to the Appellant, the general definition of "income" in section 3 of both Acts and limiting the word "income" as used in section 7(3) of the 1932 Act [section 9(3) of the 1936 Act] to the net profit or gain arising from its business in Saskatchewan. As the judgment of Sir Lyman Duff C.J., concurred in by Davis and Taschereau JJ., says: 20

P. 109, l. 30-33.

"It is clear, I think, that the effect of the words 'net profit or gain arising from the business of such person in Saskatchewan' in section 21a is, for the purpose of that section, to delete from the definition of income in section 3 the words 'or elsewhere'." 30

The net profit or gain "arising from" the business of a non-resident in Saskatchewan is the net profit or gain "earned from" such business in Saskatchewan. Both of these views, as pointed out in the same judgment, are fortified and supported by section 4(m) of the 1932 Act [section 4 (j) of the 1936 Act] and section 23 of the 1932 Act [section 26 of the 1936 Act].

P. 109, l. 34-
p. 110, l. 6.

13. The Income Tax Commissioner (or Commission) did not ascertain the net profit or gain of the Appellant that arose from or was earned in its business in Saskatchewan, but resorted to the regulation and arbitrarily took, as the Appellant's taxable income in Saskatchewan, the percentage of the Appellant's income everywhere that its gross sales in Saskatchewan, for the periods in question, bore to its gross sales everywhere. In so doing the Commissioner (or Commission) taxed that percentage of the Appellant's manufacturing profit, all earned out of Saskatchewan. This is clearly demonstrated by assuming that a company which does all its 40

manufacturing in Ontario makes agricultural implements for special use in Saskatchewan and sells all such implements in Saskatchewan, the sales totalling \$100,000, with a total net profit of \$10,000. Under Saskatchewan Regulation 2 the percentage of that total net profit which would be deemed the Company's net income taxable in Saskatchewan would be 100%, as follows:
$$\frac{(\text{Sask. sales}) 100,000}{(\text{total sales}) 100,000} \text{ of } \$10,000 = \$10,000.$$

In the result Saskatchewan would tax all of the Company's net profit on the manufacturing and sale of said implements, although all the manufacturing was done in Ontario. As is stated in the judgment of Chief Justice Sir Lyman Duff, concurred in by Davis and Taschereau, JJ.:—

“The profits of the Company are derived from a series of operations, including the purchase of raw material or partly manufactured articles, completely manufacturing its products and transporting and selling them, and receiving the proceeds of such sales. The essence of its profit making business is a series of operations as a whole.” P. 109, l. 15-20

“It is not the profits received in Saskatchewan that are taxable; it is the profits arising from its business in Saskatchewan, not the profits arising from the company's manufacturing business in Ontario and from the company's operations in Saskatchewan taken together, but the profits arising from the company's operations in Saskatchewan.” P. 112, l. 16-21

In this connection the Appellant relies on the decision of the Judicial Committee of the Privy Council in *Commissioners of Taxation vs. Kirk*, 1900 A.C. 588 applied by Chief Justice Sir Lyman Duff, concurred in by Davis and Taschereau JJ. The decision of the Judicial Committee in the Kirk case is also an answer to the contention of the Respondents' counsel in the Courts below that where a company both manufactures and sells goods its profits arise or are earned entirely where the goods are sold. P. 110, l. 7-
p. 111, l. 22.

See particularly 1900 A.C. at p. 592-593.

The majority judgments of Rinfret J., concurred in by Crocket and Kerwin JJ., and Hudson J. do not in any way contradict the opinion of Chief Justice Duff, concurred in by Davis and Taschereau JJ., that the Appellant's manufacturing profit was earned outside Saskatchewan.

Wm. Wrigley, Jr. Company, Ltd. vs. The Provincial Treasurer of Manitoba, (1947) S.C.R., 431, particularly Rinfret CJ. and Taschereau J. at 435-439, and Estey J., p. 453-459.

14. The judgment of Rinfret J., concurred in by Crocket and Kerwin JJ., erred in stating—

“that the question whether profits or gains arose within or without Saskatchewan is really a question of fact already decided against it by the Commissioner of Income Tax, the Board of Revenue Commissioners and the Judge of the Court of King's Bench.” P. 119, l. 27-31.

Record

The written admission of facts filed on the appeal to the Board of Revenue Commissioners and the assessments themselves show clearly that there was no such finding by the Commissioner of Income Tax.

Ante p. 3, lines 25-44.

P. 45, l. 15-18. The Board of Revenue Commissioners made no such finding of fact, but, after quoting the regulations, stated that, "Pursuant thereto, the Income Tax Commissioner has used a computation basis which has regard to the ratio between the Company's total sales and its sales within the province." In expressing the opinion that the method did not tax income outside Saskatchewan, the Board was merely drawing an incorrect conclusion from admitted facts or an incorrect conclusion of law based upon the incorrect premise that the regulations were valid. While Anderson J., the King's Bench Judge, on appeal from the Board, said "The evidence is that the assessments are approximately, but not absolutely correct—an approximation to absolute accuracy", this and similar findings of Anderson J. were unsupported by the evidence and were not accepted by the Saskatchewan Court of Appeal, which Court said in its judgment: 10

P. 92, l. 14-17. "It may be said that, strictly speaking, a tax imposed by either of these methods is not a tax on income because admittedly the company's real income in the province has not been ascertained." 20

. . . .

P. 92, l. 45-
p. 93, l. 3. "In effect these regulations substitute for an amount which would be the net profits of the company earned in Saskatchewan, if the information necessary to ascertain these profits was available, another amount, to be such portion of the company's total income as corresponds to the percentage which the company's sales in Saskatchewan bear to its total sales." 30

P. 108, l. 32-39. On this point the judgment of Sir Lyman Duff C.J., concurred in by Davis and Taschereau JJ., is, the Appellant submits, correct. Furthermore, no cross-appeal was taken by the Respondents from the above quoted findings of the Court of Appeal. 30

P. 122, l. 31-36. 15. The judgment of Hudson J. erred in holding, in effect, that the Court of Appeal for Saskatchewan had less jurisdiction to consider facts than the King's Bench Judge, Mr. Justice Anderson, had.

See Treasury Department Act, 1938, sec. 42, as amended by Statutes of 1940, cap. 5, sec. 4.

(Sask.) Court of Appeal Act, sec. 8.

(Sask.) Court of Appeal Rule 44.

Schedule to
this Case,
p. 12, l. 12-
p. 14, l. 12.

P. 7, l. 22-
p. 8, l. 4. 16. Furthermore, even apart from the question of the manufacturing profit, in the percentage method employed by the Commissioner he did not ascertain the net profit or gain arising from or earned in the Appellant's business in Saskatchewan, since the costs of making sales and doing 40

business are not uniform throughout Canada, particularly with the difficult conditions prevailing in Saskatchewan during the periods in question.

See Limitation of Civil Rights Act, 1933, sec. 5(1).

Also ante, p. 4, lines 7-17.

The fact of the difficult conditions in Saskatchewan is judicially noticed in the judgment of Mr. Justice Anderson.

Record

Schedule to
this Case,
p. 14, l. 13-
p. 15, l. 12.

P. 71, l. 32-45.

10 17. Section 7(4) of the 1932 Act [section 9(4) of the 1936 Act] does not authorize the making of any regulations which increase, as against a non-resident, the liability to taxation under the said Acts beyond the limit imposed by section 21a of the 1932 Act [section 23 of the 1936 Act]. Therefore Regulation No. 2 was only intended to apply to resident companies, subject to the protection given by section 4(m) of the 1932 Act [4(j) of the 1936 Act]. This is borne out by Regulation 5(b). If, however, the regulations do apply to a non-resident company (which is not admitted), then Regulation 2 is *ultra vires* the Lieutenant Governor in Council as being inconsistent with and a departure from section 21(a) of the 1932 Act [section 23 of the 1936 Act].

20 See the judgment on this point of Sir Lyman Duff C.J., concurred in by Davis and Taschereau JJ.

P. 111, l. 23-
p. 112, l. 37.

Taxing Acts are construed strictly against the taxing authorities, and words imposing or increasing a tax must be clear, express and unambiguous. Intention to impose a tax cannot be inferred and it is for the taxing authority to bring each case clearly within the taxing Act. The burden is upon the Respondents, which burden they failed to satisfy.

Brunton vs. New South Wales Commissioner, 1913 A.C. 747 at 760.

Munro vs. Commissioner of Stamp Duties, 1934 A.C. 61 at 68.

30 The judgment of Rinfret J., concurred in by Crocket and Kerwin JJ., and the judgment of Hudson J. erred in holding that the said regulations are *intra vires* the Lieutenant Governor in Council, or are valid as against the Appellant.

P. 118, l. 17-
p. 120, l. 31.

P. 123, l. 8-
p. 124, l. 39.

18. The judgment of Rinfret J., concurred in by Crocket and Kerwin JJ., erred in stating that the regulations do the same thing as the statute and that the Commissioner, in making each assessment, intended to tax exclusively the profits and gain arising from the Appellant's business in Saskatchewan and did not intend to reach anything but the profits or gains arising from that business.

P. 119, l. 15-44.

40 19. The judgment of Rinfret J., concurred in by Crocket and Kerwin JJ., erred in holding that the method used by the Commissioner was rendered necessary as a result of the fact that the Appellant does not keep separate profit and loss accounts for its business carried on in Saskatchewan, or was nothing else than the adoption of the best available means or the only method available to ascertain the income of the Appellant arising from its business in Saskatchewan. The Commissioner, after

P. 119, l. 44-
p. 120, l. 31.

Record

computing the Appellant's net income everywhere, could have adopted the three-factor formula of tangible property, payroll and sales used by the Appellant in its returns for 1935 and 1936, to allocate the share thereof earned in Saskatchewan (subject to a proper deduction in respect of a reserve for bad debts). Or, the Commissioner could have suggested to the Appellant some alternative method of allocation that would give reasonable weight to the manufacturing as well as the selling end of the Appellant's business.

P. 119, l. 8-15;

The statute referred to in *Attorney General vs. Till*, cited in the said judgment, is quite distinguishable from the statutes in the case at bar and, furthermore, the Parliament of the United Kingdom is, of course, not constitutionally restricted as is the Legislature of Saskatchewan. 10

See below, l. 21-36.

20. The limitation on the right to appeal from the judgment of the Court of Appeal for Saskatchewan to the Supreme Court of Canada, imposed by section 42 of The Treasury Department Act, 1938, as amended in 1940, Cap. 5, sec. 4, is *ultra vires* the Saskatchewan Legislature.

Crown Grain Co. vs. Day, 1908 A.C. 504.

Supreme Court Act, 1927, Cap. 35, sec. 6 and sec. 2, subsections (a), (b), (d) and (e). 20

21. The Saskatchewan Income Tax Acts and said regulations are *ultra vires* the Province of Saskatchewan in so far as they purport to tax income of the Appellant, a non-resident company, earned outside Saskatchewan, particularly its manufacturing profit. To bring taxation within the legislative jurisdiction of the Province it must be "direct taxation within the province", as laid down by section 92(2) of The British North America Act, 1867. The statutes are Income Tax Acts and the subject matter of the tax is "income".

See Sec. 7 (3) of the 1932 Act [sec. 9(3) of the 1936 Act].

Provincial Treasurer of Alberta vs. Kerr, 1933 A.C. 710, at 718-721. 30

The Provincial Legislature cannot apply a fictitious method of determining what is income arising from or earned in business carried on in Saskatchewan and cannot define something to be such income which is not in fact and in law such income, at least as against a non-resident.

Attorney General for Alberta vs. Attorney General for Canada, 1939 A.C. 117 at 130-1.

22. The decision in *Bank of Toronto vs. Lambe*, 12 A.C. 575, cited in some of the judgments in the Courts below, is quite distinguishable from the case at bar. The statute there under consideration was a Corporation Taxation Act of Quebec Province, imposing a tax on banks and companies carrying on or transacting business within the Province. Saskatchewan has a Corporations Taxation Act, R.S.S. 1940, Cap. 51. 40

The subject matter of the tax under such statutes is not income, as is the subject matter of the tax under the Saskatchewan Income Tax Acts.

Record
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23. The Appellant submits that so much of the judgment of the Supreme Court of Canada as is adverse to the Appellant is wrong and should be reversed and that the Appellant's appeal should be allowed, with costs throughout, and that it should be adjudged that the said three assessments are invalid and should be set aside, not only on the ground upon which they have been set aside in the Courts below, but also upon the other grounds urged by the Appellant, for the following among other

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REASONS.

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1. Because, since the Appellant is a non-resident, its income liable to taxation is limited by the said Acts to the net profit or gain arising from or earned in its business carried on in Saskatchewan.
2. Because the Income Tax Commissioner (or Commission) did not ascertain such net profit or gain but, in resorting to the said regulations, taxed part of the Appellant's manufacturing profit, all earned out of Saskatchewan.
3. Because, even apart from the manufacturing profit, the Commissioner (or Commission), in the percentage method employed, did not ascertain the net profit or gain arising from or earned in the Appellant's business in Saskatchewan.
4. Because the regulation relied on by the Commissioner (or Commission) either does not apply to a non-resident company or was beyond the power of the Lieutenant Governor in Council.
5. Because the burden was upon the Respondents to show that the Appellant is brought strictly within the taxing Acts and that the assessments are valid, which burden the Respondents failed to satisfy.
6. Because the judgment of Rinfret J., concurred in by Crocket and Kerwin JJ., erred in holding that the question whether profits or gains arose within or without Saskatchewan is a question of fact decided against the Appellant.
7. Because the judgment of Hudson J. erred in holding that the Court of Appeal for Saskatchewan had less jurisdiction to consider facts than the King's Bench Judge had.

Record

8. Because the judgment of Rinfret J., concurred in by Crocket and Kerwin JJ., and the judgment of Hudson J., were erroneous in other respects, as set forth in this Case and as will appear on the argument of the appeal.
9. Because the subject matter of the tax is "income" and the Saskatchewan Income Tax Acts and regulations are *ultra vires* the Province of Saskatchewan in so far as they purport to tax income of the Appellant arising from or earned in its business carried on outside Saskatchewan, particularly the manufacturing profit.

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FRANK L. BASTEDO.

SCHEDULE TO APPELLANT'S CASE

THE COURT OF APPEAL ACT (Sask.). (*Revised Statutes of Saskatchewan, 1940, Chapter 60.*)

Section 2.—In this Act and the rules made hereunder, unless the context otherwise requires, the expression:

- 1. "Court" means the Court of Appeal. R.S.S. 1930, c. 48, s. 2.

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10 Section 8.—Upon appeal from, or motion against, the order, decision, verdict or decree of a trial judge, or on the rehearing of any cause, application or matter, it shall not be obligatory on the court to grant a new trial, or to adopt the view of the evidence taken by the trial judge, but the court shall act upon its own view of what the evidence in its judgment proves, and the court may draw inferences of fact and pronounce the verdict, decision or order which, in its judgment, the judge who tried the case ought to have pronounced. R.S.S. 1930, c. 48, s. 8.

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20 Section 17.—(1) The judges of the court, or a majority of them present at any meeting held for that purpose, shall have power to make rules for all or any of the following purposes, that is to say:

- (a) regulating the practice and procedure relating to all matters coming before the court, the duties of the officers thereof and the costs of proceedings therein;

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- (e) generally for providing for every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act and of all other Acts which may be at any time in force respecting the court.

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Schedule to
Appellant's Case
(continued)

SASKATCHEWAN COURT OF APPEAL RULE 44, (as in force
when appeal herein to Court of Appeal heard and decided).

Rule 44.—The court shall have, in addition to all the powers and duties as to amendment, full discretion and power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from 10
which the appeal is brought. Upon appeals from a judgment after trial, or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court. The court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the court, notwithstanding that the notice of appeal may 20
be that part only of the decision may be reversed or varied; and such powers may also be exercised in favour of all or any of the respondents, or parties, although such respondents or parties may not have appealed from or complained of the decision. The court shall have power to make such order as to the whole or any part of the costs of the appeal as may be just. (E. 868.) S. 654.

THE LIMITATION OF CIVIL RIGHTS ACT, 1933, (Sask.)
(Saskatchewan Statutes, 1933, Chapter 83, assented to
March 30th, 1933.)

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Section 5.—(1) When an article, the selling price whereof exceeds \$100, is hereafter sold, and the vendor, after delivery, has a lien thereon for all or part of the purchase price, the vendor's right to recover the unpaid purchase money shall be restricted to his lien upon the article sold, and his right to repossession and sale thereof, notwithstanding anything to the contrary contained in The Farm Implement Act or in any other Act or in any agreement or contract between the vendor and purchaser.

(2) Subsection (1) of this section shall not apply to the sale of binders, nor to the sale of land with chattels upon an entire consideration, nor to an agreement for the sale of livestock.

Schedule to
Appellant's Case
(continued)

(3) Notwithstanding anything contained in this Act, section 28 of The Farm Implement Act respecting the assignment of the earnings of a large implement shall continue to be operative.

10 (4) Subsection (1) of this section shall apply to all instalment sales, whether such sales are effected by way of a conditional sale agreement or lien note, or by way of a promissory note in the first instance with the delivery at the time of sale or subsequent thereto to the vendor of a chattel mortgage covering the whole or part of the purchase price of the article sold.

(5) This section shall not apply where the article sold is totally destroyed, either by the wilful act of the purchaser, or otherwise.

20 (6) Where it is shown to a court of competent jurisdiction that the purchaser has wilfully damaged the article sold or that the article has been damaged by his neglect, or that for any other reason it is inequitable that the provision contained in subsection (1) of this section should apply, the court may make such order in the premises as it may deem just and expedient.

(This section was in force during the years 1934, 1935 and 1936.)

30 NOTE: Printed copies of The Saskatchewan Income Tax Act, 1932, The Saskatchewan Income Tax Act, 1936, and The Treasury Department Act, 1938, (with relevant amendments) are being filed for use on the appeal.