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Jan. 26, 29, & 30

Sept. 22

BETWEEN:

F. H. MULHOLLAND .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

AND BETWEEN:

J. L. SPRATT .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

AND BETWEEN:

S. L. HOLLAND .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT;

Crown—Re-negotiation of supply contracts by the Minister of Reconstruction and Supply—The Department of Munitions and Supply Act, 1939, Second Sess., c. 3, s. 13 as amended by S. of C., 1943-44, c. 8, s. 7 and by The Department of Reconstruction and Supply Act, S. of C. 1945, c. 16, s. 11(1), (2) and (3)—Appeals from orders and directions of the Minister—Onus on appellants to establish error in said orders and directions—Whether or not relationship of master and servant exists a question of fact—Difference between relations of master and servant, and of principal and agent—The Minister's power of re-negotiation of supply contracts not limited to those entered into with the Crown or with those having a government contract—"Supply contracts"—Evidence—Oral or written statements by persons not parties and not called as witnesses inadmissible to prove truth of matter stated—Practice—Rule 169 of the General Rules and Orders—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 61, 72—Evidence taken on commission can be used in evidence only by direction of the Court or a Judge unless provisions of s. 72 of the Act complied with—Commission evidence rejected as inadmissible since Commissioner's affidavit taken before a Justice of Peace and not before one of the persons mentioned in s. 61 of the Act—Appeals dismissed.

In January, 1940, certain verbal arrangements were made between a company which manufactured and sold a large variety of cutting tools in Canada and the appellants Spratt and Mulholland who had previously been employed as salesmen by a manufacturers' agent representing the company. The arrangements were that the appellants would have an office in Toronto, represent no firms other than the company, sell the company's products in all of Ontario except the eastern portion, promote goodwill on the company's behalf, provide free space to store such of the company's goods as were kept on hand in Toronto and pay all their operating costs, including salaries and expenses of their salesmen and office staff. In return for these services the company agreed to pay them in equal shares a straight

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ten per cent commission on all sales made by the company in their area, whether or not such sales were made by them. The appellants Spratt and Mulholland carried on accordingly until December, 1941, when new verbal arrangements were made, this time, with the three appellants and by which the territory would now cover all of Ontario and the commission would thereafter be divided in three equal parts. These new arrangements were then continued. On June 20, 1947, by a separate order and direction of the Minister of Reconstruction and Supply served on each appellant and made under the provisions of The Department of Munitions and Supply Act, Statutes of Canada, 1939 (Second Session) c. 3 as amended, each appellant's costs of operation and profits in respect of certain contracts during a period ending December 31, 1945, were fixed at a certain amount and each was directed to pay the sum received by him in excess of the amount so fixed. From this order and direction of the Minister each appellant now appeals.

Held: That the onus is on the appellants to establish error in the orders and directions of the Minister.

2. Whether or not in any given case the relationship of master and servant exists is a question of fact; but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. The difference between the relations of master and servant, and of principal and agent, may be said to be this: a principal has the right to direct what work the agent has to do; but the master has the further right to direct how the work is to be done.

3. That on the facts none of the appellants was at any relevant time an employee of the company, but on the contrary, they were in business on their own account as manufacturer's agents, but limiting their activities to the one manufacturing concern—namely, the company.

4. That the Minister's power of re-negotiation of supply contracts under s. 13 of The Department of Munitions and Supply Act is not limited to those entered into with His Majesty or with those having a government contract.

5. That the contracts or arrangements existing between the appellants and the company were "supply contracts" which the Minister had the power to re-negotiate.

6. That insofar as the appellants Spratt and Mulholland are concerned there were two supply contracts entered into by them with the company, that of January, 1940 and the arrangements made in December, 1941, with all three appellants must be considered as a second contract and not merely as a variation of the first contract.

7. That notwithstanding a slight error in the Minister's order and direction as to the appellant Holland, the basis of the claim for repayment has not been affected.

8. That oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matter stated.

9. That by reason of the provisions of Rule 169 of the General Rules and Orders of the Court evidence of a witness taken on commission can be given in evidence only by the direction of the Court or a Judge, unless the provisions of s. 72 of the Exchequer Court Act, R.S.C. 1927, c. 34 have been complied with.

10. That as the affidavit which the commissioner was required to take before proceeding with the examination of the witness was taken before a Justice of the Peace and not before one of the persons authorized by s. 61 of the Exchequer Court Act to take affidavits which can be used in the Court, the whole of the commission evidence must be rejected as inadmissible.

11. That each of the three appeals is dismissed.

APPEALS from orders and directions of the Minister of Reconstruction and Supply made under the provisions of The Department of Munitions and Supply Act, S. of C. 1939, Second Sess., c. 3 as amended.

The appeals were heard before the Honourable Mr. Justice Cameron at Toronto.

John Jennings, K.C. and *W. Z. Estey* for appellants.

J. W. Pickup, K.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (September 22, 1951) delivered the following judgment:

At the request of the parties these three appeals were heard together, it being agreed that the evidence adduced should apply to all. In each case an appeal is taken from an order and direction of the Minister of Reconstruction and Supply, dated June 20, 1947, and made under the provisions of the Dept. of Munitions and Supply Act, Statutes of Canada, 1939, Second Sess., c. 3, as amended. Section 13 of that Act confers powers on the Minister to renegotiate certain supply contracts and when he is satisfied that the total amount paid or payable thereunder is in excess of the fair and reasonable cost of performing the contract together with a fair and reasonable profit thereon, he may fix the fair and reasonable cost of performing the contract, the fair and reasonable profit thereon, and may direct the person to whom the excess amount has been paid to pay such excess to the Receiver General of Canada. Sections 13(6) and (7) provide for an appeal from such order and direction of the Minister to this Court.

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Each of the appellants upon being served with an order and direction of the Minister appealed therefrom. Pleadings were directed by order of this Court and in their statements of claim each appellant asked for a declaration declaring the orders and directions null and void, that they be set aside and that it be declared that there is nothing due and owing to the Receiver General of Canada thereunder.

Ex. 1 is the order and direction given to the appellant Spratt, and is as follows:

ORDER AND DIRECTION

WHEREAS Mr. J. L. Spratt was a party to two or more supply contracts (as defined in Section 13 of the Department of Munitions and Supply Act) and the undersigned is satisfied that the total amount paid or payable to him thereunder is in excess of the fair and reasonable cost of performing the said contracts, together with a fair and reasonable profit;

NOW, THEREFORE, pursuant to the powers conferred by the Department of Munitions and Supply Act and the Department of Reconstruction and Supply Act, 1945;

1. It is hereby ordered that the amount that Mr. J. L. Spratt is entitled to retain or receive in respect of supply contracts during the sixty month period ending December 31, 1945, as the fair and reasonable cost of performing the said contracts together with a fair and reasonable profit thereon during the said period be and it is hereby fixed at the sum of $104,603.

Mr. J. L. Spratt is hereby directed to pay forthwith to the Receiver-General of Canada the sum of $223,897, being the amount which he has received in respect of the said supply contracts during the said period in excess of the amount so fixed in respect thereof.

Dated at Ottawa this 20th day of June, 1947.

C. D. HOWE
Minister of Reconstruction and Supply.

That given to the appellant Mulholland (Ex. 3) is identical in terms and amounts; and that given to the appellant Holland (Ex. 2) differs only in that his contract was stated to be for a period of forty-eight months, his costs of operation and profit were fixed at $83,180 and he was directed to pay $172,783.

The appellants sold a large variety of cutting tools on behalf of Union Twist Drill Company, Butterfield Division, of Rock Island, Quebec. The Union Twist Drill Company is an American corporation having a Massachusetts charter, but operating its Butterfield Division at two plants in close proximity, one at Rock Island, Quebec, and the other at

Derby Line, Vermont. These two plants operated under one management but it appears that the goods which the appellants sold were manufactured at Rock Island. For purposes of brevity I will hereafter refer to the Union Twist Drill Company, Butterfield Division, as "the company." It is not disputed that each of the appellants over the periods in question received from the company the sum of the fixed costs and profit and of the amount which each was directed to pay to the Receiver General.

After the statement of defence was delivered, the appellants demanded particulars of para. 2 thereof and in reply the respondent furnished the following particulars:

> The Attorney-General of Canada on behalf of His Majesty says that the contract or arrangement referred to in paragraph 2 of the Statement of Defence was a contract or arrangement such as is described in said paragraph 2 made between the Appellant and Union Twist Drill Company. The terms and details of such contract or arrangement are unknown to the Respondent but are known to the Appellant.

It will be seen, therefore, that the "supply contracts" mentioned in the orders and directions refer not to the selling contracts negotiated by the appellants for the sale of the company's products, but to the contract or contracts entered into between the appellants and the company. The dispute centres around the interpretation to be placed on the words "supply contract," it being submitted by the appellants that their arrangements or contracts with the company were not "supply contracts" within the meaning of that term as defined in section 13(1).

The first point to be determined is whether the onus is on the appellants or the respondent. Mr. Jennings, counsel for the appellants, submits that it lies on the respondent and that he must not only satisfy the Court that the contracts of the appellants with the company were "supply contracts," but also must prove affirmatively that the amounts fixed by the Minister for costs of performance and for profits were, in fact, fair and reasonable under all the circumstances.

The appeal provisions are as follows:

> 13. (6) A person affected by an order or direction made by the Minister under this section may within thirty days after the receipt of a copy of such order or direction inform the Minister of his intention to appeal against such order or direction to the Exchequer Court of Canada and within such period of thirty days file a notice of such intention in the Court, whereupon all proceedings under such order or direction shall be stayed pending the disposition of the appeal by the Exchequer Court.

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(7) On the filing of the notice of appeal, the Exchequer Court shall, on the application of the Minister or of the appellant give directions relative to the disposition of the appeal, and shall upon the hearing of the appeal have jurisdiction to review any direction or decision of the Minister under this section and may confirm the Minister's order or direction or vary the same as it deems just and the decision of the Court shall be final and conclusive.

In my opinion, the onus is on the appellants to establish error in the orders and directions of the Minister. These matters are before the Court by way of an appeal from such orders and directions made after the Minister is satisfied of the existence of certain facts (section 13(3)(4)). Then subsection (6) provides for the giving and filing of notice of intention to "appeal" and subsection (7) refers to the disposition of the "appeal." It seems to me that in using the word "appeal" throughout, Parliament indicated that upon the hearing of the appeal, the procedure to be followed would be the same as normally follows from an appeal from an inferior court to a superior court, namely, that when the legislation does not otherwise provide, the one making the appeal is required to establish error in fact or in law in the order or judgment from which the appeal is taken.

I have given the most anxious consideration to this question, more particularly because of the provision in section 13(7), that "the decision of the Court shall be final and conclusive," and because the matter has not previously been the subject of judicial interpretation. A careful examination of all the provisions of section 13 has convinced me that Parliament conferred on the Minister very wide powers in the re-negotiation of supply contracts—including the power when satisfied that the total amount paid thereunder is in excess of a fair and reasonable cost of performing the contract, together with a fair and reasonable profit thereon—to make an *order and direction* fixing the amount which a contractor is entitled to retain and ordering the repayment of any excess. It is a ministerial order made under statutory authority and is valid until, upon appeal, it is established by an appellant upon affirmative evidence that it contains errors in fact or in law. The extent to which the order and direction is made valid is shown by the provisions of ss. (8) and (9) of section 13. Under the former, one who fails to comply with any order or direction is declared to be guilty of an offence under the

Act; and in the latter the amount directed to be paid to the Receiver-General in such an order and direction is recoverable with costs *as a debt due to His Majesty,* notwithstanding that proceedings have been taken under subsection (8).

At first sight the powers conferred on the Minister would seem to be somewhat arbitrary, but it is to be noted that section 13(2) requires any person entering into a supply contract to keep detailed records and accounts of the cost of carrying out the contract and to make them available to the Minister's representative. It may be assumed, therefore, that if the subsection were complied with, an appellant would have no great difficulty in presenting such evidence as would enable the Court to properly review the Minister's order and direction.

It may be noted, also, that in this case formal pleadings were directed and that the appellants were ordered to deliver a statement of claim. They are, therefore, in the position of plaintiffs and must prove the allegations in their statements of claim.

In many ways the right of appeal here granted is similar to that found in Part VIII (Appeals and Procedure) of the Income War Tax Act, R.S.C. 1927, c. 97, as amended. It is well established that in an appeal under that Act, and notwithstanding the language used in section 63(2) thereof (that upon the Minister transmitting certain documents to the Court "the matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing") the burden of proof is upon the appellant and the taxpayer must establish the existence of facts or law showing an error in relation to the tax imposed upon him (*Johnson* v. *Minister of National Revenue* (1)).

In the present appeals I am also of the opinion that the burden of showing error in the orders and directions of the Minister lies upon the appellants.

As I have said, the appellants' submission is that their arrangements or contracts with the company did not fall within the definition of "supply contract" and that, there-

(1) (1948) S.C.R. 486.

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fore, the Minister had no power to direct repayment of any amounts. The applicable parts of section 13 are as follows:

13. (1) In this section,

(a) "supply contract" means a contract, including a sub-contract, entered into on or after the ninth day of April, 1940, or entered into but not fully performed and completed before the said day,

(i) to manufacture, produce, finish, assemble, transport, repair, maintain, service, store or deal in or which in any way relates to munitions of war or supplies; or

(ii) to construct or carry out or which in any way relates to a project;

(b) "sub-contract" includes any contract or arrangement

(i) to perform all or any part of the work or service, or to make or furnish any article or material, for the performance of any other supply contract; or

(ii) under which any amount payable is contingent upon the entry into of any other supply contract or determined with reference to any amount payable under or otherwise by reference to any other supply contract; or

(iii) under which any part of the services performed or to be performed consists of soliciting, attempting to negotiate or negotiating any other supply contract; and

(c) "contract" includes sub-contract.

(3) If the Minister is satisfied either before or after the performance, in whole or in part, of a supply contract, that the total amount paid or payable thereunder to any person is in excess of the fair and reasonable cost of performing the said contract together with a fair and reasonable profit, he may by order reduce the amount that the said person is entitled to retain or receive thereunder to such amount as he may fix as the fair and reasonable cost of performing the said contract together with a fair and reasonable profit thereon and the Minister may direct the said person to pay to the Receiver General of Canada forthwith any amount which the said person has received under the said contract in excess of the amount so fixed.

(4) If any person is a party to two or more supply contracts the Minister may

(a) by one order reduce the total amount that the said person is entitled to retain or receive under any two or more or all of the said contracts to such amount as he may fix as the fair and reasonable cost of performing the said contracts together with a fair and reasonable profit thereon; or

(b) by order fix the amount that the said person is entitled to retain or receive in respect of supply contracts during such period as may be designated by the Minister as the fair and reasonable cost of performing the said contracts together with a fair and reasonable profit thereon during the said period, and, if the said person has during the said period carried on business other than the performance of supply contracts the Minister may, for the purpose of determining the fair and reasonable cost of performing supply contracts, or the fair and reasonable profit thereon, during the said period, determine the share or part of the gross

income of the said person, or of the costs incurred by him, during the said period that is to be regarded as being attributable to such other business;

and the Minister may direct the said person to pay to the Receiver General of Canada forthwith any amount which the said person has received under the said contracts or in respect of supply contracts during the said period in excess of the amount so fixed in respect thereof.

Much of the evidence adduced by the appellants had to do with the terms of the contracts between them and the company, it being submitted on their behalf that on that evidence the Court should find that they were mere servants or employees of the company. The matter is of importance in that, presumably, if they were servants of the company, the only re-negotiation which the Minister could then enter into would be the contracts of the company and by disallowing to the company any excess amounts paid by it to the appellants as being in excess of the fair and reasonable cost of performing its contracts. As a matter of fact, the contracts of the company were re-negotiated and all the amounts paid to the appellants, as well as to the three other firms representing the company in other parts of Canada, were allowed in full.

None of the arrangements or contracts with the appellants was in writing. It becomes necessary, therefore, to consider carefully the evidence as to the formation of the agreements and what was done thereunder insofar as they indicate the relationship between the appellants and the company.

Whether or not in any given case the relationship of master and servant exists is a question of fact; but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. The difference between the relations of master and servant, and of principal and agent, may be said to be this: a principal has the right to direct what work the agent has to do; but the master has the further right to direct how the work is to be done (Halsbury, Second Edition, Vol. 22, p. 113).

The company has sold its products for many years in Canada. In January, 1940, it sold them through four agencies, all being manufacturers' agents handling not only the company's products but those of other manufacturers as well. Its Ontario representative was one Harrison, a manufacturers' agent who handled several other lines as

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well and was interested in a manufacturing concern also. His territory covered all of Ontario except the eastern portion. His contract with the company was similar to those of the other three agencies, namely, that he was to sell the company's products in his area, promote goodwill on its behalf, provide free space to store such of the company's goods as were kept on hand in Toronto, and pay all his operating costs, including salaries and expenses of his salesmen and office staff. His premises and offices were at Mimico adjacent to Toronto. In return for these services he was paid a straight 10 per cent commission on all sales made by the company in his area, whether or not such sales were made by him. Harrison died in January, 1940, and upon his death Mr. G. F. Holland, the General Manager of the company, made verbal arrangements with the appellants Spratt and Mulholland (both of whom had previously been salesmen employed by Mr. Harrison) to represent the company for the same area and on the same terms as to payment, and with the same duties as were carried out previously by Harrison. The arrangement was subject to three conditions, all of which were agreed to, namely, that those appellants would move their office to Toronto, that they would represent no firms other than the company and that the commission of 10 per cent would be divisible between them in equal shares. Spratt and Mulholland carried on accordingly. They secured quarters on King Street, Toronto, taking the lease in their own names or in the name of Spratt and Mulholland Tool Sales. They purchased office equipment and supplies, having first secured a loan for that purpose from the company. Upon the door of that office and in the telephone directory they used the names "Union Twist Drill Company, Butterfield Division," and also "Spratt and Mulholland Tool Sales, Co-distributors." At their own expense they provided space for storage of the company's products in Toronto, but the company paid insurance on such goods. They paid all the costs of operation, including the rent, office and salesmen's salaries, and all travelling expenses. They sold the products of the company, in very large quantities, all in the name of the company, and selling nothing on their own account. They shipped such goods as they had on hand in Toronto direct to purchasers, but otherwise the orders were filled by the company and shipped direct to

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the customers. All invoices and accounts were rendered by the company to the customers and the company collected all its own accounts. If freight were paid by the appellants, they were re-imbursed by the company which also supplied the appellants with its own order forms and letterheads and for a time paid certain telegraph and telephone charges.

Shortly after the end of each month the appellants Spratt and Mulholland each received individually from the company a cheque for 5 per cent of the commission earned in the preceding month. These cheques were then deposited by them in a joint account which required the signatures of both Spratt and Mulholland; and after all operating expenses were paid therefrom, the balance was divided equally between them.

Spratt and Mulholland carried on together in this way until December, 1941. At that time they had an interview with the general manager of the company, Mr. G. F. Holland, father of the other appellant. He intimated to them that as their territory was large it would be desirable to have additional help. He then proposed that, if agreeable to them, his son, the appellant Holland, would join them and that in that case he would add to their territory that part of Eastern Ontario which had previously been covered from Montreal. The suggestion in this regard did not emanate from Spratt or Mulholland, but they agreed at once, and also to Holland's suggestion that thereafter the 10 per cent commission would be divided equally between the three appellants. This new arrangement continued in effect until 1947 and, except for the fact that the territory was increased so as to cover all of Ontario and that the commission was then divided into three equal parts, all other arrangements and duties were the same as before. In February, 1947, the appellant Holland succeeded his father as general manager of the Butterfield Division and he in turn was followed in Toronto by a younger brother, the same arrangements being then continued.

I have considered most carefully all the evidence as to the relationship between the appellants and the company, and while at first I had some doubts on the matter, I have now reached the firm conclusion that the appellants were not employees of Union Twist Drill, but were, in fact, at

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all relevant times in business as agents or manufacturer's agents, although their activities were limited to the products of one firm.

It is admitted that throughout the entire period the company made no deductions in respect of income tax from the amounts paid to the appellants as they were required to do for all employees, whether paid by salary or commission. Then it is admitted that until Harrison's death, all four of the company's sales representatives throughout Canada (including Harrison) were, in fact, manufacturers' agents and not employees, and that after Harrison's death the other three were still manufacturers' agents. It is also shown that following Harrison's death, the work performed and services rendered by the appellants to the company were precisely the same as those of Harrison, except that in 1941 the territory was increased.

The change in office from Mimico to Toronto and the division of the same commission into two equal parts, and the agreement that Spratt and Mulholland would carry no other line of goods, did not in any way change the nature of the relationship that had previously existed between the company and Harrison. The duties to be performed remained essentially the same.

Many of the other things which Spratt and Mulholland did, lead me to the same conclusion. They personally selected the new Toronto office and later on, with the appellant Holland, selected the quarters to which they moved in 1943. The lease was taken in their names and they paid the rent and bought the necessary furniture and equipment. They employed their own staff of assistants and paid all office and travelling expenses. For some years they used the name "Spratt and Mulholland Tool Sales" on their office door and in the telephone directory. Spratt said that this was done as for a time they contemplated taking on other agencies as well. This may be doubted, however, because of the evidence that from the inception of the matter it was clearly understood by all that they could represent no one except Union Twist Drill. They secured a loan from the company to assist in the purchase of office equipment, which suggests that the company was not equipping a branch store for the use of its own employees. It was said that Holland, Sr. had stipulated that

the commission would be divisible in equal shares between Spratt and Mulholland, but that he gave no reasons for that requirement. On the other hand, it is shown that the arrangements for separate cheques were made with the approval—and probably the suggestion—of the appellants' auditors, an arrangement which would be beneficial from the income tax point of view. As I have said above, the whole of the commission cheques, when received, were at once put into a bank account in the names of the appellants. The company's goods on hand in Toronto were stated to be "on consignment," a term which seems inappropriate if the appellants were employees of the company and if the Toronto office were in fact "a branch store" of the company, as is suggested.

Nor can I find on the evidence that the company had power to direct how the work of the appellants was to be done. A number of instances were cited by the appellants as to certain "directions" and "requirements" of Holland, Sr. which at first might indicate that the appellants were under his direct control; but in cross-examination it was made clear in practically every case that these were "requests" which were subject to the approval of the appellants. It is clear that the general manager was to some extent a dominating personality and that when he expressed a wish for something to be done or acquiescence on the part of the appellants in some scheme or suggestion, they would usually feel it advisable to concur. Their position was somewhat precarious in that they had no written contract with the company, the contract contained no terms as to its duration, and inasmuch, also, as they carried no other lines of goods. While, therefore, they were not obliged to concur in his suggestions, it was highly advisable for them to do so. One instance of that sort is the request for their approval to take in the appellant Holland (a matter which originated with Holland, Sr.), to which request they at once acceded. Other instances were given, such as his dislike of a particular typewriter which was their property and which he suggested they should change, and which they did change; another instance was his dislike of one of their salesmen, Ward, and his repeated intimations that he did not like him, resulting finally in

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Ward's discharge by the appellants, although they personally had no fault to find with him. In neither case were orders given by Holland, although his wishes were made quite clear.

Then, too, much is made of the contacts kept with the company through its general manager. He visited them on three or four occasions each year and would sometimes take them to call on prospective customers. They were in telephone communication with him four or five times a week and he would urge them to see certain prospects, to check on the business of rival firms and to promote the interest of the company. The appellant Holland said that they were to use their own discretion in the fulfilling and handling of the company's interests. When Spratt was asked whether any one gave him instructions as to how often he should go, or where he should go at a particular time, or whether that was left entirely and absolutely to his own judgment, he said, "Not always, no. I have been specifically requested to look after a certain complaint or check into a fall-off in business, or things of that nature (by Mr. Holland); he visited Toronto perhaps every three months and we were in frequent telephone conversation with him, perhaps three to six times a week; those conversations were to resolve problems that had arisen in connection with our business."

The appellant Holland, Jr. repeatedly spoke of the "instructions" given by the company. Referring to the period following Harrison's death in 1940, while he was still at the company office, he said that "the company would give detailed instructions to any of the four offices that we so thought; this one (referring to the Toronto office) would receive more attention." When it is recalled that this witness considered the other three agencies as manufacturers' agents, it will be seen from the statement above that generally speaking they were treated in the same way as the Toronto agent, although the latter received some more attention. He also said, "The specific carrying out of such work is given to the people in these areas on the assumption, of course, that they will be carried out to the company's advantage. So long as such operations are carried out to what the company considers their advantage, there will be no further directions from Rock Island to alter the course of the situation."

That witness also stated that when he came to Toronto and while there, he had severed his relations and engagement with Union Twist Drill Company.

My conclusion on this point, therefore, is that none of the appellants was at any relevant time an employee of the company, but on the contrary that they were in business on their own account as manufacturers' agents, but limiting their activities to the one manufacturing concern—namely, the company.

It may be convenient at this point to dispose of a number of questions as to the admissibility of certain evidence which I admitted at the trial, subject to the objection of counsel and which I reserved for further consideration.

Counsel for the appellants tendered, through the appellant Spratt, a catalogue (Ex. 12) issued by the company in 1939 and apparently circulated to its customers and used by its agents (including the appellants) in making sales. It was produced from the custody of Mr. Spratt who received it in March, 1939, while he was still a salesman in the employ of Harrison. On one of the front pages reference is made to the Montreal, Toronto and Vancouver stores, and to the Winnipeg office, in each case with its address. The sole purpose of tendering this catalogue is, as stated by counsel, that it tends to prove that the company recognized that the business in Toronto was their store and that it was a recognition by the company of the relationship that existed between the appellants and the company—a matter which is here in issue.

This document is inadmissible on several grounds. In the first place, it was issued in 1939 and could have no reference to the status of the appellants and is therefore irrelevant to this issue. Even if admitted in evidence, it would be of no effect as against the oral evidence that in 1939 all the sales were made through manufacturers' agents. But it is also inadmissible through the witness Spratt as being merely hearsay and not within any of the exceptions to the hearsay rule. The general principle is that oral or written statements made by persons who are not parties and are not called as witnesses *are inadmissible to prove the truth of the matter stated.* The question of the publication of the catalogue is not in issue; but the question of the status of the appellants to the company

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is in issue and therefore, when it is proposed to use the assertions in the catalogue that the Toronto store was the store of the company, it is inadmissible through the witness Spratt. It might be otherwise if tendered through another witness such as an officer of the company who had caused its publication and circulation, as an act corroborating his evidence as to the status of the appellants. It must, therefore, be rejected.

Counsel also tendered a postcard (Ex. 10) sent to the appellant Spratt by the general manager of the company. It is a printed card which had been sent out by the company to the trade at or about the time Spratt and Mulholland became the agents of the company in January, 1940. Over the name of the company it announces the transfer of the company's stock and offices from Mimico to the new address in Toronto, and adds—"Under the Management of Messrs. J. L. Spratt and F. H. Mulholland." This card, in my opinion, is also inadmissible through the witness Spratt as proof of the truth of the statement that Spratt and Mulholland were managers of the company office in Toronto, on the ground that it is hearsay evidence and for that reason is in exactly the same position as the catalogue above mentioned.

A further question which I reserved was the admissibility of certain questions put to Mr. Spratt in cross-examination as to his knowledge of the re-negotiation of the company's contracts. That question need not be further considered as the appellant Holland stated in direct examination to his counsel that all the costs of the four selling agents of the company, including those of the appellants, were then allowed in full as deductible expenses of the company.

The only evidence tendered on behalf of the respondent was that of George F. Holland of Worcester, Massachusetts, an official of the Union Twist Drill Company, and taken on commission at Worcester. Counsel for the appellants objected to the use of this evidence on several grounds, but at the hearing I permitted it to be read reserving my finding as to its admissibility.

I have considered the matter very carefully and have reached the conclusion that, in every respect but one, the application for the order to take the evidence on com-

mission and the conduct of the examination itself were strictly in accordance with the provisions of the Exchequer Court Act and with the General Rules and Orders and the practice of this Court. The one matter to which I have referred was that the affidavit which the commissioner was required to take before proceeding with the examination was *sworn before a Justice of the Peace.* Counsel for the appellants submits that for this reason the evidence is inadmissible inasmuch as the provisions of section 61 of the Exchequer Court Act have not been complied with.

The writ of commission was issued in the terms of Form 29 pursuant to Rule 169, and attached thereto were the instructions and Directions to the Commissioner, one of which was as follows:

4. Before you in any manner act in the execution hereof, you shall take and subscribe, before any person authorized under The Exchequer Court Act, ch. 34 of the Revised Statutes of Canada, 1927, to administer such oath, the oath hereafter mentioned, upon the Holy Evangelists or otherwise, in such manner as shall be sanctioned by the form of your religion and shall be considered by you to be binding on your conscience.

The manner in which affidavits to be used in this Court may be sworn outside of Canada is provided in section 61 of the Act as follows:

61. Any oath, affidavit, affirmation or declaration concerning any proceeding had or to be had in the Exchequer Court administered, sworn, affirmed or made out of Canada shall be as valid and of like effect to all intents as if it had been administered, sworn, affirmed or made before a commission appointed under this Act, if it is so administered, sworn, affirmed or made out of Canada before

(*a*) any commissioner authorized to take affidavits to be used in His Majesty's High Court of Justice in England;

(*b*) any notary public and certified under his hand and official seal;

(*c*) a mayor or chief magistrate of any city, borough, or town corporate in Great Britain or Ireland or in any colony or possession of His Majesty out of Canada or in any foreign country and certified under the common seal of such city, borough, or town corporate;

(*d*) a judge of any court of superior jurisdiction in any colony or possession of His Majesty or dependency of the Crown out of Canada; or

(*e*) any consul, vice-consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place and certified under his official seal.

A Justice of the Peace does not fall within any of the classifications mentioned. It is urged by counsel for the respondent that there is no evidence that the Justice of the

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Peace who took the Commissioner's affidavit was not also a Notary Public. There is no evidence, however, that he is, in fact, a Notary Public and from the record it is patent that he acted only in the capacity of a Justice of the Peace. The attached certificate of a clerk of the Superior Court shows that he was, in fact, a Justice of the Peace, and I cannot assume that he had any other status.

Counsel for the respondent submitted that it would be highly improper to consider such an objection at the time when the evidence was tendered at the trial and that such objections should have been raised earlier. No application was made for leave to use the evidence until it was tendered at the trial. I am of the opinion that by reason of the provisions of Rule 169, such commission evidence can be given in evidence only by the direction of the Court or a Judge, unless the provisions of section 72 of the Act have been complied with.

Rule 169. The Court or a Judge may, in a cause where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons duly authorized to take or administer oaths in the said Court, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, *and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct.*

An order for a commission to examine witnesses may be in the terms of Form 28 in the Appendix to these Rules, and the writ of commission may be in the terms of Form 29 thereof, with such variations as circumstances may require.

Section 72 of the Exchequer Court Act is as follows:

72. When any examination has been returned, any party may give notice of such return, and no objection to the examination being read shall have effect, unless taken within the time and in the manner prescribed by general order.

There is no indication that either of the parties gave notice of the return of the examination, and therefore the appellants had no opportunity of raising objections to the the examination being read until it was tendered at the trial.

For these reasons I have reached the conclusion that as the Commissioner's affidavit was taken before a Justice of the Peace and not before one of the persons authorized by section 61 of the Act to take affidavits which can be used in this Court, the whole of the commission evidence must be rejected as inadmissible. I have carefully considered

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the Act and the Rules and I cannot find that the Court has any power to remedy the defect when, as here, the evidence is tendered at the trial without any notice of return of the commission having been served. Section 63 of the Act gives certain powers to the Court to receive affidavit evidence notwithstanding informalities in the heading or other formal requisites "when made or taken before any person under any provisions of this or any other Act." But that provision does not extend to such a case as this.

In this connection, reference may be made to *re Goldenberg and Glass* (1) where Middleton, J.A., in the Court of Appeal of Ontario, said at p. 416:

> This affidavit unfortunately was sworn at Toledo, Ohio, before a Justice of the Peace, and was consequently not so sworn as to be admissible in evidence.

Having determined that the appellants were not employees of the company, I turn now to the contention that their contracts with the company were not "supply contracts" which the Minister had power to re-negotiate under section 13.

One of the submissions made on behalf of the appellants is that the Minister's power of re-negotiation of supply contracts is limited to those made with the Crown or one of the departments of Government, or with a government contractor. The evidence is not quite conclusive on this point but I think on the whole I may assume (but without deciding) that all of the sales made by the company through the appellants were sales to private manufacturers or jobbers. It may be noted that the amounts directed to be paid are in all cases to be paid to the Receiver General of Canada. A careful reading of the whole Act has convinced me that this submission cannot be upheld. The general powers conferred on the Minister are very broad and in very many cases extend beyond contracts made with His Majesty. It is not necessary to set out these powers in detail, but one or two instances will suffice to indicate their extent. For example, in section 11 the Minister is given certain powers to give directions "to any person who, by virtue of any contract, whether made with the Minister or any Government department or authority or any other person." Then, by section 8, certain provisions are made

(1) (1925) 56 O.L.R. 414.

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applicable only "in respect of all contracts to be entered into by the Minister on behalf of His Majesty the King in right of Canada."

In section 13—the re-negotiation section—there is nothing which limits the power of the Minister to contracts entered into with His Majesty or with a government contractor. On the contrary, it is made applicable to all supply contracts as defined in ss. (1), and by that definition it means *a contract,* including a sub-contract (entered into as therein provided), and sub-contract includes *"any contract or arrangement" as therein defined.* Had Parliament intended to limit the power of re-negotiation to contracts with His Majesty, or with those having a government contract, that intention would have been clearly expressed in the definitions of "supply contract" and "sub-contract" in ss. (1). It seems clear to me, therefore, that the Minister's power of re-negotiation of supply contracts is not limited to those entered into with His Majesty or with those having a government contract.

The next submission of the appellants is that their arrangements or contracts with the company were not, in fact, "supply contracts." It is urged on their behalf that they were merely negotiating sales of cutting tools in precisely the same way and for the same purpose as Harrison had done prior to the war; that they had no precise knowledge as to whether the tools when sold were or were not used in the production of munitions of war, or on projects; and that in many cases their sales were made to jobbers who in turn would sell to persons unknown to them; that they did not keep records of each sale, leaving that duty to the company itself; and that they were not parties to any contract relating to munitions of war or supplies.

Now the supply contracts which the Minister has power to re-negotiate are those defined in section 13(1) (*supra*) and they include not only "supply contracts," but also "sub-contracts" as therein defined. It is apparent from the statement of defence that the respondent relies in the main on its allegation that the appellants were in the position of sub-contractors, para. 2 being as follows:

2 He denies the allegations in paragraphs 2 and 3 of the Statement of Claim and says that during the sixty month period ending December 31, 1945, the appellant, with the meaning of Section 13 of the Department of Munitions & Supply Act, being Statutes of Canada, 1945, Chapter 16

was a party to a contract or arrangement whereby he furnished articles or material for the performance of one or more supply contracts and/or received moneys, payment of which was contingent upon the entry into of one or more supply contracts or was determined with reference to one or more supply contracts and/or performed services consisting of soliciting, attempting to negotiate or negotiating one or more supply contracts.

The allegations in that paragraph are designed to bring the appellants' contracts or arrangements within one or more of the three definitions of "sub-contract" in section 13(1) (*b*). If they fall within any one of the three classifications, then as "sub-contracts" they are by section 13(1) (*a*) also "supply contracts" which by section 13(3) and (4) may be re-negotiated. I do not find it necessary, therefore, to determine whether in negotiating sales on behalf of the company they were parties to a contract whereby they furnished articles or materials for the performance of any other supply contract (s. 13(1) (*b*) (i)). The evidence of the appellants themselves clearly establishes that their contracts or arrangements with the company were of such a nature that, thereunder (1) the amount payable to them was (*a*) contingent upon the entry by the company into a sales contract in the sale of cutting tools; and (*b*) was determined with reference to the amount payable by the purchasers of such tools to the company (s. 13(1) (*b*) (ii)); (2) the services performed or to be performed consisted of soliciting, attempting to negotiate or negotiating sales of cutting tools on behalf of the company (s. 13(1) (*b*) (iii)).

To be "sub-contracts" however, such contracts as I have described must relate to "any other supply contract," and the "other supply contract" relied on by the respondent is, of course, the contract for sales of cutting tools made by the company to the purchasers thereof, as a result of which 10 per cent of the sales price was divisible between the appellants in the proportions I have mentioned. Were these contracts within the definition of supply contracts provided in section 13(1) (*a*)? The appellants have not attempted to satisfy the onus which lies on them to prove that they were not. There was evidence that the appellants had not kept complete records of the sales made but had left that duty to the company. I cannot escape the conclusion that had it been to their interest to do so, the appellants could and would have produced evidence on this point so that the nature of the sales, names of the purchasers

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and of the ultimate users of the tools would have been before the Court. The appellants were under a statutory duty to keep full records, they had their own auditors and one of the appellants—Holland—is now general manager of the company, which undoubtedly would have complete records. At one stage of the proceedings, counsel for the appellants stated that their auditors would be called, but he closed his case without any evidence from them.

On the positive side, however, there is evidence which is sufficient, in my opinion, to establish that the contracts for the sales of cutting tools by the company were, in fact, within the term "any other supply contract." The appellant Spratt stated in cross-examination that as many of the plants he called on were doing secret work, he had no idea what they were turning out; that he and the other appellants took orders for tools "which may or may not have been used for war purpose"; and that he really did not know what they were used for. But he finally agreed that the appellants were selling or supplying *"the kind of tools which war plants would require."*

I consider these statements to be of great importance, more particularly the final admission made by Spratt which I think is sufficient to bring the sales by the company within the definition of "supply contracts" contained in section 13(1) (*a*) (i), in that they were contracts to "manufacture, produce . . . or deal in or which in any way relates to munitions of war or supplies." The latter two terms are defined in the Act as follows:

> 2. In this Act, unless the context otherwise requires, the expression,
>
> (*d*) "munitions of war" means arms, ammunition, implements of war, military, naval or air stores, or any articles deemed capable of being converted thereinto, *or made useful* in the production thereof;
>
> (*e*) "supplies" includes materials, equipment, ships, aircraft, automobile vehicles, animals, goods, stores and articles or commodities of every kind including, but without restricting the generality of the foregoing, anything which, in the opinion of the Minister is, or is likely to be, necessary for or in connection with the production, storage or supply of any munitions of war or necessary for the needs of the Government or of the community in war or for reconstruction as defined in The Department of Reconstruction Act, 1944.

On the evidence of Mr. Spratt that the appellants and the company were supplying tools that war plants would require, it is apparent that "cutting tools" would be made

useful in the production of arms, ammunition and implements of war, and that therefore they fall within the definition of "munitions of war." In any event, they would fall within the very broad definition of "supplies" as being "goods and articles or commodities of every kind," or "as being necessary for or in connection with the production or supply of any munitions of war . . . or necessary for the needs of the Government or *of the community* in war."

Applying the broad meaning of "munitions of war" and "supplies" to the provisions of section 13(1) (*a*) (i), I find that the sales of cutting tools by the company were, in fact, within the term "supply contracts" and that such sales constituted "any other supply contract" referred to in section 13(1) (*b*) (ii) and (iii). The original contract of Spratt and Mulholland with the company, dated January, 1940, was entered into before April 9, 1940, but not then completed; and the second contract with all three appellants was entered into after the said date, and, therefore, both contracts are within the time limits referred to in section 13(1) (*a*).

It follows, therefore, that the contracts or arrangements existing between the appellants and the company were "supply contracts" which the Minister had power to renegotiate.

The appellants did not see fit to put in any evidence as to the commissions earned by them, as to the fair and reasonable cost of performing the contract or as to what could be considered a fair and reasonable profit thereon. There is, therefore, no evidence before me by which I could review the findings of the Minister as to what constitutes the fair and reasonable cost of performing the contract, together with a reasonable profit thereon, or as to the amount which each of the appellants was directed to pay to the Receiver General.

It is submitted for the appellant Spratt and Mulholland that they had but one contract with the company, namely, that of January, 1940, and that therefore as the Minister proceeded under section 13(4) and found that they were parties to "two or more supply contracts," the orders and directions as to them should be set aside. I find no difficulty, however, in reaching the conclusion that as to these two appellants, there were in fact two contracts with

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the company. That of January, 1940, is admitted. The arrangements made in December, 1941, with all three appellants must be considered as a second contract and not merely as a variation of the first contract. In the arrangements then made, the company made its bargain with the three appellants in place of the former bargain with Spratt and Mulholland; the former commission of 10 per cent which had previously been divided equally between Spratt and Mulholland was thereafter to be divided equally between all three appellants; and additional territory was added in which the appellants could operate. Insofar as the appellants Spratt and Mulholland are concerned, I find, therefore, that there were two supply contracts entered into by them with the company. The orders and directions as to Spratt and Mulholland are therefore affirmed.

As to the appellant Holland, there was but one contract, namely, that of December, 1941. It is urged, therefore, on his behalf that the Minister's order and direction as to him (Ex. 2) was wrong in reciting that he was a party to "two or more supply contracts" and that therefore it should be set aside.

Now there is no essential difference between the powers conferred on the Minister under section 13(3) and those conferred on him under section 13(4). Under section 13(4), where two or more supply contracts are involved, the Minister, instead of treating each supply contract separately, may either (*a*) deal with them as a unit and by making but one order and direction; or (*b*) by one order fix the amount payable to a contractor in a designated period and also make certain other adjustments where the contractor has been engaged during the period on business other than the performance of supply contracts. Under both subsections, the Minister's duties are the same, namely, to fix (1) the fair and reasonable cost of performing a contract or contracts together with the fair and reasonable profits thereon, and (2) to direct what amount shall be payable to the Receiver General. In my opinion, these two subsections must be read together, certain essential duties of the Minister being set out only in subsection (3) and being carried forward into subsection (4) only by implication.

It is not shown that the Minister in fixing the amounts which the appellant Holland could retain and the amount which he was required to pay, took into consideration any contract other than Holland's contract of December, 1941, or that in any way his computations in regard thereto were inaccurate. The mere inaccuracy of the reference in the order and direction to "two or more contracts" did not result in any finding other than that which would have followed from a recital of "one supply contract." For that reason I do not think that in the result the appellant Holland has been misled or has suffered any injustice by reason of such mis-recital. Had the order and direction referred only to section 13 and recited that Holland was a party "to a supply contract or contracts," the result would have been precisely the same. It may well be that at the time this order and direction were given, the situation as to the number of contracts entered into by Holland was not at all clear. The statement of defence states that the appellant Holland was a party "to a contract or agreement" and so he has not been in any way misled by the slight error in the Minister's order and direction. In my opinion, it would be quite improper and unjust to set aside that order and direction merely because of a slight inaccuracy in referring to "two or more contracts" where but one contract existed. I must find, therefore, that notwithstanding the error in that order and direction, the basis of the claim for repayment has not been affected and the order and direction for payment by Holland will be affirmed in his case as well.

Each of the three appeals will therefore be dismissed with costs.

I think I should add that the evidence indicated that each of the appellants had paid income tax in each year on his total income. I assume, therefore, that as their incomes in each year have been greatly reduced by reason of the Minister's orders and directions, which are hereby affirmed, that the necessary adjustments of income tax will in each case be made at the proper time.

Judgment accordingly.
