potior est conditio defendentis applies. Any other view would impose a greater burden upon the owner of a lift, than on a person who deliberately transgresses his instructions and surreptitiously enters the lift when the operator is not looking. A person who like the plaintiff voluntarily and unnecessarily exposes herself to a danger by entering a lift without the operator assumes all the risks which reasonably attend such user, and has no right to complain if through her ignorance in working the lift she loses her presence of mind and in consequence injures herself. On this ground alone I think the plaintiff should lose her action. There ought therefore to be judgment for the defendants with costs.

CURLEWIS, J., concurred.

Plaintiff's Attorney: *W. R. Kennerley;* Defendants' Attorney: *F. Kleyn.*

[G. v. P.]

COMMISSIONER OF TAXES v. MESSINA (TRANSVAAL) DEVELOPMENT CO., LTD.

1915. *August* 20, *November* 22. WESSELS and CURLEWIS, JJ.

Income Tax.—Foreign company.—Loss outside the Union.—Deduction.—Taxable income.—Act 28 *of* 1914, *sec.* 14 (1).

In terms of sec. 14 (1) of Act 18 of 1914, a taxpayer is entitled to deduct from the gross amount of his income "losses, outgoings, including interest and expenses actually incurred in the Union" in producing his taxable income. In the return of taxable income of an English company carrying on business in the Transvaal, the public officer of the company deducted a certain amount being proportion of loss in respect of money lent abroad and of money deposited abroad with bankers, who had failed. *Held*, that as the loss was incurred outside the Union it could not be deducted. *Held*, further, (*per* WESSELS, J.), that the loss was *prima facie* a loss of capital and not of income, and could not, therefore, be deducted.

Stated case under sec. 28 of the Income Tax Act, 1914.

The respondent company was incorporated with limited liability under the Company laws of England, had its Head Office in London and was registered in the Transvaal as a foreign company under

Act 31 of 1909. Its objects were *inter alia* (*a*) to acquire and develop certain mining properties in the Transvaal, and to win and work gold, silver, copper, iron or other metals and precious stones; (*b*) to purchase, subscribe for or acquire, and to hold the shares, stocks or obligations of any company in the United Kingdom of Great Britain and Ireland or elsewhere; (*c*) to lend money to any person or company and on such terms as may seem expedient.

Under the provisions of the Income Tax, 1914, the public officer of the respondent company furnished a return of particulars of income for the year ending 30th June, 1914. In making such return of taxable income, an amount of £44,818 15s. was deducted, such amount being a proportion of loss debited to the profit and loss account of the company, in respect of certain money lent in London by the company to the Canadian Agency, Ltd., and certain money deposited with the respondent's bankers in London, which said moneys were lost through the failure of the said agency and the said bankers. The Commissioner, in making the assessment of the tax, disallowed the said deduction, and gave due notice of assessment to the public officer of the company. The said public officer objected to the assessment made by the Commissioner, on the ground that the company was entitled, under sec. 14 (1) (*a*) of the Income Tax Act, 1914, to make such deduction. The Commissioner disallowed the objection, on the ground that (1) the loss was not incurred in the Union by the company in the production of his taxable income; (2) the loss was a loss of capital.

The question of law for the decision of the Court was whether, in ascertaining the taxable income of the company, such deduction should or should not be made.

C. Barry, for the applicant: The question depends upon the meaning of sec. 14 (1) of the Act. "Taxable income" is defined in sec. 4 (2). The question is what is the meaning of the word "losses" in sec. 14, and I submit that word does include losses outside the Union. Counsel referred to D'Arcy-Irvine, *The Land and Income Tax of New South Wales*, pp. 119, 122, 128, 159, 431, *Scottish Investment and Trust Co., Ltd.* v. *Inland Revenue* (31 Sc., L.R. 219), Murray's *Guide to Income Practice*, pp. 75, 115, 191.

J. Stratford, K.C. (with him *J. T. Barry*), for the respondent: The first question is the construction of sec. 14 (1) and the grammatical meaning of the words. Counsel referred to D'Arcy-Irvine

(*ibid*), pp. 2, 119, 122, 310, 456; *Commissioners of Taxation* v. *Teece* (1899, A.C. 254); Dowell, *Income Tax Laws*, 6th ed., p. 183; *Commissioners of Taxation* v. *Antill* (1902, A.C. 422, at p. 428).

Barry replied.

Counsel stated that it had been agreed that there should be no order as to costs.

Curia adv. vult. *Postea* (Nov. 22):—

WESSELS, J.: It appears from the stated case that the Messina Mine is an English company carrying on mining operations in the Transvaal. Besides its mining operations in the Union it also carries on here and elsewhere the business of purchasing stock and shares and of lending money.

In furnishing particulars under the Income Tax Act of 1914, the company has deducted £44,818 15s. as a proportion of loss in respect of certain money lent by the company in London, and certain monies deposited in London with bankers who failed. The Income Tax Commissioner contends that such deduction should be disallowed, because (1) the loss was not incurred in the Union by the taxpayer in the production of his taxable income, and (2) because the loss was loss of capital.

The solution of the first question depends upon the correct meaning of sec. 14 (1) of Act No. 28 of 1914, which reads as follows:—"14 (1) For the purpose of ascertaining the taxable income of any taxpayer there shall be deducted from the gross amount of the taxpayer's income—(*a*) losses, outgoings, including interest and expenses actually incurred in the Union by the taxpayer in the production of his taxable income and including also such expenses incurred outside the Union in the production of the taxable income as the Commissioner may allow."

This section has been taken over from the New South Wales Act. The original is obscure and so is the copy. The relevant words of the New South Wales Act are as follows:—"28 (1) Losses, outgoings, including interest and expenses actually incurred in New South Wales by the taxpayer in the production of his income" (D'Arcy-Irvine: *The Land and Income Tax Law of New South Wales*, p. 119). "28 (V) Notwithstanding the limitation in subsection (1) hereof the Commissioners shall, in cases where it may seem to them just, allow losses, outgoings, and expenses, even if incurred beyond the Colony." (*Ib.*, p. 156.)

The Supreme Court in New South Wales pointed out that the

words "including interest" must be attached to outgoings, and that the section should read: "Losses, outgoings (including interest) and expenses actually incurred, etc." This is obvious, for if we couple "interest" and "expenses" together, the sentence would read: "Losses, outgoings (including interest and expenses) actually incurred, etc." In this case there would be no copulative particle between "losses" and "outgoings" and the structure of the sentence would hardly be correct English.

The next difficulty is to know what exact distinction the legislature drew between "outgoings" and "expenses."

A further difficulty is due to the antithesis between the words "expenses actually incurred in the Union," and "expenses incurred outside the Union." Mr. *Stratford* has pointed out that this antithesis is not to be found in the New South Wales Act. He argues from this antithesis, that the true meaning of the section is, that there ought to be deducted from the gross amount of the taxpayer's income all losses and outgoings of every description, and wherever incurred, and all expenses actually incurred in the Union, together with such expenses incurred outside as the Tax Commissioner may allow. On account of the antithesis he asks us to say that the words, "actually incurred in the Union by the taxpayer in the production of his taxable income," qualify the last word "expenses," and in no way qualify "losses and outgoings."

There is a great deal to be said for this contention because of the special mention made of expenses incurred outside the Union. The latter are not necessarily to be deducted, and therefore we cannot say that the words are mere surplusage and covered by the word "expenses"—they are only to be deducted if the Commissioner allows it. Mr. *Stratford* has referred us to *Teece's* case (1899, A.C., at p. 258), in which the principle is laid down that we must give to the words their natural and ordinary meaning, and construe the Act as we find it. The difficulty, however, is to say what the natural and ordinary meaning is of sec. 14 (1) (*a*).

Mr. *Barry* contends that if we take the definition of taxable income, the natural meaning of sec. 14 (1) (*a*) is that the deduction only refers to losses, outgoings, and expenses incurred in the Union, inasmuch as the legislature is only concerned with sources of income in the Union.

It is significant that our sec. 14 (1) (*a*) is copied from two sections

of the New South Wales Act, viz., 28 (I) and 28 (V), and these sections certainly only allow deductions to be made if the losses, etc., actually occurred in New South Wales, or if they occurred outside, by permission of the Commissioner.

In Act 28 of 1914 sec. 4 (2) taxable income is defined as income which has accrued from any source in the Union. Income from sources outside the Union is not taxed. It is therefore only reasonable to suppose that the legislature was not concerned with outgoings and losses which occur elsewhere, probably because their verification is beyond its control. Hence it seems to me that the more natural interpretation of sec. 14 (1) (*a*) is that the words "actually incurred in the Union by the taxpayer in the production of his taxable income," qualify all three words, "losses, outgoings and expenses," and this would undoubtedly be the correct reading, but for the antithesis. Are we then driven by the fact that there is an antithesis to say that the natural meaning is not the true meaning? I think not.

The legislature may have thought that the Commissioner could judge about small recurrent expenses made abroad in connection with the business, but that he would have little or no opportunity of verifying losses and sporadic expenditure on a large scale. It therefore allowed such lesser expenses incurred abroad, to be deducted as the Commissioner could judge of. This interpretation has two merits; it retains the sense of the New South Wales Act from which the provisions were copied, and it gives a natural meaning to sec. 14 (1) (*a*) in conjunction with the definition of taxable income.

I am therefore of opinion that only such losses and outgoings can be deducted as are incurred in the Union.

It seems clear to me from the statement of case, that the losses and outgoings which the taxpayer seeks to deduct consist either of capital loaned or deposited, or of past income loaned or deposited, or of both. In deciding this second point, I have the advantage of being able to base my decision upon one of the Supreme Court of New South Wales, in which a similar question was raised. I refer to the case of *Foreman* v. *The Commissioners of Taxation*, 1898. A surgeon invested part of his income derived from his profession in shares, and incurred a loss in this investment. He sought to deduct this loss in order to ascertain his taxable income, but the Court held that income invested became capital and could not be deducted. I quote from the judgment of the CHIEF JUSTICE: "I

confess that I am entirely at a loss to know what exact meaning to put upon the words of sec. 28 (1): 'Losses actually incurred by the taxpayer in the production of income.' In the present case, however, we are not called upon to define these words; it suffices to say that they do not mean what the appellant contends they do, viz., a loss of capital. It appears that Dr. Foreman is by profession a surgeon, and invested certain money, which I may assume to be portion of his income or savings, in the shares of certain companies. When so invested that money became capital. During the year 1897 he realised a portion of his capital so invested, with the result that his capital suffered a considerable diminution for that year. He now seeks to set off that diminution as against the income tax payable upon his whole income for 1897. In other words he asks the Court to say that sec. 28 (1) should be construed as if it read: 'From the taxable amount so ascertained every taxpayer shall be entitled to deduction in respect of the annual amount of *losses of capital* actually incurred by the taxpayer in the production of his income.' As I have already stated, I am not prepared to say exactly what the words of the section do mean; but I can see nothing to warrant us in reading the word *capital* into the section. Mr. Pilcher argues that 'in the production of income' means 'in the course of an operation, the object of which is to produce income'; but I do not see how we can put that meaning upon the words of the section, or how a man can be entitled to deduct a loss of capital from his professional income, or from the reduced income produced by his diminished capital."

We must draw a distinction between loss of capital invested and loss of money employed in earning income, though as Mr. *Stratford* points out, it is difficult to see how loss can be anything else but loss of capital. At the same time income invested becomes capital. Of that there is no doubt, and unless this is shown to have been employed in the production of the income, and lost whilst so employed, it cannot be deducted. When once money has been earned as income the *onus* of showing that income tax need not be paid upon such income lies upon the taxpayer.

The loss, therefore, which the respondent seeks to set off is a *prima facie* loss of capital, and not a loss incurred in the Union in the production of taxable income.

CURLEWIS, J.: I have had an opportunity of perusing the judgment of my brother WESSELS and concur with his interpretation of sec. 14 (1) (*a*) of Act 28 of 1914, and have nothing to add to his reasons. I agree that the point of law stated for decision in this case must be answered in favour of the plaintiff, viz., that the deduction of £44,818 15s. should not be made. I prefer to base my conclusion solely on the first ground urged by the plaintiff, namely, that the loss was not incurred in the Union by the defendant in the production of his taxable income, because, though I agree that money invested in loan must be regarded as capital when lost, it is, I think, conceivable that a loss of deposit with a banker on current account may in certain circumstances be regarded as a loss in the production of income and not a loss of capital, and there is nothing before us to show what it was in the present case.

Plaintiff's Attorney: *C. J. Pienaar*, Government Attorney; Defendant's Attorney: *J. MacIntosh.*

[G. v. P.]

DEDLOW v. MINISTER OF DEFENCE & PROVOST MARSHAL.

1915. *November* 15, 19, 26. WESSELS, MASON and BRISTOWE, JJ.

War.—Acts of military authorities.—Jurisdiction of civil courts.—Where war prevails.—Meaning.—Internment of naturalised British subjects of enemy origin dangerous to state.—Military act.

Statutes.—Interpretation.—Effect of title of Act on an unambiguous section.—Act 11 *of* 1915, *sec.* 6.—*Effect.*

Where war prevails the civil courts have no jurisdiction over the acts of the military authorities unless it appears *ex facie* the documents that there is *mala fides* on the part of such authorities. "War" includes such a condition of things as when active warlike preparations, such as recruiting, equipping and despatching of troops are going on, even though there be no actual fighting.

Where the Minister of Defence had ordered the internment of D, a naturalised British subject of German origin, and stated in an affidavit that a state of war existed between the British and German Empires, that the Union of South Africa was actively participating in the military operations both in Europe and in German and British East Africa by recruiting, equipping and