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*May 14, 15
*Oct. 6

ARMY AND NAVY DEPARTMENT STORE LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

AND

ARMY AND NAVY DEPARTMENT STORE (WESTERN) LIMITED ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Related corporations—Whether owners of shares are persons not dealing with each other at arm's length—Persons connected by blood relationship and marriage—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 36, 127.

One half of the shares of the appellant company W. was owned by the appellant company A. and the other half was owned by company S. All the shares of company A. and company S. were owned by two brothers, their brother-in-law and the son of one of the brothers. The Minister regarded all three companies as related corporations by virtue of s. 36(4) of the *Income Tax Act* and designated company S. to receive the benefit of the lower tax rate for the years 1949 and 1950 under s. 36(1) and companies W. and A. to be assessed under s. 36(2). The assessment was confirmed by the Exchequer Court.

Under s. 36(4), a corporation is related to another if one of them owned directly or indirectly 70 per cent or more of all the issued common shares of the capital stock of the other, or if 70 per cent or more of all the issued common shares of each are owned directly or indirectly by (i) one person, (ii) two or more persons jointly, or (iii) persons not dealing with each other at arm's length, one of whom owned directly or indirectly one or more of the shares of each of the corporations.

*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ.

Held: (Estey J. dissenting), that company W. was not related to either company A. or company S. as neither company owned directly or indirectly 70 per cent of the shares of company W.; nor were 70 per cent of the shares of company W. owned directly or indirectly by one person or by two or more persons jointly; and even though companies A. and S. were persons not dealing with each other at arm's length, neither of them owned any shares in the other.

Per Curiam: Companies A. and S. were related corporations within the meaning of s. 36(4)(*b*)(iii), since the shares of both, being owned by persons connected by blood relationship or marriage, were owned by persons not dealing with each other at arm's length.

Per: Taschereau, Locke and Fauteux JJ.: The two brothers and the son were connected by blood relationship since they stood in lawful descent from a common ancestor (*In re Lanyon* [1927] 2 Ch. 264), and the brother-in-law, since he was married to a sister of the two brothers, was connected with them by marriage within the meaning of s. 127(5)(*c*).

Per Cartwright J.: To be deemed by s. 127(5)(*b*) not to deal with each other at arm's length, corporations must be controlled by the same person; it is not sufficient that they are controlled by the same group of persons.

Per Cartwright J.: Shareholders, either individually or collectively, do not have any ownership direct or indirect in the property of the company in which they hold shares.

APPEAL from the judgment of the Exchequer Court of Canada (1) Archibald J., holding that both appellant companies were related corporations.

M. M. Grossman Q.C. for the appellants.

J. D. C. Boland and K. E. Eaton for the respondent.

The judgment of Taschereau, Locke and Fauteux JJ. was delivered by:—

LOCKE, J.:—These appeals were taken by Army and Navy Department Stores (Western) Limited, a company incorporated under the *Companies Act of British Columbia,* and Army and Navy Department Stores Limited, a company incorporated under the *Companies Act of Alberta,* from judgments delivered by the late Mr. Justice Archibald in the Exchequer Court (1), and were heard together.

The facts to be considered are, however, not identical and the appeals must be considered separately.

The British Columbia company, which I will refer to as the Western Company, carries on business in the City of New Westminster. For its fiscal year ending October 31, 1949, the company filed a return showing a profit of $58,651.96 and computed its tax under the provisions of the

(1) [1952] Ex. C.R. 546.

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Income Tax Act at $17,055.15, which amount was paid. By an assessment dated October 24, 1950, the Minister of National Revenue assessed the company a tax for the said period in the amount of $19,061.08. The dispute is as to its liability for this difference.

Section 36 of the *Income Tax Act* (11-12 Geo. VI, cap. 52) 1948, as amended both before and after the Western company made its return, as it applied to income for the year 1949, reads as follows:—

36. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the 'amount taxable') for a taxation year is, except where otherwise provided,

(*a*) 15 per cent of the amount taxable if the amount taxable does not exceed $10,000, and

(*b*) $1,500 plus 38 per cent of the amount by which the amount taxable exceeds $10,000 if the amount taxable exceeds $10,000.

(2) Where two or more corporations are related to each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 38 per cent of the amount taxable for the taxation year.

(3) Notwithstanding subsection (2), where two or more corporations are related to each other, the tax payable by such one of them as may be agreed by them or, if they cannot agree, as may be designated by the Minister shall be computed under subsection (1).

(4) For the purpose of this section, one corporation is related to another in a taxation year if, at any time in the year,

(*a*) one of them owned directly or indirectly 70 per cent or more of all the issued common shares of the capital stock of the other, or

(*b*) 70 per cent or more of all the issued common shares of the capital stock of each of them is owned directly or indirectly by

(i) one person,

(ii) two or more persons jointly, or

(iii) persons not dealing with each other at arms length one of whom owned directly or indirectly one or more of the shares of the capital stock of each of the corporations.

This section is applicable to the 1949 and subsequent taxation years.

(5) When two corporations are related, or are deemed by this subsection to be related, to the same corporation at the same time, they shall, for the purpose of this section, be deemed to be related to each other.

Section 127 as it applied to that period read:—

For the purposes of this Act,

(*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,

(*b*) corporations controlled directly or indirectly by the same person, or

(c) persons connected by blood relationship, marriage or adoption, shall, without extending the meaning of the expression 'to deal with each other at arms length' be deemed not to deal with each other at arms length.

The difference between the amount of the tax of the Western company for the period as computed by it and the amount of the tax assessed was due to the fact that the Minister assessed the tax under ss. (2) of s. 36, while the company claimed that the tax should be levied under the provisions of ss. (1). The company gave a notice of objection to the assessment to the Minister who confirmed the assessment. The company then appealed to the Income Tax Appeal Board and, in a considered judgment delivered by Mr. R. S. W. Fordham, Q.C. on October 29, 1951, for the Board, the appeal was dismissed.

There is no record of the proceedings before the Board before us and we are not informed as to whether or not evidence was given by the appellant. The Minister of National Revenue, in notifying the company that he had confirmed the assessment, had stated that the assessment rested on the ground that the taxpayer and the Army and Navy Department Stores Limited were related companies, within the meaning of ss. (4) of s. 36: the company referred to was apparently the Alberta company, one of the appellants in these proceedings. The judgment of the Tax Appeal Board found that one half of the shares of the Western company were owned by the Alberta company and that the other half, less two shares, was owned by a Saskatchewan company of the same name. The shareholdings in the Alberta and Saskatchewan companies were found to be as follows:

Alberta company	shares	Saskatchewan company	shares
H. R. Cohen	50,000	H. R. Cohen	100,000
S. J. Cohen	10,000	S. J. Cohen	100,000
S. D. Leshgold	40,000	J. W. Cohen	50,000

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As to the remaining shares in the Western company, it was found that H. R. Cohen was the owner of one and that the remaining share was owned by a stranger. After finding that H. R. Cohen and S. J. Cohen were brothers and Leshgold their brother-in-law and that J. W. Cohen (a son of S. J. Cohen) was a blood relation of the two first named, the reasons for judgment proceeded:—

> While the said 2,500 shares of the appellant company's stock are owned by the Alberta company as such, and not by the individual shareholders of the latter, I find it difficult to escape the conclusion that there was at least indirect control of the appellant company by H. R. Cohen, S. J. Cohen and S. D. Leshgold. Bearing in mind the far-reaching words found in section 36(4)(*b*), 'owned directly *or indirectly*', it does not, I think, conflict with the effect of Salomon v. Salomon, (1897) A.C. 22, to hold that these three holders (sic) of the Alberta company were in a position to exercise full, even if indirect, control over the activities of the appellant company by virtue of their substantial holdings in the former. In the case of H. R. Cohen, his voting power was augmented by his two-fifths interest in the Saskatchewan's company's shares. It is significant too that he was also not at arm's length with its two other shareholders, they being closely related to him.
>
> The Minister's decision did not show which of the two prairie province companies was deemed related to the appellant company. It matters little, however, as both companies' shares were held mostly by the Cohens, and the shareholdings of each company in the appellant company's stock were about equal, as indicated above.

It is apparent from the reasons delivered that there was no evidence before the Tax Appeal Board that the two shares in the Western Company to which reference was made were the property of the Saskatchewan company, as was shown in the evidence taken before Archibald J. It was there shown by the evidence of the secretary of the Saskatchewan company that it was the owner of 2,500 of the shares of the Western company but held a certificate for 2,498 shares only, one share having been issued to H. R. Cohen and one to S. D. Leshgold, in order to qualify them as directors. The transfer form on the back of these two certificates had been signed by Cohen and Leshgold respectively and it was shown that the shares were held by the solicitors for the Saskatchewan company on its behalf. There was no contradiction of this evidence.

Mr. Justice Archibald, who disposed of the appeal of the Alberta company at the same time as he dismissed the appeal of the Western company, did not mention the fact that it had been proven that the ownership of the shares was divided equally between the Alberta and the Saskatchewan companies and I think it is clear that he did not

consider the effect that this had upon the issue in the appeal. His reasons merely stated that he dismissed the appeal of the Western company for the reasons given in his decision on the appeal of the Alberta company. The issue in that appeal, however, was different.

Upon the undisputed evidence the facts accordingly are that during the taxation period in question the 5,000 issued shares of the Western company were owned one half by the Alberta and one half by the Saskatchewan company. The Western company was entitled to be taxed under the terms of ss. (1) of s. 36, unless it lost that benefit by reason of being "related" to one of the other companies, as that expression is defined by ss. (4) of s. 36. Neither the decision of the Minister nor of the Tax Appeal Board nor of Archibald J. mentioned to which corporation the Western company was related but, if I understand correctly the argument addressed to us on behalf of the Minister, the Crown's position is that it was related to both the Alberta and the Saskatchewan companies. Since, however, neither the Alberta nor the Saskatchewan company owned 70 per cent of all the issued common shares of the capital stock of the western company, para. (*a*) of ss. (4) cannot apply. As to para. (*b*) it is not suggested that 70 per cent of the issued common shares were owned by one person or by two or more persons jointly, so that if the Western company is to be deprived of the benefit of ss. (1) it must be under the terms of subpara. (iii) of para. (*b*). The expression "persons" include corporations under the definition of that term in s. 127(1)(*ab*) of the *Act*. If it be assumed that the Alberta and the Saskatchewan companies are persons not dealing with each other at arm's length, there still remains the fact that while each owned half of the shares of the Western company the Alberta company did not own any of the shares of the Saskatchewan company nor did the Saskatchewan company own any shares in the Alberta company. Accordingly, subpara. (iii) has no application. With respect, the reasons for the judgment of the Tax Appeal Board do not appear to me to touch the question to be decided. In my opinion, the Western company was entitled to be taxed under the provisions of ss. (1) of s. 36.

The appeal of the Alberta company raises a quite different issue. As has been shown above, H. R. Cohen and his brother-in-law Leshgold owned 90,000 of the 100,000 issued

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shares of the Alberta company and H. R. Cohen owned 100,000 of the shares of the Saskatchewan company. In addition to this, S. J. Cohen, a shareholder of the Alberta company, was the owner of 100,000 shares of the Saskatchewan company and his son J. W. Cohen 50,000 shares. If, therefore, the Cohens and Leshgold were persons not dealing with each other at arm's length, the conditions of subpara. (iii) are complied with and the two corporations are to be deemed related.

For the appellant it is said that the expression "blood relationship" is so vague and uncertain as to be incapable of interpretation. In support of this contention, the cases on the construction of the words "relatives" or "relations" in matters involving the interpretation of wills such as *Ross* v. *Ross* (1), *In Re Lanyon* (2), and *Sifton* v. *Sifton* (3), are relied upon. *In Re Lanyon,* the testator by his will provided that his trustees should stand possessed of his residuary estate upon trust to pay the income to his son for his life and on his decease upon trust to pay the capital to his children or grandchildren or equally between them if more than one, provided that his son did not marry a "relation by blood." It was contended that the condition was void for uncertainty. Russell, J. by whom the matter was decided, considered that the meaning of "blood relationship" was clear and that it described the relationship existing between two or more persons who stand in lawful descent from a common ancestor. He did not consider the provision in the will void for uncertainty but held it to be ineffective as being contrary to public policy as being a restraint upon marriage. In *Sifton's* case, Lord Romer who delivered the judgment of the Judicial Committee, after referring to the meaning attributed to the expression "blood relation" by Russell J., said that, in their Lordships' opinion, the condition might have been held to be void for uncertainty as, if the testator did not intend by the use of the expression to include the whole human race, he had failed to specify the number of generations in which no common ancestor of the spouses was to be found. I do not think that these decisions are of assistance in determining the present matter. The fact that there would undoubtedly be difficulty in determining the scope of the expression in

(1) (1894) 25 Can. S.C.R. 307. (2) [1927] 2 Ch. 264.
(3) [1938] A.C. 656.

some circumstances does not render the words meaningless. The question here to be determined is whether H. R. Cohen, S. J. Cohen and J. W. Cohen are connected by blood relationship. The three men are shown by the evidence to be descended from a common ancestor, the father of H. R. and S. J. Cohen. Accepting the meaning attributed to the expression by Russell J., which I think to be the correct one, these men are connected by blood relationship.

This does not, however, dispose of the matter since, while the three Cohens owned all of the shares in the Saskatchewan company, Leshgold owned 40 per cent of the shares in the Alberta company. Leshgold is married to a sister of H. R. and S. J. Cohen and the question is, therefore, whether he is "connected by marriage" with them, within the meaning of the subparagraph. The matter is to be considered without reference to the amendment made to s. 127 by s. 31 of c. 29 of the Statutes of 1952, by which the expression was defined. Without overlooking the necessity for clarity in the language of a taxing statute, I am of the opinion that this language is sufficiently clear. One of the meanings assigned to the word "connection" in the New Oxford Dictionary is: relationship by family ties as marriage or distant consanguinity, and a second: a person who is connected by others by ties of any kind, especially a relative by marriage or distant consanguinity. In Webster's New International Dictionary, the word is similarly defined. In this sense, which I think to be the natural and ordinary meaning of the expression, Leshgold and the Cohen brothers were connections and so "connected by marriage", within the meaning of s. 127(5)(*c*). As Leshgold and H. R. Cohen between them owned 90 per cent of the shares of the Alberta company, the conditions of s. 36(4)(*b*)(iii) were complied with and the Alberta and Saskatchewan companies were "related" to each other, within the meaning of s. 36(3).

It is stated in the factum of the appellant that the Minister of National Revenue had of his own motion and without consulting the Alberta and Saskatchewan companies designated the latter as the corporation to be taxed under ss. (1) of s. 36. Subs. (3) provides that when two or more corporations are related to each other the tax payable by such one of them as may be agreed by them shall be computed under ss. 1 and that it is only where they cannot

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agree that the company to be so taxed may be designated by the Minister. We have no record of the proceedings before us in which the Minister is said to have made this direction. In the absence of any evidence on the point, I think we cannot be asked to assume that the Minister acted without evidence satisfactory to him that the parties could not agree which should receive this benefit, if only one was entitled to it.

In the result, the appeal of the Western company should be allowed with costs throughout and judgment entered declaring that, for the taxation period in question, that company was entitled to be taxed under the provisions of ss. (1) of s. 36. The appeal of the Alberta company should be dismissed with costs.

ESTEY, J. (dissenting in part):—There are here two appeals, one by Army & Navy Department Store Limited, an Alberta company (hereinafter referred to as the Alberta Corporation) and the Army & Navy Dept. Store (Western) Limited, a British Columbia company (hereinafter referred to as the Western Corporation). These companies, for the taxation years 1949 and 1950, along with the Army & Navy Department Store Limited, a Saskatchewan company (hereinafter referred to as the Saskatchewan Corporation), were taxed as related corporations. The first two corporations were taxed under s. 36(2) of *The Income Tax Act* (S. of C. 1948, 11-12 Geo. VI, c. 52), while the Minister designated that the Saskatchewan Corporation should be taxed under s. 36(3). All of the corporations filed their returns as unrelated or independent corporations.

It is agreed that the shares in these corporations are held as follows:

(1) The Saskatchewan Corporation—the shareholders are:
40 per cent to S. J. Cohen
20 per cent to J. W. Cohen (his son)
40 per cent to H. R. Cohen (a brother of S. J. Cohen)

(2) The Alberta Corporation—the shareholders are:
50 per cent to H. R. Cohen
10 per cent to S. J. Cohen (his brother)
40 per cent to S. D. Leshgold (brother-in-law of H. R. Cohen and S. J. Cohen)

(3) The Western Corporation has 5,000 shares to the value of $10.00 each, divided as follows:

	shares
to the Alberta Corporation	2,500
to the Saskatchewan Corporation	2,498
to H. R. Cohen	1
to J. F. Bolecon	1

The shares in the name of H. R. Cohen and J. F. Bolecon in the Western Corporation are director's qualifying shares.

Section 36 reads in part as follows:

36. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the 'amount taxable') for a taxation year is, except where otherwise provided,

(*a*) 15 per cent of the amount taxable if the amount taxable does not exceed $10,000, and

(*b*) $1,500 plus 38 per cent of the amount by which the amount taxable exceeds $10,000, if the amount taxable exceeds $10,000.

(2) Where two or more corporations are related to each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 38 per cent of the amount taxable for the taxation year.

(3) Notwithstanding subsection (2), where two or more corporations are related to each other, the tax payable by such one of them as may be agreed by them or, if they cannot agree, as may be designated by the Minister shall be computed under subsection (1).

.....

The term "related corporations" is defined in s. 36(4), as amended in 1951 and made applicable to 1949 and subsequent taxation years, as follows:

36. . . .

(4) For the purpose of this section, one corporation is related to another in a taxation year if, at any time in the year,

(*a*) one of them owned directly or indirectly 70 per cent or more of all the issued common shares of the capital stock of the other, or

(*b*) 70 per cent or more of all the issued common shares of the capital stock of each of them is owned directly or indirectly by

(i) one person,

(ii) two or more persons jointly, or

(iii) persons not dealing with each other at arms length one of whom owned directly or indirectly one or more of the shares of the capital stock of each of the corporations.

The phrase "arms length" is defined in s. 127(5) as follows:

127. . . .

k (5) For the purposes of this Act,

(*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,

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> (*b*) corporations controlled directly or indirectly by the same person, or
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> (*c*) persons connected by blood relationship, marriage or adoption,
>
> shall, without extending the meaning of the expression 'to deal with each other at arms length', be deemed not to deal with each other at arms length.

The appellants submit that as the word "relationship" or "related" is not defined in the statute at any time relevant hereto (it is defined subsequently, S. of C. 1952, c. 29, s. 31, ss. 2) that it ought to be construed as meaning the next of kin who would take in the event of intestacy. In their submission appellants' counsel adopted the statement of Chief Justice Strong in *Ross* v. *Ross* (1):

> the word 'relations' standing alone must be restricted to some particular class for if it were to be construed generally as meaning all relations it would be impossible ever to carry out the directions of the Will. The line, therefore, must be drawn somewhere and can only be drawn so as to exclude all persons whom the law in the case of an intestacy recognize as the proper class among whom to divide the property of a deceased person who dies intestate, namely his heirs.

In support of this contention he invokes the rule that where certain words have received a judicial interpretation Parliament, in subsequently adopting or using such words without any indication to the contrary, may be taken to have intended that they be used as so interpreted in the courts. *Barlow* v. *Teal* (2). The respondent points out that the statement of Chief Justice Strong was in relation to the interpretation of a will and that, while Parliament, in legislating in respect to the same or similar matters, might so intend, it does not apply where, as here, the subject matter of the legislation is in relation to income tax, a subject entirely different from that of wills. It is, however, unnecessary to decide this issue. Even if we assume that the word "relationship" means next of kin, these corporations are, within the meaning of the statute, related.

It will be observed that under s. 36(4)(*b*)(iii) there are two requirements: (*a*) at least 70 per cent of the issued common shares in each of the corporations shall be owned directly or indirectly by persons not dealing with each other at arms length; and (*b*) one of the persons must own at least one or more of the shares of the capital stock in each of the corporations. It would appear that under the terms of this section the Saskatchewan and Alberta Corporations are related.

(1) (1894) 25 Can. S.C.R. 307 at 330. (2) (1885) 15 Q.B.D. 403.

In the Saskatchewan Corporation H. R. Cohen and S. J. Cohen own 80 per cent of the shares of stock. These parties, H. R. Cohen and S. J. Cohen, are brothers and the former having no children his brother, S. J. Cohen, would come within those who would take if the former died intestate. In the Alberta Corporation H. R. Cohen and his brother-in-law S. D. Leshgold own 90 per cent of the stock and S. J. Cohen owns 10 per cent. In other words, the shares of the Alberta and Saskatchewan Corporations are owned by persons who are "connected by blood relationship or marriage" within the meaning of s. 127(5)(*c*). The further requirement of s. 36 (4)(*b*)(iii) is found in the fact that H. R. Cohen owns "one or more of the shares of the capital stock of each of the corporations." It follows that the Alberta and Saskatchewan Corporations are related within the meaning of s. 36(4)(*b*)(iii).

In the Western Corporation the shares are held as follows:

	shares
Alberta Corporation	2,500
Saskatchewan Corporation	2,498
H. R. Cohen	1
J. F. Bolecon	1

The issue is again whether this Western Corporation is related to the Alberta and Saskatchewan Corporations and in particular whether 70 per cent or more of all the issued common shares of capital stock of each of these corporations is "owned directly or indirectly by . . . persons not dealing with each other at arms length one of whom owned directly or indirectly one or more of the shares of the capital stock of each of the corporations" within the meaning of s. 36(4)(*b*)(iii).

We are not here concerned with the fact that a corporation is a distinct and separate legal entity nor with any question of corporate capacity or power. The issue here raised is that of direct or indirect ownership of the shares in the Western Corporation. That the Alberta and Saskatchewan Corporations own all the shares in the Western Corporation does not necessarily conclude the matter in determining whether these corporations are related within the meaning of the statute. These corporations are artificial bodies that act as directed by individuals. H. R. and

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S. J. Cohen and S. D. Leshgold are owners of all the shares in the Alberta Corporation and all but 20 per cent (owned by J. W. Cohen, a son of S. J. Cohen) in the Saskatchewan Corporation.

While the appellants emphasize that s. 36(4)(*b*)(iii) deals with ownership of shares, it should be observed that it is ownership "directly or indirectly" on the part of persons not dealing at arms length. The dictionary defines "indirectly" as circuitous or roundabout. Parliament, by the inclusion of the word "indirectly" in this context, evidenced a clear intention that the share position of a corporation should be so far examined as to ascertain who, in fact, are the owners who effectually exercise the powers of ownership. It is a provision in respect of which the language of Wills J. is appropriate:

> . . . especially in revenue matters, it seems to me that one ought to look at the substance, and not merely at matters of machinery and form;

The St. Louis Breweries Limited v. *Apthorpe* (1).

When one examines this situation as suggested by Wills J., the conclusion cannot be avoided that, while directly the Saskatchewan and Alberta Corporations own the Western Corporation, H. R. and S. J. Cohen and S. D. Leshgold are the indirect owners of 70 per cent or more of all the issued common shares of the capital stock and are persons not dealing at arms length within the meaning of s. 36(4)(*b*)(iii). It would seem that Parliament, by the inclusion of the word "indirectly" in s. 36(4)(*b*)(iii) intended to provide for just such situations as here created by the three parties H. R. and S. J. Cohen and S. D. Leshgold.

Then the other requirement of s. 36(4)(*b*) is satisfied by the fact that H. R. Cohen owns at least one share in each of these corporations. The evidence discloses that his share in the Western Corporation is held in trust for the Saskatchewan Corporation. It is described in the evidence as a share given to him in order that he might serve in the capacity as a director and, therefore, one who must act at the instance of the Saskatchewan Corporation, which, in fact, means that he will act at the instance of himself and S. J. Cohen who own 80 per cent of that Corporation. The fact that he has not the beneficial interest in that one share is

(1) (1899) 79 L.T. 551 at 555.

not, under the circumstances of this case, sufficient to take him out of the provisions of s. 36(4)(*b*)(iii).

All of these corporations filed their income tax returns as if they were unrelated or independent corporations and the Minister has designated the Saskatchewan Corporation as the one that might be taxed under s. 36(3), which provides:

> 36. (3) Notwithstanding subsection (2), where two or more corporations are related to each other, the tax payable by such one of them as may be agreed by them or, if they cannot agree, as may be designated by the Minister shall be computed under subsection (1).

It is here contended that, inasmuch as there is no evidence that the parties could not agree, the Minister had no authority to make such a designation. Such an issue might well be raised by the Saskatchewan Corporation, which, however, has not taken an appeal from the Minister's decision. It cannot appropriately be raised by either of the appellants in the appeals here taken, particularly as it is not contended that either of these appellants (Alberta and Western Corporations) should have been so designated.

The appeals should be dismissed.

CARTWRIGHT J.:—These appeals were argued together. The facts out of which they arise and the relevant statutory provisions are fully set out in the reasons of other members of the Court and I shall repeat them only so far as may be necessary to indicate the reasons for the conclusion at which I have arrived.

For the reasons given by my brother Locke I agree that the appeal of the Alberta Company should be dismissed.

Turning to the appeal of the Western Company, the question is whether it is related to either the Alberta Company or the Saskatchewan Company. The notion of one company being related to another is the creation of statute and whether or not the appellant is so related must be ascertained by applying the words of the statute to the facts. To establish the relationship it must appear that two conditions co-existed during the taxation year, (*a*) that as to both the appellant company and the company to which it is said to be related 70 per cent or more of all its issued common shares was owned directly or indirectly by persons not dealing with each other at arms length, and (*b*) that one of such persons owned directly or indirectly one or more of the shares of each of the companies.

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Dealing first with condition (*a*), I agree, for the reasons stated by my brother Locke, that it is established in the case of both the Alberta Company and the Saskatchewan Company that 70 per cent or more of its issued common shares was owned directly by persons not dealing with each other at arms length (viz. in the Alberta Company by H. R. Cohen, S. J. Cohen and S. D. Leshgold and in the Saskatchewan Company by H. R. Cohen, S. J. Cohen and J. W. Cohen). Can the same be said of the appellant company? For the respondent two alternative submissions are made.

First, it is said that the Alberta Company and the Saskatchewan Company own more than 70 per cent of all the issued shares of the appellant company and that they are persons not dealing with each other at arms length as they are both controlled by the same two individuals, H. R. Cohen and S. J. Cohen, whose total holdings amount to 60 per cent of the issued shares of the Alberta Company and 80 per cent of the issued shares of the Saskatchewan Company. If the statute were silent as to the circumstances in which corporations shall be deemed not to deal with each other at arms length this submission would have great force, but when section 127 by clause (*b*) provides that corporations controlled directly or indirectly by the same person shall be deemed not to deal with each other at arms length it appears to me to negative the view that corporations are to be deemed not to deal with each other at arms length when controlled not by the same person but by the same group of persons. *Expressio unius exclusio alterius.* When the wording of clause (*b*) of section 127 is contrasted with that of clause (*a*) it seems to me impossible to read the word "person" in clause (*b*) as including the plural. While the Alberta Company and the Saskatchewan Company may well be said to be controlled by the same persons they are not controlled by the same person and in my opinion they can not on this ground be deemed for the purposes of the Act not to deal with each other at arms length.

Secondly, and alternatively, it is said that more than 70 per cent of the shares of the Western Company while owned directly by the Alberta Company and the Saskatchewan Company are owned indirectly by the shareholders of the two last mentioned companies H. R. Cohen, S. J. Cohen,

S. D. Leshgold and J. M. Cohen who, as shewn in the reasons of my brother Locke, are persons not dealing with each other at arms length. With the greatest respect for those who hold the contrary view, I do not think that shareholders, either individually or collectively, have any ownership direct or indirect in the property of the company in which they hold shares. In *Macaura* v. *Northern Assurance Company* (1), Lord Buckmaster said:—

> . . . Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

and at page 633 of the same report, Lord Wrenbury points out that even a shareholder who holds all the shares in a corporation "has no property legal or equitable in the assets of the corporation."

In *Salomon* v. *Salomon and Company* (2), Lord Macnaghten says at page 51:—

> . . . the company is not in law the agent of the subscribers or trustee for them.

In my respectful opinion these passages correctly state the law.

For these reasons I am of opinion that the existence of condition (*a*) mentioned above has not been established in regard to the Western Company and this is sufficient to dispose of the appeal in its favour; I wish, however, to say a few words as to condition (*b*).

If the argument of the respondent, that all the shares of the Western Company were owned indirectly by the three Cohens and Leshgold, had prevailed, it might have been said that H. R. Cohen and S. J. Cohen, who admittedly own directly shares in both the Alberta and Saskatchewan Companies, fulfilled the requirement of section 36(4)(*b*)(iii) by owning indirectly one or more of the shares of the Western Company, although there would have been manifest difficulty in identifying any share or shares of the last mentioned company as being owned by either of them. However, this point was not pressed by the respondent who relied on the fact that one share of the Western Company was registered in the name of H. R. Cohen. If, then,

(1) [1925] A.C. 619 at 626 (2) [1897] A.C. 22.

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the Alberta Company and the Saskatchewan Company are regarded, as I think they must be, as the owners of at least 4998 of the 5,000 issued shares of the Western Company but, contrary to the view I have expressed above, should be deemed to be persons not dealing with each other at arms length, then I would agree with my brother Locke that it has been shown that H. R. Cohen did not own any share of the capital stock of the Western Company. It is argued for the respondent that even if the Saskatchewan Company is the beneficial owner of the share registered in the name of H. R. Cohen, the latter is its "direct owner" but in my view on the evidence he had no ownership either direct or indirect in this share. *The Companies Act of British Columbia,* R.S.B.C. 1948, c. 58, does not require that a director shall be the owner in his own right of a share in the company but only that his qualification shall be "the holding of at least one share in the company" and by section 90 a certificate is made only *prima facie* evidence of title. In the case at bar the evidence establishes that the share registered in H. R. Cohen's name was the sole property of the Saskatchewan Company. Mr. Cohen could not even have given title by estoppel to a purchaser in good faith and without notice as he did not have the certificate in his possesion but had endorsed it and delivered it to the solicitor of the Saskatchewan Company to hold for it and not for him. I conclude therefore that the existence of condition (*b*), mentioned above, was negatived.

For the above reasons I would dispose of both appeals as proposed by my brother Locke.

Appeal of the Western company allowed with costs; appeal of the Alberta company dismissed with costs.

Solicitors for the appellants: *Grossman & Sharp.*

Solicitor for the respondent: *J. D. C. Boland.*