1948

*April 9
*June 25

RODERICK W. S. JOHNSTON.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE...RESPONDENT.

APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Revenue—Income Tax—Whether sub-paras. (a) and (b) of Rule 1, s. 1, para. A of 1st Schedule, Income War Tax Act, are conjunctive—Whether when pursuant to S. 63 (2), pleadings are filed in Exchequer Court, onus of proof is decided by state of such pleadings—Whether such pleadings constitute "an action" or an appeal from taxation—Income War Tax Act, R.S.C., 1927, c. 97, s. 63 (2); Rules 1 and 2 of s. 1, of para. A of 1st Schedule (am. 1944-45, c. 43, ss. 21, 22)—The Exchequer Court Act, R.S.C., 1927, c. 34 (am. 1928, c. 23, s. 4)—Exchequer Court Rule 88.

Held: Rule 2 of Section 1, Paragraph A of the First Schedule of the *Income War Tax Act,* R.S.C. 1927, c. 97, has no relationship to a particular sub-paragraph of Rule 1 under which a person becomes taxable. Rule 1 provides for a certain rate of taxation for persons coming within a number of classes; if among those taxpayers, one is found meeting the description of Rule 2, then the rate is to be as prescribed by that rule.

Held: also,—Locke J. dissenting—Where an appeal under the *Income War Tax Act* has been set down for trial before the Exchequer Court of Canada, such appeal notwithstanding the language of section 63 (2) of the *Income War Tax Act,* is an appeal from taxation, and though pleadings be directed, the burden of proof is not shifted; the taxpayer must establish the existence of facts or law showing an error in relation to the taxation imposed upon him.

Per, Locke J.:—When pursuant to section 63, subsection 2, of the *Income War Tax Act* pleadings have been delivered, then as provided by section 36 of the *Exchequer Court Act,* the question of onus of proof on the various issues to be determined must, in accordance with the practice of the High Court of Justice in England, be decided upon the state of these pleadings. Upon the pleadings in this matter the onus was upon the Minister to prove affirmatively that the appellant supported his wife during the taxation year and, as this was not done, the claim of the Minister failed and the appellant was entitled upon the admissions made to a declaration that he was taxable at the lesser rate provided by Rule 1.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J., (1), dismissing the appeal of the appellant with costs and affirming the assessment made by the respondent under the *Income War Tax Act* for the year 1944.

R. W. S. Johnston for the Appellant.

E. S. McLatchy and *D. W. Mundell* for the respondent.

(1) [1947] Ex. C.R. 483.

*PRESENT: Rinfret, C.J. and Kerwin, Rand, Kellock and Locke JJ.

The judgment of the Chief Justice and of Kerwin and Rand, JJ. was delivered by:—

RAND J.:—This appeal raises a question in the interpretation of Rules 1 and 2 of Section 1 of the First Schedule to the *Income War Tax Act*. These rules, applicable for the year 1944, so far as material, are as follows:—

Rule 1.—A normal tax equal to seven per centum of the income shall be paid by every person whose income during the taxation year exceeded $1,200 and who was during that year:

(*a*) a married person who supported his spouse and whose spouse was resident in any part of His Majesty's dominions * * *

(*b*) a person with a son or daughter wholly dependent upon him for support * * *

(*c*) an unmarried person or a married person separated from his spouse who maintained a self-contained domestic establishment * * *

(*d*) an unmarried minister or clergyman in charge of a diocese, parish or congregation who maintained a self-contained domestic establishment * * *

Rule 2.—If, during a taxation year, a married person described by subparagraph (*a*) of Rule 1 of this section and his spouse each had a separate income in excess of $660, each shall be taxed under Rule 3 of this section: Provided that a husband does not lose his right to be taxed under Rule 1 of this section by reason of his wife being employed and receiving any earned income.

The Exchequer Court confirmed the assessment under which the appellant was held to be liable to the normal tax under *Rule* 3 at the rate of nine per centum per annum instead of under *Rule* 1 at seven per centum, and from that decision the matter is brought here.

In view of the course of the proceedings anterior to the matter becoming an action in the Exchequer Court under sec. 63 (2) of the Act and that no issue of fact in respect of maintenance has been properly raised by the pleadings, Mr. Johnston must be taken to be a married person within the description of paragraph (*a*); but even if we are to take such an issue as raised, on the facts before us there is nothing to justify a reversal of the finding of the Minister or the basis in fact of the assessment that the appellant maintained his wife. At the same time, having three children, he is also within the general language of paragraph (*b*). His contention is that *Rule* 2 applies only to a person who is taxable only under (*a*), and that since he can claim under (*b*) the Rule has no application.

I think this results from a misconception of the effect of *Rule* 2. If its language is carefully examined, it is seen

1948

JOHNSTON v. MINISTER OF NATIONAL REVENUE

Rand J.

to declare that, as a qualification of *Rule* 1, a person coming within a certain description shall, in a certain contingency, be taxed under *Rule* 3: it has no relation to a particular sub-paragraph of *Rule* 1 under which a person becomes taxable. *Rule* 1 provides for a certain rate of taxation for persons coming within a number of classes; if, among those taxpayers we find one meeting the description of *Rule* 2, then the rate is to be as prescribed by that Rule. It is admitted that liability for graduated tax rests upon a similar basis.

The appeal raises also the question of onus. By section 58 any person objecting to the amount at which he is assessed may appeal to the Minister. If the Minister rejects the appeal, under section 60 (1) a Notice of Dissatisfaction may be served on the Minister and the taxpayer shall in it state that he desires his appeal to be set down for trial. By subsection (2),

> The appellant shall forward therewith a final statement of such further facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal as were not included in the aforesaid Notice of Appeal, or in the alternative, a recapitulation of all facts, statutory provisions and reasons included in the aforesaid Notice of Appeal, together with such further facts, provisions and reasons as the appellant intends to submit to the Court in support of the appeal.

Section 61 provides for security for costs by "the party appealing". Section 62 calls for a reply by the Minister to the Notice of Dissatisfaction. Section 63 (1) requires the Minister within two months from the making of the reply to cause to be transmitted to the Exchequer Court (*a*) the income tax return, (*b*) the Notice of Assessment, (*c*) the Notice of Appeal, (*d*) the decision of the Minister, (*e*) the Notice of Dissatisfaction, (*f*) the reply of the Minister, and (*g*) all other documents and papers relative to the assessment under appeal. Subsection (2) declares "the matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing: Provided, however, that should it be deemed advisable by the Court or a judge thereof that pleadings be filed, an order may issue directing the parties to file pleadings." By section 64 the proceeding is to be entitled "In Re The Income War Tax Act, and the appeal of of in the Province of ".

Under section 65 (1) "any fact or statutory provision not set out in the said notice of appeal or notice of dissatisfaction may be pleaded or referred to in such manner and upon such terms as the Court or a judge thereof may direct"; and by subsection (2) "the Court may refer the matter back to the Minister for further consideration".

Notwithstanding that it is spoken of in section 63 (2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

Instead, the taxpayer abstained from making that allegation. As fact it was not raised by the defence although involved in the reference to the rule of the schedule applied by the assessor, but in the reply it was denied as fact. There, then, appeared the first reference to an allegation that should have been in the claim; and on principle I should call it an indulgence to the taxpayer, assuming that he desired to raise that point in appeal, to be permitted so to cure a defective declaration. The language of the statute is somewhat inapt to these technical considerations but its purpose is clear: and it is incumbent on the Court to see that the substance of a dispute is regarded and not its form.

I am consequently unable to accede to the view that the proceeding takes on a basic change where pleadings are directed. The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts and the pleadings are to facilitate the determina-

1948

JOHNSTON v. MINISTER OF NATIONAL REVENUE

Rand J.

tion of the issues. It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy. But unless the Crown is to be placed in the position of a plaintiff or appellant, I cannot see how pleadings shift the burden from what it would be without them. Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him.

The assessment was therefore in order and the appeal must be dismissed with costs.

KELLOCK J.:—There are two questions arising for decision on this appeal. In the first place it is contended by the appellant that as he admittedly falls within clause (*b*) of *Rule* 1 of section 1 of paragraph A of the First Schedule to the Income War Tax Act, he is liable to be taxed under *Rule* 1 and not under *Rules* 2 and 3 and cannot be taken out of the provisions of *Rule* 1 because he may also be within clause (*a*).

In my view this argument is unsound. I think the proper construction of the statute is that a person like the appellant, who may fall within the language of clause (*b*) but also falls within clause (*a*) is, by the express provision of *Rule* 2, taken out of the first rule and becomes liable to tax under the second and third rules. Even though the appellant be within clause (*b*) he is "a married person *described* by subparagraph (*a*) of *Rule* 1" and therefore subject to the provisions of *Rule* 2.

The second contention is that the appellant does not, in any event, fall within clause (*a*) of *Rule* 1 as he is not a person who in fact "supported his spouse" and that therefore, as he comes within clause (b) he remains for taxation purposes within *Rule* 1.

The learned trial judge held that the onus was upon the appellant to establish the facts in support of this contention and that he had failed to do so.

In his return the appellant claimed to be taxable for normal tax at the rate of 7 per cent and claimed "married

or equivalent status" with respect to liability for graduated tax. Item 29 of the return to which the tax payer is referred on the face of the return reads as follows:

29. *Normal Tax*
The rates are to be applied to Item 9C.

MARRIED STATUS

(1) A married person who supported his (her) spouse (other than by payment of alimony or other similar allowance)—except when within (5), (6) or (7) below.

(2) A person who supported (other than by means of the payment of alimony or other similar allowance) a wholly dependent son, daughter, son-in-law or daughter-in-law (See Item 37) except when within (3), (5) or (6) below.

(3) An unmarried person, widow(er) or a married person separated from his (her) spouse who maintained in 1944 a "self-contained domestic establishment" with a dependent relative therein (complete Item 49).

SINGLE STATUS

(4) A single person—except when within (2) or (3) above.

(5) A married man whose wife had an income in excess of $660 from sources other than wages or salary.

(6) A married woman whose husband had an income in excess of $660 from any source.

(7) A married person whose spouse was not resident in Canada, in the British Empire or in an Allied country (See item 38.)

(8) A married person who did not support his (her) spouse, or a married person who paid alimony or other similar allowance to his (her) spouse when living apart—except when within (2) or (3) above.

The Minister rejected the appellant's claim and assessed him in fact under the provisions of *Rules* 2 and 3. The Notice of Assessment gave as the basis for this assessment the following:

You have been assessed as a single person with three dependents, your wife having income from sources other than wages or salary in excess of $660.

thus indicating that in the decision of the Minister the appellant fell within Item 29 (5), namely, a married person who, although supporting his spouse, had an income in excess of $660 from unearned sources.

The appellant appealed to the Minister in pursuance of section 58 of the Act, which by subsection 3 required him to follow the statutory form of Notice of Appeal and to "set out clearly the reasons for appeal and all facts relevant thereto". In his Notice of Appeal, dated 24th April, 1946, the appellant nowhere contended that he was not a person falling within clause (*a*) of *Rule* 1, nor did he set forth any facts with respect to the question of support or non-support.

1948

JOHNSTON v. MINISTER OF NATIONAL REVENUE

Kellock J.

In his factum the appellant is frank in stating that this issue which he described as the "secondary issue" was only raised in reply, that is, he did not raise the issue until his appeal to the Minister had been disposed of by the Minister and the appellant had taken the proceedings under sections 60 and 63 by which the appeal found its way into the Exchequer Court and an order for pleadings had been made.

In the Exchequer Court no evidence was called by either party but the following admission of facts was filed:

> For the purpose of this Matter, and without prejudice to the admission of the fact contained in paragraphs numbered 1, 2, 3, 4 and 6 of the Statement of Claim, it is further admitted that in the year 1944:
>
> (1) The Appellant and his spouse occupied the same dwelling.
>
> (2) The Appellant's income exceeded the income of his spouse.
>
> (3) The Appellant and his spouse both contributed to the maintenance of a common household in such dwelling, the operation of which was managed by the Appellant's spouse.
>
> (4) The whole income of the Appellant's spouse was expended for her personal expenses and as a contribution to the expenses of such common household.

As I read the provisions of the statute commencing with section 58, a person who objects to an assessment is obliged to place before the Minister on his appeal the evidence and the reasons which support his objection. It is for him to substantiate the objection. If he does not do so he would, in my opinion, fail in his appeal. That is not to say, of course that if he places before the Minister facts which entitle him to succeed, the Minister may arbitrarily dismiss the appeal. No question of that sort arises here, and I am deciding nothing with respect to it.

I further think that that situation persists right down to the time when the matter is in the Exchequer Court under the provisions of section 63. I regard the pleadings, which may be directed to be filed under subsection 2 of that section, as merely defining the issues which arise on the documents required to be filed in the court without changing the onus existing before any such order is made. In my opinion therefore the learned judge below was right in his view that the onus lay upon the appellant.

I further do not think that the admitted facts establish that which it lay upon the appellant to show. It was admitted that both the appellant and his wife contributed to the maintenance of the common household and that the whole income of the appellant's spouse was expended for

her personal expenses and as a "contribution" to the expenses of the common household. Nothing was shown as to the size of this contribution nor the relationship of that contribution to the amount actually required for her support. I think a husband may continue to support his wife within the meaning of the statute although his wife may supply some money toward meeting the cost of maintenance of the household. It is in each case a question of fact as to whether the wife supported herself or not. Whether this matter were made the subject of allegation in the Statement of Claim, as I think it more properly should have been, or in the reply, it was for the appellant to support it by evidence. He failed to do so and in my opinion therefore the appeal should be dismissed with costs.

LOCKE J.: (dissenting)—The appellant was during the taxation year 1944 a married man resident in Canada, having three children all under the age of eighteen years wholly dependent upon him for support. During the period in question his wife had a separate income in excess of $660 none of which was earned income, and written admissions were filed at the hearing in the Exchequer Court proving that during the period in question the appellant and his wife occupied the same dwelling, both contributed to the maintenance of the common household the operation of which was managed by the wife whose entire income was expended for her personal expenses and as a contribution to the expenses of the household, and that the appellant's income exceeded that of his wife. Upon this state of facts the appellant claimed that under the terms of *Rule* 1(*b*) of the First Schedule to the *Income War Tax Act* he was liable for normal tax at the rate of seven per centum of his income: in addition the appellant claimed other deductions which will be later referred to. The assessment disallowed these claims and assessed the appellant as a single person with three dependents upon the stated ground that his wife had an income from sources other than wages and salary in excess of $660 and on appeal to the Minister the assessment was confirmed. Upon the appellant serving a notice of dissatisfaction, as required by sec. 50 of the Act, the Minister delivered a reply denying the allegations in the notice of appeal and notice of dissatisfaction, in so far as they were incompatible with the statements contained

1948

JOHNSTON v. MINISTER OF NATIONAL REVENUE

Locke J.

in his decision and affirmed the assessment as levied. Upon the Minister complying with sec. 63 of the Act and transmitting the specified documents to the Registrar of the Exchequer Court, an order was issued directing the parties to file pleadings and the appellant filed a Statement of Claim alleging the facts above recited and claiming a declaration that he was liable to be assessed for normal tax at the rate of seven per centum for the taxation period in question and to the other deductions claimed.

By the Statement of Defence the Minister admitted the allegations made in so far as they were allegations of fact and not conclusions of law: as to the claim that the normal tax should be limited to seven per centum the defence alleged:—

> That the appellant was subject to normal tax at the rate of nine per centum as provided by Rules 2 and 3 of section 1 of paragraph A of the First Schedule of the *Income War Tax Act*.

As to the other deductions claimed the appellant's right was expressly denied. *Rule* 2 of sec. 1 of the First Schedule to the Act says that if during the taxation year a married person described by subpara. (*a*) of *Rule* 1 and his spouse each had a separate income in excess of $660 each shall be taxed under *Rule* 3. The married person described by subparagraph (*a*) of *Rule* 1 is one who supported his spouse and whose spouse complied with the requirements of the subparagraph as to residence. *Rule* 3 provides that the normal tax imposed should be at the rate of nine per centum in respect of an income such as that of the appellant. While the Minister had not, as required by *Rule* 88 of the Exchequer Court, stated the material facts upon which he relied to bring the appellant within the purview of *Rules* 2 and 3 but merely stated as a conclusion of law that the appellant was subject to taxation as provided by *Rules* 2 and 3, the appellant filed a Reply and Joinder of Issue in which he denied that he was a married person described by subpara. (*a*) of *Rule* 1 of sec. 1, or by subpara. (*a*) of *Rule* 3 of sec. 2, and joined issue.

Sec. 63, s-s. 1, of the *Income War Tax Act* specifies the documents to be transmitted to the Court by the Minister. S-s. 2 is as follows:—

> The matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing. Provided, however, that should it be deemed advisable by the Court or a judge thereof that pleadings be filed, an order may issue directing the parties to file pleadings.

Sec. 36 of the Exchequer Court Act, as enacted by *cap.* 23, Statutes of 1928, provides that the practice and procedure in suits, actions and matters in the Court shall, so far as they are applicable and unless it is otherwise provided for by the Act or by general rules made in pursuance of the Act, be regulated by the practice and procedure in similar matters in His Majesty's High Court of Justice in England on the first day of January, 1928. At the hearing of what is designated an appeal but which is clearly to be treated in the terms of sec. 63, s-s. 2, of the *Income War Tax Act,* as the trial of an action, the learned trial Judge considering that the onus was upon the taxpayer to establish that the appellant supported his wife or that he did not do so and that the burden was upon him to establish from the "facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal" that the assessment was incorrect, and finding that this had not been done dismissed the appeal. Upon the appeal to this Court we were referred to a decision of the learned President of the Exchequer Court, *Dezura* v. *Minister of National Revenue* (1) at 469, wherein it was said that the onus of proof of error in the amount of the determination rests on the appellant.

With respect, I am unable to agree that this is so in any case where pleadings have been delivered. The decision of the learned trial Judge appears to me to overlook the fact that pleadings defining the issue were delivered and that, in accordance with the practice in the High Court of Justice in England referred to in sec. 36 of the Act, the question of onus on the various issues to be determined must be decided upon the state of these pleadings. It is true that sec. 60, ss. 2, of the *Income War Tax Act* says that the appellant with his Notice of Dissatisfaction shall forward to the Minister a final statement of such further facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal, or in the alternative a recapitulation of all facts, statutory provisions and reasons included in the Notice of Appeal, together with such further facts, provisions and reasons as the appellant intends to submit to the Court in support of the appeal, but when, as provided by sec. 63, ss. 2, the matter is to be deemed an

(1) [1948] 1 D.L.R. 465.

1948

JOHNSTON v. MINISTER OF NATIONAL REVENUE

Locke J.

action in the Court ready for trial or hearing and pleadings have been delivered, the matter is, in my opinion, to be proceeded with in the same manner as any other trial. It cannot be treated both as an appeal to be determined upon the material submitted to the Minister and as a trial upon pleadings where either party may adduce whatever evidence they see fit to call. In my view the statement referred to in sec. 60, ss. 2, is not to be considered otherwise than as an argument: it is clearly not evidence. Whatever may be said for a contrary view, the nature of the proceeding appears to me to be made clear when, as permitted by sec. 63, ss. 2, pleadings are ordered and filed. The parties are then in the same position as other litigants in the Court and the position of the Crown, at least in respect to the burden of proving its case, is the same as that of any other litigant. In this situation the statute has said that the practice of the High Court of Justice governs: what that practice is does not admit of doubt. In *Daniell's Chancery Practice,* 8th Ed. 498, it is said that it may be laid down as a general proposition that the point in issue is to be proved by the party who asserts the affirmative, according to the maxim of the civil law: *ei incumbit probatio qui dicit, non qui negat.* In *Taylor on Evidence,* 12th Ed. (Vol. 1, p. 252), it is said:—

> The burthen of proof lies on the party who substantially asserts the affirmative of the issue. * * * The best tests for ascertaining on whom the burthen of proof lies are to consider first which party would succeed if no evidence were given on either side.

In Odger's *Pleading and Practice,* 12th Ed. p. 129, it is said that as a general rule the burden will lie on your opponent to prove at the trial the facts which you have traversed, but the burden will lie on you to prove the facts which you have alleged by way of confession or avoidance and you will not be allowed to shift the onus of proof by traversing when you should confess and avoid, even where your opponent has given you the opportunity by introducing an unnecessary averment into the preceding pleading. The same author (p. 287) says further:—

> What the issues are appears, or ought to appear, clearly from the pleadings. From the pleadings also it can at once be ascertained on which party lies the initial burden of proof on each issue—though it may soon be shifted to the other party. "The burden of proof" is the duty which lies on a party to establish his case. It will lie on A, whenever A must either call some evidence or have judgment given against him.

As a rule it lies upon the party who has in his pleading maintained the *affirmative* of the issue; for a negative is in general incapable of proof. *Ei incumbit probatio qui dicit, non qui negat.* The affirmative is generally, but not necessarily, maintained by the party who first raises the issue. Thus, the onus lies, as a rule, on the plaintiff to establish every fact which he has asserted in the Statement of Claim, and on the defendant to prove all facts, which he has pleaded by way of confession and avoidance, such as fraud, performance, release, rescission, etc.

Dealing with the question as to which side has the right to begin, Odger says that this depends entirely on the pleadings (p. 302). There is nothing in the Rules of the Exchequer Court which in any way render these principles inapplicable to proceedings such as those under consideration here and, in my view, they apply. The decisions under the English Act to which we were referred, to the effect that the onus is on the appellant to show that the assessment is wrong, do not assist, since there is there no statutory provision corresponding to sec. 60, ss. 2, of the *Income War Tax Act* and pleadings are not delivered.

Here the defence admitted the allegations of fact made by the appellant upon which he relied in support of his contention that he was liable to the normal tax at the lower rate. While admitting these allegations the defence set up certain matters by way of confession and avoidance: the allegations in paragraph 4 of this pleading, in so far as they dealt with the question of normal tax, consisted of an allegation that the income of the appellant's spouse had exceeded $660 and was not earned income, and the statement that the appellant was subject to normal tax at the rate of nine per centum, as provided by *Rules* 2 and 3 of sec. 1 of Paragraph A of the First Schedule of the *Income War Tax Act.* This plea did not comply with *Rule* 88 of the Exchequer Court which requires (as does its counterpart, O. 19, R. 4 of the Supreme Court of Judicature) that every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies. Whenever the right claimed or the defence raised is the creature of statute, being unknown to common law, every fact must be alleged necessary to bring the case within the statute (Odger, 12th Ed. p. 86). Here, instead of alleging the facts relied upon to make applicable the provisions of subpara. (*a*) of *Rule* 1, the defence pleaded a conclusion of law. Allegations of this nature need not be

1948

JOHNSTON v. MINISTER OF NATIONAL REVENUE

Locke J.

traversed (Bullen & Leake, 9th Ed. p. 541): the appellant, however, in his reply denied that he was a married person described in the subparagraph and in this form the pleadings must be taken to raise the issue (*Lush* v. *Russell,* 1850, 5 Exch. 203).

In this state of the pleadings the appellant, whose position was that of the plaintiff in the trial referred to in sec. 60, ss. 2, was entitled to rest his case, that he was subject only to the lower rate of normal tax imposed by subpara. (*b*) of *Rule* 1, upon the admissions made in the Statement of Defence and the further written admissions made on behalf of the defendant. The effect of the defendant's plea in the circumstances was to allege affirmatively that the appellant was a married person who supported his spouse within subpara. (*a*) and, therefore, liable to taxation at the higher rate. The onus was upon the defendant to prove that this was a fact but he tendered no evidence. The matter was, therefore, left in this state that it was admitted by the parties that the appellant's spouse was in receipt of a private income in excess of $660 and less than $16,420, that the husband and wife occupied the same dwelling, both contributing to the maintenance there of a common household, and that the whole of the wife's income was expended for her personal expenses and as a contribution to the expenses of the household. The meaning to be assigned to the written admission is, in my opinion, that the wife clothed herself and provided the money for her personal incidental expenses, that this did not exhaust her income and that she contributed the balance to the upkeep of the family home. The learned trial Judge found that the evidence did not establish whether or not the appellant supported his wife and considering the onus of proving the facts to be on the appellant held that the appeal failed. As, in my opinion, the onus was upon the defendant to prove affirmatively that the appellant did support his spouse during the taxation year and as this was not done the claim of the Minister fails and the appellant was entitled to a declaration that he was taxable under subpara. (*b*) of *Rule* 1.

It was argued before us that there was a presumption of fact that the appellant "supported his spouse" within the meaning of subpara. (*a*) upon the ground that at law it is the duty of the husband to maintain his wife according to

his condition or estate in life or according to his means of supporting her, and it should be inferred that he discharged this legal duty. I am not of the opinion that any such presumption of fact should be made in a matter of this nature. If there was such a presumption of fact in the present case it appears to me to be rebutted by the written admission made on behalf of the Minister that the wife clothed herself and contributed to the upkeep of the family home. The word used in subpara. (*a*) of *Rule* 1 is "support" and the word is to be assigned its ordinary meaning: this is a taxing statute and in accordance with long recognized principles is to be construed strictly: the subject is not to be taxed unless the language of the statute clearly imposes the obligation (Maxwell, *On the Interpretation of Statutes,* 9th Ed. p. 291). Here it is established by the admission that the spouse, at least partially, supports herself and assists in the maintenance of the family home. I do not think that subpara. (*a*) of *Rule* 1 is to be interpreted as if it read: "a married person who supported his spouse or contributed to her support": and upon the admitted facts it must be given this interpretation if liability under this subparagraph is to be found.

The appellant argued before us that even if there had been evidence that he was a married person who supported his spouse within the meaning of that expression as used in subpara. (*a*) that he was also clearly within subpara. (*b*) of *Rule* 1 and entitled to the lower rate. In the state of the record I consider it unnecessary to deal with this question.

The appellant further claimed to be entitled to a declaration that he was entitled to deduct $150 from the graduated tax under the terms of subpara. (*b*) of *Rule* 3 of sec. 2 of the First Schedule to the Act. The Minister has disputed this on the ground that the appellant was a married person described by subpara. (*a*) of *Rule* 3 of Sec. 2, the terms of which are identical with those of subpara. (*a*) of *Rule* 1. This contention was not supported by any evidence while the fact that the appellant was a person with three children under eighteen years of age wholly dependent upon him for support was admitted. It follows, in my opinion, that the appellant was entitled to this deduction from the graduated tax.

1948

JOHNSTON v. MINISTER OF NATIONAL REVENUE

Locke J.

The appellant further claims to be entitled to deduct from the taxes otherwise payable by him the sum of $1,000 under the terms of subpara. (i) of para. (*d*) of sec. 7A of the Act: the defendant contends that as the appellant is a person subject to tax under *Rule* 3 of sec. 1 of para. A of the First Schedule this deduction should be $800 only. As the appellant was, in my opinion, a person subject to tax under subpara. (*b*) of *Rule* 1 of sec. 1 and as $1,000 is less than ten per centum of his taxable income he is entitled to deduct that amount.

The appeal should be allowed, with costs in this Court and in the Exchequer Court, and the appellant assessed for the taxation year 1944 in accordance with the above findings.

Appeal dismissed with costs.

Solicitors for the Appellant: *Johnston, Heighington & Johnston.*

Solicitor for the Respondent: *W. S. Fisher.*