1963

CANADA
LAW REPORTS

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DU CANADA

Exchequer Court of Canada
Cour de l'Échiquier du Canada

PAUL A. RAYMOND, C.R.
WILLIAM C. McBRIDE
Official Law Editors
Arrêtistes

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Ottawa, 1964

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON
(*Appointed October 6, 1942*)

PUISNE JUDGES:

THE HONOURABLE J. C. A. CAMERON
(*Appointed September 4, 1946*)

THE HONOURABLE JOHN DOHERTY KEARNEY
(*Appointed November 1, 1951*)

THE HONOURABLE JACQUES DUMOULIN
(*Appointed December 1, 1955*)

THE HONOURABLE ARTHUR LOUIS THURLOW
(*Appointed August 29, 1956*)

THE HONOURABLE CAMILIEN NOËL
(*Appointed March 12, 1962*)

THE HONOURABLE ANGUS ALEXANDER CATTANACH
(*Appointed March 27, 1962*)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable W. ARTHUR I. ANGLIN, New Brunswick Admiralty District—appointed June 9, 1945.

The Honourable SIR BRIAN DUNFIELD, Newfoundland Admiralty District—appointed May 9, 1949.

The Honourable HENRY ANDERSON WINTER, Newfoundland Admiralty District—appointed May 9, 1949.

His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.

The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.

The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty District—appointed October 8, 1959.

The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.

His Honour JAMES AUGUSTIN MACDONALD, Prince Edward Island Admiralty District—appointed July 11, 1961.

The Honourable THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed September 28, 1961.

The Honourable GEORGE ERIC TRITSCHLER, Manitoba Admiralty District—appointed October 19, 1962.

The Honourable GORDON R. HOLMES, Prince Edward Island Admiralty District—appointed May 24, 1963.

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His Honour GEORGE LIVINGSTON CASSADY, British Columbia Admiralty District—appointed June 28, 1962.

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SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

ALFRED S. MARRIOTT, Q.C., Ontario Admiralty District—appointed February 21, 1957.

ATTORNEY-GENERAL OF CANADA:

The Honourable LIONEL CHEVRIER

SOLICITOR GENERAL OF CANADA:

The Honourable J. WATSON MCNAUGHT

JUGES

DE LA

COUR DE L'ÉCHIQUIER DU CANADA

en fonction au cours de la période de publication de ces rapports:

PRÉSIDENT:

L'HONORABLE JOSEPH T. THORSON
(*nommé le 6 octobre 1942*)

JUGES PUÎNÉS:

L'HONORABLE J. C. A. CAMERON
(*nommé le 4 septembre 1946*)
L'HONORABLE JOHN DOHERTY KEARNEY
(*nommé le 1er novembre 1951*)
L'HONORABLE JACQUES DUMOULIN
(*nommé le 1er décembre 1955*)
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(*nommé le 29 août 1956*)
L'HONORABLE CAMILIEN NOËL
(*nommé le 12 mars 1962*)
L'HONORABLE ANGUS ALEXANDER CATTANACH
(*nommé le 27 mars 1962*)

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L'Honorable HENRY ANDERSON WINTER, district d'amirauté de Terre-Neuve—nommé le 9 mai 1949.
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L'Honorable ARTHUR IVES SMITH, district d'amirauté de Québec—nommé le 16 juin 1950.
L'Honorable ROBERT STAFFORD FURLONG, district d'amirauté de Terre-Neuve—nommé le 8 octobre 1959.
L'Honorable DALTON COURTWRIGHT WELLS, district d'amirauté d'Ontario—nommé le 28 janvier 1960.
Son Honneur JAMES AUGUSTIN MACDONALD, district d'amirauté de l'Île du Prince-Édouard —nommé le 11 juillet 1961.
L'Honorable THOMAS GRANTHAM NORRIS, district d'amirauté de la Colombie-Britannique—nommé le 28 septembre 1961.
L'Honorable GEORGE ERIC TRITSCHLER, district d'amirauté de Manitoba—nommé le 19 octobre 1962.
L'Honorable GORDON R. HOLMES, district d'amirauté de l'Île du Prince-Édouard—nommé le 24 mai 1963.

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Son Honneur GEORGE LIVINGSTON CASSADY, district d'amirauté de la Colombie-Britannique—nommé le 28 juin 1962.
L'Honorable CHARLES WILLIAM TYSOE, district d'amirauté de la Colombie-Britannique—nommé le 31 janvier 1963.

JUGE SUBROGÉ EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

ALFRED S. MARRIOTT, C.R., district d'amirauté d'Ontario—nommé le 21 février 1957.

PROCUREUR GÉNÉRAL DU CANADA:

L'Honorable LIONEL CHEVRIER

SOLLICITEUR GÉNÉRAL DU CANADA:

L'Honorable J. WATSON MACNAUGHT

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At page 64, line 35 the sentence beginning with the words "My understanding . . . " should not appear as part of the quoted passage since they are the words of the learned trial judge.

At page 258 the first word in the captions "Admiralty" should read "Shipping".

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE EXCHEQUER COURT OF CANADA

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1. *Aluminium Union Ltd. v. Minister of National Revenue* [1960] Ex. C.R. 363. Appeal dismissed.
2. *American Export Lines Inc. v. Port Weller Dry-Dock Ltd.* [1962] Ex.C.R. 188. Appeal dismissed.
3. *Argyll, The Ship and Her Owners v. The Owner of the Ship Sunima, Aksje Selskap I.M.A.* [1962] Ex.C.R. 203. Appeal dismissed.
4. *Boehringer Sohn C.H. v. Bell-Craig Ltd.* [1962] Ex.C.R. 201; [1963] S.C.R. 410. Appeal dismissed.
5. *Cardwell, Raymond Philip v. Philippe Leduc et al.* [1963] Ex.C.R. 207. Appeal pending.
6. *Dobieco Ltd. v. Minister of National Revenue* [1963] Ex.C.R. 348. Appeal pending.
7. *Fraser, Ronald K. v. Minister of National Revenue* [1963] Ex.C.R. 334. Appeal pending.
8. *Halley, James J. v. Minister of National Revenue* [1963] Ex.C.R. 372. Appeal dismissed.
9. *Hill-Clark-Francis Ltd. v. Minister of National Revenue* [1961] Ex.C.R. 110; [1963] S.C.R. 452. Appeal dismissed.
10. *Hollinger North Shore Exploration Co. Ltd.* [1960] Ex. C.R. 325; [1963] S.C.R. 131. Appeal dismissed.
11. *Irwin, Joseph S. v. Minister of National Revenue* [1963] Ex.C.R. 51. Appeal pending.
12. *M. Geller Inc. et al. v. The Queen* [1960] Ex.C.R. 512; [1963] S.C.R. 000. Appeal allowed.
13. *MacInnes, William Hedley v. Minister of National Revenue* [1962] Ex.C.R. 385; [1963] S.C.R. 299. Appeal allowed.
14. *Magda, Michael v. The Queen* [1953] Ex.C.R. 22. Appeal dismissed.
15. *Mainwaring, Gladys M. v. Minister of National Revenue* [1963] Ex.C.R. 274. Appeal pending.
16. *Ministre du Revenu National v. Eastern Abattoirs Ltd.* [1963] R.C. de l'É. 251. Appel interjeté.
17. *Morris, Philip R. v. Minister of National Revenue* [1963] Ex.C.R. 313. Appeal pending.

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18. *Northern Sales Ltd. v. National Gypsum Co. Ltd.* [1963] Ex.C.R. 1. Appeal dismissed.

19. *Queen, The v. Poudrier & Boulet Ltd.* [1960] Ex.C.R. 261; [1963] S.C.R. 194. Appeal dismissed.

20. *Reith, Hans-Edwin et al. v. Algoma Central & Hudson Bay Railway Co.* [1963] Ex.C.R. 258. Appeal pending.

21. *Rodi & Wienenberger Aktiengesellschaft v. Metalliflex Ltd.* [1963] Ex.C.R. 232. Appeal pending.

22. *Sedgwick, Joseph v. Minister of National Revenue* [1962] Ex.C.R. 337. Appeal allowed.

23. *Smith, Harvey Clarke v. Minister of National Revenue* [1961] Ex.C.R 136. Appeal dismissed.

24. *West York Coach Lines Ltd. v. Minister of National Revenue* [1962] Ex.C.R. 323. Appeal dismissed.

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AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

NORTHERN SALES LIMITED .....PLAINTIFF;

AND

NATIONAL GYPSUM COMPANY INC. ..DEFENDANT.

Shipping—Practice—Action on charterparty containing clause for arbitration of disputes—Motion to dismiss action or stay of proceedings dismissed—Arbitration clause null and void as against public policy—Arbitration proceedings in foreign country no bar to action in Canada.

Plaintiff's action is to recover from defendant damages alleged to have been sustained as the result of a breach at Montreal, Quebec of a charterparty entered into between them at New York, U.S.A. The charterparty provided for the settlement of any dispute by arbitration at New York. Defendant moves for a dismissal of the action or a stay of proceedings on the ground *inter alia* that the Court is without jurisdiction to hear it.

Held: That this Court has jurisdiction to hear and determine the issues and the arbitration clause in the charterparty is against public policy and null and void.

2. That arbitration proceedings commenced in New York do not bind the defendant and do not constitue a *lis pendens* and do not bar the action.

MOTION to have plaintiff's action dismissed or proceedings stayed.

The motion was heard before the Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

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Robert A. Hope for the motion.

L. S. Reycraft contra.

SMITH D.J.A. now (May 1, 1962) delivered the following judgment:

The court, seized of defendant's motion demanding the dismissal of plaintiff's action or alternatively the staying of all proceedings therein, having heard the parties by their respective attorneys, examined the proceedings and deliberated:

By its action the plaintiff claims damages allegedly sustained by it as the result of defendant's breach of a charterparty signed at New York, on the 7th day of December 1960, by which the defendant undertook that its steamship *Lewis R. Sanderson* would proceed with all convenient speed to Montreal and there load a cargo of wheat for carriage to "one safe Port out of Civitavecchio, Genoa or Naples".

It is alleged that the said vessel failed to proceed to Montreal and there load said cargo in accordance with the said contract with the result that the plaintiff was unable to ship wheat which it had contracted to deliver to Federazione Italiana dei Consorzi Agrari and as a consequence was obliged to pay damages to said purchaser; which damages, plus loss of profit, interest and expenses, total the sum of $81,307.78, the plaintiff claims from the defendant.

The defendant's motion which seeks to obtain the dismissal of plaintiff's action or alternatively a stay of proceedings is based upon the fact that the said charterparty contains what is described as a

New York Produce Exchange Arbitration Clause

Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

It appears that by letter dated February 22, 1962, plaintiff through its attorneys claimed payment of the above-mentioned damages. To this letter the defendant through its attorneys replied by letter of February 28, 1962, indicating that it wished to arbitrate the matter in accordance

with the terms of the charterparty and appointed as its arbitrator one P. V. Everett, of New York, and called upon plaintiff to name an arbitrator by March 2, 1962.

On March 7, 1962, defendant's attorneys obtained an order from the United States District Court (Southern District of New York) ordering plaintiff to show cause why it should not arbitrate. The plaintiff appeared in response of this order and contested the jurisdiction of the United States Court, and, on March 9, 1962, procured the issue of a Writ of Summons in the present case.

On April 3, 1962, plaintiff's contestation of the New York arbitration was dismissed and plaintiff was ordered to appoint an arbitrator within 10 days.

The defendant appeared on the present action under protest and in support of its present motion it alleges that:

a) The said charterparty signed and dated in New York called for arbitration in New York;

b) Plaintiff was called on to arbitrate prior to the issue of the Writ herein;

c) Defendant appointed its arbitrator to the knowledge of Plaintiff's attorneys;

d) Plaintiff has not named an arbitrator and has not complied with the terms of the charterparty or the law;

e) The dispute should first be arbitrated;

f) The plaintiff has been ordered to appoint an arbitrator by a competent Court having jurisdiction in the matter;

g) There is *lis pendens;*

h) This Court has no jurisdiction.

I propose to deal first with the last mentioned ground of attack, namely that this Court is without jurisdiction.

In my opinion, this ground of complaint is unfounded. On the contrary this Court has jurisdiction both *ratione materiae* and territorially. Plaintiff's claim arises "out of an agreement relating to the use or hire" of a ship and falls within the jurisdiction of this Court *ratione materiae.* (*Admiralty Act,* Sec. 18, Para. 3(*a*)(i)).

The plaintiff in its Statement of Claim alleges breach of the said contract at Montreal and this allegation has not been denied. It would appear therefore that this Court has territorial jurisdiction in virtue of Sec. 20(1)(*e*) of the *Admiralty Act,* which provides that:

20(1) An action may be instituted in any registry when:

(*e*) the action is *in personam* and is founded on any breach or alleged breach within the district or division of such registry, of any con-

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tract, wherever made, that is one within the jurisdiction of the Court and, according to the terms thereof, ought to be performed within such district or division.

The arbitration clause above quoted, even if valid, could not have the effect of removing the dispute from the jurisdiction of this Court. *(Code of Civil Procedure 94) Gordon & Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd.*[1]

It was submitted on behalf of the defendant that if this Court has jurisdiction the charterparty is governed by the law of the United States or alternatively by the law of England and that the question of whether or not the said arbitration clause is binding and valid must be determined in accordance with the law of the United States or of England. This is a proposition which I am unable to accept.

Arbitration agreements and proceedings, as well as the rules relating to *lis pendens* are procedural in nature. (*Code of Civil Procedure* 411 *et seq;* and *Code of Civil Procedure* 173) and, in the absence of any provision relating to same in the Admiralty Rules or in the *General Rules and Orders of the Exchequer Court,* they are governed by the practice and procedure in force in the Superior Court of this Province. (*General Rules and Orders in Admiralty,* Rule 215; and *General Rules and Orders of the Exchequer Court,* Rule 2(1)(*b*).)

It must be determined therefore whether the said arbitration clause is valid according to the laws of the Province of Quebec and is one which our Courts will enforce and give effect to.

The question as to whether arbitration clauses which would have the effect of removing the hearing and determining of disputes from the jurisdiction of our Courts are or are not contrary to public order has been the subject of much judicial discussion and certainly some difference of opinion. Perhaps the most recent decision bearing on this matter is the judgment of the Court of Appeal in the case of *Vinette Construction v. Dobrinsky*[2], where the Court (one judge dissenting) held that an arbitration clause which constitutes a true clause compromissoire, the effect of which would be to deprive the Court of jurisdiction, is contrary to public order and null. This decision is in accordance with

[1] (1940) 40 Que. K.B. 428. [2] [1962] Que. Q.B. 62.

a considerable body of jurisprudence and must, in my opinion, be regarded as binding until it has been overruled. It would, moreover, appear to be in accord with the common law of England.

Halsbury Laws of England, Vol. 8, 2nd Ed. page 532, Para. 1177.

That the arbitration clause under consideration is a true clause compromissoire, the effect of which, if enforced, would be to deprive the Court of jurisdiction, I have no doubt.

Counsel for defendant argued however that the validity of the said arbitration clause must be determined in accordance with the laws of the United States, where the contract was made. It is no doubt true that our Courts in adjudicating in respect of contracts executed in foreign jurisdiction are obliged to give consideration to the *lex loci contractus*, but they will not enforce or give effect to a contract which, under the laws of this Province, is against public order, even though the said contract may be legal and binding in the jurisdiction in which it was made. (*Civil Code* 13; *Johnson Conflict of Laws*, p. 186).

Apart however from the fact that the said arbitration clause is against public order and illegal, the mere institution of arbitration proceedings in the State of New York does not, in the opinion of the Court, constitute *lis pendens* and justify the defendant's demand that the proceedings taken before this Court be either dismissed or stayed.

Whatever the decision of the Arbitration Board in New York may be, it will not be *res judicata* here (*Code of Civil Procedure* 210) and for that, if for no other reason, such arbitration proceedings do not constitute *lis pendens*. (*Johnson Conflict of Law*, Vol 2, p. 434; *The Howard Guernsey Man. Co. v. King*[1]; *Rice v. Holmes*[2]; *Roscoe Admiralty Practice*, 5th edit. p. 102; *The London*[3], *The Christiansborg*[4].

I conclude therefore that this Court has jurisdiction to hear and determine the issues herein and that the arbitration clause above-quoted is a clause compromissoire and, as such, is against public policy and null and void. This being so, the said clause is not binding upon the defendant and

[1] (1894) 5 Que. S.C. 182.
[2] (1899) 16 Que. S.C. 492.
[3] [1931] P. 14.
[4] (1885) 10 P.D. 149.

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the arbitration proceedings commenced in New York do not constitute *lis pendens* and are no bar to the present action.

The defendant's motion is unfounded and is dismissed with costs.

Judgment accordingly.

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Mar. 27

Sept. 27

BETWEEN:

ASSOCIATED INVESTORS OF CANADA LTD. ..... APPELLANT;

AND

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

Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Capital gain or income—Company investing funds from sale of investment certificates—Mortgage discounts or bonuses—Volume of business and organization set-up—Operations those of a business—Appellant's sole incentive to make a profit—Appeal dismissed.

Appellant operated its business by selling investment certificates to the public and re-investing the money so obtained in mortgages, stocks and bonds, paying to the certificate buyers interest at four per cent compounded once annually. The company had assets of over ten million dollars and also a large organization with various departments to carry on its operations. It did not purchase existing mortgages but advanced money to mortgagors usually at a 15 per cent discount. It held the mortgages until they were paid off at or before maturity. Most of the mortgages acquired were for small loans and were of a type unacceptable to insurance and trust companies. The respondent assessed the appellant for income tax on the discounts or bonuses realized from a large number of the mortgages in the years 1955 to 1958. From this assessment the company appeals contending that such discounts or bonuses are capital gains and not taxable.

Held: That the mortgage discounts or bonuses realized by appellant are income and therefore taxable as such.

2. That the operations of the appellant were those of a business in a scheme of profit-making or an adventure in the nature of trade.

3. That the large number of mortgages, the amount of money involved and the organization set up to handle the transactions indicate that the appellant's mortgage operations were not merely incidental to but were an essential feature of the general business of the appellant.

4. That the evidence showed that the appellant's whole incentive in acquiring the type of mortgages in question was to obtain discounts or bonuses and that there was profit to be made in them without undue risk, and it cannot be said that the discounts or bonuses constituted the increment which provided for the additional risk.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Noël at Edmonton.

A. F. Moir, Q.C. and *C. C. Curlett* for appellant.

W. G. Morrow, Q.C. and *D. F. Coate* for respondent.

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

NOËL J. now (September 27, 1962) delivered the following judgment:

This is an appeal against the appellant's income tax assessments for the years 1955, 1956, 1957 and 1958. In his assessments, the respondent added to the appellant's reported income for each of the above mentioned years the sums of $1,725, $33,878.30, $2,613.85, $13,266.57 respectively, representing bonuses received by the taxpayer in respect of loans made to mortgagors. These were loans where the amount of the mortgage was greater than that advanced.

The amounts are not in dispute here and the case turns on whether these amounts constitute income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act,* R.S.C. 1952, c. 148 which read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside of Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

139(1)(*e*):

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

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In the opening of the hearing, counsel for both parties agreed to tender as exhibits a balance sheet of the appellant (Exhibit 1), an investment certificate (Exhibit 2) and then a series of photostats of documents taken from the appellant's files indicating typical or sample transactions: documents *re* William Kosowan (Exhibit 3), *re* Clarence P. Zimmel (Exhibit 4), *re* Fort Hotel (Exhibit 5), *re* Moss (Exhibit 6), *re* Hawkeye (Exhibit 7), *re* Hamilton (Exhibit 8), *re* Thorpe (Exhibit 9) and the last Exhibit, No. 10, the Department's file, with the certificate by the Honourable the Minister of National Revenue and the notices of appeal, assessment, etc. attached.

The documents indicating sample transactions can be listed and detailed as follows:

Ex.	*Date*	*Name*	*Per Cent*	*Amount of mortgage*	*Bonus*	*Re-fund*	*Paid Off*
3	1/ 3/55	Kosowan	7	$ 6,000	$ 350	nil	23/6/55
4	1/ 9/55	Zimmel	6	$ 9,000	$ 1,200	$600	30/1/56
5	15/10/56	Fort Hotel	7	$ 33,000	$ 3,300	nil	15/5/59
6	1/ 8/57	Moss Holdings	7	$200,000	$25,000	nil	in existence
7	13/ 1/55	Hawkeye	7	$ 1,650		nil	28/2/57
8	15/10/56	Hamilton	7	$ 40,000	$ 5,000	nil	in existence
9	1/ 4/55	Thorpe	7	$ 15,500	$ 3,100	nil	

The only witness heard, and he was so heard on behalf of the appellant, was the President and General Manager of the appellant company (hereinafter sometimes referred to as "the taxpayer"), Mr. Henry G. Curlett, who stated that he had caused the appellant company to be incorporated in the year 1948 and had owned all the shares but two when its capitalization was $100,000; when the capitalization rose to $400,000, Fairborn Investment, of which he owned 60 per cent, owned 3,000 of the shares of the appellant company. He stated however that at all times he was in control of the company. The latter has a mortgage, sales, accounting and legal department.

The taxpayer operated by selling investment contracts to the public, reinvested the monies received in mortgages, bonds and stocks and paid its holders of the contracts a four per cent compound interest once annually. The first year of operation, Mr. Curlett did most of the selling of certificates and for the first three years did most of the appraisal and examination of the mortgages.

According to Exhibit 1, a balance sheet of the taxpayer for the year 1958, it had assets of $10,854,097.50 and liabilities to the public, including accounts payable and a Department of National Revenue debt of $8,917,798.24. At the end of 1961, Mr. Curlett stated that the assets of the company were roughly over nineteen million dollars and its liabilities to the public, approximately $17,500,000.

The taxpayer, according to Mr. Curlett, took mortgages from those who could not obtain the conventional type or an N.H.A. mortgage; he describes the mortgage taken by the company as a small mortgage or the working man's mortgage and added that his company had taken, in 1949, a great number of mortgages in a locality called Jasper Place, which is a suburb of the City of Edmonton. There were no sewers or water at Jasper Place and those wishing to live there could not obtain conventional mortgage money. According to Mr. Curlett, in order to obtain conventional mortgage money, water and sewage was required, the mortgage owner must have an income of $300 a month, he must have worked two years in his present occupation, be under fifty years of age and have a full basement. Those were five musts and if any one of those were out, then there was no conventional money available. The conventional interest mortgage rate at the time was six per cent and the taxpayer charged this same rate.

Besides taking mortgages in Jasper Place, the taxpayer, as it grew, took conventional type of mortgages on business property, charging an interest rate of seven per cent which compared at the time with the conventional money available from insurance companies.

In addition to the interest rate of six per cent the taxpayer would usually get a bonus of 15 per cent; this bonus was a net amount as the legal and conveyancing costs and so on were also deducted from the mortgage money; in some cases, the total amount of the mortgage money was turned over to the borrower who would return the bonus and, in others, the bonus was deducted before it was turned over to the mortgagor. As a matter of fact, Exhibits 3 to 9 inclusive (the sample documents) reflect both methods.

Exhibit 1 indicates that the taxpayer had invested $562,435 in bonds. These bonds, according to the taxpayer, were retained until maturity unless there was a change in

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interest or they were recalled. In one such instance $300,000 3% Government bonds were replaced by $300,000 3¼% Government bonds.

From the beginning of its operations, the taxpayer placed 2,400 mortgages and Mr. Curlett stated that they had never sold any. In all of these 2,400 cases the taxpayer financed contractors, aproximately twelve in number. The contractors would build houses and arrange for the mortgages and then sell the houses and the purchasers would assume the mortgages and the taxpayer would collect by instalments, both interest and principal on the basis of the original borrowed amount. In no instance did the taxpayer go out and purchase mortgages nor did the taxpayer sell the mortgages to other people but held them all to maturity with the exception of a few which were prepaid. Indeed, in some instances, mortgages were paid in full before term and in such cases, according to Mr. Curlett, the taxpayer would refund a part of the bonus.

In the month of March 1962, the taxpayer held fifteen million dollars in mortgages of which amount $720,000 were bonuses.

The President of the appellant company maintains that his company invested in Jasper Place, a substandard district, although the National Housing Act, as managed through the insurance companies or the conventional lending institutions, refused to make any money available there. In his own words he said at p. 13 of the transcript:

> They were very anxious to have these houses built and I have letters from N.H.A. to make available that kind of money, but it wasn't for that kind of district, we couldn't sell it, it was a substandard district, but in my book it was good, and it has proven itself good. We have built a city out there of thirty-three thousand and it was twelve hundred when we started out there. We now have sewer and water in and I bought the bond issue from the town of Jasper Place to help put the water and sewer in and we are highly regarded in Jasper Place, and they know we have made a discount on the mortgages and they were very happy to have us make it.

In cross-examination, Mr. Curlett admitted that over the years approximately 85 per cent of the business transactions of the taxpayer were in mortgages and 15 per cent in Government or municipal securities and he added that most of these mortgages ($17,500,000) were on home properties and that at least 60 per cent entailed a bonus of some kind or other although six million dollars in commercial loans had no discounts at all.

In answer to a question by the respondent's counsel as to why the taxpayer did not place the mortgage money on the ordinary conventional type of loans at six per cent, he had this to say at p. 18 of the transcript:

A. If you were paying 4% compound, the difference between that and 6% is a very fine figure if you take out your overhead—

Q. So in order to get a bigger margin, you went to the more unorthodox mortgages and got a bonus, is that right?

A. That is right.

The appellant company operates in the provinces of Saskatchewan, Alberta, British Columbia and the Northwest Territories, where they have salesmen. As the President and General Manager of the taxpayer stated, they try to distribute their money where they get it from.

The President and General Manager of the appellant company, Mr. Curlett, expresses his confidence in real estate and at p. 26 of the transcript explains why his company loaned money on mortgages at Jasper Place:

A. The 15 houses which I had sold and had mortgages or agreements for sale on them in the Town of Westlock, that had no water or sewer, and only three of them had foundations, but I didn't lose a dollar on them. That's why I felt quite sound in my field in Jasper Place. The other one was the Montreal Light, Heat and Power that I didn't lose on. Every other investment I had and which the Bank of Montreal considered was a pretty smart investment portfolio, believe me, I thought was the weeds by the end of 1932.

Q. So that you had more faith in places like Jasper Place, without sewage, as it then had, than N.H.A. for example?

A. I built a hotel out in Jasper Place at a cost of about $375,000 before water and sewer was there. I put my own water and sewer in for that hotel, but I knew we couldn't live along side of a city of 150,000 without getting water and sewer, just a matter of coming in.

Q. As a matter of fact, the faster you helped the contractors develop Jasper Place, the quicker sewer would come, is that right?

A. Very correctly.

He also stated that his company never advertised for mortgages in the newspapers or elsewhere and they always had more mortgages than they could handle.

At p. 27 of the transcript he had this to say in this connection:

Q. There were lots of people beating at your door to discount mortgages?

A. And we have yet.

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Q. I'm sorry.
A. And we have yet, too.
Q. So you can pick what you want?
A. That's right.

Mr. Curlett denied that the taxpayer had ever purchased mortgages at a discount although he admitted that there might have been the odd one, but if so, it certainly was not the taxpayer's line of business.

The question to be decided is whether the proceeds from the taxpayer's bonus mortgage operations are income or capital gains. This matter has been given considerable attention in the last year or so and has been dealt with in a number of decisions of this Court: cf. *Minister of National Revenue v. Minden*[1]; *Minister of National Revenue v. MacInnes*[2]; *Minister of National Revenue v. Rosenberg*[3]; *Minister of National Revenue v. Wolfe*[4] and a decision of the Supreme Court of Canada in *Irrigation Industries Limited v. Minister of National Revenue*[5].

In no case, however, with the exception of the Irrigation case, has the taxpayer been a company and although the Irrigation case dealt with the problem of deciding whether the amounts received were of a capital or income nature, they were not in that instance proceeds from mortgage discounts or bonuses.

It is a trite statement of the law of income tax that when one holds an asset not for resale, but for what the asset can produce in and of itself, the gain on sale of that asset is usually one of a capital nature. However, the proceeds of such an investment which might, in most cases, be non-taxable may become taxable when they are entered into, even as an asset acquired to be retained until maturity, to such a degree and in such a manner that they become a veritable business.

This is very clearly set down by Lord Justice Clerk *in re Californian Copper Syndicate (Limited and Reduced) v. Harris*[6]:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D

[1] [1962] C.T.C. 79.
[2] [1962] C.T.C. 350.
[3] [1962] C.T.C. 372.
[4] [1962] C.T.C. 466.
[5] [1962] C.T.C. 251.
[6] 5 T.C. 165.

of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making.

Further authority can also be found *in re Smith Barry v. Cordy*[1], the facts of which can be summed up as follows: In 1937 the appellant embarked on a carefully worked out scheme whereby between July 1937 and February 1939 he laid out his capital in the purchase of a large number of endowment policies on other people's lives with such dates of maturity as would provide £7,000 a year until 1960.

The Special Commissioners held that:

On consideration of the particular facts of this case and the evidence before us, having in mind especially the number of purchase transactions over a period of about 18 months, together with the manner in which the policies were selected and purchased in pursuance of an organised scheme, we hold that the appellant engaged in a concern in the nature of trade, resulting in profits—the fruit of the capital laid out—which are assessable to income tax under Case 1 of Schedule D.

This decision was confirmed on appeal and at p. 255 Macnaughten J. in connection with the matter of intention had this to say:

The question, therefore, is whether a person who buys endowment policies with no intention of selling them is engaged in a concern in the nature of trade. It is conceded that a single purchase would not be a concern in the nature of trade, but, it is suggested, if there are many purchases, then it would form a trade, even though there was no intention whatever of reselling the policies. No other inference of fact is open to me.

And to use an expression of Rowlatt J. *in re Graham v. Green*[2]: A person can organize himself to do that (namely to buy) "in a commercial and mercantile way and the profits which emerge are taxable profits, not of the transactions but of the trade".

[1] 28 T.C. 253. [2] 9 T.C. 313.

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And to paraphrase the learned President of this Court (Thorson P.) in *Minister of National Revenue v. Spencer*[1]: No single criterion can be adopted to decide whether a transaction or a number of transactions are adventures in the nature of trade, each case depending on its facts and the thing to do is to determine the true nature of the transaction or transactions in each and every case.

Let us now examine the facts here. It appears from the evidence that the taxpayer company was formed for the purpose of selling investment certificates to the public, the money so obtained carrying a compound annual rate of interest of four per cent. From the evidence of its President and General Manager it also appears that in order to be able to so pay this interest and make a profit the money so obtained was reinvested in other securities such as shares, bonds but principally in mortgages. These activities of the taxpayer, in my opinion, point clearly to a speculative business.

The mortgages, as we have seen, were obtained from contractors at a discount and the obtention of so many of these mortgages, the manner in which they were processed and the magnitude of the amounts involved indicate to me, and I have no hesitation in so saying, that the mortgage operations of the taxpayer were not merely incidental but were an essential feature of the general business of the company.

Authority on this point can be found *in re Scottish Investment Trust Co. v. Forbes*[2]:

> As its name indicates, this is an Investment Company, and the Memorandum makes it plain that its profits are to be derived from various operations relating to the investments. The third head of the Memorandum professes to state the objects of the Company, and in head (6) of this enumeration occur the words "to vary the investments of the Company, and generally 'to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the Company'".
>
> It is true that the doing of any of these things might be incidentally necessary in the conduct of the business of any company. It is also true that this Memorandum states in the latter heads of the same article several things which are less properly described as objects of a Company than as incidental acts of administration. But from the structure of the Memorandum it appears that *the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business.* In my view such speculations are among the appointed means of this Company's gains. Accordingly, I should consider it legitimate

[1] [1961] C.T.C. 130. [2] 3 T.C. 234.

for the directors to divide profits so made, although in determining the amount divisible they would necessarily have regard, not alone to the individual transaction yielding profit, but to the general results of their changes of investments. It would be right that they should maintain as strictly as possible the relative rights of separation between capital and income, and make all apportionments necessary in that behalf.

The taxpayer, in the present case, as we have seen, did a very considerable amount of business in its mortgage operations and to do this he had set up an imposing organization with various departments. Such a set up in my opinion would also tend to indicate that all the operations of the taxpayer, and particularly its mortgage operations, were that of a business in a scheme of profit-making or at least an adventure in the nature of trade. As stated by Thorson P. in *Minister of National Revenue v. Spencer (supra)*: "I have already referred to the decision that establishes that it is not essential to a transaction being an adventure in the nature of trade that an organization should have been set up to carry it into effect. But, obviously, the fact that there was such an organization goes a considerable distance towards the conclusion that such an adventure was contemplated."

The mortgage operations here were not admittedly of the conventional type but were not, from the admission of the taxpayer's President and General Manager, of a risky nature. Indeed, a mortgage turned down by a trust company is not necessarily a poor one. The very performance of the taxpayer, in my opinion, showed there was money to be made without undue risk in mortgages unacceptable to life and trust companies, the traditional sources of mortgage funds. It cannot, therefore, be contended that the bonus was the increment which provided for the additional capital risk. Indeed, Mr. Curlett's faith in the Jasper Place development for instance, was such that he built a hotel there at a cost of about $375,000 before water and sewer were there which surely indicates that the investment, at least as far as the taxpayer was concerned, was a solid investment as well as a successful and profitable one.

Considerable emphasis was laid by counsel for the appellant on the fact that no resort was made to advertising in connection with the mortgage operations of the taxpayer; it appears, however, that there was no necessity for so doing as the taxpayer admitted it had more demands than it could satisfy.

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The taxpayer's intent in entering into the mortgage transactions, whether it was attracted to these transactions because of the profit it would make or the interest it would receive, or a combination of both, is clear in this case as the President and General Manager of the company quite frankly admitted: he could not go out and get the ordinary conventional loan because it would not have been enough margin of profit and he had to get the bonuses to get the profit. The bonus, therefore, was the whole incentive here. The fact that the taxpayer was using someone else's investment to make its profit would also tend, in my estimation, to indicate that we have here a veritable business.

The fact that the greater number of mortgages were held to maturity cannot in itself, as we have seen, make them non-taxable investments. In our opinion, their retention until maturity was in accordance with the general scheme of business of the taxpayer and was necessary to enable it to make the payments which would allow it to pay the four per cent compound interest and, therefore, was an important feature of its business operations. In view of the above, I find that the appellant was engaged in operating a business in the ordinary sense of the term and that its mortgage operations were a very important part of same. In the result, therefore, the appeal will be dismissed with costs.

Judgment accordingly.

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Sept. 28

Oct. 12

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

E. H. POOLER AND COMPANY LIMITED ..... RESPONDENT.

Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a)—"Outlay or expense incurred for the purpose of gaining or producing income from a business of the taxpayer"—Amount of fine imposed by Board of Governors of Toronto Stock Exchange not deductible from income—Appeal allowed.

Respondent was fined $2,000 by the Board of Governors of the Toronto Stock Exchange and a claim that such sum was deductible in computing income of the year such fine was imposed was allowed by the Tax Appeal Board. From that decision the Minister appeals to this Court.

Held: That respondent as a member of the Toronto Stock Exchange became a party to or at any rate subject to punishment by the Exchange for acts of one of its employees which were not part of respondent's business or for the purposes of that business and such outlay or expense was not incurred for the purpose of gaining or producing income from respondent's business within the meaning of the *Income Tax Act*, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(*a*) and therefore the amount of the fine was not deductible in computing respondent's income from its business.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Thurlow at Toronto.

N. A. Chalmers for appellant.

D. Andison for respondent.

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

THURLOW J. now (October 12, 1962) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board allowing an appeal by the respondent and vacating a re-assessment of income tax for the year 1958. The matter in issue is the deductibility in computing income for income tax purposes of a fine of $2,000 which was imposed on the respondent by the Board of Governors of the Toronto Stock Exchange.

The respondent since its incorporation in 1954 has carried on business on a considerable scale as a stock broker and throughout this period has been the owner of a seat held by its president or one of its members on the Toronto Stock Exchange. The revenues of its business to the extent of about 90 per cent consist of commissions on the purchase and sale of stocks and bonds on behalf of clients, the remainder being interest on balances owed by clients, proceeds of occasional underwritings and sundry amounts from other minor sources. From June 1956 until September 1957 the respondent had in its employ as a branch manager William H. Ramsay whose functions included the soliciting

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and obtaining of orders from members of the public for execution on the Exchange. Mr. Ramsay was also a vice president of the respondent company.

In May 1957 customers' accounts obtained by Mr. Ramsay were opened in the names of Clifford J. Butler, Joseph Beaudry, and John Fauquier all of whom were concerned in trading on margin in the stock of Aconic Mining Corporation which had been listed towards the end of 1956 for trading on the Exchange. By May 29th as a result of transactions carried out in the meantime Mr. Butler had become indebted to the respondent in an amount exceeding $100,000 and at that point the respondent's president, Mr. E. H. Pooler, advised Mr. Ramsay that Mr. Butler's credit was thenceforth to be restricted to $100,000 and that he would be obliged to comply with margin requirements which were much more severe than those usually exacted. These instructions appear to have been carried out but on August 6, 1957 the price of shares of Aconic which had been traded for some time at $9 to $11 a share, fell to $1.90 and as a result the respondent and others suffered substantial losses. An investigation by the Ontario Securities Commission followed and ultimately criminal proceedings were instituted against Mr. Butler and Mr. Beaudry. An investigation was also undertaken by the Board of Governors of the Exchange as a result of which on October 1, 1957 the Board found "that Mr. Ramsay, while a Vice President and Director of the member corporation of E. H. Pooler & Company Limited, was guilty of conduct detrimental to the interest of the Exchange in inducing the opening by member firms or member corporations (other than E. H. Pooler & Co. Limited) of accounts in the name of C. J. Butler, Joseph Beaudry and E. H. Fauquier, or any of them for the purpose of carrying on margin certain shares of Aconic Mining Corporation" and thereupon imposed on the respondent the fine of $2,000 which is in question in these proceedings.

The penalty was imposed under By-Law No. 11 of the Exchange paragraphs 1 and 2 of which were as follows:

Sec. 1. If any member shall be adjudged by the Board of Governors guilty of a violation of any of the By-Laws or Rules or Regulations of the Corporation, or of failure to obey or conform to any decision of the Corporation or the Board, or of any conduct, proceeding or method of business which the Board in their absolute discretion deem unbecoming a member of the Exchange, or inconsistent with just and equitable prin-

ciples of trade, or detrimental to the interests of the Exchange;—the Board may impose any one or more of the following penalties, viz.: (1) a fine not exceeding $5,000, (2) suspension for such period or periods and upon such conditions if any as the Board may determine, and (3) expulsion; and, in addition thereto, may declare forfeit the seat and membership of any member expelled.

Sec. 2. A member shall be fully responsible for the acts and omissions of his employees, and if he carries on business as a member firm for the acts and omissions of his partners and the employees of such member firm, and if he carries on business as a member corporation for the acts and omissions of the directors, officers and employees of such member corporation, and if he operates an affiliated company for the acts and omissions of the directors, officers and employees thereof; and if any such act or omission be held by the Board of Governors to be one which, if done or omitted by the member, would subject him to any of the penalties above provided, then such member shall be liable therefor to such penalty to the same extent as if such act or omission had been done or omitted by him personally.

These by-laws were made under the authority of the Act of Incorporation of the Toronto Stock Exchange and supplementary letters patent issued under the Ontario *Companies Act*. Under s. 9 of the Act of Incorporation penalties incurred under the by-laws by any person bound thereby are recoverable by action.

By s. 3 of the *Income Tax Act* it is declared that the income of a taxpayer for a taxation year includes his income for the year from all businesses and by s. 4 it is provided that subject to the other provisions of Part I of the Act income for a taxation year from a business is the profit therefrom for the year. Speaking generally the profit from a business means the amount by which the revenues of the business exceed the expenses of carrying it on and this concept is not excluded by the other provisions of the Act but it is provided in s. 12(1)(*a*) that:

In computing income no deduction shall be made in respect of an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from . . . a business of the taxpayer.

In *Royal Trust Company v. M.N.R.*[1] the President of this Court discussed the approach to the question of the deductibility of an expense in computing income from a business under the provisions of the *Income Tax Act* at page 42 as follows:

Consequently, if the correct approach to the question of whether a disbursement or expense was properly deductible in a case under the *Income War Tax Act* was the one which I have outlined, it follows,

[1] [1957] C.T.C. 32.

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a fortiori, that it is the correct approach to the question of whether an outlay or expense is properly deductible in a case under the *Income Tax Act*. Thus, it may be stated categorically that in a case under the *Income Tax Act* the first matter to be determined in deciding whether an outlay or expense is outside the prohibition of Section 12(1)(*a*) of the Act is whether it was made or incurred by the taxpayer in accordance with the ordinary principles of commercial trading or well accepted principles of business practice. If it was not, that is the end of the matter. But if it was, then the outlay or expense is properly deductible unless it falls outside the expressed exception of Section 12(1)(*a*) and, therefore, within its prohibition.

Counsel for the Minister was not prepared to concede that the amount of the fine would be deductible in any case for the purpose of computing the profit from the respondent's business, but rested his case on the submission that it was not a normal risk or incident of the respondent's business that its vice president should be found guilty of objectionable conduct, that neither the conduct that incurred the fine nor the payment of the fine could result in income and that the amount so paid did not fall within the exception to the prohibition of s. 12(1)(*a*) as an outlay or expense incurred for the purpose of gaining or producing income from the respondent's business.

The respondent's submission on the other hand was that the liability that fell upon it to pay the fine arose out of one of the ordinary day to day risks incident to the carrying on of its business, that is to say the continuing risk of being fined by the Exchange (which regulates only the business activities of its members) for the acts of the respondent's employees, a risk which arises as soon as anyone is employed to carry out duties incident to the carrying on of the business, that the fine was therefore paid for the purpose of gaining or producing income from the business within the meaning of the exception to s. 12(1)(*a*) of the Act and was otherwise properly deductible in computing the profit from the business.

In the course of the argument reference was made to a number of cases on deductions decided under the English income tax statutes and under the *Income War Tax Act* including *C.I.R. v. Alexander von Glehn & Co. Ltd.*[1] and *Imperial Oil Ltd. v. M.N.R.*[2]. While a good deal of assistance may be derived from a study of these cases insofar as principles of general application are involved in them it

[1] 12 T.C. 232.

[2] [1947] Ex. C.R. 527.

must I think be borne in mind that the law to be applied in this case is s. 12(1)(*a*) of the *Income Tax Act* the wording of which differs materially from the corresponding provisions of the English Acts as well as from s. 6(*a*) of the *Income War Tax Act* and that the result in any particular case may not necessarily be the same as it would have been if either the English or the earlier Canadian statute were applicable.

In applying the wording of s. 12(1)(*a*) to the present case it seems to me to be immaterial whether the fine is regarded as an "outlay" or as an "expense" but the problem which arises on the facts appears to be somewhat different depending on whether these words are coupled with the verb "was made" or with the verb "was incurred". I shall accordingly deal with the resulting expressions separately.

Viewing the fine as "an outlay or expense . . . made" ("expense" does not seem to fit naturally with "made" but the two words appear to be connected grammatically in the section) the question that arises on s. 12(1)(*a*) is whether or to what extent the outlay or expense was made for the purpose of gaining or producing income from the respondent's business. As I see it there is no conceivable way in which the payment of this fine could lead to the gaining or production of income from the respondent's business. Nonpayment of it might possibly have led to suspension of the respondent's privileges as a member of the Exchange and thus to interference with the normal conduct of the business but I do not regard that as the reason for making the payment nor was it argued that that was the reason. In my opinion the respondent was liable to make the payment whether it continued to carry on its business or not and the making of it had no relation to the carrying on of the business. Viewed as an "outlay or expense . . . made" the payment thus does not meet the requirement of the exception to the prohibition of s. 12(1)(*a*).

Turning now to examine the fine as an "outlay or expense . . . incurred" the question that arises first is how the liability to pay it arose. The liability arose of course because the Board of Governors of the Exchange imposed the fine but that answer leads one immediately to inquire why the Exchange imposed it. The answer to this is that the Board had found that Mr. Ramsay while a vice president and director of the respondent was guilty of conduct detrimental

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to the interest of the Exchange in inducing other members of the Exchange to open margin accounts for Messrs. Butler, Beaudry and Fauquier. This then is the conduct which incurred the fine. It was not, as I view it, the employing of Mr. Ramsay which, even if regarded as something done in the course of the respondent's business and as involving a risk that he might by his conduct cause the respondent to be fined, was at most a remote circumstance having no real bearing on the question what it was that incurred the fine. In this view, apart from any broader principle which may or may not be applicable in the particular circumstances to exclude its deduction, the fine could not in my opinion escape the prohibition of s. 12(1)(*a*) unless the inducing by Mr. Ramsay of other members of the Exchange to open such accounts was an act done in the course of or for the purposes of the respondent's business.

The evidence falls short of satisfying me that this was the case. Primarily the business of the appellant was to act on behalf of customers in the execution of their orders to buy and sell stocks and bonds and thereby to earn commissions. To introduce Mr. Butler or his associates to competitors and induce them to do business with them was in my view not part of this business at all. It is not shown to have been a normal practice in the business nor did the respondent receive or become entitled to commissions on the transactions conducted by the other brokers for Mr. Butler or his associates. Nor has the conduct in question been shown to have been carried out for the purposes of the respondent's business. On this aspect of the matter, Mr. William Wismer, a vice president of the Exchange, indicated that the Board considered that Mr. Ramsay was a member of the group consisting of Messrs. Butler, Beaudry and others which was concerned in promoting Aconic as he had given them assistance in arranging for accounts to be carried by members of the Exchange. There is also the evidence of Mr. Pooler who said he believed that Ramsay having been prevented from doing all the business he could obtain from Butler introduced him to other members of the Exchange because he wanted to help Butler. Neither of these explanations suggests to me that in introducing Butler to other brokers Ramsay was endeavouring to earn or secure commissions for the respondent or to promote its business but rather that he was doing so for reasons of

his own. What these reasons were, however, remains unexplained. Ramsay was not called as a witness nor is there any further evidence on the point. It was suggested in argument that he may have made the introductions to other brokers in order to hold Mr. Butler's goodwill for the respondent and in that sense to promote the respondent's business but that in my view is mere speculation and I would infer no such conclusion. On the whole, the situation as disclosed appears to me to be simply one in which the respondent as a member of the Exchange became a party to, or, at any rate became subject to punishment by the Exchange for acts by Ramsay which were not part of the respondent's business or for the purposes of that business and in my opinion it has not been established that the outlay or expense in question was incurred to any extent for the purpose of gaining or producing income from the respondent's business within the meaning of s. 12(1)(*a*) of the Act. It follows that the fine is not deductible in computing the respondent's income from its business.

The appeal will therefore be allowed with costs and the re-assessment restored.

Judgment accordingly.

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Sept. 28
Oct. 17

BETWEEN:

WESTMINSTER SHOOK MILLS LIMITED
Appellant (PLAINTIFF),

AND

THE SHIP *STORMER* ....Respondent (DEFENDANT).

Shipping—Action in rem does not lie where registered owner of ship domiciled in Canada—Admiralty Act, R.S.C. 1952, c. 1, s. 18, s-ss. 3(a)(i) and 4—"Use" or "hire" of a ship—Appeal from District Judge in Admiralty dismissed.

Plaintiff brought its action against defendant ship claiming damages for loss sustained by it through the breaking of booms of logs which defendant had contracted to tow from one point to another in British Columbia waters, alleging such breaking of the booms was due to insufficient power of defendant ship to tow the logs in safety.

The action was dismissed by the District Judge in Admiralty for the British Columbia Admiralty District and from that judgment plaintiff appeals to this Court.

Held: That no action in rem lies where the registered owner was domiciled in Canada at the date of the institution of the action as per the *Admiralty Act*, R.S.C. 1952, c. 1, s. 18, s-ss. 3(*a*)(i) and 4.

2. That the oral agreement entered into between the parties related to the use or hire of a ship as per s. 18, s-s. 3(*a*)(i) of the *Admiralty Act*.

3. That the appeal must be dismissed.

APPEAL from the judgment of the Honourable Mr. Justice Norris, District Judge in Admiralty for the British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Victoria.

G. F. McMaster for appellant (plaintiff).

John C. Bouck for respondent (defendant).

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

DUMOULIN J. now (October 17, 1962) delivered the following judgment:

This is an appeal from a decision dismissing with costs, plaintiff's action, rendered November 29, 1961, by the Honourable Mr. Justice T. G. Norris, District Judge in Admiralty for British Columbia.

The pertinent facts, outlined in a Statement of Facts Agreed by Counsel, relate that:

1. During September, 1956, the Plaintiff ..... contracted with R. L. Richardson, operating as Howe Sound Towing Company, for the towage of about 36½ sections of logs from Clam Bay to New Westminster for reward.

* * *

5. R. L. Richardson was aware that the power of the Defendant ship was insufficient to tow the said logs in safety.

6. At or about 1:00 p.m., the said booms struck Race Point and were broken up, allowing many of the logs to escape.

* * *

8. The loss and damage (i.e. expense incurred for the recovery and rebooming of the drifting or grounded logs by Gulf Log Salvage Association) were due to the fact that Defendant ship did not have sufficient power to overcome the normal tide and current encountered on the route taken which was the customary one for the purpose.

A personal action was instituted on January 30, 1958 against R. L. Richardson and Howe Sound Towing Company for damages arising out of "the negligent use of the Ship *Stormer*" (cf. Agreed Statement of Facts, s. 9), and, the same day, a Consent Judgment for $7,191.56, was entered against R. L. Richardson and the Company. On the said judgment no more than $50 have been recovered.

With a comprehensible hope of bringing about a better result, the plaintiff, on May 27, 1960, resorted to this action against the ship *Stormer,* her owners and all others interested.

Against this would-be remedy, respondent objects that s. 18, s-s. (3)(*a*)(i) and s-s. (4) of the *Admiralty Act,* 1952, R.S.C. c. 1, precludes any recourse to an action *in rem,* since all parties admit the Canadian domicile of the ship's owners at the material time. The relevant provisions just mentioned read as follows:

18. (3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine

(*a*) any claim

(i) arising out of an agreement relating to the use or hire of a ship,

(4) No action "in rem" in respect of any claim mentioned in paragraph (*a*) of subsection (3) is within the jurisdiction of the Court unless it is shown to the Court that at the time of the institution of the proceedings no owner or part owner of the ship was domiciled in Canada.

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The plaintiff's contention, on the other hand, is that the oral contract at issue was not for the "use or hire of a ship" but merely for the towing of logs, with the consequent inference that this disabling section would not apply.

To start with, it would seem odd that a case devoid of any factual connexity whatsoever with the use or hire of a ship for towing those logs could ever see the light of day in an Admiralty Court.

Furthermore, the appellant company has explicitly entertained a truer appreciation in paragraph 9 of the "Statement of Facts Agreed by Counsel" wherein it unreservedly agreed to qualify its action as one "for damages *arising out of the negligent use of the Ship Stormer* by R. L. Richardson in the towing of logs . . ." (italics are mine).

Lastly, if the logs were not towed for a certain distance through the medium of the ship *Stormer*, used and hired for such a purpose, then this Court is left in total ignorance of the hauling power that brought them opposite Race Point. This Court, therefore, fully concurs with the learned trial Judge's finding that the oral agreement entered upon by the contending parties related to the use or hire of a ship as foreseen in s-s. (3)(*a*)(i) of s. 18.

Accessorily, appellant submitted that, whatever the outcome of its main argument might be, s-s. (2) of 18, integrating under the style of Schedule "A", s. 22 of the *Supreme Court of Judicature (Consolidation) Act*, 1925, of the Parliament of the United Kingdom as part of our own *Admiralty Act*, prohibits the applicability of s-s. (4) aforesaid.

The Court can no more agree with this submission than with the former one, since s-s. (2) in its six first lines, enacts that:

> (2) Without restricting the generality of subsection (1) of this section, *and subject to the provisions of subsection (3) thereof*, section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, *in so far as it can*, apply to and be applied by the Court, . . . (italics are mine).

Now, we have seen that, pursuant to s-s. (4) of our s. 18, no action *in rem* lies "in respect of any claim mentioned in paragraph (a) of s-s. (3)", when, as admitted here, an owner or part owner of the ship is domiciled in Canada at the time the proceedings were instituted.

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An express reference of this nature merges s-s. (4) with s-s. (3), both these provisions thereby becoming, so to say, a common hyphenated text, superseding Schedule A, as clearly stipulated in s-s. (2). This subsidiary plea also remains unavailing; it only enhances the manifest exclusion in the instant case, of an action *in rem*.

For the reasons previously given, the appeal is dismissed and the judgment of the learned trial Judge affirmed in all of its several conclusions.

The Court doth further order and adjudge that the respondents do recover from the appellant all costs incurred in both this Court and the one below after taxation thereof.

Judgment accordingly.

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Sept. 17

Oct. 22

BETWEEN:

HARGAL OILS LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 83A and 83A(8a)—Deductibility of prospecting, exploration and development expenses—Deduction not allowed for same taxation year in which predecessor corporation sells its assets to successor corporation—Appeal dismissed.

The *Income Tax Act*, R.S.C. 1952, c. 148, s. 83A provides that a corporation whose principal business is the production, refining or marketing of petroleum or mining or exploring for minerals may deduct pre-production expenses from income. Section 83A(8a) provides that such a corporation which acquires substantially all the property of a predecessor corporation may deduct the carry-over of drilling and exploration expenses of the predecessor corporation in calculating income. The section provides that "no deduction may be made under this section by a predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation . . . .".

Appellant during its taxation year which ended June 30, 1958, sold its assets to Freehold Gas and Oil Ltd. and claimed a deduction from income for the year 1958 of $29,136 of drilling and development expenses pursuant to s. 83A(8*a*) of the Act which claim was disallowed by the respondent. An appeal from such disallowance to the Tax Appeal Board was dismissed and appellant now appeals to this Court from the finding of the Tax Appeal Board.

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Held: That the appeal must be dismissed.

2. That the predecessor corporation cannot claim a deduction of drilling and exploration expenses in the taxation year in which it sells substantially all its assets to a successor corporation.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Dumoulin at Victoria.

Kenneth E. Meredith for appellant.

E. S. MacLatchy, Q.C. and *R. L. Radley* for respondent.

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

DUMOULIN J. now (October 22, 1962) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated September 26, 1961[1] dismissing Hargal Oils' appeal in respect of the re-assessment of its income tax for 1958.

The appellant, a public company incorporated under the *Companies Act of British Columbia,* has its Head Office at Vancouver, and, for the taxation year ended June 30, 1958, was entirely engaged in the business of petroleum production and exploration for petroleum or natural gas.

By June 30, 1957, the company aforesaid claims to have incurred since the calendar year 1952, "drilling and exploration expenses" in a sum of $95,614.57, which were not deductible from its income for previous years.

Paragraphs 4 and 5 of the Notice of Appeal go on to say that:

4. During the year ended June 30th, 1958, but prior to this date, the assets of the Appellant were sold by the Appellant to Freehold Gas & Oil Ltd. (N.P.L.).

5. The Appellant filed its income tax return for the year ended June 30th, 1958, and claimed a deduction of the sum of $29,136 for drilling and development expenses pursuant to the provisions of the Income Tax Act leaving a balance unclaimed of $66,478.57.

On December 29, 1959, the Minister disallowed this deduction of $29,136 and reassessed the appellant accordingly.

[1] (1961) 27 Tax A.B.C. 408.

The fiscal provisions just alluded to are section 83A (1952, R.S.C. c. 148), more particularly its sequences 83A(3) and 83A(8*a*).

This encompassing enactment despite—or perhaps on account of—its pretensions at exhaustiveness, resolves itself into another statutory Noah's Ark, corralling together a menagerie of conjectures, deductions hinted at or refused and criss-cross references to other sections, inevitably jeopardizing the task of making "head or tails" of such a jumble.

However, a sufficient and practical summing-up of the parties' conflicting views may be derived from their respective briefs. Beginning with the appellant's Summary of Argument, page 1, we are told that:

> Basically the taxpayer relies on the provisions of paragraph 83A(3). An abbreviated version of this paragraph, stripped of its non-essentials for the purposes of this case could read as follows:
>
> > An oil company may deduct from its income for the year exploration and drilling and other expenses in an amount not exceeding its income for the year.

On page 2, in paragraphs (*c*) and (*d*), the comments hereunder appear:

> (*c*) The deductibility of the expenses is limited to the income of the company for the year. This means that there may be a carry over of expenses from year to year by a company (duly qualified) which could be applied against its income in succeeding years to the extent of that income . . .
>
> (*d*) The working of the section [i.e. 83A(3)] might be illustrated by a simple example as follows:
> Company incurs drilling and exploration

expenses from 1952—total	$50,000
Income Year 1	10,000
Excess expenditure remaining	40,000
Income Year 2	30,000
Excess expenditure	10,000
Income Year 3	10,000
Excess expenditure	Nil.

Assuredly these statements have, at the very least, the merit of clarity.

I may immediately rule out s. 83A(3) as it obviously relates to a different contingency: that of a corporation's yearly income tax returns. The instant problem is wholly separate and falls in the category dealt with in s. 83A(8*a*), namely: the determination of deductions allowed to a

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"successor" company for the year it acquired the assets of a "predecessor" corporation. To this latter enactment I now return.

The respondent, in his written reply, admits that Freehold Gas and Oil Ltd. was a "successor corporation" and Hargal Oils a "predecessor corporation" within the meaning of the applicable sections; also that, "but for the provisions of subsections (8*a*) of section 83A . . . Hargal would be entitled to the deduction of $29,136 for the 1958 taxation year as provided by subsection (3) of section 83A".

Consequently, in the very words of respondent's Summary, paragraph 4:

> The only issue in dispute is whether subsection 8(*a*) operates to deprive Hargal of any deduction under section 83A in the 1958 taxation year, being the year the property was transferred to Freehold.

From this last starting point, the respondent proceeds on a course of reasoning which, in my opinion, savours more of hair-splitting than of a rational interpretation of the law, as might be deduced from its paragraph 6, hereunder recited (cf. Summary of Argument p. 2):

> 6. Clause (iii) of paragraph (*e*) of the subsection may seem to imply that the predecessor might be able to claim in the year of transfer. This would be the situation where, for example:
>
> (*a*) The predecessor's taxation year ended March 31, 1962;
>
> (*b*) The transfer took place in May 1962;
>
> (*c*) The successor's taxation year ended December 31, 1962.

My only additional comments to this are that I am at a loss to find a justification for it in clause (iii) of (*e*); furthermore that it would flatly derogate from the sweeping and overriding prohibition of "the concluding words of subsection (8*a*)" as said in the two first lines of respondent's paragraph 5. I fully share, on this point, the appellant's rejoinder that:

> (*a*) Nothing in the Subsection [viz. (iii) of (*e*)] suggests this peculiar and particular alleged limitation.

In point of fact, the solution is a simpler one, plainly implied, I believe, by the interplay of:

1. The entitlement of s. 83A(8*a*) to wit: "Property acquired by successor corporation", especially devoting this section's purview to the case of a "successor" and not that of a "predecessor" corporation;

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2. The wording of clause (iii) of paragraph (*e*) in which the expression "predecessor corporation, etc." appears merely as a condition precedent to a "successor" corporation's right to a deduction;

3. Finally the concluding and also conclusive lines of 83A (8*a*) which sufficiently speak for themselves *"res ipsa loquitur"*. I quote:

> and, in respect of any such expenses (i.e. *inter alia*, drilling, exploration and prospecting costs) included in the aggregate determined under paragraph (*e*) no deduction may be made under this section "by the predecessor corporation" (underlining is mine) in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

Since those operational expenditures were not deductible from the appellant's income for the years 1952 to 1957 inclusive, as admitted in paragraph 3 of the Notice of Appeal, then, nothing short of a positive statutory provision could suffice to bestow upon such outlays the privilege of deductibility otherwise denied to them during the sequential period of their occurrence. Again, a scrutiny of the verbose texts involved fails to convince me that I should find in them the rehabilitating effect—*si ita licet dicere*—sought by the appellant. Indeed, it was seen that the imperative direction in the ultimate paragraph of 83A(8*a*) irretrievably defeats the company's interpretation of the law.

I cannot reach any other conclusion but that the sum of $29,136 was properly added to Hargal Oils' income for the taxation year 1958.

For the above reasons, this appeal is dismissed and the respondent entitled to recover taxable costs.

Judgment accordingly.

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Sept. 25, 26, 27

Oct. 31

BETWEEN:

CANADIAN BRINE LIMITED, Plaintiff (APPELLANT);

AND

NATIONAL SAND & MATERIAL COMPANY LIMITED, WILSON MARINE TRANSIT COMPANY and THE HANNA MINING COMPANY

Defendants (RESPONDENTS).

Shipping—Practice—Rule 20(d) General Rules and Orders, Exchequer Court in Admiralty—Service ex juris against foreign defendants—Claim for damages to pipe line—Alleged collision by defendant ships or a combination of them through faulty navigation—Pleadings—Discretion—Appeal from order of Surrogate Judge dismissed.

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CANADIAN BRINE LTD. v. NATIONAL SAND & MATERIAL CO. LTD. *et al.*

Appellant, the owner of the Canadian portion and the lessee of the United States portion of a pipe line under the Detroit River claimed damages for injuries to the pipe line and its appurtenances alleged to have been caused by ships owned by the defendants, or by any combination of these ships colliding and interfering with the pipe line due to the negligent navigation and operation of the ships. Service of the writ of summons was effected on the first defendant in the Ontario Admiralty District and the appellant applied for and obtained leave to serve the other two defendants out of the jurisdiction. The application was supported by two affidavits in which certain allegations were made to the effect that the foreign defendants were proper parties to the action brought against the first defendant. Leave to serve *ex juris* was then granted. Both foreign defendants applied to set aside the leave and service made and to strike out their names as parties to the action. The Surrogate Judge of the Ontario Admiralty District granted the applications and set aside both the leave and service made thereunder. Plaintiff appealed.

Held: That the material before the Court is not sufficient to show that the foreign defendants are proper parties to the action and that the case is a proper one for service out of the jurisdiction.

2. That for service *ex juris* under Rule 20(*d*) of the Rules of the Exchequer Court in Admiralty mere allegations in an indorsement on a writ or in a statement of claim are not enough; the appellant has to show that the case is one which falls within the said rule which permits service and that the foreign defendants are necessary or proper parties to the action.

3. That even if the requirements of Rule 20(*d*) could be regarded as having been met, the material before the Court does not make out a case for the exercise of the Court's discretion in favour of the appellant.

4. That the appeal is dismissed.

APPEAL from an order of the Surrogate Judge of the Ontario Admiralty District setting aside an order for service *ex juris* and the service made thereunder.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

A. J. Stone for plaintiff (appellant).

J. A. Bradshaw for defendant (respondent) Wilson Marine Transit Co.

Jean Brisset, Q.C. for defendant (respondent) Hanna Mining Co.

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

THURLOW J. now (October 31, 1962) delivered the following judgment:

This is an appeal by the plaintiff from an order of the Surrogate Judge of the Ontario Admiralty District setting aside leave which he had previously granted to serve the

defendants, Wilson Marine Transit Company and The Hanna Mining Company out of the jurisdiction and the service effected pursuant to such leave.

The appellant is the owner of the Canadian portion and the lessee of the United States portion of a pipe line under the Detroit River between Windsor, Ontario and Detroit, Michigan used for the purpose of transporting brine and in the endorsement on the Writ of Summons claims damages for injuries to the pipe line and its appurtenances in excess of $200,000 alleged to have been caused on or about November 25 or 26, 1958 by the Ship *Charles Dick* owned by the defendant, National Sand and Material Company Limited, or by the ship *Thomas Wilson* owned by the defendant, Wilson Marine Transit Company, or by the ship *Edward J. Berwind* owned by the defendant, The Hanna Mining Corporation or by any combination of the said ships by colliding and interfering with the pipe line and its appurtenances due to negligent navigation and operation of the ships. In the statement of claim filed some two months after the issue of the writ and after the making of the order for service *ex juris* the claim was expanded to allege that the damage was caused by the trespass, nuisance or negligence of the *Charles Dick,* or alternatively of the *Thomas Wilson,* or alternatively of the *Edward J. Berwind,* or alternatively of all or a combination of the three ships and that such trespass, nuisance or negligence occurred on the Canadian side of the International boundary or alternatively on the United States side of the boundary. Service of the Writ of Summons having been effected on the first named defendant in the Ontario Admiralty District, the appellant applied for and obtained leave to serve the other two defendants out of the jurisdiction. The application was supported by two affidavits sworn by Robert Bernard Michael Keenan, a student-at-law in the office of the plaintiff's solicitors to the first of which was exhibited a transcript of evidence said to have been given by Captain Carl Henry Borgen, the master of the *Thomas Wilson,* at the trial of another action. This disclosed that the *Thomas Wilson* had been anchored in the Detroit River on the United States side of the International boundary, a short distance upstream from the pipe line from the evening of November 24 until the afternoon of November 26 and that in that period Captain Borgen had seen the *Charles Dick* at

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anchor on the Canadian side of the boundary slightly downstream from the *Thomas Wilson* and had also seen the *Edward J. Berwind* and other unnamed ships manoeuvering in the vicinity. The affidavit went on to say that from this evidence it appeared to the plaintiff and its solicitors that the ships *Charles Dick, Thomas Wilson* and *Edward J. Berwind* were manoeuvering or anchored in the vicinity of the pipe line on or about the 25th or 26th days of November, 1958 and may have caused the damage proceeded for. The affidavit further disclosed that records kept by the J. W. Westcott Company indicated that the *Charles Dick* had entered up-bound in the Amherstburg Channel in the Detroit River at 12:15 p.m. on November 25, 1958 and had cleared the Detroit River at 10:40 p.m. on the same day. In his second affidavit, sworn several days later, Mr. Keenan after giving addresses in the United States where the two foreign defendants were probably to be found and stating that they were not British subjects went on to say:

> I am informed and verily believe that the Plaintiff has a good cause of action and that this application is made on the grounds that the said two Defendants are necessary and proper parties to this action which was properly brought against the Defendant National Sand & Material Company Limited, 48 St. Clair Avenue West, Toronto, which last mentioned Defendant has been duly served in the Ontario Admiralty District of this Honourable Court.

Leave to serve *ex juris* was granted under Rule 20(*d*) of the *General Rules and Orders of the Exchequer Court of Canada in Admiralty* by which it is provided that:

> Service out of the jurisdiction of a writ of summons or notice of a writ of summons, may be allowed by the Judge whenever:
>
> * * *
>
> (*d*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the district or division in which the action is instituted;

By Rule 21:

> Every application for leave to serve a writ of summons, or notice of a writ of summons, on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Judge that the case is a proper one for service out of the jurisdiction.

Both foreign defendants on being served with notice of the writ launched applications to set aside the leave and the service made pursuant thereto and to strike out their names as parties to the action. The application of each of these defendants was supported by an affidavit of one of its solicitors stating in each case that the defendant is not a British subject and does not have any office or carry on any business within the Province of Ontario or elsewhere in Canada except that on occasions vessels owned and/or managed by it and engaged in trade and commerce on the Great Lakes, their connecting and tributary waters, pass through the territorial waters of Canada and call at ports thereof. Both affidavits referred to records of the J. W. Westcott Company which indicated that in all some 40 vessels were in the Detroit River between its Amherstburg and Detroit observation stations (which are more than 14 miles apart) at one time or another on November 25 and November 26, 1958 some of which were probably anchored in the area and some not. The affidavit filed in support of the application of The Hanna Mining Company also showed that its ship the *Edward J. Berwind* was anchored in United States territorial waters up-stream from the pipe line from 6:15 p.m. on November 25, 1958 until about 9:30 p.m. on November 26, 1958. In the course of cross-examination on his affidavit, the solicitor indicated that the place where the *Edward J. Berwind* had anchored was about one-half mile from the pipe line.

Before the applications were heard, a further affidavit sworn by Warren Maitland Harris Grover, another student-at-law in the office of the plaintiff's solicitors was filed on behalf of the plaintiff. In it the deponent stated that he was informed by Patrick T. Nolan, Superintendent of the plaintiff and verily believed "that on November 25, 1958, he (Nolan) saw the *Thomas Wilson* at anchor in the Detroit River on the Canadian side of the river directly over the Canadian Brine pipe line", and "that he (Nolan) observed the *Thomas Wilson* to be at anchor in the morning and all day of November 25, and that he also saw the boat there on the morning of November 26, 1958". The affidavit goes on to state that Mr. Nolan further informed the deponent and the deponent verily believed that the Detroit meter chart which records the brine flow as metered on the Detroit side of the river had stopped recording on the morning of

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November 26, 1958, that the recording cable was laid in the same trough as the pipe line itself, that the inspection carried out by divers in the early part of 1959 indicated that the cable was damaged at the same time that the pipe line was damaged in that it was scored in the same places as the pipe line and that in his opinion the severing of the cable which caused the Detroit meter chart to stop recording was the best possible indication of the time that the pipe line was damaged. Grover too was cross-examined on his affidavit and stated further that he was informed by Nolan that the cable broke at 3:55 a.m. on November 26, 1958, and that the damage to the pipe line extended over a distance of some 200 feet of its length. He was not sure of what he had been told as to how far the damaged area was from the Canadian shore, and there is no satisfactory evidence on the question whether it was in Canadian or in United States territorial waters. It also appeared from the cross-examination that Mr. Nolan had not personally identified the *Thomas Wilson* as the ship which he saw directly over the pipe line on November 25 and 26.

In his decision on the two applications the learned Surrogate Judge considered objections taken by counsel for the applicants that Rule 20(*d*) was inapplicable because though the action was admittedly "properly brought" against the defendant, National Sand and Material Company Limited, the foreign defendants were not "necessary" or "proper" parties to it, their joinder as defendants not being authorized by Rule 29; and being in considerable doubt as to whether the applicants were proper parties within the meaning of Rule 20(*d*) and considering that such doubt should be resolved in favour of the foreign defendants he felt bound to grant the applications and thereupon set aside the leave and the service made pursuant thereto.

In my opinion, the learned Surrogate Judge made the right order on the material before him, but my reasons for reaching that conclusion differ somewhat from his. For my part while I too am not satisfied that the owners of the three ships were properly joined in the action, my doubt arises from the lack of material on which to determine the matter rather than on the interpretation of Rule 29. By Rule 29:

> Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants.

Generally speaking the effect of this rule is to retain the ancient practice in admiralty of permitting numerous parties having interests of the same nature in the matter to join or be joined in the same proceeding. But as I read it, the Rule is not restrictive. It is an enabling rule. It expressly permits joinder of certain parties in certain cases and that is as far as it goes. It does not purport to be and is not exhaustive on the subject of joinder of parties, nor does it appear to deal with joinder of causes of action. The latter subject as well as the subject of when parties who have interests in the matter which are not of the same nature may be joined is dealt with elsewhere. In the *Marlborough Hill*[1] the Supreme Court of New South Wales held that a corresponding rule also numbered 29 applied to allow joinder of plaintiffs having separate though similar causes of action against a ship but it is noteworthy that on appeal[2] the Privy Council while upholding the order appealed from did not do so by interpreting and applying Rule 29 but stated that the matter was covered either by Rule 29 or by Rule 155. The latter rule provided that:

> In all cases not provided for by these rules the practice of the Court in its Common Law jurisdiction shall be followed, or in cases therein unprovided for the practice of the Admiralty Division of the High Court of Justice of England shall be followed.

Rule 29 as well as Rules 30, 31 and 32 have their origin at least as far back as 1883 when they appeared as Rules 23 to 26 of the Rules for the Vice Admiralty Courts in Her Majesty's Possessions Abroad established by Imperial Order in Council of August 23, 1883. By Rule 207 of the same Rules it was provided that:

> In all cases not provided for by these Rules the practice of the Admiralty Division of the High Court of Justice of England shall be followed.

Thereafter similar Rules numbered 26 to 29 respecting parties were included in the Rules of the Maritime Court of Ontario made in 1889. In these Rules there is none corresponding to Rule 255 of the Vice-Admiralty Rules but the matter was covered by s. 15 of the *Maritime Court Act* R.S.C. 1886, c. 137 which provided that in the absence of any other provision the practice and procedure of the High Court of Admiralty in England at the time of its abolition should be applicable. The Maritime Court of

[1] [1919] N.S.W.S.R. 306. [2] [1921] 1 A.C. 444, 456.

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Ontario was abolished on the coming into force of the *Admiralty Act*, 1891, S. of C. 1891, c. 29, which conferred admiralty jurisdiction throughout Canada on the Exchequer Court of Canada. In the General Rules and Orders regulating the practice and procedure in admiralty cases in the Exchequer Court of Canada dated December 5, 1892, Rules 29 to 32 were the same as the present Rules having the same numbers and Rule 228 brought into play the practice for the time being in force in respect to admiralty proceedings in the High Court of Justice in England in all cases not otherwise provided for by the Rules. In the present Rules of the Court in Admiralty dated June 2, 1939, and made pursuant to the *Admiralty Act*, S. of C. 1934, c. 31, Rules 29 to 32 were unchanged but by Rule 215 it was provided that:

> In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

By s. 35 of the *Exchequer Court Act*, R.S.C. 1952, c. 35:

> The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in Her Majesty's High Court of Justice in England on the 1st day of January, 1928.

Neither the *Exchequer Court Act* nor the Rules of the Exchequer Court purport to deal specifically with procedure in admiralty or generally with joinder of parties or of causes of action but Rule 2 provides:

> (1) In all suits, actions, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:
>
> (*a*) If the cause of the action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England; and
>
> (*b*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England.

If the Rules of the Exchequer Court which are dated April 21, 1931, are treated as having made provision in the place of s. 35 of the *Exchequer Court Act,* which was first enacted in 1928, Rule 2 may have the effect (except in respect of matters otherwise provided for in clause (*b*)) of incorporating the practice and procedure of the High Court of Justice in England in effect subsequent to January 21, 1928, in cases in which the cause of action arises in Canada, rather than to limit the incorporation to the practice and procedure existing on that date but this, I think, makes no difference in the present case because so far as I am aware the English Rules with respect to joinder of parties and joinder of causes of action have not in the meantime changed in any respect material to this proceeding.

Under the English practice established since the alteration made in Order XVI, Rule I following the decision of *Smurthwaite v. Hannay*[1] Rule 4 of Order XVI dealing with joinder of defendants receives a liberal construction and it would in my opinion be open to the plaintiff in a case of the kind set forth in the endorsement of the writ and in the statement of claim to join all three defendants in this action. *Vide* the remarks of Swinfen Eady, L.J., on the development of the practice under this rule in *Re Beck, Attila v. Seed*[2]. The claim is asserted against all three defendants jointly and against them in the alternative and appears on the face of it at least to meet the requirements of the rule.

That, however, is a somewhat different matter from the question which arises on an application for service *ex juris* under Rule 20(*d*). In seeking such an order, it is for the plaintiff to make it sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction. For this purpose mere allegations in an indorsement on a writ or in a statement of claim are not enough. The plaintiff must show that the case is one which falls within the rule which permits such service and as applied to the present situation the plaintiff must make it sufficiently to appear that the foreign defendants are necessary or proper parties to the action, that the action is properly brought against the defendant resident within the jurisdiction and that the case is in other respects a proper one in which to make such an order.

[1] [1894] A.C. 494.

[2] (1918) 118 L.T. 629, 631.

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The authorities on this subject emphasize the necessity for the exercise of great care in authorizing service abroad and the need for this caution is probably of even greater importance when the foreign defendant is not a British subject. In *The Hagen*[1], Farwell, L.J. expressed three important principles as follows:

> During these present sittings Vaughan Williams L.J. and myself have on more than one occasion had to consider Order XI., and we have had many authorities discussed and fully considered by the Court, and the conclusion to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J., in *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch. D. 239, at p. 242, that "it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiciton." The second point which we considered established by the cases was this, that, if on the construction of any of the sub-heads of Order XI. there was any doubt, it ought to be resolved in favour of the foreigner; and the third is that, inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application.

In *Société Générale de Paris v. Dreyfus Brothers*[2], Lindley M.R., had set out some additional principles respecting service out of the jurisdiction at p. 224 as follows:

> We are referred to Order XI., and it is contended that inasmuch as an injunction is asked, and as an affidavit has been made in the terms required by that order, we have no right to refuse leave to serve this writ, and it has been contended, upon the authority of *Call v. Oppenheim* 1 Times L.R. 622, that if we do we shall be running counter to a decision of the other branch of this Court. I differ entirely from every one of those allegations. In the first place, Order XI. enumerates certain circumstances under which, and under which alone, the Court can give leave to serve writs out of the jurisdiction. It does not say that when those circumstances occur the Court is bound to give leave. On the contrary, the language is that service out of the jurisdiction "may be allowed by the Court or a Judge" in certain specified events. This shews that the Court has a discretion and is bound to exercise its discretion. This becomes still plainer by turning to rule 2, which states certain matters which the Court is bound to have regard to when it is asked for leave to serve a writ in *Ireland*, or *Scotland*. It is not that you are entitled to have leave simply because you bring your case within one or the other of the eleven rules of Order XI. You cannot get the leave unless you do, but it does not follow if you do you are to have the leave. The Court has a discretion, and that discretion must of course be exercised judicially, and upon proper grounds.

[1] [1908] P. 189.

[2] (1887) 37 Ch. D. 215.

Then it is said you cannot go into the merits. That is quite true. Of course you cannot properly upon an application to serve a writ try the action. The object in giving leave to serve the writ is to put the parties in a position to try the action by-and-bye, but at the same time a judge cannot perform the duty imposed upon him by this Order unless he so far look into the matter as to see whether the plaintiff has a probable cause of action or not. I do not think the Court ought to look into the defence as distinguished from the plaintiff's case. The Court must look at the plaintiff's case and see whether he has a probable cause of action. If he has no probable cause of action, and if the cause of action depends entirely upon foreign law, and the proper foreign tribunal has decided against him, that he has no cause of action, there is no ground for exercising the discretion of the Court and the Court ought to refuse the leave to serve the writ.

In the present case the material put before the Court in my opinion does not make it sufficiently to appear that the case is a proper one for service out of the jurisdiction under the rule for to my mind the material does not show enough to make it appear that the foreign defendants are proper parties to the action. They may well be proper parties if the plaintiff has reason to believe that one or more of the three ships caused the damage complained of and if the plaintiff is genuinely in doubt as to which of them it was. But the affidavits do not disclose such a situation. At most they say that the evidence of Captain Borgen given in an earlier action made it appear to the plaintiff and its solicitors that any of the three ships may have been responsible. On reading the evidence of Captain Borgen this seems to me to mean no more than that any one of a number of ships including the three in question may possibly have been responsible because they were manoeuvering or anchored in the river in the vicinity of the pipe line on the days when the damage is alleged to have been done. For aught that appears, it seems just as likely that the damage was done by some unknown ship for there is nothing to indicate that the three were the only ships manoeuvering or anchored in the vicinity which could in the circumstances have caused the damage. It is thus not a case in which the affidavits make it to appear that the plaintiff has a probable cause of action either against the defendants jointly or against them severally or against one or another or any combination of them. Nor do the affidavits say that the deponent believes that the plaintiff has a good cause of action against these defendants or any of them for the deponent simply says that he believes the plaintiff has a good cause of action without saying against whom and in the circumstances disclosed this

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appears to me to mean no more than that he believes the plaintiff has a good cause of action against someone. Nor is the case shown to be one in which any of the defendants on being charged with responsibility for the damage has sought to place the blame on another of them. Moreover, the material before the Court does not indicate that the plaintiff is in doubt as to which, if any, of the three ships caused the damage. Consistently with the material, the plaintiff may for example, know that it has no cause of action against the owner of the *Edward J. Berwind* or the owner of the *Charles Dick* for nothing in the material indicates that the *Edward J. Berwind* was at any material time anchored closer than one-half mile from the pipe line and on the other hand, the material does indicate that the *Charles Dick* had left the Detroit River some hours before the damage was done. Nor does the bald assertion by Mr. Keenan that he is informed and verily believes that the application is made on the grounds that the two foreign defendants "are necessary and proper parties to this action which was properly brought against" the owner of the *Charles Dick,* in my opinion do anything to fill the need to make it sufficiently to appear to the Court that on the facts known to the plaintiff, the foreign defendants are necessary or proper parties to the action. In my opinion, it must be shown that in the circumstances the foreign defendants are proper parties to be joined in the action against the resident defendant and the material before the Court does not make it appear that that is the case.

The foregoing in my opinion is by itself sufficient ground for discharging the order for service out of the jurisdiction but I would add that even if I thought that the facts disclosed were sufficient to make it appear that the foreign defendants were proper parties to the action so that the requirements of the wording of Rule 20(*d*) could be regarded as met, I would not regard the material as making out a case in which the discretion of the Court should be exercised in favour of the appellant. First, the material does not in my opinion make it appear that the appellant has a plausible or probable cause of action or a good arguable case against any of the defendants. The most that can be said of it is that it shows that it is possible that the appellant may have a cause of action against one or more of them. Secondly, the Court is left in uncertainty as to whether the

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alleged tort occurred in Canadian or United States territorial waters, a matter which affects the question of which Court would be the *forum conveniens*. Finally, having regard to the very different complexion which the matters disclosed by Mr. Grover puts on the case as it had been made to appear by the affidavits of Mr. Keenan, and particularly with respect to the claim against the owner of the *Charles Dick* which is the foundation for the application of Rule 20(*d*), it is not clear to me that leave would have been granted to the plaintiff when applying *ex parte* for the order for service *ex juris* if the information later given by Mr. Grover had been before the Court and I am not satisfied that the plaintiff when applying for that order made a full and fair disclosure of the facts within its knowledge at that time.

I am accordingly of the opinion that the leave to serve *ex juris* and the service made pursuant thereto were properly set aside. The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.

1961

May 23

1962

Nov. 7

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

PARIS CANADA FILMS LIMITED ....RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 106(2), 109(1), 123(8)(b)—Canada-United States Tax Convention Act, S. of C. 1943, c. 21 as amended by S. of C. 1950, c. 27, arts. I, II, VIII, XIIIC—Canada-France Income Tax Convention Act, S. of C. 1950-51, c. 40, arts. 2, 13—Liability to withhold tax on amounts paid to non-residents for the use of films in Canada—Appeal allowed in part.

Respondent, a Canadian company, in the business of distributing motion picture films, acquired exhibiting rights to a number of foreign films under various arrangements (1) an agreement with a Moroccan film company which gave respondent the right to exploit certain films for a period of 5 years for a 50 per cent share in the profit therefrom (2) an agreement with a French company conferring similar rights but for stated lump sum considerations and (3) with a United States film company which transferred irrevocably to the respondent for a stated lump sum all its rights to 59 films without a time limit

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By s. 106(2) of the *Income Tax Act* a tax is imposed on non-resident persons at the rate of 10 per cent of amounts paid or credited for a right in or to the use of motion picture films . . . . that have been or are to be used or reproduced in Canada.

On an appeal from a decision of the Tax Appeal Board the Minister contends that the respondent should have deducted the 10 per cent non-resident tax and having failed to do so was liable for the tax under s. 123(8)(*b*) of the Act. Respondent contends that payments were capital payments and not subject to the withholding tax or that the payments were exempt from Canadian tax by virtue of the reciprocal tax treaties between Canada and the United States and between Canada and France.

Held: That the payments dependent on profits and the lump sum payments for the Canadian rights for five years were for the "right to the use of motion picture films . . . that are to be reproduced in Canada" within the meaning of s. 106(2) of the Act.

2. That as the territory of Morocco never formed part of metropolitan France within the meaning of the Canada-France Convention, an enterprise of that territory is wholly outside the purview of the said convention.

3. That although the Canada-France Convention applies in the case of payments to the French company, paras. iii and iv of Article 13 of the Convention specifically provide for the taxation of the payments by the debtor state, namely Canada.

4. That the assignment in perpetuity of the exploitation rights by the United States company was equivalent to a transfer of stock-in-trade and so exempt from Canadian tax under Art. I of the Canada-United States convention.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Montreal.

Philippe Guay and *Roger Tassé* for appellant.

Lazarus Phillips, Q.C. for respondent.

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

DUMOULIN J. now (November 7, 1962) delivered the following judgment:

The Minister of National Revenue has filed this appeal against a decision, dated November 26, 1959, of the Tax Appeal Board[1], affirming respondent's objection to a reassessment of its income tax for 1953.

At all relevant times, Paris Canada Films Limited, having its Head Office in the City of Montreal, conducted in Canada, its business of distributing motion picture films.

[1] 23 Tax A.B.C. 120.

In normal pursuit of its trade the respondent, as more fully illustrated hereunder, concluded several agreements with foreign owners, producers, or initial distributors of picture films, namely: Sigma-Vog-Les Films Marceau of Paris, France; Maroc Films, of Casablanca, Morocco, and Sodak International Films Inc., of New York, U.S.A.

In connection with these contracts, respondent paid the following amounts, during 1953, to:

Sigma-Vog-Les Films Marceau	$ 12,500
Maroc Films	8,500
Sodak International Films Inc.	210,000

The appellant seeks to recover from the respondent the "withholding" tax of 10% stipulated in section 106(2) of the *Income Tax Act* (R.S.C. 1952, ch. 148), amounting to $23,100, for which the respondent was re-assessed on February 6, 1957, consequent upon its omission of complying with this alleged obligation.

Against this fiscal demand the respondent urges a two-fold exception set out in paragraphs 10 and 12 of its "Reply to the Minister's Notice of Appeal" reading thus:

> 10. THAT the payments made by the Respondent for the purchase of the above mentioned films were capital payments and not subject to withholding tax.
>
> 12. The assessment aforementioned violates the Conventions for the avoidance of double taxation between Canada and the United States of America and between Canada and France.

The first objection is one wherein fact and statutory law merge together, whilst the second deals with the interpretation of two International Agreements.

As will appear, the indispensable approach to the treaties lies in the preliminary analysis of respondent's first argument, the Court must therefore proceed to elucidate this essential factor.

Section 106(2) of the *Income Tax Act* (1952, R.S.C. ch. 148), applicable to the instant case, prescribed that:

> 106(2) Every non-resident person shall pay an income tax of 10% on every amount that a person resident in Canada pays or credits or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of payment for a right in or to the use of motion picture films that have been or are to be produced or reproduced in Canada.

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In its Notice of Appeal, at paragraph 2, the Minister declares that:

> 2. On July 10, 1951, June 18, 1953 and July 10, 1953 there intervened, between Sigma-Vog-Les Films Marceau, having its residence outside Canada, and the Respondent, contracts which granted to the Respondent distribution rights for Canada for a number of films which are enumerated in the said contracts.

Paragraphs 3 and 4 contain similar allegations, regarding distribution rights for Canada acquired from other non-resident organizations, Maroc Films and Sodak International Films Inc., the contractual dates being the only variant, in exhibits 6, 7, 8, 9, 10 and 11.

The sole question at issue is whether or not Paris Canada Films Ltd., obtained from non-residents "a right in or to the use of motion picture films", to be reproduced in Canada, even though such a right might be derived from an outright "purchase".

The respondent in its qualified denial of appellant's paragraphs 2, 3 and 4 holds "that the contracts referred to therein (i.e. exhibits 6, 7, 8, 9, 10 and 11) speak for themselves". If so, what do these contracts stipulate?

Exhibit 6, the agreement between Maroc Film of Casablanca, Morocco, and Paris Canada Films, Ltd., of Montreal, dated at Paris, April 8, 1951, enacts the following, *inter alia*:

> Messieurs, (viz. Paris Canada Films Ltd., the Respondent)
>
> Par la présente, nous vous confirmons, en qualité de propriétaires des droits, l'accord intervenu entre nous:
>
> 1°) En qualité de notre mandataire vous exploiterez pour notre compte exclusivement dans les territoires ci-après énumérés.
>
> — C A N A D A —
>
> la version en langue française, du film intitulé «LA PASSANTE» . . .
>
> 2°) Cette exploitation (underlinings are mine throughout these notes) aura lieu pour une durée de CINQ ANS (5) années, à dater du jour de l'acceptation du film par la censure canadienne. . . .
>
> Vous vous engagez à mettre en exploitation le film au plus tard le— après l'obtention du visa de censure.
>
> 3°) Vous vous engagez à nous fournir le 20 de chaque mois:
>
> *a*) Un bordereau récapitulatif des contrats signés, mentionnant, pour chaque établissement, le pourcentage de location ou le forfait, le minimum garanti, la date limite d'exécution;
>
> *b*) Un bordereau détaillé par salle, des encaissements, mentionnant: le nom de la ville, la date de passage, la recette nette, le pourcentage de location appliqué, le montant de la facturation . .

c) Un relevé du compte mensuel tenu séparément pour le film. Les produits d'exploitation du film nous seront versés jusqu'à concurrence de 50/50 (cinquante-cinquante) étant entendu que Vous Nous verserez, à valoir et à titre de MINIMUM GARANTI, une somme de 1,500,000,—(Un million Cinq Cent-Mille Francs) . . . de la recette brute d'exploitation que vous nous ferez parvenir avant le 20 de chaque mois suivant le début de l'exploitation de la première copie.

Le surplus des recettes brutes vous restera acquis, tant à titre de rémunération forfaitaire de mandataire que pour vous couvrir des frais d'exploitation visés au paragraphe 6 ci-après . . .

Exhibit 7, between the same parties, bearing date of December 5, 1951, to all practical intents is similar, providing also for a five-year exploitation of certain films.

Exhibit 8 links together for identical purposes of exploitation and a five-year term, Sigma-Vog-Les Films Marceau of Paris (July 10, 1951) and respondent.

Exhibit 9, dated at Paris, June 18, 1953, grants to Paris Canada Films, during five years, at a price of $3,500, "les droits exclusifs de représentation cinématographique . . .". The party of the first part, or stipulator, here, is Les Films Marceau.

Exhibit 10, again between the above, is precisely to the same effect as the preceding indenture, bestowing for a consideration of $5,000, "les droits exclusifs de représentation cinématographique", in Canada. Date: July 10, 1953; duration: five years.

It seems a waste of time to underscore that each of those five contracts possessed all the elements attaching to a "right to the use of motion picture films . . . that are to be reproduced in Canada", and none of the essential components of a "purchase".

Exhibit 11, a contract with Sodak International Films Inc., of New York City, bears date of July 6, 1953. Couched in brief terms, and for a large lump sum of $210,000, it assigns the transferor's rights, which are qualified as follows:

En notre qualité de propriétaires des droits d'exploitations cinématographiques . . . nous vous cédons irrévocablement . . . les droits que nous détenons pour les 59 films cités ci-dessous nommés . . .

The rights conceded here are similar to those transferred by the preceding contracts: commercial exploitation of motion picture films, but with an irrevocable surrender unrestricted as to time. Despite this particular feature,

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about which more will be said further on, the respondent company, obligated by section 109(1) to "deduct or withhold . . . the amount of the tax and forthwith remit that amount to the Receiver General of Canada on behalf of the non-resident person . . .", and having omitted to do so, would incur the sanction decreed by section 123(8)(*b*) of the Act, ". . . to pay to Her Majesty . . . the whole amount that should have been deducted or withheld", unless, and we now reach the respondent's second objection, the relevant International Conventions, in avoidance of double taxation, should operate as relieving measures.

Since the contract between the respondent and the New York firm of Sodak International Films (ex. 11) comprises practically the 9/10 of the amount at stake, it is apropos to review, firstly, the *Canada-United States Tax Convention Act,* 1943 (7-8 Geo. VI, chap. 21), as amended in 1950 (14 Geo. VI, chap. 27).

Article I of the Convention in the 1943 treaty enacts that:

> An enterprise (defined in the Protocol, sec. 3(*b*)) of one of the contracting States is not subject to taxation by the other contracting State in respect of its industrial and commercial profits except in respect of such profits allocable in accordance with the Articles of this Convention to its permanent establishment (defined in the Protocol, sec. 3(*f*)) in the latter State . . . . Sodak Films has no "permanent establishment in Canada".

Article II proceeds to narrow down the expression "industrial and commercial profits", thus:

> For the purposes of this Convention, the term "industrial and commercial profits" shall not include income in the form of rentals and royalties, interest, dividends, management charges, or gains derived from the sale or exchange of capital assets . . .

Next in the line of appropriate texts comes the initial paragraph of Article XIII C in Schedule A of the 1950 amending Act (14 Geo. VI, chap. 27) which I quote:

> Royalties for the rights to use copyrights or in respect of the right to produce or reproduce any literary, dramatic, musical, or artistic work (but not inclusive of rents or royalties in respect of motion picture films) derived from sources within one of the contracting States by a resident or corporation or other entity of the other contracting State not engaged in trade or business in the former State through a permanent establishment shall be exempt from tax imposed by such former State.

It now remains for me to determine the legal nature of the transaction evidenced in exhibit 11, whereby the rights of cinematographic exploitation (droits d'exploitation cinématographique) for Canada are assigned irrevocably

by Sodak Films of New York to Paris Canada Films of Montreal, against a monetary consideration of $210,000, payable in twelve months and three instalments.

Proceeding by elimination, I incline to believe that a lump payment for rights irrevocably ceded, tantamount to an assignment in perpetuity, as in exhibit 11, can hardly be reconciled with the customarily accepted notions attaching to "rents or royalties", *id est*: limit of time, retention of a *jus in re* by the lessor, and periodical rentals by the lessee, either for fixed sums or an apportionment of receipts.

Neither can this deal, or more exactly its subject-matter be considered as instancing a "sale or exchange of capital assets", that, in the present set of facts, would also be exempt from taxation in Canada, by virtue of Article VIII of the 1943 Tax Convention, hereunder recited:

> Gains derived in one of the contracting States from the sale or exchange of capital assets by a resident or a corporation or other entity of the other contracting State shall be exempt from taxation in the former State, provided such resident or corporation or other entity has no permanent establishment in the former State.

The only commercially profitable use to which motion picture films can be put consists in their reproduction on the theatrical screens of the land. Then, an assignment in perpetuity of all exploitation rights to those 59 films, listed in exhibit 11, by a non-resident company, whose regular business it is to transact such deals, seems equivalent to a disposal, or sale, of so many "inventory or stock in trade goods", producive of corresponding "industrial and commercial profits".

We have seen that receipts of this kind benefit from the tax exemption decreed by Article I of the Canada-United States Convention. On this most important part of the case, the respondent's objections appear fully substantiated, and the appellant's claim to a $21,000 withholding tax is unfounded.

Coming now to the second series of motion picture contracts, exhibits 6 to 10 inclusive, concerning which the Canada-France Income Tax Convention (1950-1951, S.C. 15 Geo. VI, chap. 40) was invoked by respondent, attention is at once attracted to Article 2:

> For the purposes of this agreement: I.—The term "France" when it is used in the geographical sense, will mean only "Metropolitan" France excluding Algeria, the overseas departments and other territories of the French Union.

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Two contracts filed as exhibits 6 and 7, though dated at Paris, France, have, as a party thereto, "Maroc Film, 38, rue Galliéni, Casablanca (Maroc)".

Although this point was not argued at trial nor raised in the written pleadings, I do not think I should, on that account, ignore the jurisdictional extent of the Treaty. To all appearances, "Maroc Film", with its place of business at Casablanca, Morocco, which never formed part of "Metropolitan" France, is an enterprise wholly outside this convention's purview, and the $8,500, admittedly paid to it by the respondent, offers proper ground for the applicability of the 10% tax imposed by section 106(2).

The latter international Covenant also governs the third and last group of undertakings, comprised in exhibits 8, 9 and 10, between Sigma-Vog-Les Films Marceau, a Parisian producing and distributing concern, and the respondent.

Each of these three contracts, with a duration restricted to five years, sufficiently responds to the taxing requirements set out in Article 13, paragraphs III and IV of the Canada France Convention providing that:

> III. The proceeds of royalties (redevances) derived from the sale or licensing of the use of patents, trademarks, secret processes or formulae, are taxable in the State of the debtor.
>
> IV. The word "royalties" as used in paragraph III of this Article should be understood to include the income from the lease of motion picture films.

Notwithstanding the mention, in exhibits 9 and 10, of the term "cession", currently associated with notions of sale, the purport of the transaction, a grant of cinematographic reproduction rights for a five-year period at global prices of, respectively, $3,500 and $5,000, undoubtedly fall in the classification of "income from the lease of motion picture films". No ambiguity whatever subsists as to exhibit 8, and its fifty per cent apportionment of profits between the parties thereto, affording a clear application of the "royalty" payment, assessable in the debtor State. The respondent should account for a withholding tax of ten per cent on this last sum of $12,500.

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Dumoulin J.

For the reasons outlined the appeal is allowed as regards the amounts paid to Maroc Films, exhibits 6 and 7 and to Sigma-Vog-Les Films Marceau, exhibits 8, 9 and 10; it is dismissed in the matter of Sodak International Films Inc., exhibit 11.

The record will be referred back to the appellant to adjust the assessments accordingly.

Since respondent has succeeded for nine-tenths of the amount involved it should be entitled to the entire costs after taxation.

Judgment accordingly.

BETWEEN:

1962

Mar. 19

Nov. 15

JOSEPH S. IRWIN ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 14(2), 46(4) (English and French versions, 127(1)(e))—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 14(2), 139(1)(e)—Income Tax Regulations, s. 1800—Interpretation Act, R.S.C. 1952, c. 158, ss. 31(o), 36—Time limit for re-assessment—Whether day of original assessment counted—Proceeds from sale of petroleum and natural gas rights—Whether profits from a business—Valuation of inventory of unsold rights—Appeals allowed.

Appellant, a consulting geologist with long experience in western oil and gas fields, had acquired over a period of twenty years various rights to oil and gas lands on twelve occasions, sometimes in association with others, and had disposed of such rights without himself developing any of the properties. The appellant was assessed for income tax purposes on the profits realized from these sales and an appeal from that assessment was denied by the Tax Appeal Board from which decision appellant appeals to this Court. He contends that the proceeds received represented the realization of an investment from which he had hoped to obtain a royalty income. The respondent contends that the transactions represented ventures in the nature of trade the profits of which were taxable.

Held: That the profit of the appellant from his oil and gas transactions was a profit from a business within the meaning of the Act.

2. That appellant was entitled to evaluate his inventories of unsold rights at the estimated fair market value thereof, pursuant to s. 14(2) of the Act and s. 1800 of the Regulations and since it was a trial *de*

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novo the appellant was not prevented from establishing at this late date before the Court a "market" basis in the valuation of his inventory.

3. That the day on which the original assessment was issued must be excluded in calculating the four year period that the re-assessment in question was accordingly valid.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Noël at Calgary.

J. H. Laycraft for appellant.

R. L. Fenerty, Q.C., and *D. F. Coate* for respondent.

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

NOËL J now (November 15, 1963) delivered the following judgment:

This is an appeal from a judgment of the Income Tax Appeal Board[1] which affirmed reassessments with respect to the appellant's income tax assessments for the years 1952, 1953 and 1955, by which the amount of profits realized on the sale of a number of oil and gas leases and rights was added to the taxpayer's income for the above years.

The Minister of National Revenue assessed the appellant additional taxes on the basis of an increase of $37,556.06 in taxable income for 1952, of $13,047.54 for 1953 and $16,864.62 for 1955, on the allegation that the appellant had realized net gains as income for trading in petroleum and natural gas reservations as follows:

For 1952		
Crown Petroleum & Natural Gas Reservation 1268		$ 41,952.40
Crown Petroleum & Natural Gas Reservation 1326		$ 1,280.00
		$ 43,232.40
Deduct Losses Sustained		
Costs incurred to 1952 on C.P.R. Reservation	$2,211.81	
Costs incurred on Crown Petroleum & Natural Gas Reservation 730 to Dec. 31, 1952	$2,229.37	
Lease Rentals Paid	$1,235.16	$ 5,676.34
Increase		$ 37,556.06

[1] 23 Tax A.B.C. 233.

For 1953		
⅓ interest in Petroleum and Natural Gas Reservations 1317 and 1318		$ 1,000.00
⅓ interest in Petroleum & Natural Gas Reservation 1326 and interspersed leases plus a ⅓ interest in 2½% gross royalty therein		$ 13,885.44
		$ 14,885.44
Deduct:		
Rentals paid on C.P.R. Reservation	$1,217.50	
1954 Revised loss	$ 620.40	$ 1,837.90
		$ 13,047.54
For 1955		
Interest received New Superior Oils reported in error	$ 50.00	
Interest received Western Tungsten & Copper Mines not reported in error	$ 90.00	$ 140.00
Net gains		
Crown Petroleum & Natural Gas Reservations 513 and 514	$ 1,264.34	
Crown Petroleum & Natural Gas Reservation 1268	$ 2,976.40	
Crown Petroleum & Natural Gas Reservation 1326 plus interspersed leases	$ 14,102.50	
	$ 18,343.24	
Deduct lease rentals	$ 1,618.62	$ 16,724.62
		$ 16,864.62

The appellant, a resident of the City of Calgary, Alberta, describes himself as a professional consulting geologist engaged in preparing geological reports and giving geological advice. He attended the Missouri School of Mines and graduated as a Bachelor of Science in mining engineering in 1912; in 1922, after ten years of experience, he obtained the degree of Engineer of Mines. In 1916 he joined the Carter Oil Company in Tulsa as an exploration geologist. After the First Great War, following a stay in the United States Army, he joined the Producers and Refiners Corporation, in Denver, Colorado, as exploration geologist and remained with them until about 1928 when he became a consulting geologist in Denver. In 1929 he did some consulting work for a Canadian company, in Alberta, the Nordon Corporation. In 1930 he rejoined the Producers and

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Refiners Corporation who had formed a subsidiary in Calgary called the Parco Oil Company and remained with them until they withdrew from the province in 1932. He then became a consulting geologist and maintains he has been in that business ever since.

The taxpayer explained that a consulting geologist does geological exploration, renders geological reports to clients for a fee and also attempts to determine favourable places for drilling; in addition he sometimes does valuation work to determine or estimate oil and gas reserves, adding that he, the taxpayer, did all this.

According to this witness, oil lands in Alberta are developed as follows: Certain companies do their own exploration work and have company geologists and others, when they do not have a geological department, hire consulting geologists; certain individuals and groups employ consulting geologists to locate favourable places for drilling and if these individuals and groups are not of a size or competent to do their own drilling and have not sufficient finances to do so, they make deals or farm-outs with oil companies to secure the drilling.

A farm-out is an arrangement whereby the owners of the oil or gas lands delegate to others an obligation to drill wells for a certain percentage of interest or a royalty or for both and in some cases with a bonus thrown in.

It is essentially a transaction which is in the nature of an option, whereby the farmee by performing certain work at his own expense may acquire an interest in the property, and that may be an entire title to whatever leases may be obtained out of the reservation or it may be a divided interest depending entirely on what the agreement is, or it may be the entire title subject to a gross overriding royalty which is a participation in the gross amount of receipts from the sale of the substances. In some cases a carried interest may be retained which, in essence, is a net royalty. In such a case, the grantor makes no expenditure with respect to the percentage interest he has retained on the property and all expenditures are assumed by the developer, the percentage of the grantor being applied after recovery of costs by the developer. In the case of a working interest, the grantor pays his own portion of the development costs. In other cases, where the conditions are so apparently good or where the regards for the possibilities in certain areas

are such that the land apparently has great merit, in addition to the interests and royalties, a cash bonus may be paid.

In some cases, one prefers paying a cash bonus rather than granting a royalty because the latter is expressed in a percentage and as the wells go down and are depleted, the percentage looms higher and higher.

The drilling of an Alberta oil well, according to the taxpayer, is an expensive operation particularly from the point of view of an individual and might run from a minimum of $25,000 or $30,000 up to half a million dollars and in many cases in the deeper drilling, up to a million dollars a well and is therefore beyond the capacity of an individual.

The taxpayer stated that in the last twenty years he had acquired rights to oil lands on twelve occasions for the purpose of having them explored and then developed if exploration warranted it and finally if the development was successful he would obtain a royalty or a payment out of the oil or gas found. Seven of these lands are involved in the reassessments.

He admitted at p. 48 of the transcript that he never intended to do any development himself because development is beyond the capacity of an individual and at p. 86 with regard to the properties dealt with by him in accordance with this appeal he stated:

Q. Would it be fair to say in regard to each of these properties that we have referred to, you did not intend to do anything on your own behalf other than dispose of them to some other agency?

A. That is certainly correct, yes.

Q. Right.

A. I couldn't develop them myself, never had any intention to.

Q. You also intended to turn each of these interests to account at its fair value, did you not?

A. Yes, yes, either in royalty or royalty and bonus.

Q. Yes?

A. And in two cases the bonus was—

Q. And you did in each case obtain the best deal that you were able to obtain on these lands?

A. Oh, yes, yes.

Q. On each of these interests?

A. Yes.

Q. Right. Now, it is pretty obvious, the payment of a rental under a lease doesn't enhance its value, does it, it just keeps it alive?

A. Keeps it alive, yes.

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The taxpayer has a professional office in Calgary, Alberta, where he practices alone and without a staff at the present time although he has had a staff at times.

The taxpayer had this to say in connection with his interests in oil lands:

With respect to his interests in oil and gas lands in the Princess-Steveville-Denhart area he stated that he acquired leases in this area in 1944. They were obtained as a reservation from the C.P.R. Company and held in the name of H. S. Flock who held a one-half interest. The net cost to the taxpayer was $2,211.81 which represented the number of years of rentals. No development was attempted on this reservation. The taxpayer had done work for Mr. Flock's syndicate on a certain reservation on which development work was done and Mr. Flock and the taxpayer felt that the surrounding areas had merit so they took up these two reservations. In 1953 Mr. Flock had formed the Flock Gas and Oil Company and he wanted the property contained in these reservations transferred to that company for which the taxpayer was given 34,500 shares of the Flock Gas and Oil Company plus a 1¼% gross overriding royalty. These shares are still in escrow. He never had them and they have no market value. On the original reservation, the arrangement with Mr. Flock was that they each would pay their one-half interest or one-half portion of the expense and for that they would have an undivided half interest in the thing and that they would retain a 2½% jointly or a 1¼% individually overriding royalty.

Crown Petroleum and Natural Gas Reservation, #730, in the Sullivan Lake area of Alberta was acquired in December 1948 and the taxpayer's interest was one-half in return for paying one half of the cost. That interest was later reduced to 10% due to the fact that the rentals on the leases out of the reservation had reached such proportions that it was beyond the taxpayer's capability. This reservation was exchanged to leases so that development could take place and the taxpayer's interest ended up as 10% of the lease with no obligation to pay annual rentals. Considerable exploration was done on this reservation in the way of geological work comprising the drilling of shallow test wells to determine the geological structure and in addition to that two deep exploratory or test wells were

drilled at a cost to Western Leasehold of $160,000. The latter acquired the right to drill on the basis of receiving one-half interest on the whole. The two wells, however, were unsuccessful and were abandoned and the leases have long since been surrendered. The net cost to the taxpayer for this reservation was $2,229.37 which represents rentals.

Crown Petroleum and Natural Gas Reservations #513 and #514, were acquired in March 1948 and were located in the same general area as #730. The taxpayer had a ½% royalty interest at first and during the attempts to get them drilled, that ½% was changed to 20% undivided interest in order to facilitate the deals for the drilling. The people who had approached the taxpayer for prospects gave him that ½% interest for services rendered and the taxpayer added for geological knowledge. The value of that ½% interest turned out to be nil because there was no discovery. A substantial amount of exploration work was done on this reservation, and some 26 shallow structure test holes were drilled in the average of 450 or 500 feet for testing the geological structure. The drilling was done by the Pacific Western Oil Company for the first well and the New British Dominion Oil Company for the other. The total cost of the drilling was $114,000 and was done, according to the taxpayer, on a probable basis of one half of the whole thing. Those two wells were unsuccessful and abandoned. After this abandonment, the taxpayer still had some interest in the property as the leases were held by the original permit holders and in order to liquidate the whole thing, they were sold. There was no cost or expenses incurred by him on this reservation. Receipts from the sales of leases to Canadian Gulf Oil Company was $1,264.34 in 1955 and $64 in 1956. The taxpayer did some exploration work but incurred no expenses. Pacific Western had obtained an option type of farm-out. It was not obligated but was permitted to drill and the leases depended on the results of its exploration work.

Crown Petroleum and Natural Gas Reservation, #1268, was the taxpayer's entirely because he liked it. He acquired it on the basis of a Canadian geological survey report by a Dr. Hume. The anticline is about 20 miles southeast of Calgary and the taxpayer felt that the location had merit. He applied to the Crown in November 1950 and obtained the reservation. He claims that he undertook exploration

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obligations in respect of this reservation but while he was wondering what he could do with it, he was approached by a Mr. Oscar Weiss of the Weiss Geophysical Company who asked him if he knew of any prospects that he might explore. The taxpayer mentioned this one and Weiss Geophysical Company took it under option with the obligation to do geophysical exploration work and with the understanding that if they liked it well enough they could drill a well. They did the geophysical work but were not sufficiently impressed to exercise the option and gave it up. Later, in 1952, Mr. Frank Reubens, of the Northern Canadian Oil Company came to the taxpayer and wanted to do some drilling so he made a deal with him. As the reservation was in a hot area, the taxpayer felt that a bonus was in order. He also sought to obtain a royalty and there was no trouble there and the royalty that Northern Canadian Oil Company was quite willing to give him was a 2½% overriding or gross royalty and $4.50 an acre bonus. The deal with Northern Canadian Oil Company took place around June 1956 when the taxpayer received a payment of $20,000 for the option. On November 17, 1957, an additional amount of $25,000 was paid and upon the payment of this amount Northern Canadian acquired the right to all the leases subject only to an overriding royalty to the taxpayer. Northern Canadian then took over the entire 9,920 acres of leases and had they made a discovery, the entire 9,920 acres would have become theirs. Here again, there was no drilling obligation. It was only in the case where in their opinion their exploratory geological and geophysical work would warrant it that they would drill a well, which they eventually did at a cost of $270,000. The well, however, was dry and abandoned. At that time the leases held on the reservation were entirely in the hands of Northern Canadian Oil Company and the taxpayer's 2¼% royalty (later reduced to 2% in order to allow Northern Canadian to peddle off the leases) still obtained; as the Northern Canadian Oil Company wanted to liquidate the situation and sell the leases with no royalty attached to them, the taxpayer received $2,976 for a complete release. The taxpayer's expenses here amounted to $2,047.60.

Crown Reservations 1317-1318 are located in the Medicine Hat and Eagle Butte areas of Alberta. Here the taxpayer had a one-third interest along with two partners, a

Mr. Siebens and a Mr. Knight. He and his partners disposed of them because there did not seem to be any likelihood of getting any drilling or development. The taxpayer's one-third receipt from that was $1,000. These reservations were acquired on January 22, 1952, and sold on November 3, 1953. The taxpayer here admits that he received his one-third interest for geological services although he had charged $300 for the fee but did not get that. The taxpayer's intent was not to make any expenditures on account of development work. What he intended to do was to try to make a farm-out which would result in somebody else developing these reservations. He would retain a royalty interest and always with the intention of getting a bonus if possible.

Reservation #1326 located in the Gladys Ridge area which is about 20 miles east of Calgary was acquired in 1951. This reservation is contiguous to Reservation #1268 on the west. The taxpayer acquired a one-third interest in 1326 and paid one-third of the expenses. He and his partners attempted to get development of this property and succeeded in interesting the Shell Oil Company. The latter took an option on it and did substantial geophysical work. Shell undertook this development on the basis that it would pay $10 an acre bonus, part of it on the option and the remainder on the exercise of the option plus a $2\frac{1}{2}\%$ royalty. The shareholder's share amounted to one-third of $10, $\$3.33\frac{1}{3}$ plus one-third of $2\frac{1}{2}\%$ which is $\frac{5}{6}$ths of a 1% royalty. The taxpayer's net return, after expenses, was $12,516.56, as the amount received from Shell was $21,980.16 and the taxpayer's expenses for rentals were in the amount of $9,463.60. There has been no development on this reservation and, therefore, no discovery and the only thing that now remains is the $\frac{5}{6}$ths of 1% royalty payable to him if production is ever obtained and that will remain so long as Shell retains those leases. Shell did not select all the leases available out of the reservation and the remainder of those leases were later sold in 1955 by his two partners to Imperial Oil Company for a price of $9 an acre. The taxpayer's share of that was one-third which was $3.00 an acre and his receipt from this was $14,102.50. There was no override here and the taxpayer did not try to negotiate any. The taxpayer had no part in the agreement with Shell. His partners had the agreement

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with Shell and the taxpayer had an agreement with them which covered his one-third interest. The two people in question were again Mr. Siebens and Mr. Knight. The taxpayer admits that to his knowledge these two partners purchased and sold interests in oil rights at that time. In 1951 he received from Shell $3,500.16 which was his one-third part of the option payment. The Shell and Imperial freehold leases were interspersed with Reservation #1326. Under the Shell deal made in 1951, or subsequently, the taxpayer was permitted to lease such portion of the 50% of the total acreage of the reservation available for leases that Shell Oil did not want to lease.

The Crown leases in the Pekisko area of Alberta were contiguous to the Duke of Windsor's E.R. Ranch. The taxpayer had long been interested in the possibilities of oil on the Duke's ranch and had written a report summarizing those possibilities which he sent to the Duke who had made a deal on the lease that he had on his ranch with Socony Mobile Oil Company and he sent this company a copy of Mr. Irwin's report where they learned of his interest in the oil possibilities at the ranch. In 1953 Socony asked him if he would like a farm-out of the lease because they had not thought enough of it to drill it. The taxpayer obtained a farm-out and interested Anglo Canadian Oil Company in the lease because they had leases and reservations surrounding the ranch and they were willing to drill a well on it. This well was drilled at a cost of $250,000 and proved unsuccessful. The taxpayer states that he would have had a royalty on this well if it had been successful. In the agreement with the Anglo Canadian Oil Company to drill a well he specified that any leases which they acquired outside of the Duke's ranch would, if the well was unsuccessful and they wished to surrender them, be surrendered back to him, which they did and the taxpayer retained those leases. The royalty in this case was ½%. There was here an obligation to drill by anyone taking the farm-out. The taxpayer, however, did not undertake any obligation to drill. What he did do in taking the farm-out was to undertake to try to get somebody who would take the obligation to drill. The taxpayer had the right to dispose of these leases to somebody that would develop them and he could have made an override or perhaps even a bonus on disposing of them in that way, although here he was unable

to do so. He however retained the right to have them offered to him free of cost prior to surrendering the leases to the Crown. During the time that these have come back to him, and up to 1955, he had paid $6,066 in rentals.

The properties obtained in 1942-1944 from C.P.R., Reservation #436, in the Vermilion area of Alberta, situated at about 200 miles northeast of Calgary, were acquired in 1947 and assigned to the Commonwealth Petroleum Ltd. in 1948. A well was drilled on it by Commonwealth Petroleum Ltd. and Hudson's Bay Oil and Gas Company but the well was dry. The taxpayer's net receipt here was $3,975.84; there was a 2½% royalty that was surrendered back to the C.P.R. and the royalty, therefore, ceased to exist. In this case there was a commitment on the part of Commonwealth to drill the reservation. It would either be at their expense or at the expense of anyone that they might get to join with them.

The Dina, Saskatchewan, lease was a Government lease assigned to Northern Canadian Oil in 1949. The basis of the agreement with Northern Canadian Oil was $1,400 plus 2½% royalty. There was no drilling commitment here.

C.P.R. Reservation #141 was acquired in 1942 and #231 in 1944 both of which were cancelled in 1945. The taxpayer attempted to make some disposition or find someone who might take these reservations but he could not get anyone to take them on any terms and he was not prepared to develop them himself.

C.P.R. Reservation #308 was acquired in 1946 but was disposed of to Wessex Petroleums in 1946 for shares having a nominal or par value of $800. He has never sold these shares. There was no requirement to develop with Wessex nor an overriding royalty. The company is now defunct so the shares are worthless.

The Silverdale syndicate, situated in the Lloydmunster area covered between 60 and 160 acres on which the taxpayer had a ½% royalty which he received during the life of the well. As there was no royalty received in 1961, the taxpayer assumes the well is now depleted. These receipts were reported by the taxpayer annually and tax was paid thereon.

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The taxpayer stated that outside of the oil lands listed here he has acquired no other oil or gas rights during the period 1942 to 1945 and that since 1955 he has not acquired any interest in such rights.

The appellant advanced as his first argument, and this applies to his 1952 assessment only, that s. 45(4)(*b*) of the *Income Tax Act*, R.S.C. 1952 c. 148 provided that reassessment be made

> (b) within four years from the day of an original assessment . . . .

The original assessment for the year 1952 was dated May 23, 1953, and the reassessment was dated May 23, 1957, and it was submitted that consequently the Minister had reassessed one day too late, the last day for reassessment being May 22, 1957, as the four year period started running from midnight on May 23, 1953, to midnight on May 22, 1957. He contended that when a document is executed at any time on a certain day it becomes effective at midnight and a fraction of a second on that day and throughout the whole of that day on the basis that in law there is no fraction of a day and he argued additionally that the word "from" was to be interpreted as inclusive of the day upon which reassessment was made.

Counsel for the appellant quoted a number of authorities such as *Pugh v. Duke of Leeds*[1] and *Lester v. Garland*[2] to the effect that the word "from" may mean either inclusive or exclusive according to the context and subject matter and *Canadian Fina Oil Limited v. Paschke*[3] *West et al. v. Barr*[4], *In re Railway Sleepers Supply Company*[5] to the effect that the date of a document should be included when payments to be made under a document are to be received within a certain period from the document.

A perusal of these authorities discloses that the Courts looked into what had been intended between the parties and as the parties intended that the rights exist for the entire day on which the document was made, effect was given to this intent.

[1] 2 Cowp. 718, 98 Eng. Rep. 1323.
[2] 15 Ves. Jun. 249, 33 Eng. Rep. Ch. 748.
[3] (1957) 21 W.W.R. 260.
[4] (1945) 1 W.W.R. 337.
[5] (1885) 29 L.R. Ch. D. 204.

This, however, is not quite the same as the present case where things have to be done within a certain time from, and which can obviously not be done until a certain thing has occurred.

Indeed, according to *Halsbury's Laws of England,* Second Edition, volume 32, at p. 42, nos. 207 and 208:

> The general rule in cases in which a period fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs, should not be counted against him.
>
> . . . and, also, where a Statute provides that something may only be done within a certain period from the passing of the Act, the day on which the Act was passed is excluded.

In *Radcliffe v. Bartholomew*[1] which dealt with the interpretation of the English Act in the prevention of cruelty to animals in which it was stated that "every complaint under the provisions of the Act is to be made within one calendar month after the cause of such complaint shall arise", it was held that the day on which the original offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made.

In *McCann v. Martin*[2] which dealt with the time for renewal of registration, it was decided that the year within which the renewal was to be filed was to be computed from the day on which the mortgage itself was filed, which meant that the year began at the first moment of time after that day had been completed.

In *South Staffordshire Tramway Company v. The Sickness and Accident Insurance Company Limited*[3], Mr. Justice Day stated:

> . . . as regards time, the word "from" is akin to "after" and excludes the day fixed for commencement of the computation.

In *Brown v. Croucher*[4] Riddel J. stated:

> It may be said at once that had it not been for the case in our own Court of Appeal McLean v. Pinkerton, 7 A.R. 490, there could have been no doubt as to the law in this Province being in that regard the same as the law in England, as thus expressed by Mathew L.J. in Goldsmith's Co. v. West Metropolitan Railway Co., (1904) King's Bench 1, at p. 5.
>
> The rule is now well established that where a particular time is given from a certain date within which an act is to be done, the day of the date is to be excluded.

[1] [1892] Q.B. 161.
[2] 15 O.L.R. 193.
[3] [1891] Q.B. 402.
[4] [1931] O.L.R. 541.

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In *Lester v. Garland* (*supra*) at p. 752 it was stated:

> It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does.

It was pointed out by counsel for the respondent that recourse should be had here to the *Interpretation Act*, 1952 R.S.C. c. 148, ss. 31(*o*) and 35(36). Indeed, in s. 31(*o*) it is stated that:

> (*o*) where a number of days not expressed to be "clear days" is prescribed the same shall be reckoned exclusively of the first day and inclusively of the last; where the days are expressed to be "clear days" or where the term "at least" is used both the first day and the last shall be excluded.

In s. 35(36) it is stated that:

> (36) "year" means a calendar year.

The above, in my opinion, is sufficient authority to exclude the day upon which the assessment was made. However, should I have any hesitancy in excluding that day, the French text of s. 46(4)(*b*) of the *Income Tax Act* dispels any doubts I might have in this regard. Indeed it reads as follows:

> (*b*) dans les quatre années *qui suivent le jour* d'une première cotisation en tout autre cas;

Now it is clear as was held by the Supreme Court in *King v. Dubois*[1] a statute in the English version must be read with the statute in the French version.

> Before calling attention to the effect of this language, it is right to mention, first of all, that the statutes of the Parliament of Canada in their French version pass through the two houses of Parliament and receive the assent of His Majesty at the same time and according to the same procedure as those statutes in their English version. The enactment quoted is an enactment of the Parliament of Canada just as the enactments of the same section, expressed in English, are. My understanding of the principle is that if there is difficulty in interpretation, and if this difficulty can be cleared up by reference to the other, then, of course, that is done; and certainly they are throughout Canada of equal weight.

Further authorities on this point can be found in *Stevenson v. Canadian National Railways*[2]; *McArthur v. The King*[3]; *Food Machinery Corporation v. Registrar of*

[1] [1935] S.C.R. 401. [2] (1948) 1 W.W.R. 129.
[3] [1943] Ex. C.R. 104.

Trade Marks[1] and finally *Composers, Authors and Publishers Association of Canada Limited v. Western Fair Association*[2].

The French text in my opinion clearly indicates that the four years run following the day of an original assessment as the words "suivent le jour" are used which in English is translated by "follow the day". This in my opinion answers the point raised by the appellant against the assessment made in respect of 1952 which, I therefore find, complies with the provisions of s. 46(4).

The next question in issue is as to whether the sums added to income for the years 1952, 1953 and 1955 are taxable income of the appellant or capital gains.

For the year 1952 the applicable statute was the *Income Tax Act*, S. of C. 1948 c. 52 and for the years 1953 and 1955, the *Income Tax Act*, R.S.C. 1952 c. 148. The relevant provisions of these statutes were ss. 3 and 4 which were the same in both statutes and s. 127(1)(*e*) of the 1948 Act which was merely renumbered as s. 139(1)(*e*) in the 1952 Act.

These provisions are as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside of Canada and without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

139(1)(*e*):

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

For the appellant it is contended that the amounts so added to his income were merely the realization of a capital asset and as such were not taxable; that the transactions he made were investments from which he hoped to receive taxable income by way of royalties; that he is a developer and not a dealer and that he did develop completely and consistently in his status as an individual; that time after time he persuaded large companies to drill these properties; that in such a risky business as the development of gas

[1] [1946] 2 D.L.R. 258 at 263.

[2] [1951] S.C.R. 596.

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and oil lands, it would have been foolish to go it alone as people do not drill unproven acreage "with all their rigs in one basket" and that the thing to do is to spread them around in groups which the appellant did; that the properties acquired were not bought for resale but with the intention of arranging with responsible oil companies or other parties to have wells drilled thereon for which the taxpayer would turn over the properties after reserving a small gross royalty to himself; that this is borne out by the fact that the taxpayer caused or arranged to have drilled the last six wells on P. & N.G. Reservations #513, #514, #730 and #1268 and on the leases in the Pekisko area at a cost of $795,000.

For the Minister, it is submitted that the sums were income from a business and, therefore, within ss. 3, 4 and 127(1)(*e*) and later 139(1)(*e*) of the *Income Tax Act;* that this appears from the multiplicity of the transactions involved in dealing with various developments of oil interests by the appellant and from his unwillingness or inability to develop these properties himself; that these interests were wildcat or speculative.

Before considering the legal problems involved, it might be helpful to look into the various transactions of the appellant and determine from the outset what the true nature of these transactions were as from this true nature alone may we find whether we are faced here with sums that are of a capital nature, or income from a business within the extended meaning given to the word "business" by s. 127 (1)(*e*) and later 139(1)(*e*) of the Act.

Indeed, no single criterion can be adopted to decide whether a transaction or a number of transactions are adventures in the nature of trade, each case depending on its facts.

There is no question but that the evidence as to the nature of the deals the appellant or his partners made, showed that he or they intended each time he or they acquired any of these interests, to turn them to account by whatever was the most rewarding means possible.

In some cases he sold his interests for royalty only, sometimes for royalty and cash and sometimes for cash only; in other words, he was prepared in all cases to negotiate his interests to the highest bidder and for whatever he could get from them.

Such conduct on the part of the taxpayer is very close to that of a typical trader in oil leases as described in cross examination by Dr. John Campbell Sproule, a witness produced by the appellant as it appears on pp. 138 and 139 of the transcript.

Q. Just a few questions, Dr. Sproule, in general. In 1951 and 1952 prospective developers and even dealers or speculators were very busy searching out and acquiring interests in any particular areas in the province that interested them, were they not?

A. Yes, Mr. Fenerty.

Q. And as a matter of fact that, I might even call it a speculative fever, that had been going pretty strongly since about Leduc, 1957 was it? 1957?

A. That was the latest fever.

Q. Yes. I mean it had been going since 1957?

A. '47.

Q. Yes '47, yes, thank you doctor. And a speculator undoubtedly makes the best deal he can, doesn't he, for the land?

A. Yes.

Q. Perhaps typically doesn't impose a drilling covenant in his deals?

A. He may or may not.

Q. Yes. Even a speculator may impose a drilling covenant, is that right?

A. He may impose a drilling covenant, but for the most part speculators are more interested in disposing of it for a higher price. Yes.

Q. Regardless of whether or not there is obligations?

A. Yes.

Q. And a speculator is interested in getting cash plus a bit override as well if he can, isn't he?

A. If he can without sacrificing too much in the way of cash.

In my opinion the principle laid down in *C.I.R. v. Livingston, et al.*[1] by Lord Clyde is applicable here. He said:

I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade", merely because it was a single venture which only took three months to complete.

If in the case of one transaction the above principle can be applied, with how much more force must we apply it to a multiplicity of transactions such as we have here and where in two of which the taxpayer was in partnership with a Mr. Siebens and a Mr. Knight both of whom the taxpayer admitted were traders in oil rights at the time.

[1] (1926) 11 T.C. 538.

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The transactions of the taxpayer here are indeed very similar to those dealt with in *Western Leaseholds Limited v. M.N.R.*[1], where it was held that they were trading rights. Indeed in this case Western Leaseholds Limited in the year 1946 granted Shell Oil an option to purchase rights in certain acreage for which it received $30,000; in 1947 the Company granted a similar option to Imperial Oil for which it received $250,000; in 1949 and 1950 Imperial Oil exercised its option and as a result, Western Leaseholds Limited received payments totalling nearly $2,000,000.

In 1949 it received over $900,000 in respect of a leasing agreement made by Minerals with a group headed by Barntol Oil.

The Minister ruled that all of the above amounts received by Leaseholds were income subject to tax and this Court upheld the Minister's assessments.[2] Leaseholds appealed to the Supreme Court of Canada (*supra*) and the appeal was dismissed. At p. 1317 it was held:

> All of the payments received by Leaseholds were taxable as income. These amounts were profits realized from the business of dealing in mineral rights. It was contemplated that by granting subleases, reservations or options or otherwise turning to profitable account the rights held by Leaseholds under its contract with Minerals, money might be realized which would enable Leaseholds eventually to produce and market oil. Consistently with one of its declared objects, Leaseholds carried on the business of dealing in these rights with a view to profit.

It is true that the taxpayer had no organization set up for the purpose of dealing in these oil rights, but he was then, and still is, an experienced geologist of repute in Alberta and was more than able to deal with the oil rights alone which with the exception of his two partnership ventures he effectively did. This indeed was in the line of his own trade and as stated by Lord Normand in *C.I.R. v. Fraser*[3]:

> It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside of the line of his own trade or occupation is an adventure in the nature of trade.

Here again with how much more force may we apply this to the present case where again we are not dealing with

[1] 59 D.T.C. 1317. [2] [1958] Ex. C.R. 288
[3] (1942) 24 T.C. 498 at 502.

one transaction alone, but with several and where in two instances the interests of the taxpayer were professional awards in the performance of professional services.

I, therefore, feel compelled to find that the taxpayer here was in all these transactions buying and selling speculative interests in oil and gas reservations; that he was unwilling and unable financially to personally develop these properties and, therefore, sold his titles to others and with one exception, did not even impose an obligation on the purchaser to develop and because of this I fail to see anything of an investment nature in these transactions.

Quite the contrary, I can see in the conduct of the taxpayer, whether he had to sell his interests or not, the carrying on of a business or at least several adventures in the nature of trade. There is indeed no evidence that he intended to retain these interests as an investment particularly if one considers that his usual means of obtaining a return was by disposing of his interests in the properties. The argument advanced by him to the effect that he was a developer and not a trader and that he did develop completely and consistently with his status as an individual cannot, in my opinion, be entertained. He certainly cannot be called a developer as he in fact developed nothing; the potential or real developers in all these transactions were all those to whom he sold his rights and the fact that no individual could develop these rights because of the magnitude of the cost merely establishes that he could not, because of this financial impossibility, become a developer, but was forced in each and every instance to become a trader.

He, therefore, in my opinion, is a trading speculator and did exactly what one of his own witnesses, Dr. Sproule, describes as the typical speculator in Alberta at p. 119 of the transcript:

> Q. Is it typically the case that one sees a speculator developing the oil lands which he is buying and selling?
>
> A. No. A speculator very seldom makes any attempt to develop it, and he is not generally concerned with whether or not it is developed, as long as he gets a price for it, and the highest price possible.

That the taxpayer during the period under review was a trader speculator is not too surprising. Indeed, with the special knowledge and experience he had of oil and gas

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interests at a time when Alberta was being so active in such fields, it would indeed have been surprising had he not gone into such ventures. At p. 118 of the transcript, Dr. Sproule confirms this oil activity from 1950 to 1955:

> A. Alberta was very active during that period and there was a great deal of wheeling and dealing, if you like, in oil lands,

For further authority on this point, what the taxpayer did as an individual is very similar to what was done by a company in the *Californian Copper Syndicate v. Harris*[1] case where Lord Justice Clerk stated:

> I feel compelled to hold that the Company was in its inception a company endeavouring to make a profit by a trade or business and that the profitable sale of its property was not truly a substitution of one form of investment for another. It is manifest that it never did intend to work the mineral field with a capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing others to take it up on lease terms that would bring substantial gain to themselves. This was that the turning of investment to account was not to be merely incidental, but was, as the Lord President put it in the case of the Scottish Investment Company, the essential feature of the business, speculation being among the appointed means of the Company's gains.

Or what was done in the *Sheddy v. M.N.R.*[2] case as reported in the headnote:

> The appellant was a member of a syndicate that held several oil and gas leases. Arrangements were made with a drilling operator whereby the latter undertook to drill wells on the syndicate's leases at his own expense. If a well proved to be productive, the driller agreed to pay the syndicate a specified lump sum plus a royalty on the oil produced; in return, the lease involved was to be assigned to the driller. . . . The appellant's share of the lump sum payments received by the syndicate was added to his declared income by the Minister. The appellant maintained that the lump sum payments were capital receipts since they had been received for the assignment of the syndicate's leases which were its capital assets.
>
> Held by this Court (Cameron J.):
>
> The appeal was dismissed. The lump sum payments were taxable in the hands of the appellant and the other members of the syndicate as income from a business. The syndicate was formed for the purpose of carrying on a business for profit. The leases were acquired with the intention of turning them to account for the benefit of the members in the best manner possible. There never was a firm and fixed intention on the part of the members (who possessed relatively little capital) to regard the leases as an investment which the syndicate would retain and develop on its own account. The disposal of the leases was one of the contemplated modes of carrying on the syndicate's business.

[1] (1904) 5 T.C. 166. [2] 59 D.T.C. 1073.

In the present case also the taxpayer possessed very little capital and had a financial burden in that the rentals became so costly that he had to sell his interests to the highest bidder.

He purchased these reservations for the purpose, as he put it himself, "of disposing them to some other agent, of turning each of them to account at its fair value" and may I add, basing myself on the evidence presented, of obtaining the best deal he was able to; such objects, in my opinion, are all of a business nature and are similar to those that would have motivated a trader or a dealer. I am, therefore, of the opinion that the appellant's transactions were at least adventures in the nature of trade and that his profit from them was profit from a business within the meaning of ss. 3 and 4 of the *Income Tax Act* as extended by s. 127(1)(*e*) and later s. 139(1)(*e*).

It is now necessary to consider the alternative contention of the appellant that he is entitled to apply rule 1800 of the *Income Tax Regulations* pursuant to s. 14, s-s. 2 of the *Income Tax Act* and place his inventory of petroleum and natural gas interests for the three years under review on a market value figure which on that basis would indicate that the taxpayer has sustained no profit, but has incurred losses. Section 14(2) of the *Income Tax Act* and regulation 1800 read as follows:

(2) For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

Regulation 1800:

For the purpose of computing the income of a taxpayer from a business

(*a*) all the property described in all the inventories of the business may be valued at the cost to him; or

(*b*) all the property described in all the inventories of the business may be valued at the fair market value.

At the time of the reassessments the properties of the taxpayer had been taken at cost. Later, before the Tax Appeal Board, in 1957, the taxpayer produced Exhibit A prepared by Mr. Morton, the chartered accountant of the

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taxpayer, and which purported to be a schedule of inventories of petroleum and natural gas reservations of the taxpayer, part of the figures of which came from cost prices and others from the taxpayer himself partially substantiated by Dr. Sproule and purported to be market prices.

In 1962, before this Court, the taxpayer produced as witness the same Mr. Morton and Mr. John Campbell Sproule, a consulting geologist. The latter valued the various properties of the taxpayer on a fair market value basis and produced as Exhibits 1, 2 and 3 written reports of such values. Mr. Morton produced as Exhibit 4 statements of the profits realized and the losses incurred by using the provisions of regulation 1800 under the *Income Tax Act* for the years 1952 to 1955 as well as the market values of the inventories as set down in Dr. Sproule's reports.

In other words, Mr. Morton took Dr. Sproule's figures and assuming them to be correct for market value prepared inventories based upon them with the result that the taxpayer instead of making profits in the three years under review now sustained losses.

At the hearing, a general objection was made by counsel for the respondent to the production of the written reports prepared by Dr. Sproule evaluating on a market price basis the properties of the taxpayer and produced as Exhibits 1, 2 and 3 as well as to the production of Exhibit 4 by Mr. Morton which, as we have seen, is a statement of the profits and losses realized, on the basis that the only document with respect to inventories of the taxpayer that can be considered in the present appeal is the one that was in existence before the Appeal Board and that it is most irregular to attempt to bring up now a new inventory prepared four weeks before this appeal.

He further argued that as the Minister had based the assessments appealed against on valuation of the taxpayer's properties at cost, unless the appellant can establish that this is an error in fact or in law on the part of the Minister to have so proceeded, the assessments in this Court are not subject to appeal.

He admitted that taken together s. 14(2) and regulation 1800 are somewhat confusing and so does it appear to this

Court, but he maintains that as the assessments were based on cost, they were made in accordance with the Act and with the regulations as both bases were provided for.

His next point was that there was no inventory or document or valuation in existence at any relevant time, i.e. when the assessments or reassessments were made, under which any other valuation could have been adopted by the Minister at the time other than that of cost as the new inventory basis proposed by the appellant at market price was an afterthought prepared a few weeks before the present appeal.

He further urged that the documents prepared by the appellant and produced under reserve of respondent's objection as to admissibility purports to be an evaluation or refers to an evaluation in March of the present year. It does not appear to relate to the confirmation or otherwise of the accuracy of a document in existence at any time relevant to the matters in appeal, these matters being the times of assessment, the times of reassessment or at latest the date of the hearing before the Income Tax Appeal Board of the present appeal.

Counsel for the respondent stated that he could not object to the witness (Sproule) giving evidence as to evaluation, if that is relevant on the basis of inventory documents in existence at the time of the assessment or perhaps even at the time appealed from, but he submitted these documents do not appear to relate to that at all.

He then stated that he had deliberately put in evidence Exhibit A as being the only document that existed in the nature of an inventory or an evaluation existing at the time of the decision appealed from and not even existing at the time of the assessment.

He then suggested that to try now under the guise of evidence of value to create an inventory document which does not exist is in his mind quite improper.

What respondent is saying is that back in 1951, 1952, 1953, 1954 and 1955, the taxpayer should have made an inventory document and that if he did not rush to get this done at the time he will be forever barred from doing so.

Now if we go back to the above years, the taxpayer at the time took it for granted that whatever he received from the properties listed in the inventory was capital

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gains and, therefore, no taxes having to be paid there was no necessity to consider the value of the properties at all. On what legal basis was the appellant here obliged to have an inventory document in existence at least before the Income Tax Appeal Board as suggested by counsel for the respondent.

To the following question by the Court, p. 232, counsel for the respondent had this to say with regard to the manner in which the Minister can choose either cost or market price for the evaluation of inventory.

THE COURT: Are you saying then that the Minister, within his discretion, can choose either one of the two ways and the taxpayer has nothing to say?

MR. FENERTY: I would go this far, this much further, my lord, if by any chance the taxpayer had prepared an inventory, had filed a return, and had asserted a right to have a particular method dealt, to be dealt with in a particular method at the time that he filed his return, then perhaps he might have some status to say that he could choose between the methods (*a*) and (*b*) under the Regulations, but he is coming into this Court on the basis that he has to say, "This assessment is wrong because there is an error in law or there is an error in fact."

I fail to see any provision of the law which would oblige the appellant to have such a document prepared at any time unless, of course, the matters being dealt with are clearly used to carry on a business and then, of course, s. 125 of the Act requires an inventory to be kept. This section reads in part as follows:

125(1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (*including an annual inventory kept in prescribed manner*) at his place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

(2) Where a person has failed to keep adequate records and books of account for the purposes of this Act, the Minister may require him to keep such records and books of account as he may specify and that person shall thereafter keep records and books of account as so required.

Subsection (2) above merely provides that when a person fails to keep such an inventory, the Minister may require him to keep one and one shall thereafter be kept. This is far from compelling a taxpayer to have an inventory prepared at the time of assessment, reassessment or at the time of the appeal before the Appeal Board as suggested by the respondent.

Section 14(1) of the *Income Tax Act* which states that "when a taxpayer has adopted a method for computing income from a business or property for a taxation year and that method has been accepted for the purposes of this Part, income from the business or property for a subsequent year shall, subject to the other provisions of this Part, be computed according to that method" does not appear to me of being of any assistance to the respondent because the taxpayer here had adopted no method for computing income from his business as he thought the amounts received were capital gains and not business receipts. He therefore had the right to adopt whatever method of inventory the law or the regulations provided.

It would indeed be most unreasonable that where a taxpayer was under the false impression as here that the amounts received were capital gains and therefore not taxable, and he could easily be so in these capital gains or taxable income cases where the whole conduct must be examined in order to determine the taxability of a particular amount and where, may I add, the capital gain question is becoming more and more confused, he would be precluded from establishing an inventory in a manner provided for under the law.

A further objection was proposed by counsel for the respondent on the basis that the Notice of Appeal to this Court referred to an inventory having a total figure of $130,466.80 and this amount is pleaded specifically by the appellant.

Immediately at the hearing and before this Court, counsel for the appellant applied for such amendment as was required to make the figures in the pleadings correspond to the evidence to be adduced.

This objection, and the appellant's application, were taken under reserve and the Court stated it would render a decision herein once the evidence had been adduced and, of course, if the documents prepared by the appellant were accepted it would follow that the amendment would be granted.

The first matter to be dealt with here is the proposition advanced by the respondent that unless the taxpayer can establish that the assessments made by the Minister on the basis of an evaluation of the properties at cost was an

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error in law or fact at the time on the part of the Minister, the assessments in this Court should not be subject to appeal.

In my opinion such a proposition cannot be entertained as if the appeal before this Court is a trial *de novo* or a new trial, the parties are not restricted to the issues either of fact or of law that were proven and argued before the Tax Appeal Board and, therefore, new facts or even different facts can be adduced, proven and argued before this Court.

This situation was dealt with in *Goldman v. M.N.R.*[1] by Thorson P. where he stated:

> . . . that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

It was, therefore, permissible here for the taxpayer before this Court to prove something new which had not been adduced before the Board and on the basis of which the Minister's decision may be in error in fact or in law. Consequently, Exhibits 1, 2, 3 and 4 of the appellant are admitted and his motion to amend his pleadings to make the figures therein correspond to the evidence adduced herein is granted.

The second matter of importance to be dealt with is what are the rights of a taxpayer under s. 14(2) of the *Income Tax Act* and regulation 1800.

This section, as we have seen, provides that for the purpose of computing income, the property described in an inventory shall be valued at the lower of its cost to the taxpayer or its fair market value, or in any such other manner as may be permitted by regulations and, of course, regulation 1800 provides that:

> (*a*) all the property described in all the inventories of the business may be valued at the cost to him; or
>
> (*b*) all the property described in all the inventories of the business may be valued at the fair market value.

[1] [1951] C.T.C. 247.

Section 139(1)(*w*) defines inventory as meaning:

> . . . a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year;

It is also provided that for the purpose of s. 125 an inventory must show the quantities and costs of the properties:

> . . . that should be included therein in such a manner and in sufficient detail that the property may be valued in accordance with this Part or section 14 of the Act.

Section 14(2) of the *Income Tax Act* appears to be much broader than the regulations on the manner of evaluation and in the event of inconsistency between the two, the provisions of the Act would prevail. However, as the Act provides that other manners may be provided for by regulations, any regulation so providing pursuant to the Act would have the same authority as the Act itself.

According to s. 14(2) and regulation 1800 of the *Income Tax Act,* as we have just seen, inventory can be valued according to either of the three methods mentioned above namely:

(*a*) Cost (Regulation 1800(*a*))
(*b*) Market (Regulation 1800(*b*))
(*c*) Cost or market whichever is the lower, s. 14(2).

In the latter case (*c*) one of three methods may be adopted: 1) each inventory item is valued at cost and at market and the lower of the two amounts is entered on the inventory sheet; 2) inventory items are grouped by departments or otherwise, each group being evaluated at cost or market whichever is the lower; 3) the taking of the lower as between cost and market is applied to the inventory total.

In (*a*), i.e. "Cost", the property described in all the inventories of the business may be valued at cost and in (*b*), i.e. "Market", all the property described in all the inventories of the business may be valued at the fair market value.

Now unless there is any other provision in the law, and I understand there is not, which would prohibit the taxpayer from choosing one or the other of these methods of establishing his inventory, I cannot see how he could be pre-

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cluded even at this late stage before this Court from using one of the three above methods given to him in the Act.

It would seem that as Exhibit A is partly cost and partly market price and not the lower of the two for each item, or for each group or the taking of the lower as between cost and market applied to the inventory total it is of no assistance to the taxpayer and must, therefore, be rejected.

However, the taxpayer before this Court has attempted to establish the fair market value for all of his properties. This he had the right to do under regulation 1800(*b*) but he also had the burden of establishing this fair market value in a satisfactory manner.

This burden is well defined in *M.N.R. v. Simpsons Limited*[1]:

> ... the true position is that on an appeal to this Court from a decision of the Income Tax Appeal Board, whether the taxpayer or the Minister is the appellant, the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law.

Exhibit 4 which is the fair market evaluation of the taxpayer's properties as established by J. C. Sproule and associates and Mr. Morton indicates that these properties at the relevant times had fair market values as follows:

$269,473.00 as of December 31, 1951
$154,133.40 as of December 31, 1952
$ 49,859.40 as of December 31, 1953
$ 30,599.40 as of December 31, 1954
$ 23,501.00 as of December 31, 1955
$ 23,034.00 as of December 31, 1956

Has the appellant established to the satisfaction of this Court that the figures proposed are the true fair market values of his properties? In *Sellars Gough v. M.N.R.*[2] this Court decided that the question of fair market value was entirely a question of fact.

The expression "market value" is either (1) the price at which it is estimated that the stock can be realized after deducting all expenditures incurred before disposal or (2) the cost of replacing the stock at the accounting date.

[1] [1953] Ex. C.R. 93 at 97. [2] 54 D.T.C. 1170.

As we are dealing here with property to be sold immediately in its existing condition and not as incorporated in a manufactured product, the first method, i.e. selling price must of necessity be adopted and for each of these properties the taxpayer must establish what could have been realized at the relevant times.

Dr. John Campbell Sproule, a consulting geologist testified on behalf of the taxpayer as an expert evaluator of his oil and gas interests. This gentleman graduated from the University of Alberta with a Bachelor of Science degree in 1930, in geology with a Master of Arts degree in 1931 and with a Doctorate of Philosophy in geology in 1935. He opened a Geology Consulting Office in Calgary in 1951 with a group of engineers and geologists and stated that his firm did anywhere between 400 and 1,000 evaluations of oil properties in a year.

He testified that in order to evaluate oil lands or unproven acreage an evaluation is made of the potential of the wells drilled nearest to the project property, and then a detailed study of the sub-surface geological horizon is made. He added that the evaluation reports produced as Exhibits 1, 2 and 3 are based on his knowledge of the local and regional geology in the vicinity of the project's parcels at the time and upon his knowledge of private sales. In other words, he claims to have restored the situation as at the time from year to year, from 1951 to 1956, on the basis of his own records, published records, as well as what he knew about the properties at those periods. The witness mentioned that it so happened that on three out of seven of the taxpayer's properties he had on file detailed records as he had evaluated them for other companies.

This witness admitted that evaluations for whatever purpose they are made, on wildcat or undeveloped acreage, are either more or less educated guesses. This is what he had to say on this matter at p. 136 of the transcript:

THE COURT: It is pretty hard to establish a value then, isn't it?

A. At that point, my lord, you must depend, to a great extent, on geological interpretation of the sub-surface and geophysical interpretation of sub-surface and any tools that you have at hand, and it can be said that any evaluation is subject to correction and to error, that is correct, all we can do is the best that can be done at a given time, with the evidence available at that time.

Q. Another one of these uncertain things?

A Yes, my lord.

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Q. To evaluate a building and to evaluate a lease is a pretty hard job, isn't it—

A. It is—

Q. —it is just sketchy, I mean the best we can do is guess, you say it is intelligent guessing, but it is guessing?

A. It is educated guessing—

Q. Educated guessing?

A. And I think that that should be followed by the comment that it is educated guessing but it is room, there is room for so much error that a consultant or the estimator must, of necessity, lean toward the conservative side, and I may say that in our guessing, our educated guesswork we have always tried to do that and as witnessed by the seven pipeline hearings that we have given evidence at, in which we have used geological evidence beside engineering evidence, and used them both rather than the engineering evidence that others, that some others prefer to be happy with, in those seven pipeline hearings we have come up with the highest estimate for undeveloped and unknown reserves at every hearing, that we have given at the hearing, and in every case those reserves are now too low on a proven basis; . . . Where there are a number, where there is a large number of evaluations we make mistakes, and you are bound to make mistakes in some of them, some of them in the light of later evidence would look very bad, but on balance where you have a large number of these or a fair number of these evaluations, such as this group here—

Q. Your batting average is good?

A. Your batting average is good, . . .

Dr. Sproule dealt firstly with the two C.P.R. permits of the Denhart area shown as Block No. 1 and Block No. 2 on Figures I to VI of Exhibit 1. These two Blocks were acquired in 1944. The development work around these two permits are detailed in Exhibit 1 from year to year on a basis of the wells completed and known as at the end of each of these years. Figure 1 represents the drilling and developing situation as at the end of 1951, December 31. Figure II as at the end of 1952 and so on to the end of 1956 so that one gets a running account of what happened in the way of development and acquisition of knowledge around those two parcels during the six year period as stated by Dr. Sproule on p. 107 of the record:

A. . . . it is the completion dates of those wells in those areas and a knowledge of the oil and gas reserves that were proven and a knowledge of the dry holes and the discouraging results, and a

knowledge of certain encouraging results within dry holes that were not taken advantage of at that time, and anyway the total situation with respect to knowledge is represented in each year, so that we can, with that background of knowledge recorded in Government publications from time to time, we can, at any period in history, go back and tell you exactly what the situation was at a given date, and that is what we have done here. I have used that background of geological information in conjunction with another set of information, it's called, it is called Land Information Card, that is published by an accepted firm in Western Canada, the name is Well Information Services, and they turn out records of all sales, petroleum and natural gas reservations, Crown leases, drilling reservations, gas licensed sales, different sorts of sales that give you in detail the prices in, as at a given time, so I have used all those published figures, as well as certain private information and the sub-surface data in order to arrive at values for Irwin's interest in each of those years.

He pointed out that in Township 22, Range 13 for instance a sale made in that area on July 22, 1953 showed a price per acre of $11.29 plus $1.00 which is $12.29 and another parcel was sold at $22.79 an acre. A row of gas wells in the vicinity had alerted industry to this high valuation at the time. However, despite the fact industry thought very highly of this area, as an extension off to the northwest, there are now no producing wells there which as mentioned by Dr. Sproule has nothing to do with the situation, it being one of the vagaries of the oil business and adding—"you can make some bad mistakes in terms of evaluation at a given time,".

With respect to the evaluation of overriding royalties, Dr. Sproule stated that they are expressed in terms of dollars per 1% gross royalty per 160 acres which is the common way of expressing royalty. He added that over the past eleven years his firm had bought several millions of dollars of such royalties for a client and that he had arrived at these valuations on the basis of those records over the province.

The fair market value figures of the taxpayer as arrived on by Dr. Sproule and Mr. Morton and as listed in Exhibit

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4 are in the amount of $269,473 as of December 31, 1951, and are broken down as follows:

Holdings	*Gross Acreage*	*Nature of J.S.Irwin Interest*	*J.S.Irwin Net Acreage*	*Fair Market Value J.S.Irwin Interest*
		December 31, 1951		
Leases out of				
Reservation # 730 ..	16,275	50 % working	8,137	$ 8,544.00
Reservation # 513 ..	10,080	20 % carried	2,016	2,117.00
Reservation # 514 ..	3,840	20 % carried	768	941.00
Reservation #1317 ..	40,000	33⅓% working	13,333	9,333.00
Reservation #1318 ..	67,040	33⅓% working	22,346	18,771.00
Reservation #1326 ..	17,920	33⅓% working	5,973	41,811.00
Shell Freehold	640	33⅓% working	213	1,864.00
Imperial Freehold ..	3,040	33⅓% working	1,013	8,509.00
Reservation #1268 ..	9,920	100%	9,920	99,200.00
2 C.P.R. Reservations re Flock Gas & Oil				78,383.00
Market value of inventory December 31, 1951				$269,473.00

A close examination of this inventory, item by item as listed above, may give us a general idea of the accurateness of the evaluations submitted.

The leases out of Reservation #730 were acquired by the taxpayer in 1948, drilled by Western Leasehold at a cost of $160,000 in 1951 and abandoned in 1952. The net cost to the taxpayer was $2,229.37 which represents rentals. The taxpayer's interest in 1952 was reduced to 50% and later in the same year it was reduced to 10%. This reservation is adjacent to Reservations #513 and #514. The closest oil production is from the Viking Sand in the Hamilton Lakefield, located in township 35, Range 9, W.4M, about twenty miles northeast of the reservation and the Provost gas field, located about fifteen miles east of the reservation which was discovered in 1946 and finally the western region, Watt Lake well, completed in October 1952. However, during the period that the taxpayer held the interest, no discoveries were made in the immediate vicinity.

The calculation of $8,544 for the taxpayer's 50% working interest in 1951 and $2,148 for his 10% working interest in 1952 is based for the 50% working interest on a basis of $1.50 an acre and for the 10% working interest, on the basis of $2.50 an acre. Dr. Sproule arrived at these figures by

taking land purchases in the vicinity. According to this witness, the two most significant land purchases were Anglo Canadian Oil Company Limited, in 1951 at $1.16 an acre and $10.11 an acre for the western corner of the same parcel made in 1952. This, and an examination of the common sales records prior to and during the years 1951 to 1956 inclusive, indicates, in my opinion, that Dr. Sproule's estimate for Reservation #730 does not appear to be unreasonable or unequitable but should, however, be restricted to $8,544 as this amount only appears in Exhibit 4.

The leases out of Reservations #513 and #514 were also acquired in March, 1948, by the taxpayer in return for services rendered and his interests were sold partly in 1951 and partly in 1956. A substantial amount of exploration work was done here and the Pacific Western Oil Company and the new British Dominion Oil Company both drilled a well at a total cost of $114,000. The two wells, however, were unsuccessful and abandoned. The taxpayer still retained some interest in this property as the leases were held by the original permit holders and in order to liquidate the whole thing they were sold to Canadian Gulf Oil Company for $1,264.34 in 1955 and $64 in 1956. The taxpayer did some exploration work here, but incurred no expenses. Here again Dr. Sproule's evaluation of $2,117 for #513 and $941 for #514 does not appear to be unreasonable under the circumstances, bearing in mind that the prospects here were similar to those in Reservation #730.

With respect to Reservations #1317 (Medicine Hat) and #1318 (Eagle Butte), the taxpayer had a one-third interest with two partners, a Mr. Siebens and a Mr. Knight. This one-third interest was received by the taxpayer for geological services.

According to the taxpayer, these reservations were acquired on January 22, 1952, although Dr. Sproule stated that they were acquired in 1951. They were sold on November 3, 1953 because there did not seem to be any likelihood of obtaining any drilling or development, the taxpayer's one-third receipt being the sum of $1,000.

Dr. Sproule's evaluation of the interests of the taxpayer in Reservation #1317 in the sum of $9,333 and in the sum of $18,771 in Reservation #1318 would, under the circumstances appear to be exaggerated, particularly in view of

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the fact that it was impossible to obtain any drilling and development on these lands, that they were retained for such a short period of time and sold for such a small amount. Dr. Sproule admits that at the time the taxpayer held Reservations #1317 and #1318, the oil prospects were not generally highly regarded and, at the time, the market for gas was not good. He is, however, of the opinion that the proximity of the Medicine gas field, at the time the largest gas field in western Canada, made Reservation #1318 a fairly valuable land holding through both of the years concerned. There were, however, few land sales in the general area of these two reservations in 1951 and 1952 and, consequently, there were few land sales published. The Crown sales relating to #1318 during the years 1951 and 1952 were on an average of 82 cents per acre and there were no Crown sales for Reservation #1317. Should we apply this 82 cents per acre to both reservations, we would obtain a figure of $6,050.60 for #1317 and $15,392.22 for Reservation #1318 which would be the fair market values respectively of these reservations.

Reservation #1326 was acquired on January 19, 1951, by Messrs. Harold Siebens and Jesse Knight and the taxpayer acquired a one-third interest in this reservation and paid one-third of the expenses. The Shell Company, in 1951, became interested in this property and took an option on it on the basis that it would pay $10 an acre bonus, part of it on the option and the remainder on the exercise of the option plus a 2½% working royalty. The shareholder's share here amounted to one-third of $10, 3.33⅓ plus ⅓ of 2½% which is ⅝ths of 1% royalty. His net return after expenses was $12,516.56 as the amount received from Shell was $21,980.16 and his expenses for rentals were in the amount of $9,463.60. These rights were sold late in 1953.

Shell did not select all the leases available out of this reservation and the remainder were later sold in 1955 by his two partners to Imperial Oil for a price of $9 an acre. The taxpayer's share of that was one-third, $3 an acre and his receipt was in the amount of $14,102.50.

The Shell and Imperial Freeholds were interspersed with Reservation #1326 and the taxpayer's interest was a 33⅓% working royalty.

Dr. Sproule placed valuation of between $10 and $12 per acre on Reservation #1326 based on the fact that late in 1951 he made a valuation of $20 an acre for the A. G. Bailey Company of lands held by Alberta Leaseholds which, according to this witness, checkerboarded with the taxpayer's land and also because of the Weiss Geophysical Corporation of Canada's seismic profile of March 21, 1951, which ran across the Twin Dome structure and through the taxpayer's acreage and also because of the completed Shell McKid gas well drilled only 12 miles west along the same Twin Dome structure on which the taxpayer's acreage was concentrated and which acreage showed on the Weiss geophysical as a pronounced ridge. Dr. Sproule also based his valuation on lands sold in 1953 for $5.11, $10.93, $10.86, $15.00, $25.17 and $20.07 per acre in the vicinity of the taxpayer's properties.

He, therefore, feels that $10-$12 an acre is the minimum fair market value of the taxpayer's Reservation #1326 and this is in his opinion a conservative estimate.

The evidence, on the other hand, discloses that there has been no development on this reservation and, therefore, no discovery and the only interest retained by the taxpayer is the $\frac{5}{6}$ths of 1% royalty payable to him if production is ever obtained and which will remain so as long as Shell retains the leases. This applies also for the Shell and Imperial Freeholds interspersed leases.

Furthermore, as the option taken on this reservation by the Shell Company took place in 1951 and that from then on the interest from the taxpayer was only $\frac{5}{6}$ths of 1%, one may well ask how a one-third interest can be included in the inventory at the end of the very year that the greater part of that interest was sold.

Dr. Sproule's valuation of the taxpayer's interests on a gross acreage of 17,920 of Reservation #1326 is $41,811 which is $7 an acre; his valuation of his interest in the 640 acres Shell Freehold is $1,864 and that in the 3,040 acres Imperial Freehold is $8,509. In view of the circumstances mentioned above, it would seem that an estimation of $7 per acre as applied by Dr. Sproule himself to Reservation #1326 should also be applied to both the Shell and Imperial Freeholds. Consequently, Reservation #1326 would remain with a valuation of $41,811 for 5,973 acres, Shell Freehold would have a value of $1,491 for 313 acres

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and Imperial Freehold would have a value of $7,091 for 1,013 acres which appears to be the fair market value for these interests.

Reservation #1268 was acquired in 1950 from the Crown and belonged to the taxpayer entirely. Weiss Geophysical took this reservation under option in 1951 and after doing geophysical work was not sufficiently impressed to exercise the option and gave it up. In 1952 a deal was made with Northern Canadian Oil Company who wanted to do some drilling and the taxpayer obtained a 2½% overriding royalty and $4.50 an acre bonus. From this he received an amount of $20,000 in June 1952 and on November 17, 1952, an additional amount of $25,000.

A well was drilled and found dry and abandoned. This 2½% override royalty was then reduced to 2% in order to allow Northern Canadian to peddle off the leases and subsequently in 1955 the taxpayer received $2,976.40 for a complete release of his 2% override royalty. As the taxpayer's expenses were in the amount of $2,047.60 his net receipts from this reservation are in the amount of $45,922.40.

Dr. Sproule's estimate of the value of the taxpayer's interests as at December 31, 1951, is $99,200 at $10 per acre. Here also Dr. Sproule states that in 1951 he made an evaluation for the A. G. Bailey Company of lands held by Alberta Leaseholds and his estimate of these properties was on a basis of $13 an acre. These lands checkerboarded with those of the taxpayer. Furthermore, lands were sold for $10.93 and $10.86 an acre in adjoining ranges but no sales were made in range 25 where the taxpayer's properties were located. The amount of $99,200, in my opinion, is not supported by the evidence. Indeed the reservation was acquired in 1950, examined and rejected by Weiss Geophysics in 1951 and by the end of 1951 beginning 1952, as admitted by the taxpayer himself, it was getting stale. Consequently, the amount of $45,922.40 would appear to be the fair market value of this reservation as of December 31, 1951.

The two C.P.R. reservations in the Princess-Steveville-Denhart area were acquired from the C.P.R. Company in 1944 and held in the name of H. S. Flock who held a one-half interest, the taxpayer holding the other half. These reservations comprised an acreage of 7,465. No development

was attempted on this reservation. In 1953 Mr. Flock formed the Flock Gas & Oil Company and caused the property contained in this reservation to be transferred to the Company. For his interests the taxpayer was given 34,500 shares of the Flock Gas & Oil Company and a 1¼% gross overriding royalty. These shares have no market value and are still in escrow. The net cost to the taxpayer for his interest was $2,211.81 representing the number of years of rentals. These reservations comprise a total acreage of 14,930.

Dr. Sproule valued the taxpayer's interest here for the years 1951 and 1952 on the basis of a 50% interest at $15 an acre and the value of the 1¼% overriding royalty for the years 1953 to 1956 inclusive was expressed in points which means 1% overriding royalty per 160 acres.

His figures are based on the drilling progress made from year to year in the closely associated Princess, South Princess and Denhart Jefferson, Rundle lower cretaceous and Bow Island (Viking Oil and Gas fields) and on sales in 1952 and 1953 which took place in the immediate vicinity of the taxpayer's properties. The three sales mentioned were made at a price of .54, $1.12, .63 per acre for each lot. The average approximate price per acre would, therefore, be $0.76.

Bearing in mind that these properties could not be sold between 1950 and 1952 and that they were turned in for escrow shares which are now worthless and that the reservations were finally abandoned, the amount suggested by Dr. Sproule of $78,333 would appear to be way beyond what the fair market price of these properties were.

Indeed it would appear that a fair and equitable valuation might be obtained on the basis of $1.12 an acre which, as we have seen is the higher selling price for the three sales made in the immediate vicinity of the taxpayer's properties during the period under review. Using that price as a yard stick and applying it to the 7,468 acreage, the amount of $8,360.80 is arrived at which, in my opinion, is the fair market value of the taxpayer's interest in these reservations.

I have therefore come to the conclusion that the assessment made in respect of the year 1952 complies with the provisions of s. 46(4) of the *Income Tax Act* and was not tardy, that the profit of the taxpayer from his oil and gas

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rights transactions was profit from a business within the meaning of ss. 3 and 4 of the Act as extended by s. 127(1)(*e*) and later 139(1)(*e*) of the same Act; that the taxpayer was entitled under s. 4(2) of the *Income Tax Act* and regulation 1800 passed pursuant thereto to produce an inventory of his properties on a fair market value basis which for the properties of the appellant as of December 31, 1951, have the following fair market values:

#730	$ 8,544.00
#513	$ 2,117.00
#514	$ 941.00
#1317	$ 6,050.60
#1318	$ 15,392.22
#1326	$ 41,811.00
Shell Freehold	$ 1,491.00
Imperial Freehold	$ 7,091.00
#1268	$ 45,922.40
C.P.R.	$ 8,360.80
	$137,721.02

The appeals will therefore be allowed with costs and the assessments referred back to the Minister to be revised accordingly.

Judgment accordingly.

BETWEEN:

JOSEPH S. IRWIN ..... APPELLANT;

AND

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

[See headnote to preceding case *ante* p. 51.]

This is an appeal from a judgment of the Income Tax Appeal Board[1] which affirmed a reassessment with respect to the appellant's income tax assessment for the year 1953 by which an amount of profits in the sum of $13,047.54 for

[1] 23 Tax A.B.C. 233.

the year 1953 realized on the sale of a number of oil and gas leases and rights was added to the taxpayer's income for the above year as follows:

For 1953		
⅓ interest in Petroleum and Natural Gas Reservations 1317 and 1318		$ 1,000.00
⅓ interest in Petroleum & Natural Gas Reservation 1326 and interspersed leases plus a ⅓ interest in 2½% gross royalty therein		$ 13,885.44
		$ 14,885.44
Deduct:		
Rentals paid on C.P.R. Reservation	$1,217.50	
1954 Revised loss	$ 620.40	$ 1,837.90
		$ 13,047.54

The taxpayer, a professional consulting geologist, had, in the last twenty years, acquired rights to oil lands on twelve occasions for the purpose of having them explored, developed and then obtaining a royalty or a payment out of the oil or gas found.

For the appellant, it is contended that the amounts so added to his income were merely the realization of a capital asset and as such were not taxable; that they were investments from which he hoped to receive taxable income by way of royalties; that as an alternative argument and in the event he should not succeed in his contention that the profits realized were capital profits he is entitled to apply rule 1800 of the *Income Tax Regulations* pursuant to s. 14(2) of the *Income Tax Act* and place his inventory of petroleum and natural gas interests on a fair market value figure which, on that basis, would indicate that he has sustained no profits, but has incurred losses. For the Minister, it is contended that the sums were income from a business and, therefore, within ss. 3 and 4 and 127(1)(*e*) of the 1948 Act which was merely renumbered 139(1)(*e*) in the 1952 Act; that the taxpayer was not entitled under s. 14(2) of the *Income Tax Act* and Regulation 1800 to place his inventory on a basis other than cost.

This appeal, and two others, bearing numbers 160971 and 160973 and all rising out of the same set of circumstances, came on for hearing at Calgary, Alberta, at the same time.

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A judgment was rendered in one of these appeals bearing number 160973 covering the facts contained in all the appeals. Indeed, all the evidence adduced and arguments proposed apply to the three appeals and the Court's decision in case 160973, with the exception of the matter of the tardiness of the assessment which applies only to the 1952 taxation year, shall be the decision of this Court in this appeal also. Judgment has today been handed down in case bearing number 160973 of this Court holding that the profit of the taxpayer from his oil and gas right transactions was profit from a business within the meaning of ss. 3 and 4 of the Act as extended by s. 127(1)(*e*), later replaced by s. 139(1)(*e*) of the same Act; that the taxpayer was entitled under s. 4(2) of the *Income Tax Act* and Regulation 1800, passed pursuant thereto, to produce an inventory of his properties on a fair market value basis which as of December 31, 1951, had the following fair market values:

#730	$ 8,544.00
#513	$ 2,117.00
#514	$ 941.00
#1317	$ 6,050.60
#1318	$ 15,392.22
#1326	$ 41,811.00
Shell Freehold	$ 1,491.00
Imperial Freehold	$ 7,091.00
#1268	$ 45,922.40
C.P.R.	$ 8,360.80
	$137,721.02

and finally allowing the appeals with costs and referring the assessments back to the Minister to be revised accordingly.

For the same reasons as stated in case number 160973 of the Exchequer Court of Canada—and which may be considered as forming part of this judgment—the present appeal is allowed and the assessment here should also be referred back to the Minister to be revised accordingly.

The appellant is entitled to his costs after taxation, but inasmuch as the same counsel appeared for the appellant in all these cases which were dealt with in one hearing, the appellant's costs at the trial will be limited to one case.

Judgment accordingly.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1959
Nov. 23, 24
25

1962
Nov. 15

AND

SAMUEL L. SHIELDS ..... RESPONDENT.

Revenue—Income tax—Income Tax Act 1948, S. of C. 1948, c. 52, s. 15(1) —Income Tax Act, R.S.C. 1952, c. 148, s. 15(1)—Partnership Act, R.S.O. 1950, c. 270, s. 2—Partnerships Registration Act, R.S.O. 1950, c. 271—Excise Tax Act, R.S.C. 1952, c. 100—Validity of father and son partnership—Did partnership in fact exist in the conduct of the business—Appeal allowed.

Respondent is a builder who for many years built for sale houses on tracts of land subdivided by him. In 1950 he entered into a partnership agreement with his minor son, then at school, and for the next three fiscal periods of the business ending in 1951, 1952 and 1953 reported the profits as divisible half and half between himself and his son. The Income Tax Appeal Board allowed an appeal by respondent from his assessment for income tax and on appeal from that decision to this Court the Minister contends that the partnership agreement that was executed was not in fact recognized as governing the operations of the business but that it was conducted in fact as sole proprietorship. The issue before the Court is did a partnership in fact exist. The Court found that the partnership was "a mere simulate agreement and not a reality" and there never was in fact any intention on the part of the father to treat his son as a partner because: the father exercised complete dominion over all the partnership assets and used the assets to his own advantage treating them as his own property; the father registered a declaration under *The Partnerships Registration Act* (*Ontario*) stating that the partnership was in fact a sole proprietorship carried on by him; the father dealt with the banker of the partnership stating to the banker that the business was in fact a sole proprietorship; the son, at least in the initial period of the alleged partnership was in fact paid wages from which unemployment insurance was deducted; conflicting reports as to the ownership of the business for some of the years; the admission by both the respondent and the son that the largest single property of the business, then under construction, was an asset and undertaking of respondent alone and not subject to the partnership agreement.

Held: That the mere existence of a partnership agreement is not conclusive.

2. That the onus is on the taxpayer to demonstrate that the partnership agreement that was executed actually governed and controlled the operation of the business.

3. That the evidence showed beyond doubt that the partnership agreement was a mere simulate agreement and not a reality and that there never was any intention of the respondent to treat his son as a partner in fact.

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4. That while there was a partnership agreement it was never considered by the respondent as binding on him and did not in fact govern the actions of the parties to it in the conduct of the business.

5. That by virtue of s. 3 of the *Partnerships Registration Act* the respondent is estopped from denying a declaration made thereunder to the effect that he alone carried on the business.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

W. Z. Estey and *F. J. Dubrule* for appellant.

H. H. Stikeman, Q.C. and *J. N. Turner* for respondent.

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

CAMERON J. now (November 15, 1962) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated April 9, 1957[1] allowing the respondent's appeals from re-assessments made upon him for the taxation years 1951, 1952 and 1953, and dated September 1, 1955. The respondent is a builder residing in Toronto and during each of those years he received income from a number of sources, including income from Shields Construction Co. (which for the sake of brevity I shall at times hereinafter refer to as the "firm"). Attached to his income tax returns for those years (Exhibits I, J and K) are the annual financial reports of that firm stated therein to be a partnership in which he and his son Victor were equally entitled to the profits. Accordingly, in each of those years the respondent included in his personal returns only one-half of the profits of the firm as then computed by him.

In the re-assessments, the Minister made substantial upward adjustments to the net profits of Shields Construction Co. for each of these years as shown by Schedule I attached to the three re-assessments and no appeal has been taken in regard to these matters. In addition, the Minister, being of the opinion that the respondent was the sole proprietor of and therefore entitled to the whole of the profits of Shields Construction Co., assessed the whole of such profits

[1] 17 Tax A.B.C. 100.

as so revised, to him. The amounts involved are very substantial as shown by the following summary which relates only to the profits of Shields Construction Co.

	1951	*1952*	*1953*	*TOTAL*
Net Profit Assessed	$88,617.80	$95,318.48	$189,627.92	$373,564.20
Deduct: Net Profit reported by Samuel L Shields	25,675.77	21,334.51	32,973.38	79,983.66
Additional Net Profit assessed against Samuel L. Shields ..	$62,942.03	$73,983.97	$156,654.54	$293,580.54

The appellant's appeals to the Tax Appeal Board were allowed, Mr. Fisher being of the opinion that Shields Construction Co. was a partnership in which the respondent and his son Victor were entitled to the profits in equal shares. From that decision the Minister now appeals to this Court. The onus, however, is on the respondent to establish that there is error in fact or in law in the re-assessments under appeal (*M. N. R. v. Simpson's Ltd.*[1]).

Shields Construction Co. commenced business on April 1, 1950 and its fiscal period ended on March 31. Accordingly, under s. 15(1) of the 1948 *Income Tax Act* and the *Income Tax Act,* the profits therefrom to which the respondent was entitled formed part of his income for the taxation years 1951, 1952 and 1953.

The sole question before me is whether the whole of the profits of the firm for those years and as revised by the Minister in the re-assessments should be assessed to the respondent or only one-half thereof. That question is to be answered by a consideration of all the facts and a determination not only as to whether there was a partnership agreement between the respondent and his son, but also whether such an agreement governed and controlled the operation of the firm.

The evidence of the respondent as to the formation and termination of the various partnerships and companies under which he and/or Victor carried on business as builders is as follows: The respondent, originally a printer, was associated with one Silver in the building and sale of houses for five or six years prior to 1950, first as a partnership under the name of Essex Housing Co. and thereafter until

[1] [1953] Ex. C. R. 93.

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early 1950 as Essex Housing Ltd. The latter business was terminated early in 1950 and the assets divided equally between Silver and the respondent. The respondent then decided to continue in business as a builder and to take into partnership with him his son Victor, then less than seventeen years old, the partnership to be called Shields Construction Co. Victor at all relevant times resided in the family home and was a student at Forest Hills Collegiate Institute until May, 1952. A partnership agreement (Exhibit 1) was entered into in March, 1950 and continued for three years until terminated by mutual consent as of March 31, 1953. During those years four or five large parcels of land were purchased and subdivided, a large number of buildings constructed and many sold. The title to all the lands was taken in the name of the respondent alone. He executed all agreements, contracts, mortgages and deeds.

He states that as of April 1, 1953, he took over all the assets and assumed all the liabilities of the firm (including the amount due to Victor as then computed at $58,044.74), carrying on business under the same name until March 31, 1954, when he incorporated Shields Construction Co. Ltd. (in which he owned all the shares), that company in turn taking over all the assets and assuming the liabilities of Shields Construction Co. (including the amount due to Victor revised upwards to $103,345.80). He also says that at the dissolution of the partnership on March 31, 1953, Victor went into business on his own account as a builder under the name of Shields Housing Co., that he had no interest in that proprietorship although title to all the land was in his name; and that when Victor became of age about August, 1954, he (Victor) incorporated his business as Victor Shields Homes, Ltd., owning all the shares.

The evidence is that at all relevant times Messrs. Hattin, Moses & Co., Accountants, were the auditors of Shields Construction Co., and H. P. Botnick its solicitor.

The respondent produced Exhibit 1, a partnership agreement bearing date March 23, 1950, in which he and Victor are respectively the parties of the first and second part. The recital thereto reads:

WHEREAS the parties hereto are desirous of entering into the building business in partnership on the basis that the party of the first part shall purchase the land and finance the cost of construction, and the party of the second part shall give supervision and perform such other work

as he is reasonably capable of doing in and for the partnership business and on the understanding that the net profits of the business shall be shared equally between the parties hereto.

By that document the father and son agreed to become partners in the construction business subject to the terms and conditions thereof which include the following:

1. The partnership shall commence on the 1st day of April, 1950, and shall continue from that date until it shall be determined under the provisions hereof.
2. The firm name and style of the partnership shall be SHIELDS CONSTRUCTION COMPANY, and the said party of the second part shall not enter into any engagement on behalf of the partnership except in the said name.
3. The bank of the firm shall be The Royal Bank of Canada Spadina & College branch, or such other bank as shall be from time to time agreed upon.
4. All monies received from time to time on account of the partnership shall be paid into the bank for the time being of the partnership, and all disbursements on account of the partnership shall be made by cheque on such bank.
5. All cheques issued by the partnership shall be signed or stamped in the firm name of Shields Construction Company and shall be signed by the party of the first part in his individual name.
6. All expenses incurred in or about the said business shall be paid and borne out of the earnings of the business, or in case of a deficiency, the losses shall be borne and paid by the partners in equal shares.
7. Each partner shall be faithful to the other in all partnership transactions, and shall devote such time and attention to the partnership business as may be required to carry it on to its best advantage.
8. The said party hereto of the second part shall not during the continuance of the partnership, either alone or with any other person, either directly or indirectly, be engaged or interested or employed in any other business, or in the same kind of business carried on by the partnership, without the consent in writing of the other partner.
9. The net profits of the business shall belong to the partners in equal shares and the net profits shall be divided as soon as may be convenient after the yearly account shall have been taken as hereinafter provided, and unless the partners agree in writing to divide the profits at any other time or times.
10. It is understood and agreed by and between the parties hereto that all lands purchased and all buildings whether complete or incomplete, shall if it can conveniently be done, be registered in the name of the party of the first part only, and not in the name of the partnership.
15. If at any time after the day of either partner shall be desirous of retiring from the partnership, he may give the other partner, or leave for him at the place where the business is then being carried on, a notice in writing of such his desire, and

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of his intention to determine the partnership so far as he is concerned, and the partnership shall, at the expiration of three months after the giving or leaving of such notice, determine accordingly.

16. Upon the determination of the partnership, the assets of the partnership shall be realized and be applied, firstly, in payment of the debts of the firm; secondly in paying to each partner the amount of his capital in the business; and the surplus shall be divided equally between the partners or their respective representatives.

There is no clear evidence as to the precise date on which that agreement was prepared or signed. Undoubtedly it was prepared by Mr. Botnick, the firm's solicitor, on the instructions of the respondent and signed by the respondent and Victor, Mr. Botnick being the attesting witness. While no one could swear that it was executed on the date it bears, I am satisfied that it was executed on or shortly after its date, March 23, 1950. The respondent stated that he wanted Victor as a partner as the latter had shown an interest in the building business when the respondent was associated with Silver, and because such an interest would give Victor a chance and "a cause to be very interested". In doing so, he was following the precedent set by his father who had made him a partner in the printing business. Now I have no doubt that that agreement as between the parties thereto, if carried out, was sufficient to constitute a partnership within the meaning of that word as defined in the *Partnerships Act,* R.S.O. 1950, c. 270

2. Partnership is the relation which subsists between persons carrying on a business in common with a view to profit, but . . .

I think it is settled law, however, that for income tax purposes it is insufficient to establish a partnership in fact merely by the production of a partnership deed. It must also be shown that the parties thereto acted on it and that it governed their transactions in the business being carried on.

In *Simon's Income Tax,* 2nd Ed., Vol. I at p. 335, it is stated:

It is the actual carrying on of a trade under these conditions which constitutes a joint trading venture liable to be treated for tax purposes as a partnership or firm, not a mere agreement to carry it on. . . .

The production of a partnership deed or written agreement will not of itself establish a partnership if the agreement is not acted on. In *Dickenson v. Gross (Inspector of Taxes)* 1927, 11 T.C. 614, a deed was executed providing for the profits of certain farms to be divided between the owner and his three sons, the "partners" paying rent to the owner and

all having power to sign cheques. The farms were, however, carried on as they had been before the deed was entered into, the deed being ignored. Rowlatt, J. confirmed the General Commissioners' decision that no partnership existed for tax purposes, saying:—"Many people . . . think that by putting a bit of paper in a drawer they can make an Income Tax partnership, and they go on treating the undertaking as though it were still the sole uncontrolled property of the one person . . . instead of a partnership."

It will be convenient to consider first the evidence relied on by counsel for the respondent as tending to prove that the partnership agreement governed the conduct of the partners. It may be noted here that the original books and records of Shields Construction Co. and Shields Housing Co., and Victor Shields Homes, Ltd., were not produced at the trial and most of the evidence led by the respondent on this point consists of the oral evidence of himself, of Victor and Mr. Moses, the auditor, and of annual financial reports prepared by Mr. Moses or his firm.

As to the agreement itself, there seems no doubt that Shields Construction Co. commenced business on April 1, 1950 (Clause 1) and that its banking business was carried on at the bank specified in Clause 3 in the manner stated in Clauses 4 and 5. All expenses incurred were paid or provided for out of the earnings of the firm (Clause 6), but there were no losses. There is evidence that the respondent was the office manager and that he had a superintendent—one Robitaille—who was in charge of many of the building operations. There is also evidence that Victor did devote considerable time to the business. Until he left school in May, 1952, he was engaged at times in the evenings, on weekends and on holidays, and occasionally perhaps during normal school hours, in co-ordinating the work at the various projects, arranging for the delivery of materials and the attendance of sub-contractors as needed; and in inspecting some of the work. When he left school, he was fully occupied in such work and actually in charge of two or three projects, probably under the guidance of the superintendent and of his father.

Clause 8 was carried out and title to all land was taken in the name of the respondent (Clause 10). As to Clause 15, no written notice of dissolution was given by either party, but both stated that it was mutually agreed upon. As to Clause 16, it is said that after provision for payment of debts and the capital supplied by the respondent, the surplus, while not actually divided between the parties,

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was allocated to them in equal shares on the firm's books. I shall have occasion later to refer to that in more detail.

Mr. Moses produced a number of annual financial returns as supplied to the firm and its bankers, being respectively Exhibits 3, 4 and 5 for the years ending March 31 in 1951, 1952 and 1953, showing that the firm commenced business on April 1, 1950 and continued to March 31, 1953, and that the annual profits as then computed less drawings were allocated to the respondent and Victor equally. These reports form part of the respondent's tax returns for the years in question (Exhibits I, J and K). While Mr. Moses stated that his firm had access at all times to the firm's records and books, at times assisting in the keeping of the books of account and frequently discussing the accounts with the respondent and Victor, I am quite unable to determine how much of the information contained in these reports was actually taken from the original records or how much was communicated to them by the respondent or Victor. In any event, it is apparent that the auditors were not kept fully informed as to the date of commencement and termination of the alleged partnerships, as will later appear.

These annual reports indicate that for the firm's years ending March 31, the respondent made very substantial drawings of $2,238.71, $73,058.30 and $40,809.50. For the same years they indicate that Victor for his own use drew $562.40, $2,050.00 and $2,550.00. In addition, payments were made by the firm on account of Victor's income tax as follows: $5,000.00, $11,776.50 and $11,723.94 in 1952, 1953 and 1954, but probably for the taxation years 1951, 1952 and 1953. They also show that at the end of the firm's fiscal year, Victor's capital account (representing accumulated profits less drawings as then computed) were respectively $25,113.36, $39,397.87 and $58,044.74.

In support of the respondent's contention that the partnership with Victor was terminated on March 31, 1953, and that Victor then went into business on his own account as Shields Housing Co., the financial reports for each of the firms for the year commencing March 31, 1953, were produced. Attached to and forming part of the respondent's amended tax return for 1954, filed July 27, 1955, is the financial report of Shields Construction Co. in which the

whole of the net income of $14,645.19 is allocated to the respondent. In the explanatory schedules thereto under the heading "Schedule of partners' capital accounts as of February 28, 1954," Victor's capital account totals $103,345.80 after drawings of $14,673.94 (paid on account of his income tax) and after increasing his capital account from $58,044.74 as of March 31, 1953, by $59,375.00, to a total of $103,345.80. In the balance sheet that amount is shown as a loan payable to Victor. I may note here that the stated capital accounts of both the respondent and Victor were increased in that year by reason of the Department's having increased very substantially the value of the "work in progress" as of March 31, 1953, and by other upward adjustments.

Exhibit O is Victor's 1954 tax return. Attached thereto is a financial report for Shields Housing Co. for the period April 1, 1953, to February 28, 1954, showing all the net income of $46,238.02 allotted to Victor. It is significant that this report, while prepared by Hattin, Moses & Co., does not bear its name although a prior report for the same year (Exhibit W) has the name attached.

The balance sheet forming part of Exhibit G, the auditor's report for Shields Construction Co. Ltd. for the year ending February 28, 1956, shows "Loans payable—Victor Shields—$102,658.51". Mr. Moses also stated that Victor was paid on account of his indebtedness about $8,000.00 to $9,000.00 in 1958 and $82,000.00 to $83,000.00 in 1959, all by cheque, leaving an unpaid balance of about $12,000.00.

Counsel for the respondent submits that on this evidence it should be found that a partnership existed between the respondent and Victor, that it was carried out, and that while Victor's accumulated profits as of March 31, 1953, were not then paid to him, they were allocated to him and subsequently all but $12,000.00 was paid five or six years later; and that, accordingly, the respondent should succeed.

These matters in my view are the only ones that tend to support the respondent's contention that the partnership agreement did govern the action of the parties thereto. In the absence of any other evidence, I think the respondent might have established his case.

There is, however, a great deal of evidence which points the other way. I am fully satisfied that the main purpose of the respondent in entering into the partnership with his

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minor son was to secure a benefit for himself by sharing the profits of the partnership with Victor and thereby reducing substantially his own taxable income. In certain circumstances that, of course, is permissible as pointed out in *Ayrshire Pullman Motor Services, et al. v. C. I. R.*[1] where at p. 763 the Lord President (Clyde) said:

> No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow—and quite rightly—to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.

In *Dickenson v. Gross (Inspector of Taxes)*[2] Rowlatt J. stated it in this way at p. 620:

> As I pointed out in the case Mr. Bremner cited to me—and as has been often pointed out before—people can arrange their affairs, if they do really arrange them, so as to produce a state of facts in which the taxation is different, and it is no answer—it is perfectly immaterial—to say that they have done it for that purpose.

But Rowlatt J. continued as follows:

> But in this case the facts show that in very many ways the deed was simply set on one side and disregarded, and when you find the deed is disregarded, and also that it was entered into for the purpose of obtaining relief from taxation, one is apt, perhaps naturally and quite properly upon the question of fact, to pay a little more attention to those circumstances and those points in which it was disregarded.

I turn now to a consideration of the evidence which tends to support the submission of counsel for the Minister that the partnership deed was in fact disregarded.

Under the *Partnership Registration Act of Ontario* R.S.O. 1950, c. 27, persons associated in partnership for trading, manufacturing or mining purposes are required to register a declaration in writing, signed by all the members of the partnership, and the declaration is required to name all the partners and specify the date of birth of any partner under twenty-one years of age. Exhibit A is a certified copy of a Declaration of Business made under that Act, dated and registered February 17, 1950, in which the respondent certified that he had carried on and intended to carry on

[1] 14 T.C. 754. [2] (1927) 11 T.C. 614.

business as a builder under the name of Shields Construction Co. and "that the said business has subsisted since the first day of February, 1950 and that no other person is associated with me in the said business".

It is clear from the respondent's own evidence that this document was prepared *after* he had decided to enter into the partnership agreement with his son and after Mr. Botnick, the solicitor, had pointed out the difficulties that would result in the buying, mortgaging and selling of land if the partnership were registered as being composed of both the respondent and Victor, the latter then being a minor. The respondent first said that Mr. Botnick had then drawn up the declaration of partnership as registered, but later he stated that Exhibit A was in his own handwriting and that he prepared it himself. That registration was never changed at any time, no notice of dissolution was prepared or filed and there was no registration under the Act indicating that the partners in Shields Construction Co. were the respondent and Victor. The respondent explained the matter further:

> I just registered because a company name had to be registered and since I could not register the partnership I had to register this to come under the—so I would not have any trouble in case someone wants to know if Shields Construction Co. was building houses and somebody would come along: "Who is Shields Construction Co.?" So I registered as being the sole owner and that is all.

The respondent added that he registered it so as to give notice to the world that he was the sole partner.

The firm had its banking account at a branch of the Royal Bank of Canada in Toronto. Mr. A. L. Leslie, its manager, was called as a witness for the respondent and in cross-examination produced certain documents from the bank's records filed with it by the respondent. Exhibit S contains *inter alia*:

(1) A certificate dated February 15, 1950, signed by the respondent that he was doing business as "Shields Construction Co." and was the sole owner of that business. That certificate was never revoked or cancelled.

(2) A certificate from the Registrar dated February 18, 1950 that the respondent had filed Exhibit A certifying that he was carrying on business as Shields Construction Co. and that no other person was associated with him in business.

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(3) A bank form signed by Shields Construction Co. per the respondent dated February 5, 1953, authorizing Victor Shields merely to receive from the bank a statement of the accounts of the firm with vouchers, etc., and to sign and deliver to the bank the bank's form of verification, settlement of balance and release.

The evidence of Mr. Leslie makes it clear that the bank at all relevant times relied on the respondent's representation that he was the sole proprietor of the business and solely responsible for all loans granted and that all the business was transacted with him. The bank had no official notice that Victor was at any time a partner although from the firm's auditors or from the respondent it received annual statements of its financial affairs, including for some years at least a statement that the profits were divided equally between the respondent and Victor. For example, in a "Statement of Affairs" prepared by the bank for reference to its head office for the year March 31, 1952 to March 31, 1953 (Exhibit U), the respondent is shown as the sole partner, but in the manager's remarks it states:

> Although the auditors' report indicates it is operated as a partnership, this is for income tax purposes only, as it is actually a registered sole partnership. Mr. Victor Shields, the other partner shown, is our client's son who is a minor.

and much the same comment is made for the previous year. It is to be noted, however, that Mr. Leslie stated that neither the respondent, Victor, nor Mr. Moses had told him that the partnership was "for income tax purposes only".

Exhibit C is a statutory declaration taken by the respondent in connection with an application by Shields Construction Co. for a mortgage loan from the Prudential Insurance Co. of America. Therein the respondent declared himself as carrying on business as Shields Construction Co. and that the partnership was registered. The respondent admitted in evidence that that declaration was untrue.

It is in evidence that title to all lands acquired by Shields Construction Co. during these years was taken in the name of the respondent personally and no declaration of trust in favour of Victor's interest was prepared.

Exhibits D, F, and E are Returns of Remuneration Paid (T-4 Summary), signed and filed by the respondent with the Department of National Revenue and are respectively for the calendar years 1950, 1953 and 1954. The payor is stated to be "Shields Construction Co." In Exhibit D, dated February 7, 1951, for the calendar year 1950 and made ten months after the partnership with Victor was said to have begun, the name of the respondent only is shown after the words "Name and address of owner or partners", and in the certificate attached the respondent certified that the information given is true, correct and complete in every respect. In Exhibit F for the year 1953 and dated February 24, 1954, the respondent certified that the partners were Victor and himself although his own evidence is that the partnership was dissolved in March, 1953. In Exhibit E for 1954, he certified that he was the sole owner although Victor's name was originally included as a partner, but his name was later blocked out.

There is some evidence, also, that for part of the time, at least, Victor was considered as an employee and so considered himself. Exhibit Y is a photostatic copy of an application for an insurance book from the Unemployment Insurance Commission dated April 14, 1950, signed by Victor, stating that he was a field supervisor *employed* by Shields Construction Co. As a partner in the firm, he would not have been entitled to so apply. The evidence of Mr. W. S. McInnis, formerly employed by the Income Tax Division, shows that while so employed he examined the books of the firm at its place of business. He found from the records that during the fiscal year ending March 31, 1951, Victor was paid *wages* of $43.22 per week (after unemployment insurance was deducted) for one week in April, 1950 and for a number of weeks from June to August 31, 1950, totalling in all $562.40. This information was secured from the firm's payroll records which were not available when later required by another tax official, or at the trial. In the auditor's statement for that year (Exhibit 3) that amount is shown as the only deduction from Victor's capital account. For the year ending March 31, 1952, Victor drew payments of $50 per week from June 22, 1951 to March 31, 1952, a total of $2,050.00. These payments were made regularly by cheque and did not appear in the payroll records. They were the only payments made to him in that

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year, but two payments of $2,500.00 each were made on his behalf on account of income tax (presumably for 1951) and the total of $7,050.00 was shown in the auditor's statement as drawings for the year. Similarly for the year ending March 31, 1953, Victor was paid $50.00 per week (a total of $2,550.00) and that amount, together with income tax payments made on his account amounting to $11,776.50 (totalling in all $14,326.50), were shown as drawings from capital account in the auditor's statements. For these three years, therefore, Victor personally received a total of $5,-162.40 and income taxes totalling $28,500.44 were paid on his account.

As I have said, the respondent swore that he had no interest in Shields Housing Co. and that it was the sole property of Victor from its inception. The evidence establishes clearly that the respondent held himself out as its sole owner. Exhibit B is a declaration made by him under the *Partnerships Registration Act* dated and registered February 3, 1953, in which he certified "that I have carried on and intend to carry on trade and business as a builder under the name of Shields Housing Co. . . . that the said business has subsisted since the first day of February, 1953, and that no other person is associated with me in partnership in the said business." That was the only registration of Shields Housing Co.

A bank account for that firm was opened with the same branch of the Royal Bank. Mr. Leslie produced Exhibit T which contains a certificate dated December 15, 1952, and signed by the respondent that he was the sole owner; a certificate as to the registration of Exhibit B; and a general power of attorney signed by the respondent on behalf of the firm in favour of Victor. Mr. Leslie said that the bank had no knowledge that Victor was the owner of the firm and that he transacted all banking business with the respondent. It is admitted that the title to all lands of Shields Housing Co. was taken in the name of the respondent alone.

Earlier herein I referred to the auditors' financial report of Shields Construction Co. for the year ending February 28, 1954 (Exhibit L), indicating that the respondent in that year was the sole partner. In fact, that was the second report prepared by the same auditors for the same period. Copies of both were supplied to the bank and formed part

of Exhibit V. The first one shows the net income of $33,382.09 divided equally between the respondent and Victor, as well as their capital accounts accumulated as of February 28, 1954; there is nothing in that balance sheet to indicate any "Loans payable to Victor".

Similarly, there were two reports prepared by the same auditors for the first fiscal year of Shields Housing Co. ending February 28, 1954. The second one, earlier mentioned, shows Victor as the sole partner and that the original investment of $10,233.00 was his alone. The first report (Exhibit W) was given to the bank by the auditors and shows not only that the net income of $46,238.02 was divided equally between the respondent and Victor, but that each had invested exactly one-half of $10,233.00. A comparison of these two reports shows that they are identical in content except for the allocation in the second report of all the capital investment and all the profit to Victor.

Neither the respondent nor Victor attempted to explain these discrepancies in any way, although the practice of the auditor was to give all reports to each partner. Mr. Moses' explanation is not at all convincing. He referred to the first reports as "preliminary" reports, although there is nothing in them which suggests that they were not final and prepared according to the original entries in the firm's books. Mr. Moses made it perfectly clear that his firm had full access to the original records at all times, discussed them with the partners and took some part in the actual bookkeeping. I cannot agree with his opinion that when a partnership or proprietorship is established the books do not show the partners or proprietor until the end of the first fiscal year when the auditors take over. I can reach only one conclusion, namely, that the first reports of each firm for that year were prepared from the original books and had the approval of the respondent and Victor. Mr. Moses made it clear that before reports were prepared it was his practice to have all statements to be contained therein verified by the owners.

I am confirmed in that view of the matter by the contents of Exhibit Z2, the auditors' working papers for Shields Housing Co. for the year ending February 28, 1954. On April 21, 1954, the auditors wrote a letter to "Shields Housing Co.—Attention S. L. and V. Shields", forwarding the first report. In a memo attached it is shown that the

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report was discussed with the principals "S. L. and V." on April 20, 1954, the reference clearly being to the respondent and Victor, and that the report was delivered to the firm on April 22, 1954. There is also a copy of another letter to "Shields Housing Co.—Attention Victor Shields"—dated April 13, 1955, enclosing the second report. The working papers attached clearly indicate that as originally prepared the profits were allocated to the respondent and Victor equally, but were later changed and allocated to Victor alone, presumably for the purpose of the second report. It is interesting to note that included in the working papers is the two page certificate of approval signed by Victor alone, indicating that he is the sole proprietor. Its date is given as April 20, 1954, but no witness confirmed that as the date of signature. Obviously, it was not in the hands of the auditors on that date which was the same as the date when the first report was discussed with both the respondent and Victor as principals, and two days before the first report was delivered. The clear inference, in the absence of any evidence to the contrary, is that the approval when signed by Victor was antedated so as to accord with the second report made in 1955.

Considerable doubt is thrown on the evidence of the respondent and Victor that their association terminated in March, 1953, by Exhibit H, a letter by Mr. Botnick, the solicitor, dated March 15, 1954, sent to the Director of Income Tax and written on the instructions of the respondent. It says in part:

> I act for Samuel L. Shields and Victor Shields who are *carrying on* a building business in partnership under the name of Shields Construction Co. (The italics are mine.)

There were a substantial number of things which taken together indicate that the respondent never considered himself as bound by the terms of the partnership agreement; that he was prepared to carry it out only to the extent that it was necessary to show for income tax purposes that Victor was a partner and therefore entitled to one-half of the profits, and that otherwise he was prepared to disregard it and treat the firm, its assets and the profits as his own. Victor's personal drawings for the three years were small as compared with those of the respondent. In the first year he was paid wages only and in the second and third years at the rate of $50.00 per week which would

seem to be little more than compensation for work done. The profits were not divided at the end of each year as provided by the agreement. In the first financial report for the year ending March 31, 1953, Victor's accumulated capital account was shown at $58,044.74, whereas his true entitlement, had he been a partner, was shown to be $165,180.47 (Exhibit Z1). Whatever his entitlement was as of that date, nothing further was paid to him on that account (except possibly an unexplained item of $500.00) until 1958—a period of five years—by which time the Court below had given its decision and the Minister had appealed to this Court.

It was suggested that the respondent was not in a position to settle accounts with Victor until 1958-59, that he owed the bank and other creditors large sums of money and that his assets were tied up in real estate holdings. But no one swore that he could not have paid Victor his share in March, 1953, or, at the earliest, in 1954, when Victor became of age and had commenced business on his own account, and, as a speculative builder would need large amounts of capital. As shown by his tax returns, the respondent was a man of wealth and I have no doubt that he could have settled with Victor had he desired to do so.

Three matters of particular importance must now be mentioned. In December, 1952, after Victor had told the respondent that he was about to enter business on his own account, Shields Construction Co. (per the respondent) issued a cheque to Victor for $10,000.00. The respondent said that that cheque was charged to Victor's capital account and that in computing Victor's share as of March 31, 1953, it was taken into account. The evidence of Mr. Moses shows that neither of these statements was true according to the company books and that the cheque was charged to the respondent's own drawing account and never changed. The payment at that time and in that manner may perhaps suggest that it was a "terminal" payment and made out of what the respondent considered to be his own property.

Mr. Moses also stated that the books of Shields Construction Co. showed that after Victor went into business in April, 1953 as Shields Housing Co., and thereafter for many years, he, Victor, *purchased* lands from Shields Construction Co. and its successor; that for these purchases

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Victor owed Shields Construction Co. amounts as much as $80,000.00 over the years and even as late as 1958 and 1959; and that this indebtedness was not shown as an offset against "Loans payable to Victor Shields", but was shown as a liability by Victor and carried as an open credit. This evidence, which was unchallenged, indicates clearly that the respondent had assets at all times with which he could have settled Victor's indebtedness had he wished to do so and that he considered that Victor owed him rather than that he owed Victor. It is also surprising that in 1959 the respondent should pay Victor about $70,000.00 by cheque when, as stated by the auditor, there was a balance of more than that amount owed by Victor. It may well have been a further step by the respondent to endeavour to establish that there was an effective partnership between 1950 and 1953.

The third matter relates to a large apartment house called "Davick Court". It is fully established by the evidence of Mr. Moses that the records of Shields Construction Co. show that the land on which the apartment was built was purchased in 1952 as an asset of Shields Construction Co., that construction began in that year, that the cost of the land and the costs of construction up to March 31, 1953, were charged to the firm, and that while not fully completed as of that date, a number of tenants were in possession and rentals had been treated as income of the firm (Exhibit K). In the auditors' reports, the cost of construction to that date was shown at $560,000.00 and the property was carried as inventory of the firm. In the re-assessments, the actual cost to March 31, 1953, was established at about $680,000.00 (an amount not now disputed) and in order to enable the respondent to claim capital cost allowance, it was taken out of inventory and shown as a fixed asset. After March 31, 1953, the building was finally completed at a total cost of over $900,000.00. Notwithstanding these facts, Victor stated at the trial that Davick Court was not part of the partnership enterprise and that it was built and owned by his father. It was shown, however, that Victor in evidence given to the Court below had stated bluntly that Davick Court was a partnership project.

The respondent, however, insisted at the trial that Davick Court was not and never had been part of the partnership business, that it was his own property and that in comput-

ing Victor's share in the partnership as of March 31, 1953, it was not taken into account in any way. He said that he commenced building it during the summer of 1953, but later said it might have been 1952. He stated:

> At the time (of the purchase) there was no intention as to whether I should build it myself or for the company. I probably decided to build it for myself later on and we decided to dissolve partnership.

and,

> It might have been purchased for the company and then I decided to build for myself.

and,

> I do not believe the intention was to build under my own name until later on, to belong to me, I should say, until later on.

In thus claiming sole ownership to what was probably the largest single asset of Shields Construction Co. and after that firm had expended over $680,000.00 on the construction of Davick Court, the respondent has made it abundantly clear that in his view the assets were his assets, to be disposed of or taken over by himself as he saw fit. His manifest intention was that Victor should not benefit from it in any way. Victor too, at the trial, seemed to agree that his father was entitled to do so notwithstanding the clear evidence of Mr. Moses to the contrary. Victor said that he trusted his father, that he never asked him for any part of his "share", would never have sued him for that share and that he never received any evidence of any indebtedness from his father. Even at the time the appeal was before the Tax Appeal Board in September, 1956, Victor had not the slightest idea as to how much was owing to him.

The evidence relating to Shields Housing Co. is particularly confusing and illustrates completely the conflict that exists between some items of the documentary evidence and between that and the oral evidence. Had the respondent seen fit to produce the original books and records, the actual facts might have been ascertained. The registered declaration filed by the respondent under the *Partnerships Registration Act* (Exhibit B) and the documents filed by him with the bank (Exhibit T) show the respondent as the sole proprietor, although his own oral evidence is that he had no interest in it at any time. The original capital investment of $10,000.00 also came from his own account. Exhibit X, numbered C6542, is Mr. Leslie's report to head office for the period ending February 28, 1954, and dated May 4,

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1954. It must have been based on information supplied by the respondent or the auditors. It shows the respondent as sole owner and that the financial statement was audited by Hattin, Moses & Co. In the manager's remarks it is stated:

> This firm was operated as a separate entity for the period under review from April 1st, 1953 to February 28th, 1954, *when the assets and liabilities were transferred to the newly incorporated account of Shields Construction Company Limited.* Operations were conducted by Mr. Shields' son, Victor and although the name is registered under the sole proprietorship of Mr. S. L. Shields, *the net income was allocated between the two parties.* It will continue to operate as a subsidiary of Shields Construction Company Limited until next August, when Mr. Shields' son, who is at present a minor, becomes 21 years of age. During the period under review, 35 houses were constructed and sold. A further three units were in process of construction at the date of the statement.

Exhibit W, the auditors' original report for the fiscal year, shows that the invested capital and the year's profits belonged equally to the respondent and Victor, whereas the second report for the same year (Exhibit O) shows Victor as having invested all the original capital and as entitled to the whole of the profits.

Further evidence as to what was later done regarding Shields Housing Co. is shown in the bank's report to head office numbered C7024, dated June 10, 1955 (part of Exhibit U) regarding Shields Construction Co. and revising the original balance sheet. In the manager's remarks therein it is stated:

> *Because of the difficulties Mr. Shields has experienced with the Income Tax Departments, his Auditors have found it necessary to set up the bookkeeping and balance sheets on a revised basis.* Accordingly the closing statement for Shields Construction Company at February 28, 1954 is to be re-written. We have not yet been furnished with a revised statement but the Auditor has supplied us with a copy of trial balances, which is attached hereto. The principal changes will be found in respect to inventory, fixed assets, mortgages payable, depreciation reserve and personal loans.
>
> The assets and liabilities of Shields Housing Company, which were to have been taken over by Shields Construction Co. Ltd., were instead transferred to Victor Shields Homes Ltd. As a result the pro-forma balance sheet showing combined assets of Shields Housing Co. and Shields Construction Company, submitted with our letter C 6542 has been cancelled. The revised figures at February 28, 1954 will apply instead.
>
> While Shields Housing Company account was conducted with us under the registered sole proprietorship of Mr. S. L. Shields, it was up to 1953 operated for taxation purposes as a partnership of S. L. Shields and his son, Victor Shields, who until then was a minor. Subsequently Victor Shields took over the business but until the incorporation of Victor Shields Homes Limited, which took place when Victor Shields reached his

majority in August 1954, it continued with us under the sole ownership of his father. *Victor Shields was also shown as a partner of Shields Construction Co. until February 28, 1954, although Mr. S. L. Shields conducted the account with us as registered sole owner.* Henceforth Victor Shields Homes Limited, Shields Construction Co. Ltd., and Shields Investments Reg'd (S. L. Shields, proprietor) will be on a clearly defined basis.

I must comment also on the unsatisfactory nature of the evidence of the respondent. I have already referred to a number of matters in which his evidence is shown to be completely untrue. His memory failed him completely on other matters in which one would have thought he would have been informed, more particularly so if he considered that Victor was in fact his partner for three years and entitled to a half interest in all the partnership assets. For example, he could not remember (*a*) what assets he received on the winding up of Essex Housing Ltd.; (*b*) when he had advised the auditors of the commencement and termination of the partnership with Victor; (*c*) what Victor's share in the profits amounted to at any time or why they were increased from $58,000.00 to $103,000.00 or more; (*d*) whether the $10,000.00 paid to Victor in December, 1952 was in cash or in land or when it was made; (*e*) whether he had filed a sole partnership declaration with the bank for Shields Construction Co. and Shields Housing Co.; (*f*) whether the auditors' reports of Shields Housing Co. as filed with the bank showed that he or Victor or both were the owners, although undoubtedly he received and had knowledge of the reports and had probably approved them.

Finally, it is to be noted that the respondent insisted in the evidence that Victor at no time during the alleged partnership had any interest in the assets of the partnership and that all he was entitled to was a share of the profits; and that, although all the land was registered in his name, he did not hold any of it for the benefit of his son. It is also shown that when the respondent in 1953 took over Davick Court as his own, nothing was allowed to Victor for the difference between its cost and its then market value; and that after March 31, 1953, he used the assets of Shields Construction Co. in his own business and as if they were all his personal property.

In my opinion, these facts indicate beyond doubt that the alleged partnership agreement of the respondent and Victor was a mere simulate agreement and not a reality and

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that there never was any intention on the part of the respondent to treat his son as a partner in fact. I have reached this conclusion on the facts I have mentioned, but more particularly on the following matters:

(*a*) The failure to produce the original books of account;

(*b*) The complete dominion exercised by the respondent over all the assets of the partnership, both before and after March 31, 1953, and his use of all such assets for his own advantage after that date and his repeated statements that Victor had no interest whatever therein, except the profits;

(*c*) His registered declaration and his certificate to the bank that he was the sole proprietor;

(*d*) The unsatisfactory nature of the proof as to when the partnership commenced and terminated;

(*e*) The payment of wages only to Victor for the first year and only small weekly amounts thereafter;

(*f*) His failure to distribute the profits annually as provided by the agreement;

(*g*) His attempt to withdraw for his own use the largest single asset of the partnership, Davick Court, from the partnership assets after more than $600,000.00 had been expended thereon by the partnership;

(*h*) That no interest was paid to Victor on the large balance said to have been owing to him;

(*i*) The crediting of Victor's account with a fraction only of the amount he would have been entitled to as a partner;

(*j*) His failure to pay over Victor's share until 1959 when this appeal was about to be heard;

(*k*) The revised and conflicting auditors' reports, both of Shields Construction Co. and Shields Housing Co., which must have been made by his direction or at least with his approval, and which I have no doubt were made because of his difficulties with the Income Tax Department;

(*l*) The failure of Victor to make any request to his father for payment on his alleged share of the profits even when he was in need of funds for his own business.

These facts lead me to the conclusion that while there was a partnership agreement, it was never considered by the respondent as binding on him. It was put aside and

did not in fact govern the actions of the parties thereto, except to the extent that it was helpful in carrying out his scheme to reduce his own taxable income, namely, by making payments of income tax on account of Victor's alleged profits.

Counsel for the respondent cited *Ayrshire Pullman Motor Services and D. M. Ritchie v. C. I. R.*[1], a case decided by the Court of Session, Scotland, in 1929, and referred to earlier herein on another point. That case, in my opinion, is clearly distinguishable on its facts. There, in 1927, a father entered into a written contract of co-partnership between himself and his five children relating to the operation of a motor-bus service; four of the children were daughters and two of them were minors. The contract provided, *inter alia*, as follows:

> The partnership to be held to have commenced in January, 1926. Capital to be a loan already contributed by the father and such further sums as he might contribute. The children to be interested in the profits equally, the father's interest being the sum advanced and interest thereon only. The children to draw wages but no share of profits until the father's advances were repaid. The father to have the sole general management and to operate alone on the firm's bank account.

Assessment to income tax was made on the footing that the father was the sole owner of the business and the General Commissioners dismissed appeals against these assessments. On appeal by the firm and the father it was held that the father could not be held to be for income tax purposes the sole owner of the business and the whole profits thereof.

As I read the judgment of the majority in that case, the main contention on behalf of the Crown was that the agreement had not been fully acted upon, since the accumulated profits were not divided at the end of the fiscal years, but were allowed to accumulate to the credit of the five children, and the father's indebtedness was not paid off although it could have been paid. But the partnership agreement provided that except for wages, the children should withdraw no profits from the business until the cash loan or loans made by the father should be repaid in full with interest—the father not being entitled to any profits as such. Having found that the agreement was neither a fraud nor a simulate agreement, the Court held

[1] 14 T. C. 754.

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that the mere failure to pay off the father's loan could not be regarded as a failure to carry out the agreement since, in view of the expansion of the business, it was desirable to let his capital remain in the business. The Court pointed out that the profits here had been regularly credited to the children and that after payment of the father's loan, such profits belonged to them and to no one else.

The facts in the instant case are substantially different. In the *Ayrshire* case (as shown at p. 757 of the Report), two registrations of the firm were made after the date of the partnership agreement (under the *Registration of Business Names Act*) and in both the five children were shown as partners, although in the second the father was also shown as a partner. I need not repeat the evidence as to the declarations and certificates of the respondent herein that he was the sole owner of Shields Construction Co. throughout. The facts which I have set out earlier in detail and which have led me to the conclusion that the alleged partnership agreement between the respondent and Victor are not a reality, but a mere simulate agreement, are sufficient to distinguish the present appeal from that in the *Ayrshire* case.

Dealing with the merits of the case, I have come to the conclusion that the respondent has failed to satisfy the Court that there is error in fact or in law in the reassessment under appeal.

The conclusions which I have just stated are based on the evidence as to what actually took place in regard to the alleged partnership of the respondent and his son in the business of Shields Construction Co. But there is another ground on which I think the Minister is entitled to rely.

Section 5 of the *Partnerships Registration Act* R.S.O. 1950, c. 271, reads:

> 5. The statements made in any declaration shall not be controvertible by any person who has signed the same nor as against any person not being a member of the partnership by any person who has signed the same, or who was really a member of the partnership therein mentioned at the time the declaration was made.

As I have set out earlier, the respondent prepared, signed and registered a declaration under that Act (Exhibit A) certifying that he was carrying on business under the name

of Shields Construction Co. and that no other person was associated with him in partnership in the said business. That statement, therefore, may not be controverted by the respondent as against any person not being a member of the partnership. Since these proceedings relate merely to the validity of the re-assessments made on the respondent, I do not think that s. 14 of the same Act, which provides, "Nothing in this Act shall affect the rights of partners with regard to each other", has any bearing on the matter.

Section 5 was considered by the Court of Appeal of Ontario in *Regina v. Tennen*[1]. In that case the accused was registered under the *Partnerships Registration Act* as the owner of a business named Majestic Lamp Company. Two separate charges were laid against her for breaches of the *Excise Tax Act* R.S.C. 1952, c. 100. She pleaded guilty before the magistrate, but on appeal to the County Court she asked to be allowed to change her plea to "not guilty" on the ground, *inter alia,* that it was proposed to call evidence to show that she was only the nominal owner of the business. Shea, C.C.J. refused to allow the pleas to be withdrawn and dismissed the appeal. The accused then appealed to the Court of Appeal. After disposing of other matters raised in the appeal, Roach, J.A., in giving judgment for the Court, said at p. 85:

> In my opinion having filed the declaration under the Partnerships Registration Act declaring that she alone was carrying on the business, for the purposes of the Excise Tax Act she is estopped from denying it.

The principle so laid down is in my view of equal application to the *Income Tax Act* and to the present appeal.

Accordingly, and for the reasons which I have given, the appeal will be allowed, the decision of the Income Tax Appeal Board set aside, and the re-assessments made upon the respondent affirmed.

The appellant is entitled to costs after taxation.

Judgment accordingly.

[1] [1959] O. R. 77.

1959
Sept 14
1962
Nov. 20

BETWEEN:

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .....APPELLANT,

AND

NATIONAL COUNCIL OF THE BAKING INDUSTRY .....RESPONDENT.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32, 57, 58 and Schedule III—Customs Tariff, R.S.C. 1952, c. 60, Item 710 of Schedule A—"Usual coverings" used to cover exempt foodstuffs—Whether metal or wire bread-handling and delivery trays are "usual coverings"—Appeal from decision of Tariff Board allowed.

The *Excise Tax Act* exempts from sales tax certain items of foodstuffs including bread and also "usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax and materials to be used exclusively in the manufacture of such coverings". The Department of National Revenue ruled that metal bread carriers or trays imported into Canada from the manufacturers in California, U.S.A. were subject to sales tax as not being within the exception of "usual coverings" as set out in Schedule III of the Act, and that wire delivery trays for bread supplied principally by a Montreal manufacturer were also subject to sales tax for the same reason. Respondent, the recognized trade association of the Canadian baking industry, appealed from these rulings to the Tariff Board which unanimously allowed its appeal. Leave was granted to appeal from that decision to this Court on the question of whether the Tariff Board had erred in law in reaching its finding.

Held: That "usual coverings" were to be construed as understood in ordinary language and that trays are not articles which "cover" bread within the dictionary meaning.

2. That the Tariff Board erred as a matter of law in deciding that the trays in question were "usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax" and in so doing erred in construing terms used in the *Excise Tax Act* according to meanings given to the relevant terms under the *Customs Tariff Act*.

Appeal from a decision of the Tariff Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Ottawa.

D. H. Aylen for appellant.

G. F. Henderson, Q.C. and *R. H. McKercher* for respondent.

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

CAMERON J. now (November 20, 1962) delivered the following judgment:

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This is an appeal taken under s. 58 of the *Excise Tax Act* R.S.C. 1952, c. 100., as amended, from a declaration of the Tariff Board dated March 31, 1959 (Appeal No. 496). Section 30 of the Act levies a consumption or sales tax on the sale price of, *inter alia*, all goods (*a*) produced or manufactured in Canada, and (*b*) imported into Canada. Section 32 provides that the tax so imposed does not apply to the sale or importation of the articles mentioned in Schedule III thereof. "Bread" is mentioned in that schedule under the heading "Foodstuffs" and it is therefore exempt from sales tax. Schedule III also contains the following clause under the heading "Coverings":

> Usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax and materials to be used exclusively in the manufacture of such coverings;

On April 1, 1958, the Department of National Revenue (Excise) ruled that metal bread carriers called "Del-Tras" (Exhibit NCB-1) imported into Canada from the manufacturers, Del-Tra Company of Oakland, California, were subject to sales tax as they were not within the exception of "usual coverings" as set out in Schedule III. On April 22, 1958, the Department ruled that wire delivery trays for bread (Exhibit NCB-2), the principal supplier of which was Cogan Wire and Metal Products of Montreal, were subject to sales tax for the same reason.

From these rulings the respondent herein, which is the recognized trade association of the Canadian baking industry, appealed under s. 57 to the Tariff Board. The Board's unanimous conclusion was stated as follows:

> As receptacles or containers used exclusively for holding bread, a tax exempt food, the Board is of opinion that the bread trays in question fall within the ambit of the exemption for "usual coverings".

Accordingly, the appeal was allowed.

Leave to appeal from that decision was granted to the appellant by my Order dated May 12, 1959, on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that wire delivery trays for bread manufactured by Cogan Wire and Metal Products Ltd. and "Del-Tra" metal bread carriers are "usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax" within the meaning of Schedule III of the Excise Tax Act?

That is the only question before me and I need not therefore consider whether the goods here in question are "materials to be used exclusively in the manufacture of such

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coverings" or whether they fall within another exempt item under "Foodstuffs" in Schedule III, "Materials to be used exclusively in the manufacture or production of the foregoing foodstuffs" (i.e., bread).

Counsel for the respondent submits that the appeal should be dismissed on the ground, *inter alia*, that no question of law is involved. I am of the opinion, however, that the construction of a statutory enactment is a question of law. Reference may be made to the following cases: *Deputy Minister of National Revenue for Customs & Excise v. Rediffusion Inc.*[1]; *General Supply Co. of Canada, Ltd. v. Deputy Minister of National Revenue, et al.*[2]; *W. T. Hawkins, Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[3]; and to *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[4].

In its decision the Board found the following facts:

> The bread trays in question are undoubtedly receptacles for bread, used in the following manner:
>
> As the bread is wrapped it is packed in the trays either for immediate shipment or for a short period of storage and subsequent shipment. In the case of unwrapped bread, it is packed in the trays when taken from the baking pans. When the bread is delivered to the point of sale the bread is removed from the container, placed on shelves, and the container is returned to the bakery.
>
> These trays are used in lieu of ordinary corrugated paper cartons, which were largely used for this same purpose in the past. Indeed, they continue to be used to some extent. It was admitted that these trays delivered the product in better condition than corrugated cartons and generally do so at a lower cost having regard to the extended life of the containers at issue.

These findings of fact must, of course, be accepted.

It will be convenient to describe in some detail the exact nature of the "trays" so referred to. As stated by the Tariff Board, both are undoubtedly trays. Exhibit NCB-1, called a "Del-Tra", is depicted in the six photographs comprising Exhibit NCB-5. Its main framework consists of strips of durable sheet metal with V-shaped metal corners to support the upper edges. While it may vary somewhat in size, the exhibit itself is 24″ x 22″ and 6″ in height. The metal framework is open on all sides as well as on the bottom and top. To support the loaves of bread when placed in the tray, a removable flat cardboard bottom is inserted as shown

[1] [1953] Ex. C.R. 221.
[2] [1953] Ex. C.R. 185.
[3] [1957] Ex. C.R. 206.
[4] [1956] 1 D.L.R. 497.

in the photographs, but in the Exhibit NCB-1, the cardboard filler consists not only of the flat base, but of side pieces about 4" high, thus further assisting to keep the loaves in place in the tray. The trays are so constructed that they may be conveniently stacked either at the bakery or in a delivery truck, but except when so stacked, the top of the tray is always open.

The delivery tray made by Cogan Wire and Metal Products, Ltd., of Montreal, (Exhibit NCB-2) is about 26" x 22", is 7" in height and is made of wire. The bottom consists of 21 lengths of wire placed about one inch apart and therefore no cardboard insert is needed or used. The top of the tray is not enclosed or covered in any way. In both trays the loaves are packed horizontally.

The Tariff Board's declaration indicates that its members were of the opinion that the words "usual coverings" should be construed in a broad way and that they were influenced to a substantial extent by the use of the word "coverings" in Item 710 of Schedule A to the *Customs Tariff Act,* as shown by the following extract from the Board's declaration:

> The meaning to be given to the words "usual coverings", as they appear in the context of the above-quoted section, is not, in the opinion of the Board, perfectly obvious. Do these words impart the notion of entirely surrounding the exterior surfaces of the article? Do they suggest covering at least the top surface of the article? Or are these words used in a broad or general sense to include a wrapping, package, or a container?
>
> The Board believes these words are used in this latter sense and that the exemption is intended to apply to those coverings, wrappings or packages in which goods are packed or contained, *inter alia,* for convenience of handling, for protection during transportation, or in which they are made available for sale.
>
> We are more inclined to accept this meaning for the word "covering" when we examine the use of this word in Tariff Item 710 of Schedule A to the Customs Tariff Act. It is apparent from this tariff item (*a*) that "coverings" need not cover the outside of goods; (*b*) that coverings include such coverings as hold as opposed to otherwise covering goods; and (*c*) that, in particular, coverings include receptacles.

In construing the meaning of "coverings" in the *Excise Tax Act* by reference to the definition of "coverings" as found in Item 710 of Schedule A to the *Customs Act,* I

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think the Board was clearly wrong. In *Miln-Bingham Printing Co. Ltd. v. The King*[1], Duff J. (as he then was) in delivering the judgment of the Court, said at p. 283:

> No doubt, for the purpose of ascertaining the meaning of any given word in a statute, the usage of that word in other statutes may be looked at, especially if the other statutes happen to be *in pari materia*, but it is altogether a fallacy to suppose that because two statutes are *in pari materia*, a definition clause in one can be bodily transferred to the other.

In Tariff Item 710, the term "coverings" includes those inside and outside, used in covering *or holding* goods imported therewith; and by para. (*f*) thereof includes a multiplicity of things such as packing boxes, crates, wrapping, sacks, rope or twine used in covering *or holding* goods imported therewith.

What, then, in the absence of any definition is the proper construction to be put upon the words "usual coverings" as used in the schedule? In my view, they are general words not applied to any particular science or art and they are therefore to be construed as they are understood in common language. I considered this matter in two cases in which the meaning of certain words also contained in Schedule III were in question. Reference may be made to *The King v. Planters Nut and Chocolate Co. Ltd.*[2] and to the cases therein cited; an appeal from that decision was dismissed by the Supreme Court of Canada on November 21, 1951, but is not reported. Reference may also be made to *The King v. Planters Nut and Chocolate Co. Ltd.*[3]

The word "coverings" is not defined in the Act or in the Schedule, and it would be inadvisable for me to attempt a definition, particularly in view of the very large number of "goods" not subject to tax, and as enumerated in Schedule III. It is clear, however, that to fall within the exemption here claimed the trays must be "a usual covering to be used exclusively for covering bread". Now I am fully satisfied that no one would refer to them as a "covering for bread" or as a "bread covering". It is significant to note that in the record of the proceedings before the Board, neither of the respondent's witnesses (namely, Mr. Riddell, president of the respondent and of Western Bakeries, and Mr. McKendry, general manager of another large bakery, Morrison-Lamothe of Ottawa) stated that even in the trade they were called "coverings for bread", or known as such.

[1] [1930] S.C.R. 282. [2] [1951] Ex. C.R. 122.
[3] [1952] Ex. C.R. 91.

Indeed, the respondent's representative before the Board referred to them at various times as "containers", "bread shipping carriers", "delivery containers", "wire shipping containers", "wire delivery trays", and "bread shipping containers." The evidence indicates quite clearly that they were developed for the purpose of enabling bakery employees, particularly delivery men, to carry or handle a large number of loaves at one time, thereby saving time and money. Its primary purpose, therefore, is for handling bread in quantities as was made clear by Mr. McKendry when he said:

> Yes we have found the wire tray in our own case to be the best method of handling bread, whether it is in or out of the shop, convenient units.

Mr. Riddell also stated that both are used for the same purpose, namely, for delivering bread from the wrapping machines to the grocery store.

Bread wrappers, such as the usual cellophane or wax paper wrappers would, I think, be included in "usual coverings". But these trays are, of course, not used as wrappers. Mr. Riddell explained that the bread is wrapped when it comes from the wrapping machine and that it is then as fully wrapped as it ever will be.

The standard dictionaries indicate that "covering" and "cover" have a great number of meanings. In the context of the exempting clause now under consideration, it seems to me that the following definitions are the most appropriate.

In the *Oxford New English Dictionary on Historical Principles* (later known as the *Oxford English Dictionary*), 1893, Vol. II, the following definitions are given:

> *Covering.* 1. The action of the verb cover in various senses.
>
> 2. That which covers or is adapted to cover, whether for protection, shelter, concealment or adornment; a cover; a cloth to spread over; clothing; the outer cover or integument.
>
> *Cover.* 1. To put on or lay something over (an object) with the effect of hiding from view, protecting or enclosing; to overlay, overspread with.
>
> 2. To put a covering of some specified kind on; the addition or accession of the covering, rather than the condition of the object covered, is the prominent notion.
>
> 3. To clothe (the body), to wrap, wrap up, invest, envelop.
>
> *Cover.* That which covers; anything that is put or laid over or that naturally overlies or overspreads an object with the effect of hiding, sheltering or enclosing it; often a thing designed or appropriated for the purpose.

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In the Third Edition of the *Shorter Oxford English Dictionary*:

Covering. 1. The action of the verb cover.

2. That which covers or serves to cover.

Cover. To overlay, overspread with something so as to hide or protect.

Cover. That which covers, anything that is put or laid over, or that overlies or overspreads, an object so as to hide, shelter or enclose it.

In *Webster's Third New International Dictionary*, 1961, the following definitions appear:

Covering. Something that covers or conceals.

Cover. To put, lay or spread something over, on or before, as for protection, enclosing or masking. To lie over; spread over; be placed on or often over the whole surface of.

In the exempting section, "covering" is used first as a noun and as so used I think it must refer to that which covers or is adapted to cover—a thing designed or appropriated for the purpose of covering—an exempted article; something which is placed on or perhaps over the whole surface of that article. Secondly, it is used in the phrase "for covering goods" which I think means the action of putting something on or laying over an object, with the effect of shielding, protecting or enclosing. In my view, the evidence clearly establishes that the trays are not articles which cover or are adapted to cover bread and their use does not involve the action of putting or laying them over bread. The trays, being open, are without any top, the bread is not protected, shielded or enclosed by a covering of any sort. The trays are not put over the bread, but the loaves are placed for a temporary purpose in the trays, when conceivably one of the results may be that they are protected from damage.

In my opinion, the trays in question are similar in design and purpose to baskets or receptacles or containers. On a proper construction of the exempting provision, it should be found that they are not "usual coverings" since they do not cover and likewise they are not exclusively used for covering bread since nothing is put, laid or spread over the bread.

I think that if Parliament in enacting that exempting clause had intended to include containers or receptacles as such, it would have used appropriate words such as "usual coverings, containers or receptacles used exclusively for covering, containing or holding goods not subject to

the consumption or sales tax". In amending the *Excise Tax Act* by s. 6 of c. 56, Statutes of Canada, 1953-54, the word "container" was used twice in the phrase, "the wrapper, package, box, bottle or other container."

I find, therefore, that the Tariff Board erred as a matter of law in deciding that wire delivery trays for bread manufactured by Cogan Wire and Metal Products Ltd. and "Del-Tra" metal bread carriers are "usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax", within the meaning of Schedule III of the *Excise Tax Act* and accordingly the question submitted to the Court will be answered in the affirmative, the appeal allowed, the decision of the Tariff Board set aside, and the rulings made by the Department affirmed. The appellant is entitled to its costs after taxation.

It may be noted here that by s. 2 of c. 30, Statutes of Canada, 1960, the former Schedule III to the Act was repealed and a new Schedule III substituted therefor, which substitution includes an exemption under the heading "Coverings" which is markedly different from the one here under consideration.

Judgment accordingly.

BETWEEN:

VICTORY HOTELS LIMITED .....APPELLANT;

1962
Mar. 27

Nov. 20

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 20(1), (5) (b) (c)—Sale of hotel business—Disposition of depreciable property—Time of disposition—"Disposition"—"Sale"—Recapture of capital cost allowance—Appeal allowed.

Appellant, an Alberta company, conducted during the year 1954 a hotel business in the Town of Peace River, in the Province of Alberta, and in December, 1954 accepted an offer for the sale of its hotel business with occupancy to be taken over on January 3, 1955. Matters of insurance, taxes and inventories would be settled in 1955 and the liquor licence was not to be transferred until January 3, 1955. Before the end of 1954 all documents required to effect the transfer of land, buildings and chattels had been signed and the bulk sale declaration completed. However, the affidavits or declarations accompanying the conveyancing documents had not been completed and the registration of the bill of sale, the chattel mortgage and the mortgage had not been made. Appellant claimed in 1954 depreciation on the depre-

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ciable assets sold. The Minister contended that the sale took place in 1954 and assessed appellant accordingly. From that assessment the appellant appealed to this Court.

Held: That the words "disposed of" in s.20(1) of the Act mean the disposal of the assets of the business in a manner such that the business is no longer being carried on by the person who has disposed of it.

2. That the words "disposed of" in the Act should be given their widest ordinary meaning and in that broad sense the business was not disposed of in 1954 because it was not parted with, and control over it was not passed over until 1955.

3. That the passage of title was contingent upon the happening of certain events or the possibility of such happenings before January 3, 1955 and the property therefore was not disposed of until 1955.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Noël at Edmonton.

A. F. Moir, Q.C. and *C. C. Curlett* for appellant.

W. G. Morrow, Q.C. and *D. F. Coate* for respondent.

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

NOËL J. now (November 20, 1962) delivered the following judgment:

This is an appeal from an assessment to income tax for the taxation year 1954 wherein a tax in the sum of $7,300.87 was levied by reason of the Minister's findings, namely that a sale of the taxpayer's land, furniture and fixtures and building took place in the year 1954 and not in the year 1955 and that recaptured depreciation on buildings and terminal loss on furniture and fixtures is determined on a disposal price allocated as follows:

Land	$ 1,000
Furniture and fixtures	44,500
Building	204,500
	$250,000

The Minister, therefore, added on to the taxable revised income of the taxpayer in an amount of $4,067.47 the following:

Depreciation claimed on furniture and fixtures		$ 1,019.56
Depreciation on building		17,219.92
		$22,306.95
and subtracted		
Terminal loss on furniture and fixtures	$6,478.52	
1955 loss	454.13	6,932.65
		$15,374.30

thus establishing the revised taxable income in the amount of $15,374.30 on which a tax of $3,074.86 should be paid. To this, the Minister added an amount of $4,226 as the amount taxable under s. 43 on recaptured depreciation on the building on a basis of $13,313.12, thus forming a total tax of $7,387.

The sole issue here, therefore, turns on the question as to when or in what year, 1954 or 1955, the properties of the appellant were disposed of. If this Court decided that the disposal took place in the year 1955, the appeal should be allowed, if not, then it should be denied. Such is the agreement arrived at between the parties and expressed by counsel at the opening of the hearing of this case. They also agreed that the depreciation aspect shall be reduced from $13,313.12 to $10,566.90 and of course if the appeal is successful the terminal loss on furniture and fixtures shall no longer be deductible.

The appellant, an Alberta company, conducted during the year 1954 a hotel business in the Town of Peace River, in the Province of Alberta, under the managership of one H. G. Curlett. On or about December 1, 1954, Nick Radomsky, John Tanasichuk and M. N. Gorynuk (hereinafter referred to as the purchasers), submitted to Maber Ltd., a real estate firm, an offer to purchase the business, real property and chattels of the Victory Hotels Ltd., the appellant (hereinafter sometimes called the taxpayer), for the sum of $250,000. This offer to purchase, produced as Exhibit 2, contained no date of sale and was open for acceptance to the taxpayer up to midnight on December 3, 1954, and was signed by the parties, Mr. H. G. Curlett signing on behalf of the taxpayer. Maber Ltd. then caused an agreement to purchase to be drawn, dated December 6, 1954, produced as Exhibit 3, which was also signed by the parties thereto, including once again Mr. Curlett on behalf of Victory Hotels Ltd. The clauses of some significance for the disposition of the present appeal in this document are the following:

TWENTY-FIVE THOUSAND DOLLARS .....
in cash to be held in trust by MABER'S LTD., paid upon the execution of this Agreement to Purchase from the SIXTH (6) DAY OF DECEMBER, 1954, to and including the SIXTH (6) DAY OF FEBRUARY, 1955.

IT IS FURTHER UNDERSTOOD AND AGREED BY THE PURCHASERS that they cannot have possession of the above mentioned Hotel before the THIRD (3) DAY OF JANUARY, 1955.

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BEFORE POSSESSION IS GIVEN an additional sum of SEVENTY-FIVE THOUSAND DOLLARS ..... shall be paid into MABER'S, LTD.

(6) IT IS FURTHER AGREED the Purchasers shall advertise not later than the TWENTY-THIRD (23) DAY OF DECEMBER, 1954, in the proper newspaper to secure such license within the time herein limited. Upon license being granted THE VENDOR will immediately grant possession of the said described premises, PROVIDED the date of possession is not before the THIRD (3) DAY OF JANUARY, 1955.

(7) If the Purchasers are refused a license to sell beer on the said premises, their deposit of TWENTY-FIVE THOUSAND DOLLARS, ($25,000) shall be returned to them and this Agreement shall become null and void.

(8) Upon possession being given, all taxes and insurance premiums shall be adjusted as to the date of possession, and all stock of goods in trade, and all supplies on hand shall be invoiced to the Purchasers at cost price, and they shall pay for same.

(11) Upon the above monies having been paid into the offices of MABER'S LTD., we will immediately execute the necessary TRANSFER, and BILL OF SALE, and other documents required in deals of this nature, and deliver same to MABER'S LTD., to be delivered to the Purchasers upon payment of the purchase monies to ourselves.

(12) In the event that the property or any part thereof, shall be destroyed by fire, or damaged greatly and not repaired satisfactorily, as the case may be, subsequently to the execution of this Agreement, and prior to the date we take possession of the premises at the time herein limited, we shall have the privilege of withdrawing from this Agreement and be released from any obligation contained herein and agreed to be done by us, and shall have the return of all our monies we have paid under the terms of this Agreement.

TIME SHALL BE OF THE ESSENCE OF THIS AGREEMENT.

The purchasers then incorporated an Alberta company under the name of the Valleyview Hotel Company Ltd. and the taxpayer caused to be drawn a transfer of land document (Exhibit 6) dated December 22, 1954, in favour of the Valleyview Hotel Company Ltd.; the affidavits accompanying this document were completed on January 7, 1955, and the document was registered in the Land Titles Office for the North Alberta Land Registration District as instruments #6879 J. T. on January 11, 1955.

A bill of sale, (Exhibit 4), of the chattels of the taxpayer to the Valleyview Hotel Company Ltd., dated December 22, 1954, was registered in the Peace River Registration District as instrument #1231 on January 14, 1955. This bill of sale was completed as to the affidavit of the grantee by Nick Radomsky on January 12, 1955.

On December 22, 1954, a chattel mortgage (Exhibit 5), was drawn up between Valleyview Hotel Company Ltd. and Victory Hotels Ltd. as collateral security to a real

estate mortgage in favour of the latter to secure payment of the sum of $150,000, the first payment to become due and payable on March 1, 1955, under the affidavit of Mr. Curlett, the main shareholder of the taxpayer and its manager, who stated therein that the amount set forth in the chattel mortgage is justly due. The only clauses of some significance here are the following:

> The said sum together with interest as hereinafter provided by equal consecutive monthly payments of two thousand dollars, on the first day of each and every month until fully paid and satisfied, the first of above payments to become due and payable on the first day of March, nineteen hundred and fifty five. (March 1, 1955, A.D.).
> all of which said goods, chattels, livestock, implements, farming implements, tools and appliances, furniture, household stuff, personal property and effects set forth in the schedule hereto annexed. (comprising all of the unexpendable chattels of the taxpayer) are now owned by and in the possession of the mortgagor . . .

This document was registered on January 20, 1955.

On December 22, 1954, Valleyview Hotel Company Ltd. granted to Victory Hotels Ltd. a mortgage (Exhibit 7) on the property purchased from the latter in the amount of $150,000 payable with interest by equal consecutive monthly payments of $2,000 on the first day of each and every month until fully paid and satisfied. It also carried the clause to the effect that "the first of the above payments to become due and payable on the first day of March, 1955" as well as the following one:

> It is understood and agreed that the interest payable under the terms of this mortgage shall be computed from the 3rd day of January 1955.

This document was registered in the Land Titles Office under #6880 on January 4, 1955.

On December 22, 1954, Mr. Curlett, a director of Victory Hotels Ltd., signed under oath a statement (Exhibit 8) showing the names and addresses of all the creditors of Victory Hotels Ltd. as required under the *Bulk Sales Act*. In a letter dated the week prior to December 28, 1954, Mr. Curlett, on behalf of the taxpayer, surrendered the existing beer licence of the taxpayer.

Mr. Bryant D. Richards, C. A., an accountant for Valleyview Hotel Company Ltd. stated that in a return prepared by him upon information obtained from the shareholders of the company and its solicitor and filed for the company for the year 1954 the assets of the former Victory Hotels Ltd. showed as part of the fixed assets of the Valleyview Hotel Company Ltd. on hand as at December 31, 1954.

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Mr. H. G. Curlett, the manager and main shareholder of the taxpayer, stated that the above documents and particularly Exhibit 3, the agreement to purchase, were drawn up and signed in the following circumstances. He met the prospective purchasers, Messrs. Nick Radomsky, M. N. Gorynuk and John Tanasichuk, accompanied by Mr. Maber, on December 6, 1954, in his office. He stated that it was here that he came down to a price of $250,000 from $300,000, set the rate of interest to be charged at 5%, the cash payment at $100,000 and the balance payable at the rate of $2,000 a month.

He adds that the sale was to be made on January 3, 1955 because (cf. p. 12 of the transcript):

> A. Because I had earnings of just on $25,000 or thereabouts which was the maximum, we could have 21% or 20% it was I believe at that time and I wouldn't make the sale in 1954 and have to regain my depreciation in 1955 at 51% and I explained that to them in taking down the price of $50,000 I didn't want to lose a further $10,000 which I would have to pay in depreciation, regained depreciation and that was very thoroughly understood by all the parties at that meeting.

This is corroborated by the real estate agent, Mr. Maber, who at p. 40 of the transcript states:

> A. Oh, there was quite a bit of discussion and he 'phone his accountant and he agreed to take the $50,000 loss provided I got the deposit raised and that the deal would not be completed before 1955. He couldn't sell it in 1954.

And at p. 41:

> Q. And what was said about the sale as you recall it?
>
> A. Well, the $50,000 cut in price was discussed to quite an extent, the boost in the deposit to $25,000 was discussed, and the date of sale, or the date that the sale was to become effective was discussed, to quite some length.
>
> Q. And what was the arrangement about the sale, what was said about that?
>
> A. That the sale would be consummated or completed on the 3rd day of January, 1955 and not before.
>
> Q. Why was that?
>
> A. Mr. Curlett was having an income tax problem, he was, it meant he would have to lose, I think, approximately around about another $10,000 off of the price, he had already taken a $50,000 reduction and he didn't feel like taking any more.
>
> Q. What did the purchasers say to that?
>
> A. Well I don't remember what they said but they agreed to it anyway because we signed the agreement that way.

And in connection with Exhibit 3 he was asked:

Q. Why did you word it in the manner in which it is worded? The part about the sale and possession and so on?

A. Well so as the date of possession and the sale of the hotel would be in 1955 and not in 1954.

This is also corroborated by Mike Gorynuk, one of the purchasers, at p. 61 of the transcript. This gentleman is, however, no longer interested in the Valleyview Hotel Company Ltd.

Q. Now can you tell His Lordship if there was any discussion about the date you were to purchase the Victory Hotel?

A. Well, I remember I remember talking over the date that was set for taking over possession, January 4, 1954, in '55.

Q. Yes, and did Mr. Curlett say anything?

A. No, he just, that was the arrangement.

Q. But what did he say about the arrangement?

A. Well, he couldn't release it during the year '54 due to some of his tax problems.

Q. And he told you that?

A. He told us.

Q. Did you agree to that?

A. Yes.

And later at p. 62:

Q. And at the time, or at some time during these proceedings Mr. Curlett had mentioned to you that as far as he was concerned it had to be possession in 1955 because of his tax problem?

A. That is right.

Mr. Maber then went back to his office, drew up Exhibit 3 himself and brought it back to Mr. Curlett's office where it was signed.

Mr. Curlett adds that his intention was that he was to own and operate the hotel until January 3, 1955, and, in effect, the taxpayer did operate the hotel until that date and retained and reported the income that came from the hotel up until January 3, 1955.

It is necessary in the Province of Alberta, in order to obtain or maintain a liquor licence, to show undisputed occupancy for the period of the licence and the taxpayer here held the licence for the month of December 1954 until January 3, 1955, when it was surrendered.

Indeed, two licences are not permitted for the same hotel and, therefore, the Victory Hotels Ltd.'s licence was effective until the close of business on January 3, 1955, and

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the Valleyview Hotel Company Ltd.'s licence when obtained would be effective as from the opening, on January 4, 1955. This last licence, although dated January 4, 1955, had been released by the Liquor Board on December 31, 1954.

The clause in Exhibit 3 dealing with the agreement to purchase from the 6th day of December 1954 to and including the 6th day of February 1955 was for the purpose, according to both Mr. Curlett and Mr. Maber, of covering the purchasers or purchaser with the Alberta Liquor Board; indeed they had to advertise for four consecutive weeks in the local newspapers and sufficient time had to be provided so that if they missed one issue they would still have sufficient time to publish in four consecutive issues; this was confirmed by Mr. Maber who explained the signification of the date of February 6, 1955, in Exhibit 3, at p. 42 of the transcript:

> A. Yes, these agreements here had to go through the Liquor Control Board and they demanded that they be in such a way and such wording, now at that time they had to advertise four consecutive weeks before, to give people a chance to protest the new licensee coming in, that was part of the Act. Now if they missed a week, if the newspaper made a mistake which they have done, there has been instances of it, they had to start all over again with their advertising and go for four more consecutive weeks, so you had to allow two months on your agreement, or sixty days, in case of some mistake or something like that in regard to the advertising.

And at p. 58 of the transcript:

> A. . . . you see there is 30 days, 22 days in these deals that you cannot do anything with, people are just sitting waiting for this advertising and for the license and it is quite a usual thing in that period we always drew up the documents about a week ahead of time, sometimes two weeks ahead of time and they were all held in trust until the deal was completed, until we got the license. These people were not going to buy the hotel if they did not get the license, but we did draw up the papers before hand, dozens and dozens of times, and they just laid around until the deal was completed.

Mr. Curlett went to Peace River for the takeover on January 3, 1955, where he took stock in the beverage room, the coffee shop, the basement of merchandise used in the coffee shop. He also took the room register office at midnight on January 3, 1955, and the necessary adjustments were made accordingly and up to midnight of January 3, 1955, Victory Hotels Ltd., the taxpayer, had the entire revenue.

The interest on the mortgage, as we have seen, was charged from January 3, 1955, and the insurance was adjusted as of January 3, 1955, also.

Mr. Curlett stated that the taxpayer did not pay any of the municipal taxes on the property in the year 1955 as he says the matter of taxes never came into discussion, they were not levied yet and he did not know what they would be.

However, Mr. Maber, the real estate agent, in connection with this matter of taxes, stated that on the date of the take-over, January 4, 1955, he went down to the town office, checked the taxes and obained the amount for 1954. He came back and worked out three days which did not amount to very much and adjusted the municipal taxes for the first three days of 1955.

With respect to the insurance coverage, Mr. Curlett states that the name of the insurance policy was not changed from that of the taxpayer to that of Valleyview Hotel Company Ltd. until after January 3, 1955.

Until such time as the mortgage was returned from the registry office, which was in 1955, the insurance was carried in the name of Victory Hotels Ltd. and when the mortgage was returned, a transfer of the insurance was made and the premium was adjusted back to January 3, 1955.

According to Mr. Curlett, he tried to get the insurance policy but it is no longer available in the Victory Hotels Ltd.'s file. He recalls receiving a letter from Mr. O'Brien, the solicitor for the purchasers, dated December 24, 1954, requesting him to attend to having the existing insurance policy changed in the name of Valleyview Hotel Company Ltd. with the loss payable to the taxpayer but persists in saying that the solicitor would just assume he would do that, but that this was not done until the end of January 1955.

He admitted that he paid Maber Ltd., the real estate agent, a commission.

Mr. Curlett knew that $25,000 deposit money had been paid over to Mr. Maber for the account of the taxpayer, and when asked whether he thought he was bound by Exhibit 3 when it was signed on December 6, 1954, he replied: "If there was no castastrophe happening and they put up the balance of $75,000, I certainly would . . .".

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A further question as to whether once the amount of $75,000 was paid up, he would then consider himself bound by the document (Exhibit 3), he replied:

A. No, there were two clauses in there, one that they were to receive a licence or the deposit was to be refunded and the other one was that if there was a fire in the hotel that they had the privilege of backing out.

Q. But they had the privilege, not you, is that right?

A. Well—

Q. If there was a fire?

A. That is the way that document reads and undoubtedly it would have been my fire if a fire had occurred before the 3rd day of January, there would have been no argument then as to whose it was.

An inventory of the nonexpendables was taken in December 1954 and of the expendables on January 3, 1955. Mr. Curlett states that he is not familiar with the certification on Exhibit 5, which is the chattel mortgage, to the effect that Valleyview Hotel Company Ltd. is the owner of the property as of December 22, 1954.

The taxpayer, through Mr. Curlett, admitted that on December 22, 1954, he had all the security he asked for, chattel and land mortgages, and that all that was left to be done was to register the mortgages.

He added, however, "that until the mortgage was registered and that he had the abstract to show that his security was the first on the title, had Valleyview Hotel Company Ltd. got into difficulties, or a judgment or a lien made against it, it would have been prior to his mortgage."

He also admitted signing Exhibit 8 on December 22, 1954, to the effect that there was no creditors of Victory Hotels Ltd, a document required under the Alberta *Bulk Sales Act*.

Asked as to whether the idea of signing the document was to satisfy the requirements of the *Bulk Sales Act* because there had been a bulk sale on December 22, 1954, he replied: "No this would be to complete the deal at the third day of January, you cannot make a deal of this nature and put the documents all through and register them and search them and take stock of the hotel and transfer a licence, you cannot do all of these things in one day."

Mr. Maber stated that on December 6, 1954, he deposited in his trust account at the bank a certified cheque in the amount of $5,000, one of $25,000 on December 8, 1954, and one of $75,000 on December 23, 1954.

On January 10, 1955, he issued a certified cheque for $25,000 and another one for $75,000 on January 12, 1955.

Mr. Maber states that if the liquor licence had not been issued to the purchasers, they would have received their money back and the deal would have been cancelled in accordance with a clause in the agreement (Exhibit 3). He interprets the clause to the effect that the purchasers cannot have possession of the hotel before January 3, 1955, as meaning that ownership shall not pass until that date.

Mr. Maber admitted that the purchasers wanted the transaction to be completed in 1954 for the same reason that Mr. Curlett wanted it in 1955 but he told them it would have to be 1955 and he added that they agreed after discussion that they would take possession and the sale would be completed in 1955.

At p. 54 of the transcript he was asked:

Q. Isn't it correct then, Mr. Maber, that because each side wanted a different year you left the agreement at the word "possession" and did not put in language that would have made it clear?

A. Well, it is clear enough to me but I am not a lawyer you see.

The sole question to be resolved here is where the properties of the taxpayer disposed of in 1954 or in 1955.

The pertinent sections of the *Income Tax Act* are the following:

20(1) Where depreciable property of a taxpayer of a prescribed class has, in a taxation year, been *disposed of* and the proceeds of disposition exceed the undepreciated capital cost to him of depreciable property of that class immediately before the disposition, the lesser of

(*a*) the amount of the excess, or

(*b*) the amount that the excess would be if the property had been disposed of for the capital cost thereof to the taxpayer,

shall be included in computing his income for the year.

Disposition of property is partly defined by s. 20(5)(*b*) which reads as follows:

(*b*) "disposition of property" includes any transaction or event *entitling* a taxpayer to proceeds of disposition of property;

and under s. 20(5)(*c*):

(*c*) "proceeds of disposition" of property include

(i) the sale price of property that has been sold,

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There is no question, but that the intent of the parties was that the sale of the properties of the taxpayer be effective January 3, 1955. However, what Mr. Maber, the real estate agent, was trying to do and what he did do, appears to be something quite different. Indeed it would seem that we have here in 1954:

(*a*) a valid contract of sale;

(*b*) an arrangement whereby an amount of $100,000 is in the hands of Mr. Maber, the real estate agent;

(*c*) all of the conveyancing documents including the mortgage and the chattel mortgage are signed but not registered;

(*d*) the bulk sale declaration is completed;

(*e*) the liquor licence is issued at the end of 1954, but is effective only on January 4, 1955;

(*f*) and also the right of the purchasers to get out of this contract if one or two or both of the following things happened:

(1) if there was a fire before possession and then only if the purchasers so elect;

(2) if the liquor licence was not available.

The only matters, therefore, to be completed were (*a*) the taking of possession of the properties and hotel business at midnight on January 3, 1955; (*b*) the matter of insurance; (*c*) the adjustment of municipal taxes; (*d*) the inventory of expendables; (*e*) the taking of the room registry; (*f*) the completion of the affidavits or declarations which accompanied the conveyancing documents and, finally (*g*) the registration of the bill of sale, the chattel mortgage and the mortgage.

The only evidence on behalf of the contention of the Minister to the effect that the intent of the parties was to have this transaction take place in 1954 is that of Mr. Bryan D. Richards, C.A., who drew up some books and a return indicating that the assets of the taxpayer were, in 1954, the property of the Valleyview Hotel Company Ltd., the purchaser, after talking to the shareholders of this company and its solicitor. This, in my opinion, cannot override the preponderance of the evidence which is to the effect that the parties intended this sale to take place in the year 1955.

There is no question also that the taxpayer undeniably had the use and the control of the properties and business and was entitled to its proceeds up until January 3, 1955, and the interest on the mortgage was computed as of that date.

The explanation given by the taxpayer as to why, if the intent was that the sale be effective on January 3, 1955, all the conveyancing documents with the exception of the registration and the completion of the necessary affidavits had been signed and completed before the year 1955, that one "cannot make a deal of this nature and put the documents all through and register them and search them and take stock of the hotel and transfer licence in one day," although plausible, is not entirely satisfactory. However, coupled with the fact that in order to obtain a liquor licence for a hotel in Alberta it is necessary to establish occupancy, and four weeks prior thereto, publish a notice in the newspapers on four consecutive weeks, it does become more persuasive, particularly, may I add, when the issuance of the liquor licence is a *sine qua non* condition without which the purchase would not stand. I believe that this transaction was dealt with in this manner because of the necessity of obtaining the liquor licence as the main incentive here, undoubtedly was not the buildings and land, but the hotel business.

Would, however, the completion of a valid contract of sale in 1954 prevent the taxpayer from contending that he *disposed of* these properties on January 3, 1955, the date upon which he turned over to the purchasers the physical possession of the properties?

The words "disposed of" in s. 20 of the *Income Tax Act* are of the widest meaning and should, in my opinion, be given their widest ordinary or popular meaning bearing in mind, however, that they are being used in a taxation statute, in a matter where the properties which are to be *"disposed of"* are the assets used to earn the very income from which, according to certain specified rates, depreciation can be charged off. Let me add that they may even be given in an appropriate context a wider meaning than their normal meaning, unless of course, the *Income Tax Act* itself has restricted this meaning.

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Indeed, in the context of s. 20 of the *Income Tax Act* it is not unreasonable to give the words "disposed of" their widest meaning which would be "to part with", "to pass over the control of the thing to someone else" so that the person disposing no longer has the use of the property. Indeed, Bell in the South African Legal Dictionary, at p. 182, defines "disposed of" as follows:

"to part with; to pass over the control of a thing to someone else."

The expressions "disposed of", "lost" or "destroyed" were dealt with in the Australian case of *Hentey Howe P.T.V. Ltd.* v. *Federal Commissioner of Taxation*[1] and from that decision it will be seen that the words "disposed of" are given a very wide meaning. May I add that the section of the Australian *Income Tax Act* in which these expressions were found is very similar to our s. 20. It was therein stated that:

The entitled expression "disposed of", "lost" or "destroyed" is apt to embrace every event by which property ceases to be available to the taxpayer for use in producing assessable income, either because it ceases to be his, or because it ceases to be physically accessible to him, or because it ceases to exist.

and at p. 156 of this same decision (*supra*) it is stated:

the idea of ordering, managing, controlling, arranging, the idea of the exercise of an existing power over a thing is generally inherent in the word "disposed" itself and that essential idea is not lost when the word is used with a preposition to denote an act of alienation or creation of a new interest in property.

The evidence also discloses here that the taxpayer was not only selling land and chattels and buildings, but what he was doing mainly was selling a business as a going concern. There is no doubt that had this hotel not been a going concern, the sale would not have taken place, at least not for the price that was paid. Indeed, the importance attached to the transfer of the liquor licence for instance making it a *sine qua non* condition to the deal establishes without doubt that the purchaser was buying a business.

If such is the case here, and I believe that this is so, the words "disposed of" mean the disposal of the assets of the business in a manner such that the business is no longer being carried on by the person who has disposed of it.

[1] 88 C.L.R. 151.

The question, therefore, is had these assets, the properties of the taxpayer, been disposed of as a business or were they still available to the taxpayer during the whole of the year 1954 to earn income? The answer, of course, is obvious, all the revenue including that from the rooms, the meals, the coffee shop, etc., were the property of the taxpayer up to and including January 3, 1955.

The interpretation of the words "disposed of" in the above manner with the very wide meaning I have given them as including the use and/or control of the subject matter of the disposals should and can, in my opinion, be given that meaning providing, however, that the *Income Tax Act* has not otherwise restricted their meaning.

We have seen that s. 20(5)(*b*) of the *Income Tax Act* states that " 'disposition of property' includes any transaction or event entitling a taxpayer to proceeds of disposition of property" and 20(5)(*c*) states that " 'proceeds of disposition' of property include (i) the sale price of property that has been sold,". These sections do not define but merely include as a disposition of property a transaction (a sale for instance) entitling a taxpayer to proceeds of disposition of property, i.e. to the sale price of the property sold. It would indeed appear that the meaning of "disposition of property" has been somewhat restricted by the Act when a disposal of property takes place by means of a sale; in such a case there is a disposal of property as soon as a taxpayer is entitled to the sale price of the property sold.

The verb "entitled" according to the Shorter Oxford English Dictionary means "to give a rightful claim to something". The French text of the Act uses the words "donnant droit" which of course mean to give a right to.

Was the taxpayer here *entitled* to the sale price of the property sold? In the present instance the agreement carried two conditions which, if not fulfilled, would prevent the transaction from being complete: (*a*) a liquor licence, and (*b*) if there was a fire before possession.

We have seen that the deposit money in an amount of $100,000 was held in escrow or in trust by the real estate agent until possession was given in 1955 and that no money was to be paid out or was paid out to the vendor until after the take-over on January 4, 1955.

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Indeed, Exhibit 3, the agreement to purchase, indicates clearly that Maber Ltd. was chosen by both parties to hold the deposit money until such time as the conditions were fulfilled and the purchaser had obtained possession of the properties which possession could not occur earlier than January 3, 1955. It cannot, therefore, be said that the taxpayer was entitled to the monies or the "proceeds of disposition" until January 3, 1955, or such time after that date that all the conditions of the agreement had been fulfilled.

I, therefore, find that the properties of the appellant were not disposed of in the year 1954, but only in the year 1955. The Minister was, therefore, wrong in assessing the appellant as he did in the year 1954 and its appeal against the assessment must be allowed with costs.

Judgment accordingly.

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Jan. 23, 24 25 Feb. 6

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Dec. 11

BETWEEN:

RICHARD C. W. ROLKA, ...APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 16(1), 17(2) 126A and 139(5)(a)—Sale of lots to a company for inadequate consideration—Whether vendor and company dealing at arm's length—Fair market value of lots—Indirect payments—Evidence—Solicitor-client privilege—Appeal allowed in part.

Appellant was in the general contracting business and was president and general manager of Rolmac Construction Co. Ltd. of which company he owned all the shares. He also controlled Nelmar Realty Ltd. in which three shares with a par value of one dollar each were issued, all held by persons not related to but well acquainted with the appellant. Appellant sold to Nelmar certain building lots for $29,500 which lots were resold by Nelmar shortly afterward to Cochren Construction Co. Ltd. for $50,000 the deed being made by appellant directly to Cochren on instructions by Nelmar. The profit of $20,500 resulting from this transaction was brought into the income of appellant by the Minister by virtue of s. 17(2) of the Act and from that assessment the appellant appeals to this Court.

The respondent contends that the sale of the lots by appellant to Nelmar was one for inadequate consideration by appellant to a person with whom he was not dealing at arm's length and that the fair market value of the lots claimed to be $50,000 is deemed to have been received

by the appellant. Respondent also contends that if appellant was dealing at arm's length with Nelmar the profit made by Nelmar on the sale of the lots to Cochren was a transfer of money made pursuant to the direction of the appellant for the benefit of Nelmar which by virtue of s. 16(1) of the Act should be included in appellant's income.

The Court found that the appellant arranged the incorporation of Nelmar although he never became a shareholder and that the only shareholders and directors of Nelmar were three friends of appellant, each of whom had given appellant an irrevocable option to purchase his shares; that Nelmar had no office of its own but occupied the same office as appellant's company without paying rent and appellant's private secretary kept Nelmar's books without charge to Nelmar; that the sale of the lots by Nelmar to Cochren was negotiated and settled with the appellant alone and that in any transactions which Nelmar entered into the appellant appeared to act on behalf of Nelmar and that only after the terms of the sale of the lots had been settled between the appellant and Cochren did the latter learn that the sale would be made through Nelmar; that in numerous ways Nelmar looked to the appellant for direction. The introduction of some of this evidence was challenged by appellant on the ground that a solicitor-client privilege existed in respect of certain documents obtained by the Department of National Revenue from appellant's solicitor.

Held: That Nelmar was in fact indirectly controlled by appellant throughout this transaction and he was not dealing at arm's length with Nelmar and s. 17(2) of the Act applies, the fair market value of the property sold by appellant to Nelmar must be included in computing appellant's income which fair market value was less than that claimed by respondent and the assessment must be adjusted accordingly.

2. That the objection to the introduction of certain evidence that documents were the subject of a solicitor-client privilege fails since once a privileged document or secondary evidence of it has been obtained by the opposite party independently even though it be by default of the legal adviser and even by illegal means, the document is admissible in evidence as the Court does not inquire into the manner in which the document came into the hands of parties. The fact is that the originals did come into the hands of the Minister's representative by the voluntary act of the solicitor for appellant and such privilege as may have previously existed in regard thereto was lost.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto and Hamilton.

E. D. Hickey and *D. M. Mann* for appellant.

W. D. Parker, Q.C. and *J. D. C. Boland* for respondent.

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

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ROLKA
v.
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REVENUE

CAMERON J. now (December 11, 1962) delivered the following judgment:

This is an appeal from a re-assessment to income tax made upon the appellant for the year 1953 and dated June 2, 1958. In his tax return for that year the respondent showed a taxable income of $12,472 and a tax payable of $3,412.20, and presumably the original assessment (which is not before me) was made on that basis. In the re-assessment, the Minister added to the declared taxable income of the appellant the sum of $52,500, made up as follows:

Item A.	Sale to Murray	$ 600	
Item B.	Sale to O'Hanian	1,400	
Item C.	Sale to Robinson	4,146	
Item D.	Sale to Nelmar Realty Limited	25,854	
Item E.	Sale to Cochren Construction Co. Limited	20,500	
			$ 52,500

The Minister computed the revised taxable income at $64,972 and after allowing for payment on account of $3,412.20, levied tax in the sum of $28,681.90, and interest of $6,954.90—a total of $35,636.80. To that re-assessment, the respondent filed a Notice of Objection dated July 25, 1958. No reply was filed by the Minister under s. 58(3) of the *Income Tax Act*. Accordingly, the appellant filed and served a Notice of Appeal to this Court under s. 60(2) on September 11, 1959; the Minister filed his Reply to the Notice of Appeal on August 18, 1960.

In the Notice of Appeal it was admitted that the amounts of $1,400.00 and $4,146.00 relating to the sales to O'Hanian and Robinson (Items B and C) constituted taxable income of the appellant for 1953 and consequently they need not be further mentioned.

There is now no issue as to Item A. At the trial it was agreed that the amount thereof should be reduced from $600.00 to $365.30, representing the net interest received by the appellant in 1953 in respect of the Murray transaction.

As to Item D, "Sale to Nelmar Realty Limited", counsel agreed that while the total profit of the sales to Nelmar Realty Limited aggregated $25,854 as stated in the re-assessment, there were, in fact, two sales, one made in

1953 and the other in 1954, and that the total net profit therefrom should be apportioned as computed by the appellant in para. 6 of the Notice of Appeal, namely, $12,464.53 for 1953, and $13,035.47 for 1954. In the result, therefore, only Item E remains for consideration.

The appellant resides at Burlington, Ontario, and is president and general manager of Rolmac Construction Co. Ltd. (which I will hereafter refer to as Rolmac) in which he owns all the shares except the qualifying shares, and which company carries on a general contracting business such as building schools, institutions and housing projects for industry on a contractual basis. He became construction superintendent with Hamilton Construction Company in Hamilton in 1948. Then he acquired an interest in and became general manager and secretary-treasurer of Elliott Construction Co. Ltd., building houses and stores for sale in the Hamilton area. Rolmac was incorporated in 1948 and was engaged in highway and other heavy construction work, and Elliott owned one-half of its shares and operated it, the appellant being its general manager. In 1950, it was decided to separate Elliott Construction Co. Ltd. from Rolmac and accordingly the appellant sold all his shares in the former and acquired all the shares in Rolmac.

Item E. (*supra*), referred to as the sale to Cochren Construction Co., relates to lots in Chamberlain Park Survey in the City of Hamilton. By instrument dated December 22, 1950, Rolmac gave an exclusive option to the appellant to purchase some 113 lots in Chamberlain Park Survey for $4,000, such option to be irrevocable up to December 31, 1952 (Exhibit 1). In the settlement with Elliott Construction Co. Ltd. Rolmac had taken over all but two of these lots at the agreed figure of $1,800. On December 20, 1952, the appellant notified Rolmac that he would exercise the option (Exhibit 3) and by deed dated December 23, 1952 (Exhibit 4), Rolmac conveyed the property to him. On April 1, 1953, the appellant accepted an offer to purchase 10 of the said lots from J. E. Robinson for $4,500. (Exhibit 5) and by deed dated April 6, 1953 (Exhibit 6), the appellant conveyed those lots to Robinson. The profit of $4,146 of that sale (Item C) is now admitted to be taxable income of the appellant.

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On April 2, 1953, Nelmar Realty Ltd. (hereinafter to be called Nelmar) offered to purchase the remaining lots of the appellant in the Chamberlain Park Survey (Exhibit 7) for $29,500, of which $2,000 was paid as a deposit, the offer being accepted by the appellant on the same date. In implementation of that offer and acceptance, a formal agreement of sale dated October 1, 1953 (Exhibit 9) was entered into between the appellant as vendor and Nelmar as purchaser. Thereby, the balance of $27,500 with interest at 5 per cent., was to be due and payable on October 1, 1955. The agreement further provided:

> It is understood and agreed that the purchaser may obtain deeds from time to time covering any part of the property hereby sold upon payment to the vendor of $15 per foot frontage, and any payment so made will apply in reduction of the purchase price, or the purchaser may pay on the basis of $500 per building lot whichever is the lesser.

The profit on that sale totalled $25,854 (Item D *supra*), but as I have said, the parties have agreed that only $12,464.53 thereof is income of the appellant in 1953, the balance being income for 1954. Up to this point, the above facts are not in dispute.

I turn now to the evidence relating particularly to the main dispute, namely, to Item E which in the memorandum attached to the reassessments is as follows:

> Sale to Cochren Construction Co. Limited—tax assessed to R. C. W Rolka under s. 16(1) of the *Income Tax Act* as being a transfer of money, rights or things to Nelmar Realty Limited made pursuant to the direction of, and with the concurrence of R. C. W. Rolka.
>
> | | |
> |---|---|
> | Selling price | $ 50,000 |
> | Less cost | 29,500 |
> | | $ 20,500 |

The appellant did not, in fact, convey any of the lands mentioned in the agreement of sale with Nelmar (Exhibit 9) to Nelmar. Exhibit 10 is a letter dated October 15, 1953, from Nelmar to the appellant and is as follows:

> *Re—Sale of Lots Chamberlain Park Survey*
>
> This is to advise you that Nelmar Realty Limited has sold certain of the lots on East Thirty-second Street to Cochren Construction Co. Limited.
>
> The lots sold by Nelmar Realty Limited to Cochren Construction Co. Limited are as follows:
>
> The northerly 13 feet of Lot 168, all of lots 169 to 185 inclusive, all of lots 229 to 256 inclusive, and the westerly one-half of lot 257, all in Chamberlain Park Survey registered Plan 561.

Nelmar Realty Limited hereby requests and directs you to convey the said lots by deed to Cochren Construction Co. Limited, the said deed being dated 8th October, 1953.

Nelmar Realty Limited hereby advises that under the terms of the Agreement for Sale between Richard C. W. Rolka and Nelmar Realty Limited dated 1st October, 1953, Nelmar Realty Limited will pay for the said lots at the rate of $500 per building lot, making a total payment of $12,500.

Nelmar Realty Limited hereby authorizes its solicitors herein, Messrs. Martin & Martin, to deduct from the purchase price paid by Cochren Construction Co. Limited the sum of $12,500, and to send the same to Mr. Richard C. W. Rolka to be applied in reduction of the balance due under the said Agreement for Sale dated 1st October, 1953.

Pursuant to that notice, the appellant says he conveyed the lots mentioned therein directly to Cochren Construction Co. Limited by deed dated October 8, 1953 (Exhibit 11). Subsequently, and again upon the instructions of Nelmar, he executed two further conveyances direct to Cochren Construction Co. Limited: (*a*) Exhibit 12, dated April 8, 1954; and (*b*) Exhibit 13, bearing the same date. The affidavits taken under the *Land Transfer Tax Act* by H. A. Martin, solicitor, indicate that the sale prices in the three conveyances were respectively $17,500, $16,250 and $16,250—a total of $50,000. The lands so conveyed comprised all the lands which the appellant agreed to sell to Nelmar by the agreement of sale, Exhibit 9, for $29,500.

The appellant says that at the time of that agreement he received a deposit of $2,000, that in 1953 on completion of the first deed to the Cochren Construction Co. Limited, he received $12,500; and that in 1954 on completing the two deeds to Cochren Construction Co. Limited, he received the balance of his sale price, namely, $15,000.

His main submission is that he had no contract or agreement with Cochren Construction Co. Limited or any dealings in connection with that company except to execute the three deeds to it at the direction of Nelmar; and that consequently he received no profits in respect of the Chamberlain Park Survey lots save that made on the sales to Robinson and to Nelmar.

The Minister, however, in re-assessing the appellant, took a different view of the matter. Nelmar made a profit of $20,500 on the transaction, being the difference between the sale price to Cochren Construction Co. Limited of $50,000 and the amount it had agreed to pay the appellant, namely,

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$29,500. In the reassessment, that profit was added to the appellant's taxable income, the Minister purporting to act under s. 16(1) of the *Income Tax Act*, which then read:

16. (1) A payment or transfer of money, rights or things made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

In the Minister's Reply to the Notice of Appeal, the following clauses appear:

5. The sale of the said balance of the lots to Nelmar Realty Limited was a sale by the Appellant to a person with whom he was not dealing at arm's length.

6. The fair market value of the said balance of the lots at the time of the sale to Nelmar Realty Limited was not less than $50,000.

And in "The Statutory Provisions and Reasons upon which the respondent intends to reply":

8. The Respondent says that at all times material to this appeal the Appellant and Nelmar Realty Limited were persons not dealing at arm's length with each other.

9. The Respondent says that the onus is on the Appellant to establish that the fair market value of the balance of the lots sold by him to Nelmar Realty Limited was less than $50,000.

10. The Respondent says that since the Appellant has sold the lots to a person with whom he was not dealing at arm's length at a price less than the fair market value, the fair market value of the said lots for the purpose of computing the Appellant's income is deemed by virtue of s.s. (2) of sec. 17 to have been received or to be receivable therefor.

11. The respondent says that in computing the Appellant's profit from the sale of the said lots to Nelmar Realty, the $50,000 at which the Appellant is deemed to have sold the said lots to Nelmar Realty, is to be included by virtue of para. (b) of s.s. (1) of Sec. 85B, notwithstanding that part of the purchase price was not receivable until a subsequent year.

12. Alternatively, the purchase price for which the lots were in fact transferred is to be included by virtue of para. (b) of s.s. (1) of Sec. 85B, notwithstanding that part of the purchase price was not receivable until a subsequent year.

13. Alternatively, if the Respondent was dealing at arm's length with Nelmar Realty Limited, the Respondent says the payments of money made by Cochren Construction Co. Ltd. to Nelmar Realty Limited on the sale of the said lots were made pursuant to the direction of or with the concurrence of the Appellant to Nelmar Realty Limited for the benefit of the Appellant or as a benefit that the Appellant desired to have conferred on Nelmar Realty Limited and are to be included in the Appellant's income.

14. The Respondent relies on Sec. 3, 4, s.s. (1) s. 16, s.s. (2), s. 17, para. (*b*) of s.s. (1) of s. 85B and para. (*e*) of s.s. (1) of s. 139.

In his argument, counsel for the Minister agreed with the appellant's counsel that on the facts disclosed no case had been made out which would bring the case within s. 85B of the Act, and accordingly paras. 11 and 12 of the Reply to the Notice of Appeal need not be considered. He also agreed that if the profit of $20,500 made by Nelmar on the sale to Cochren should be found to be taxable income of the appellant, that profit should be taxable as to part in the taxation year 1953 and the balance in 1954.

For the appellant it is submitted that the profit of $20,500 made by Nelmar on the sale to Cochren Construction Co. Ltd. is properly taxable in the hands of Nelmar and is not taxable to the appellant either as a payment or transfer under s. 16(1) or as a non-arm's length transaction under s. 17(2). The evidence suggested that Nelmar had included that amount as taxable income in its returns and counsel for the appellant therefore submits that if it were again taxed to the appellant, there would be double taxation of the same profit. The matter is not too clear, but I understand from the argument that while Nelmar may have included that amount in its returns, such returns showed an annual loss and consequently Nelmar was not taxed in regard thereto.

For the Minister it is submitted first that the sale of the lots in Chamberlain Park Survey to Nelmar was not an arm's length transaction; that the fair market value of the lots at the time of the sale was $50,000; and that the onus is on the appellant to establish that the fair market value was less than that amount. He relies on the following sections of the Act:

> 17. (2) Where a taxpayer carrying on business in Canada has sold anything to a person with whom he was not dealing at arm's length at a price less than the fair market value, the fair market value thereof shall, for the purpose of computing the taxpayer's income from the business, be deemed to have been received or to be receivable therefor.
>
> 139. (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, . . .
>
> shall, without extending the meaning of the expression "to deal with each other at arm's length", be deemed not to deal with each other at arm's length.

The question as to whether or not persons and/or corporations are dealing at arm's length is a question of fact to be determined by a consideration of all the relevant facts and

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circumstances and the statutory provisions. In this case, the evidence is clear that the appellant was never the registered owner of any shares in Nelmar and it cannot therefore be said that he controlled that company directly by holding a majority of its shares.

Nelmar was incorporated as a private company under the *Companies Act* of the province of Ontario on September 23, 1952. Exhibit 5 is the minute book containing a copy of the charter, the bylaws, the minutes of the directors and shareholders, the record of the shareholders and the transfer of shares. Its purposes and objects included (a) the buying, holding, selling and dealing in real and personal property; and (b) the erecting, maintaining and managing of buildings and generally carrying on the business of a real estate and improvement company and the sale and development of land. The authorized capital consisted of 40,000 shares without nominal or par value. The original incorporators and provisional directors were Mr. W. M. Martin (the firm's solicitor and also the appellant's personal solicitor, and solicitor for Rolmac) and two of his office employees, each of whom subscribed one dollar for one share. The three dollars so subscribed was the only capital put into the business at any time. As shown by the minutes of the meeting of the provisional directors held on October 8, 1962, the provisional directors resigned and transferred their shares to Harry M. Coutts (a salesman employed by Building Products Limited), John Dreim (a barber) and H. P. Wright (an accountant, who was also an accountant for the appellant and for Rolmac), all of Hamilton and all friends of the appellant. Mr. Coutts was appointed president and Mr. Dreim secretary-treasurer, but later, at some unspecified date, Mr. Wright was appointed secretary-treasurer.

Nelmar had no separate office of its own. It occupied the office of Rolmac without payment of rent, and Rolmac also supplied free of charge the use of its furniture and telephone; and Mr. Rolka's private secretary kept the books under the direction of Mr. Wright without any additional compensation. There is no evidence that Nelmar ever had any staff or employees.

It is abundantly clear that in all its transactions, Nelmar was closely connected with either the appellant or his company, Rolmac. Such construction as was done on its property was carried out by Rolmac. There were three main real

estate transactions in which it was involved, the first one having been already referred to, namely, the purchase and disposition of the lots in Chamberlain Park Survey, acquired from the appellant and previously owned by Rolmac, the profit from that transaction being the issue in this appeal.

Ancaster Development Co. Ltd. in 1952 owned property in or near Hamilton, and the appellant and one J. H. Young (now deceased) each held 45 per cent. of its shares. In that year, the appellant had an option to purchase about 24 lots from Ancaster at $500 each. In the same year he gave up the option and with his approval, Ancaster at once agreed to sell those lots to Young for $500 each, but subject to an agreement between Young and the appellant that Young could not sell them to anyone but Nelmar without the appellant's consent. Young acquired the lots in three parcels and almost immediately thereafter sold them to Nelmar at $1,200 per lot and Nelmar in turn sold them to the appellant's company Rolmac at $1,500 per lot. On these purchases and sales Young made a profit of $16,800. On completion of the sales, Young made gifts to the appellant of $5,000 by cheque and bonds of a value of about $5,200. The appellant first said that he did not know if the gifts had anything to do with the above transactions but later suggested that they may have been in appreciation of business which the appellant had directed to Young in previous years.

The facts of that devious transaction, in which the appellant could have acquired lots for building purposes for his own company, Rolmac, at $500 each, but for which Rolmac paid $1,500 to Nelmar, all within a very short time, clearly indicate in the absence of any satisfactory explanation that the appellant controlled the entire matter; that he arranged that the property would pass through the hands of Nelmar which would make a small profit, and that Rolmac would be subject to lower taxation since the cost to it of the lots would be $1,500 each, instead of $500. I am satisfied, also, that it was arranged so as to avoid a direct sale of the lots by the appellant to Rolmac (which would have been a non-arm's length transaction) and as a scheme by which the profits made by Young would be shared with the appellant.

The other main transaction by Nelmar was the acquisition of "Edgecliff", a country estate of about five acres situated on Lake Ontario near Burlington. On August 6, 1952, the

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appellant purchased it from one Maynard (Exhibit 14), paying $70,000 for the land and buildings and $6,500 for furniture. He made a down-payment of $35,000 (part of which he borrowed from Rolmac) and gave back a first mortgage for $41,600. He has resided on the property since that date.

On December 1, 1952, Nelmar offered to purchase the lands and buildings comprising "Edgecliff" for $78,000, paying $500 as a deposit, assuming the Maynard mortgage for $41,600, and the balance by giving its demand note for $35,900, with interest at 5 per cent. to the appellant (Exhibit 15); on December 5, 1952, the appellant accepted that offer which included the following clause: "The sale is conditional upon Mr. Rolka entering into a lease agreement, whereby the aforesaid R. C. W. Rolka agrees to lease the property for a period of two years for the amount of $1,200 annually. We have agreed to give Mr. Rolka an option to extend the lease period for a further two years."

By deed dated December 29, 1952, the appellant conveyed the property to Nelmar (Exhibit 16) on the terms above stated. Exhibit 17 is a lease of "Edgecliff" from Nelmar to the appellant dated December 29, 1952, for a period of two years from January 1, 1953, at $1,200 per annum (Nelmar paying taxes) with an option for a renewal for a further period of two years at the same rental. Exhibit 18 is a further lease of "Edgecliff" to the appellant dated August 20, 1957, for a period of five years from September 1, 1957, at an annual rental of $2,400, Nelmar again paying taxes and covenanting to keep all buildings in a reasonable state of repair, damage by fire, lightning and tempest excepted. While there is no clear evidence as to a further extension of that lease, it may be noted that in the unsigned minutes of a meeting of the directors held on April 27, 1960, reference is made to the "present ten-year lease between the company and Mr. R. C. W. Rolka". It is shown that for each of the first four years of the lease Nelmar incurred liabilities in respect of "Edgecliff" for interest, taxes, insurance, repairs, maintenance and gardening, in an amount which exceeded the annual rental by over $4,000; and in subsequent years the average expenses exceeded $5,000 per annum, while the rental was $2,400.

During his tenancy, Nelmar for the use of the appellant, but at its own expense, constructed a three-car garage on the property at a cost of about $2,600. In 1958 or 1959, Nelmar needed funds and a second mortgage was placed on the property which the appellant guaranteed at the request of the mortgagee. The purchase note taken back from Nelmar by the appellant was at once assigned to Rolmac, but little or no interest was ever paid thereon and in 1960 it was cancelled and Nelmar gave a third mortgage to Rolmac for the amount then owing.

Since 1956 at least, Nelmar has been inactive and its only asset has been "Edgecliff" now subject to three mortgages, and, with its substantial annual operating losses, it is likely to be in bankruptcy soon, as Mr. Wright stated.

I think it is clear that prior to the time when the appellant purchased "Edgecliff", he planned the incorporation of a realty company to which it and other properties would be transferred, that he selected three of his friends to be the shareholders, that he would not himself be the registered owner of any shares, but that he would secure from the shareholders irrevocable options giving him the right to acquire their share holdings. Wright did not know either of the other shareholders until he met them in the solicitor's office, presumably at the time the shares were transferred to them by the original incorporators. He stated also that before the appellant purchased "Edgecliff", the latter came to him and discussed the formation of a new realty company and the incorporation of Nelmar. In part, Wright said:

> Mr. Rolka came and during one of his visits said: "How would I like to be interested in a realty company which would acquire Edgecliff?"

And in explanation of Nelmar's purchase of "Edgecliff", Wright said:

> Yes I have nothing to lose. Mr. Rolka indicated he thought, in considering that on a long range, he assured me in the long range view there would be profit in this property and also assured me further real estate deals might be introduced into the company, and in fact, all these minutes—it didn't appear there was going to be any loss because all I could lose was one dollar.

Exhibit E is an undated memorandum in Wright's handwriting. It records information given to him by the appellant as to the proposed incorporation of a realty company, the name then suggested being Nelson Realty Ltd., later changed to Nelmar Realty Ltd. It refers to the acquisition

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of "Edgecliff" from Maynard by either the appellant or Rolmac at a total cost of $76,500 and the formation of Nelson Realty Company, in which three persons (including Wright and Mrs. Rolka) would each hold one-third of the shares and that "each executes irrevocable option in favour of Dick Rolka" (the appellant); and also to the proposal that the new company would purchase the Chamberlain Park lots from Rolka and the Ancaster lots from Young at $1,200 per lot after Young had purchased them from Ancaster at $500 per lot. All the matters so referred to were in fact carried out, though in part on terms somewhat different from the proposals then made; and Nelmar did acquire "Edgecliff", the Ancaster lots, and the lots in Chamberlain Park Survey. Moreover Wright, by letter dated January 12, 1954 (Exhibit F) returned to Rolka the option agreement in connection with his share in Nelmar. The appellant could not recall having received that letter or the option, but would not deny that he had received them.

In reference to the options, which the appellant urged were not options but agreements to give options, he said that in late 1953 he had a verbal understanding with all three shareholders that he would be given the first opportunity to buy their shares in Nelmar if they wanted to sell out and without any time limit; that he reduced it to writing in the form of a memorandum which each signed; that he remembers specifically only that of Dreim which he had destroyed in the winter of 1953-54 after advising the shareholders that it was of no value to him. He said that no such options were now outstanding and added that they contained no sale price which would be a matter of discussion later.

I should also state here that on many points I found the appellant's evidence to be very unsatisfactory and evasive. On a number of matters that should have been definitely within his knowledge, he was vague and uncertain and frequently said that he could not remember or that he could not recall definitely. Specifically, he said that he first knew of Nelmar when he sold "Edgecliff" to it at the end of 1952. I am satisfied that that statement was wholly untrue and that he planned its incorporation, selected the shareholders and knew of its incorporation from the beginning. Moreover, in view of the information contained in Exhibit F, it is clear that the appellant planned before the incorporation

of Nelmar to secure irrevocable options to purchase the shares. I cannot accept his explanation at the trial that he secured the options because Nelmar at the time owed Rolmac a large amount of money which he had previously guaranteed to the bank, and "naturally I wanted to protect myself as much as possible from Nelmar by any chance of their selling it to anyone who may not sign the note".

There are also a number of other documents in evidence which seem to suggest that Nelmar looked to the appellant for direction. Exhibit A is a letter from Wright to him dated June 12, 1953, under the heading "Nelmar Realty Limited", and enclosing the tax assessment for 1953 (on "Edgecliff") with a request to check the assessments "and if in order pass it over to your accountant for payment". It will be recalled that under the terms of the lease Nelmar was responsible for the taxes. Exhibit B is a letter from Wright to Rolka dated January 5, 1954, enclosing an account from National House Builders, billed to Nelmar and stating: "Will you kindly indicate if you authorized this, and if so, please instruct us to have payment made".

Exhibit C is a letter dated July 12, 1955 from Mr. Wright's son, an employee of his father's firm of accountants, to the appellant as follows:

Re: Nelmar Realty Limited. We enclose herewith Department of National Revenue T-5 return for the 1954 taxation year in duplicate. One copy of this return, marked "This Copy for Federal Income Tax" should be signed by Mr. Coutts and forwarded immediately to the Director of Income Tax, Hamilton. The second copy, marked "Retain this Copy for your Files" may be retained in the Company's files for future reference.

We further enclose "Request to File a Return", form TX 11 dated July 7, 1955 which we suggest be filed with your copy of the T-5. This return has been completed at the request of the taxation authorities and we suggest the return be filed as requested.

No satisfactory explanation is given as to why this matter was sent to the appellant instead of to the office of Nelmar.

The part played by the appellant in the sale of lots in the Chamberlain Park Survey to Cochren Construction Co. Ltd. indicates clearly the relationship of the appellant to Nelmar. I accept without reservation the evidence of Thomas Cochren, the owner of the Cochren Construction Co. Ltd., as to the manner in which he made that purchase. He said that in October, 1953, after one or more telephone conversations with the appellant, he went to the latter's office, that all the terms of the sale were negotiated and

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settled with the appellant alone, and that immediately thereafter the appellant took him to Mr. Martin's office, gave the latter instructions as to the agreed terms of the sale, and that he (Cochren) knew nothing of Nelmar until he heard the appellant instruct Martin that the sale would be made through Nelmar. There is no evidence which suggests that in the meantime the appellant had contacted any of the directors of Nelmar or secured their approval. It is significant to note that Nelmar's letter dated October 15, 1953, to the appellant (Exhibit 10) purporting to notify him of the sale by Nelmar to Cochren and directing him to convey the lots direct to that company, is dated one week after the date of the deed (Exhibit 11) and later than the date of the affidavit as to its execution by Rolka. I reject as untrue the evidence of the appellant that he did not negotiate the terms of sale with Cochren or settle the price, and that after introducing Cochren to Martin, he did nothing further in the matter until he received the letter (Exhibit 10) directing him to convey the lots to the purchaser. I accept, also, Mr. Cochren's evidence that the sale of the balance of the lots in April, 1954 was negotiated and settled in the same way with the appellant alone.

At the trial, counsel for the Minister tendered certain other documentary evidence, the admissibility of which was challenged by counsel for the appellant, alleging a solicitor-client privilege, and I must now determine that question. On September 12, 1956, Mr. R. D. Atkinson, an investigator employed by the Income Tax Division, with an associate and with the authorization of the Minister as provided in s. 126(1) of the Act, went to the office of Mr. Martin and showed him his authority. After some discussion as to whether the documents in Mr. Martin's possession were privileged, Mr. Martin handed to Mr. Atkinson a number of documents, including the originals of Exhibits I and J, but retained two other documents (the originals of Exhibits G and H) which were placed in an envelope and sealed. Section 126A of the Act relating to the procedure to be followed when a solicitor-client privilege is claimed was then in effect, but that procedure was not followed by the solicitor, although it was brought to his attention by Atkinson. On November 5, 1956, when Mr. Atkinson returned to Mr. Martin's office, the envelope was opened and the originals

of Exhibits G and H were delivered voluntarily to Mr. Atkinson and his associate. Subsequently, Mr. Atkinson had photostatic copies made, returning all originals to Mr. Martin, and at the trial produced such copies, namely, Exhibits G, H, I and J. By the provisions of s. 126(5) such a copy, made pursuant to s. 126, "is admissible in evidence and has the same probative force as the original document would have if it had been proven in the ordinary way."

All four documents are typewritten memoranda bearing the typewritten initials of Mr. Martin. Exhibit I, dated August 19, 1952, records communications made to him by the appellant at interviews on August 18 and 19. It refers specifically to the proposed purchase of "Edgecliff" by the appellant, and states: "Rolka authorized me to take title in his name and he intends to turn it over to a new company to be formed later."

Exhibit J, dated August 19, 1952, records a communication made to him by the appellant on that date relating to the formation of a new company in which there would be three shareholders holding shares equally, one of whom would be Wright, but Rolka would not be a shareholder. The new company would purchase Rolka's home, land from Rolmac, and the lots in Ancaster Development Company. Rolka would get a lease of his home from the new company "at very little money". Exhibit G is a record of a telephone call made by the appellant to Mr. Martin on September 12 when certain points were settled, including the appellant's agreement to the name of Nelmar Limited, and that Mr. Martin should proceed to apply for letters patent on the basis of a conversation between Wright and Martin. It outlines the proposed sale of the Ancaster lots to Young who would sell at a profit to Nelmar, most of the profit therefrom to be given by Young to Rolka as a gift. The proposed sale of the Chamberlain Park Survey lots is also mentioned. The memorandum continues:

> Dick wants to stand (start?) building on this land next spring . . . and it is one of the most important things Rolmac has to do next year. He sees the point that Nelmar should make money but he does not want them to make too much money . . . he is willing to pay a rent of $1,200 for the Trafalgar property (i.e., "Edgecliff").

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Exhibit H, dated September 12, 1952, is a memorandum made by Mr. Martin of a conversation with Wright on the previous day when a number of things were discussed, and settled, including the name of Nelmar. It continues:

4. We discussed the three separate transactions that Rolka was considering and we settled as follows,

(a) The Port Nelson property could be sold by Rolka to the New Company on the basis that the advantage to Rolka was that he was getting a low rent, and on the basis that the advantage to the company was that it was buying property which could be carried without too much expense and which might ultimately either be developed or sold for a very much larger sum as a capital profit. He thinks that Rolka in addition to paying a rent of $500 a year should agree to keep the place in repair and maintain grounds, etc. He thinks that we should in the company assume the existing mortgage and pay Rolka by a 4% note. He thinks the lease of Rolka ought to be for two years or three years, but not five years.

(b) On the question of the lands of Ancaster Development Limited—26 lots—which Rolka has, he says that he thinks that it would be all right for Rolka to sign this Option to Young, who in turn would give it to Nelmar, who in turn would give it to Rolmac at $1,800 per lot. It would be necessary for Dick to set the prices. It would also be necessary for cheques to be actually issued by the necessary parties, although, of course, they could be deposited at one time.

(c) In his opinion the mountain property which is now owned by Rolmac cannot be sold to Rolka who in turn sells it to Nelmar who in turn sells it back to Rolmac. He thinks this is too bare faced. He says, and I quite agree with him, in fact it is my idea that Rolka is already getting two benefits out of this, namely cheap living in a house, a capital profit of the Ancaster Development land, and he should not attempt to get another capital profit by such a bare faced scheme as the present one. He thinks that what should be done is that Dick should sell all or some of the land from Rolmac to this new Company, and let them sell it to speculators or builders or even go to the extent of having the land actually built on Rolka. The trouble with that of course would be that there would have to be deeds and mortgages, and cheques issued and the Nelmar Company would actually become quite active.

It was settled that I could go ahead and apply for Letters Patent of the Company after checking the name with Rolka but that he would have to think over again the third alternative after I had discussed the thing with Dick and see if we could not work out something different.

In my opinion, these documents are admissible. It is not necessary to decide whether they would have been privileged as communications between solicitor and client, if the provisions of s. 126A had been invoked. The fact is that the originals did come into the hands of the Minister's representative by the voluntary act of the solicitor and such privilege as may have previously existed in regard thereto

has been lost. Reference may be made to Phipson on Evidence, 9th Ed., at p. 202, where on the authority of *Calcraft v. Guest*[1], the principle is stated thus:

> But, unlike the rule as to affairs of State, if the privileged document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for it has been said that the Court will not inquire into the methods by which the parties have obtained their evidence.

From the evidence as a whole, only one reasonable conclusion can be drawn, namely, that the appellant arranged the incorporation of Nelmar for his own purposes; that the shareholders and directors exercised no independent judgment as to any of the business transactions, but were guided solely by the directions of the appellant; that they took office at his request and that he alone determined the properties which would be conveyed to it, the terms and the prices to be paid therefor, and the terms on which Nelmar would dispose of its assets. There is not a tittle of evidence which suggests that the directors ever exercised any independent judgment on any matter. Mr. Wright, who was a shareholder, director and secretary-treasurer, was called as a witness on behalf of the respondent, but gave no evidence which would suggest that he or the other shareholders in Nelmar at any time gave independent consideration to the purchase and sale of the properties. The appellant did not see fit to call either of the other shareholders.

It is settled law that when the Minister by his assessment has concluded that the relevant transaction was not one at arm's length, the onus lies on the appellant to show error on the part of the Minister in this respect. Reference may be made to *Miron & Frères Ltd. v. Minister of National Revenue*[2] and to *Johnston v. Minister of National Revenue*[3]. I must also keep in mind the judgment of the Supreme Court of Canada in *Minister of National Revenue v. Sheldon's Engineering Ltd.*[4], where at p. 645 Locke J. in delivering judgment for the Court referred with approval to the statement of Lord Cairns in *Partington v. Attorney-General*[5]:

> . . . as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be.

[1] (1898) 1 Q.B. 759 (C.A.).
[2] [1955] S.C.R. 679 at 682.
[3] [1948] S.C.R. 486.
[4] [1955] S.C.R. 637.
[5] (1869) L.R. 4 H.L. 100 at 122.

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On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

In the instant case, it is clear that the appellant at no time held any shares in Nelmar and it cannot therefore be said that he directly controlled Nelmar by reason of holding a majority of its voting shares. But the provisions of s. 139(5)(*a*) refer not only to direct, but also to indirect control, neither term being defined in the Act. Indirect, in the primary sense, means, of course, not direct. In the Shorter Oxford English Dictionary, a number of definitions are given, but I think the ones here applicable would be: "Not taking the straight or nearest course to the end aimed at"; "Roundabout"; "Devious". In *Minister of National Revenue v. Kirby Maurice Co. Ltd.*[1], I had under consideration a vendor and purchaser transaction between an individual and a corporation and stated in part at p. 84:

> It is sufficient to state that in my opinion, in a vendor and purchaser matter, an arm's length transaction does not take place when the purchaser is merely carrying out the orders of the vendor, and exercising no independent judgment as to the fairness of the terms of the contract, or seeking to get the best possible terms for himself. That was precisely the situation here. In effect, Maurice was both vendor and purchaser, and while he was not actually a shareholder at the time the agreement of October 1, 1952, was signed, he had in fact full control of the entire operation.

In view of the evidence to which I have referred and the reasonable inferences to be drawn therefrom, I have come to the conclusion not only that the appellant has failed to satisfy the Court that at the time of the sale of his property to Nelmar he did not indirectly control Nelmar, but that in fact he did control it indirectly. The conclusion is inescapable that the shareholders were merely his nominees, prepared at all times to carry out his wishes and instructions (and, in fact, did so) and exercised no independent judgment or sought to get the best possible terms for Nelmar. In my view, the appellant arranged for the incorporation of Nelmar entirely for his own purposes, including that by which he would be able to occupy as a tenant a very valuable property at a purely nominal rental. It follows that the parties to the transaction were not dealing at arm's length and that for the purpose of computing the appellant's

[1] [1958] Ex. C.R. 77.

income, the fair market value of the property must be deemed to have been received by the appellant, under s. 17(2). In view of that finding, it is unnecessary to consider the alternative submission of the Minister as contained in para. 13 of his Reply to the Notice of Appeal.

I must now endeavour to determine the fair market value of the lots sold by the appellant to Nelmar on April 2, 1953. The burden of proof is on the appellant to show that it is less than $50,000, the amount fixed by the Minister in the re-assessment and which is based on the two sales to Cochren Construction Co. Ltd. on October 8, 1953, and on April 8, 1954.

The evidence on this point is confusing and uncertain, partly because certain of the evidence relates to *building* lots of an area of 40 ft. by 100 ft., while other evidence relates to the *Survey* lots as shown on the registered plan which was not produced. I gather, however, that the Survey lots are substantially smaller than the building lots and that 10 Survey lots are roughly equal to 6 building lots. There is no evidence that at any given time any of the lots were more valuable than others.

The appellant relies mainly on the evidence of Mr. Cochren, proprietor of Cochren Construction Co. Ltd. His first purchase in October, 1953 was of 25 building lots for $17,500 or $700 each. His second purchase in April, 1954 was of 34 building lots at $32,500 or about $960 each. In his opinion, these prices were fair and reasonable, values having steadily increased due to the excessive demand for and the low supply of building lots in that area. In his opinion, $500 per building lot would have been a fair market value in April, 1953. He stated also that a purchaser buying lots in substantial quantities would expect to pay less than another buyer who purchased only a few.

In the light of other evidence, I cannot accept Mr. Cochren's opinion as to the value in April, 1953. He is a speculative builder who purchased lots for his own purposes; he is neither a real estate agent nor a land appraiser; he produced no records or any evidence of other sales made at any time and I think his opinion was little more than a very rough estimate. The evidence of the appellant himself is that when he discussed prices with Cochren in October, 1953, he advised him of the prices paid by Robinson and that Cochren suggested that consideration should be given to

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the fact that he wished to purchase more lots and should pay somewhat less per unit. There was then no suggestion that either the appellant or Cochren considered the lots to have increased in value beyond the price paid by Robinson in April, 1953.

The best evidence of value at the date of the sale to Nelmar is that of the sale by the appellant to Robinson, made one day earlier of 6 building lots for $4,500, or $750 each. There seems no doubt that that was an arm's length transaction and fairly represented the then value of lots in Chamberlain Park Survey. If the remaining 59 building lots had then been sold at the same rate by the appellant to Nelmar, he would have received $44,250. There is no evidence as to what concession would be made to a purchaser buying a large number of lots at one time, but accepting the fact that some such allowance would be made, I think it would not exceed 15 per cent. On that basis, I find that the fair market value of the lots sold to Nelmar by the appellant on April 2, 1953, was $37,613.

As to Item D of the re-assessment, the parties, as stated earlier, have agreed that the appellant made a profit of $25,854 on the basis of the sale price of $29,500, that profit being apportioned between the taxation years 1953 and 1954, as previously mentioned. The additional profit of $8,113 will also by agreement of the parties be apportioned between those years and if agreement cannot be reached on the precise amounts, the matter may be spoken to.

Accordingly, the appeal will be allowed in part, and the matter referred back to the Minister to re-assess the appellant in accordance with my findings and the agreements reached at the trial as above stated.

I have carefully considered the question of costs and have reached the conclusion that in the circumstances of this appeal, no costs should be awarded to or against either party. Success has been divided and while the appellant has succeeded in having his 1953 assessments reduced somewhat, the substantial issue was whether or not the appellant in the sale in question was at arm's length with the purchaser and on that point the respondent has succeeded. Further, I am satisfied that if full disclosure of all the surrounding facts had been made, no dispute would have arisen.

Judgment accordingly.

ONTARIO ADMIRALTY DISTRICT

1962
Dec. 13

BETWEEN:

CANADIAN BRINE LIMITED .....PLAINTIFF;

AND

NATIONAL SAND & MATERIAL COMPANY LIMITED ..... } DEFENDANT.

Shipping—Practice—Rule 158, General Rules and Orders of the Exchequer Court in Admiralty—Discontinuance of action—Defendant's costs under Rule 158—Application to fix time and place of trial dismissed.

Held: That under Rule 158 of the *Rules of the Exchequer Court in Admiralty* the plaintiff may discontinue its action at any time and pursuant to such rule at the option of the defendant there may be a judgment entered for the defendant's costs of the action on its filing of a notice to enter the same.

2. That an application by defendant to have a time and place fixed for trial will be dismissed when the plaintiff has filed a notice of discontinuance even though such notice was served later than the defendant's motion to have the time and place of trial fixed.

APPLICATION for an order fixing time and place of trial.

The application was heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

A. J. Stone for plaintiff.

F. O. Gerity, Q.C. for defendant.

WELLS, D.J.A. now (December 13, 1962) delivered the following judgment:

This is an application pursuant, I presume, to Rule 119 for an order fixing the time and place of trial. On the same day that this notice of motion was served, but as I understand from counsel for the defendant, later in the day, a notice of discontinuance was served by the plaintiff. This notice is filed pursuant to Rule 158 which provides as follows:

> The plaintiff may, at any time, discontinue his action by filing a notice to that effect, and the defendant shall thereupon be entitled to have judgment entered for his costs of action on filing a notice to enter the same. The discontinuance of an action by the plaintiff shall not prejudice any action consolidated therewith or any counter-claim previously set up by the defendant. Forms of notice of discontinuance and of notice to enter judgment for costs will be found in the Appendix hereto, Nos. 48 and 49.

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Mr. Gerity appearing for the defendant, objects to this discontinuance and claims that the Court should nevertheless grant an order setting a time and place for trial which he has asked for. The basis on which this objection is made is that to permit the plaintiff to discontinue this action is an abuse of the process of the Court. To understand what he means by this it is necessary to briefly review the history of this action as disclosed by the defendant's material.

The action was apparently commenced by the issue of a writ on December 20, 1961 last. The action was originally against the present defendant and two other defendants who are out of the jurisdiction, namely The Wilson Transit and Hanna Coal and Ore Corporation. Leave had originally been granted by the Surrogate Judge to serve them and on May 2, 1962 both these foreign defendants moved before the Surrogate Judge to set aside the service made on them out of the jurisdiction. The Surrogate Judge set the services aside. The plaintiff then appealed to a Judge of the Exchequer Court of Canada and the matter was heard by Thurlow J. who handed down reasons for judgment on October 31 last dismissing the appeal. In the meantime pleadings were delivered between the plaintiff and the present defendant and examinations for discovery were held in June of this year. The action was apparently set down for trial prior to the delivery of Thurlow J.'s judgment and the present notice of motion was served on November 7 last. On the same day the notice of discontinuance was filed.

The argument of defence counsel as I understand it, is that the plaintiff by its action of discontinuing the action seeks to evade the adverse decision in respect of the other defendants resulting from the judgment of Thurlow J., that the defendant is entitled to have the action proceed on the day set for trial despite the serving of the notice of discontinuance and that it has acquired new rights during the course of the proceedings. What these rights are is not made clear. The defendant also alleges that in permitting a discontinuance there has been a delay in proceeding with the action, it being nearly four years since the happening of the events in question and that the Court should pay no attention to the notice on the basis that there is an inherent jurisdiction in the Court to deal with proceedings which are obviously vexatious or an abuse of its process.

I must confess that I am unable to appreciate the validity of this argument. It is quite true that a lapse of time may be embarrassing to the litigant but what is allowed in that direction is surely contained in the various statutes of limitation of actions as they now exist and it is not an abuse of the process of the Court to bring an action within the time allowed by those statutes. The defendant attempts to rely on Rule 107 of the Exchequer Court Rules where there is a discretion in the Judge to give or withhold leave to discontinue and reference is made to Rule 215 of the *General Rules in Admiralty* which states:

> In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

It is to be observed, however, that Rule 215 applies only to those cases not provided for by the *General Rules and Orders in Admiralty* and with respect, it would appear to me that the matter of discontinuance is provided for by the provisions of Rule 158 which I have already quoted. In support of this view I am referred to the decision of Martin L.J.A. in *Wrangell v. The Steel Scientist*[1]. At p. 137, dealing with the point which is essentially involved here, Martin L.J.A. said this:

> In the Quebec District of this court, in *Morton Down & Co. v. The Lake Simcoe* (1905) 9 Ex. C.R. 361, my esteemed brother Routhier, made an order for security after the defendant had, as here, taken several steps in the action, but gave no reasons for so doing, which is unfortunate because the argument of both counsel proceeded upon the erroneous assumption that Rule 228 governed the matter, thus:—
>
> "In all cases not provided for by these Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed."
>
> But this rule is excluded by its own terms from any application to this case because it can only be invoked in "cases not provided for by these Rules," and the "case" is, in fact, entirely provided for by said rule 134 above recited.

I can only echo the words of Martin L.J.A. by saying that in my opinion, the matter is entirely provided for by the provisions of Rule 158 which provides for the discontinuance at any time.

The application to set a time and day for trial will accordingly be dismissed. Pursuant to Rule 158 at the option of the defendant there may be a judgment entered

[1] [1924] Ex. C.R. 136

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for the defendant's costs of the action in its filing of a notice to enter the same. Under all the circumstances I think the defendant should also have its costs of this application which I fix at the sum of $50 and they should be added to what other costs he claims in respect of the application generally.

The application will therefore be dismissed with costs to the defendant as fixed.

Judgment accordingly.

1961

Sept. 29

1962

Dec. 28

BETWEEN:

VANCOUVER PILE DRIVING & CONTRACTING COMPANY LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(b)—Loss incurred on purchase of bonds to provide security for performance of a construction contract—Deductible expense in earning income or capital loss—Appeal from Tax Appeal Board dismissed.

Appellant carried on a general contracting business specializing in bridge and wharf construction and in the course of business was awarded a contract to construct a bridge in British Columbia and was required to deposit as security for the performance of its contract, either a certified cheque in the sum of $55,000 or Dominion or Provincial government guaranteed bonds of equal value. It chose to deposit Dominion of Canada bonds of principal value of $55,000 to purchase which on the open market it borrowed that amount of money from its parent company. When the bonds were returned to it they were depreciated in value and they were later sold at a loss of $6,531.25. Appellant deducted this amount in computing its income. The respondent disallowed such deduction and the Tax Appeal Board held that the loss was a capital one from which decision an appeal was taken to this Court.

Held: That the bonds were purchased not for the purpose of satisfying the trading obligations of the appellant but rather for the purpose of providing security for the performance of its obligations. *M.N.R. v. Tip Top Tailors Ltd.* [1955] Ex. C.R. 144 and *Imperial Tobacco Co. v. Kelly* (1923) 24 T.C. 292; [1943] 2 All E.R. 119, distinguished.

2. That the fact that the taxpayer actually had no idle funds to invest but invested money which it had borrowed and did not intend to keep the bonds as a permanent investment but invested in them only temporarily during the course of construction and that the bonds were purchased to fulfil the requirement of a particular contract entered into in the course of ordinary business operations of appellant did not make the loss one incurred in its normal business operations.
3. That the loss on the sale of bonds was not a loss in respect of circulating capital as the loss was not incurred in the course of trading operations but was one on capital account.
4. That the appeal must be dismissed.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at New Westminster.

W. M. Carlyle and *John Fraser* for appellant.

George S. Cumming and *T. E. Jackson* for respondent.

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

THURLOW J. now (December 28, 1962) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board[1] dismissing an appeal by the appellant from a reassessment of income tax for the year 1957. The appeal raises the question whether the appellant is entitled, in computing its income for income tax purposes, to deduct a loss of $6,531.25 sustained on the sale of certain bonds which had been purchased for use as a security deposit required in connection with a contract made in the course of the appellant's business.

The appellant was incorporated in January 1953 under the *Companies Act* of the Province of British Columbia and at all material times since then has carried on a general contracting business specializing in pile driving and bridge and wharf construction. In the course of this business besides entering into and performing construction contracts the appellant occasionally sub-lets the whole or portions of such contracts to other contractors. Most of the appellant's work is financed by borrowings either from its banker or from another company of which the appellant is a subsidiary, the capital invested in the appellant being quite

[1] 25 Tax A.B.C. 369.

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small compared with the volume of work undertaken and consisting only of $50,000 in sums paid in for no par value shares and $15,000 for preferred shares.

In February 1955 the appellant tendered for a contract to be let by the British Columbia Toll Highways and Bridges Authority for the construction of what was known as the Middle Arm Bridge and as required by the instructions to bidders deposited with the Authority as security for the due performance of the contract, if awarded to the appellant, a certified cheque for $55,000 representing 10 per cent. of the appellant's bid. The appellant had borrowed the amount of the cheque from its banker at 6 per cent. interest.

Such a deposit was a normal requirement in connection with government contracts. In the case of the tender in question a note on the prescribed form of tender stated:

> NOTICE TO BIDDERS.—At the time of signing the contract the successful bidder may, with the consent of the British Columbia Toll Highways and Bridges Authority, substitute for the certified deposit cheque, referred to in the advertisement, Dominion or Provincial Government Guaranteed Bonds of equal value. No Registered Bonds will be accepted unless accompanied by a fully executed transfer form surrendering title to the British Columbia Toll Highways and Bridges Authority.
>
> Alternatively the deposit cheque, as aforesaid, will be cashed by the British Columbia Toll Highways and Bridges Authority, and the amount realized will be held without interest by the British Columbia Toll Highways and Bridges Authority as security for the due and faithful performance of the contract.

The appellant's tender was accepted and in June 1955 when the contract was signed it took advantage of the alternative so provided and substituted for the cheque which had been deposited at the time of the tender, Government of Canad bonds of the principal amount of $55,000 bearing $2\frac{3}{4}$ per cent. interest. These bonds had been purchased for this particular purpose with the proceeds of a loan of $55,000 at 5 per cent. obtained from the appellant's parent company and on the cheque being returned the appellant repaid its earlier loan from its banker. This was the first and only occasion when the appellant substituted bonds for a cash deposit on such a contract and it did so on this occasion to reduce the cost of the borrowed funds used to make the deposit which otherwise would have been lying idle and yielding no income while the construction work was in progress. The appellant had no other bonds or securities

and but for its purpose to use the bonds in question as security for the performance of the particular contract, would not have bought them. They had been purchased at $99 per hundred but unfortunately by November 1956 when they were released by the Bridges Authority on completion of the work their market value had fallen to $87 or $88 per hundred. The appellant therefore did not dispose of them immediately but held them, hoping for an increase in their market price, until October 1957 when owing to the need to raise money for one of its undertakings the appellant sold them at $86 or $87 per hundred, the loss on them being the amount of $6,531.25 in question which the appellant seeks to deduct in computing its income for tax purposes.

The question for determination, as I view it, is whether or not the loss in question was one of an income nature or one of capital within the meaning of s. 12(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148. The section provides that:

> 12. In computing income no deduction shall be made in respect of
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital, or an allowance in respect of depreciation; obsolescence or depletion except as expressly permitted by this Part.

In s. 11 of the Act permission is expressly given to deduct *inter alia* interest on borrowed money used for the purpose of earning income from a business or property and such capital cost allowances and depletion allowances as may be allowed by regulation but neither in the section itself nor in the regulations is any provision made expressly allowing deduction of a loss of the kind here in question. By s. 4 income for a taxation year from a business or property is declared, subject to the other provisions of Part 1 of the Act, to be the profit therefrom for the year.

In approaching the problem whether the loss in question was a loss of capital within the meaning of s. 12(1)(*b*) it is I think important to note that the appellant's business was that of making and carrying out construction contracts and that it did not include dealing in bonds. From this it appears to me to follow, *prima facie* at least, that a gain or a loss through appreciation or depreciation of bonds held by the appellant would find no place in a computation of the profit from its business but would simply be an item of capital. Moreover in my opinion neither the fact that the purpose of the company when purchasing the bonds was to hold

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them only for a short or limited time nor the fact that the company had no idle funds available for investment—other than a sum borrowed for the purpose of making a security deposit—would serve to change the *prima facie* nature of the purchase of such bonds from that of a capital transaction into one on its trading or business account or the gain or loss that might result from their subsequent appreciation or depreciation into one of a trading as opposed to one of a capital nature. Accordingly it is only if the additional fact that the purchase of the bonds was made solely for the purpose of using them as the security deposit required in connection with the Middle Arm Bridge contract and thus obtaining interest revenue to set against the interest payable on the loan, serves in the circumstances of the case to characterize the purchase as one within the realm of the appellant's trading operations that the *prima facie* conclusion that the purchase was a transaction on capital account and the loss one of capital may be regarded as displaced.

The case most strongly relied on by the appellant on this point was *Tip Top Tailors Ltd. v. M.N.R.*[1]. In that case the taxpayer's trading operations included the purchasing in Great Britain of quantities of cloth for which the taxpayer was accustomed to make payment in sterling funds. Expecting that the pound sterling would be devalued in the not distant future, the appellant made an arrangement with its banker in Great Britain under which the banker from time to time paid to the suppliers of the cloth the amounts due them and thus permitted a sizeable overdraft of sterling due to it from the appellant to accumulate. The Court held that the transactions, including those between the taxpayer and its banker being part of the process involved in purchasing and paying for cloth for the purposes of the appellant's business, were trading transactions and that the profit realized on the devaluation of the pound sterling, which enabled the appellant to repay the overdraft at substantially less than would formerly have been possible, arose from the appellant's trading operations.

Another case on which the appellant relied was that of *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. v. Kelly*[2] decided by the Court of Appeal in England. There the taxpayer was an English company whose business in-

[1] [1957] S.C.R. 703.

[2] (1943) 25 T.C. 292.

cluded the purchasing of tobacco in the United States. In the early months of 1939 the company bought $45,000,000 of United States currency to be used later in the year in making purchases of tobacco and deposited these funds with its bankers in New York. On September 8 shortly after the outbreak of the war the British Treasury requested the taxpayer to stop all further purchases in the United States and on September 30 required the taxpayer to sell its remaining dollars to the Treasury. In the meantime the value of United States dollars in terms of sterling had risen and a substantial profit accrued to the taxpayer. The Court took the view that the purchase of the dollars was the first of several steps involved in the acquisition of tobacco in the course of the taxpayer's trading operations and that the resulting profit was accordingly income from the trade.

To my mind the present case is distinguishable from the *Tip Top Tailors* case and the *Imperial Tobacco* case in that while the purchase of the bonds was made because they were needed for the purposes of the security deposit under the contract and were in fact used for that purpose they remained throughout the property of the appellant and they were not used, as was the sterling in the *Tip Top Tailors* case, nor were they purchased to be used, as were the dollars in the *Imperial Tobacco* case, to pay obligations incurred in the course of trading operations. They might of course have been sold and the proceeds turned to the payment of trading obligations and while they were deposited as security they were undoubtedly subject to the right of the Bridges Authority to sell them and to apply the proceeds in discharge of the appellant's obligations under the contract, if occasion therefor should arise, but that in my opinion is far from indicating that the bonds were acquired or deposited to pay trading obligations or, to put it another way, as a step toward the discharge of such obligations. *Vide Davies v. The Shell Company of China Limited*[1] where Jenkins L.J. said at p. 156:

> If the agent's deposit had in truth been a payment in advance to be applied by the Company in discharging the sums from time to time due from the agent in respect of petroleum products transferred to the agent and sold by him the case might well be different and might well fall within the *ratio decidendi* of *Landes Bros. v. Simpson* 19 T.C. 62 and *Imperial Tobacco Co. v. Kelly* 25 T.C. 292. But that is not the character of the deposits here in question. The intention manifested by the terms

[1] (1951) 32 T.C. 133.

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of the agreement is that the deposit should be retained by the Company, carrying interest for the benefit of the depositor throughout the terms of the agency. It is to be available during the period of the agency for making good the agent's defaults in the event of any default by him; but otherwise it remains, as I see it, simply as a loan owing by the Company to the agent and repayable on the termination of the agency; and I do not see how the fact that the purpose for which it is given is to provide a security against any possible default by the agent can invest it with the character of a trading receipt.

The situation in the *Shell* case was of course different from that in the present case in several respects and particularly in that the matter for determination was the nature of the deposits in the hands of the recipient whereas in the present case the problem is to determine the nature of the deposit from the point of view of the appellant's business but this difference appears to me to be immaterial on the particular point.

The *Tip Top Tailors* case and the *Imperial Tobacco* case accordingly in my opinion do not conclude the present case in favor of the appellant. On the other hand, I do not think the present case is within the principle of the judgment of the Privy Council in *Income Tax Commissioner v. Messrs. Motiram Nandram*[1] which was cited on behalf of the Minister for in that case the deposit was made in connection with the acquisition of an agency which was regarded as an enduring benefit of a capital nature while in the view I take the Middle Arm Bridge contract involved in the present case was itself not a capital but a revenue asset. Had the contract been assigned in whole or in part or sublet in the course of trade, as part of it probably was, any profit resulting from such assignment or sub-letting would I think have been income.

In none of the cases cited therefore was the problem precisely similar to that in the present case but in none of them nor in any other case of which I am aware has a purchase of property, of a kind not ordinarily the subject of the taxpayer's trading activities, to be used merely as a security for the performance of a contract made in the course of trading been treated as a trading transaction. Nor can I see on principle any satisfactory reason for so classifying such a purchase for, barring the case of a purchase which is itself made in the course of a venture in the nature of trade, the purchase of property of a kind not ordinarily

[1] [1940] A.C. 339.

involved in the taxpayer's trading activities appears as nothing but a mere investment and the depositing of the property as a mere setting aside of capital to answer an obligation if it arises and is not otherwise discharged and the property itself becomes involved in the trading process only if and when resort is had to it for that purpose. The fact that the bonds in the present case were purchased solely for the purpose of providing the security deposit required by the particular contract accordingly in my opinion does not affect the result and I have therefore come to the conclusion that the transaction in which the bonds were purchased was a capital transaction, that the bonds themselves were a capital as opposed to a revenue asset of the appellant's business and that the loss through depreciation in their sale value was a loss of capital within the meaning of s. 12(1)(*b*) of the Act.

It remains to deal with several other points which were raised during the argument on behalf of the appellant. It was said first that there was no investment objective, that the appellant had no idle funds for investment and that the bonds were not purchased or at any time held for normal investment reasons but would have been sold immediately on their release if it had not been for the depressed price. The reason for obtaining the bonds however was to secure a return on funds which otherwise would have been lying idle while the bridge was under construction and even though the occasion for making a deposit and requiring bonds for that purpose arose from the contract the purchasing of them for such a purpose in my opinion has all the earmarks of a temporary investment of idle funds. I therefore see nothing in the point which would suggest a different conclusion from the one I have reached.

Next it was said that no asset of an enduring nature was acquired, that the bonds were not acquired for a permanent purpose but to serve a purpose that was temporary and that the expenditure for them was not one made once and for all either with a view to bringing into existence an asset or advantage for the enduring benefit of the appellant's business or for the purpose of preserving, protecting or enhancing any of its capital assets. In this connection reference was made to *Evans v. M.N.R.*[1] and *B.C. Electric Ry.*

[1] [1960] S.C.R. 391.

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v. M.N.R.[1] and to the test formulated by Viscount Cave L.C. in *British Insulated and Helsby Cables Limited v. Atherton*[2]. The test so propounded is undoubtedly an important guide in many situations in which the question of whether an expenditure is one of a capital or of an income nature may arise but it is not formulated as an exhaustive test of what is a capital expenditure and does not purport to say anything on the subject of what is not an expenditure of a capital nature. In the present situation even granting the temporary nature of the appellant's purpose in purchasing the bonds, I do not think the test indicates that the loss in question was not of a capital nature and I am unable to derive assistance from trying to apply it.

Nor do I think it is of any assistance to say as was submitted, that the loss was not part of the cost of providing capital and did not relate to the appellant's financial arrangements, as did the payments considered in *Bennett & White Construction Co. Ltd. v. M.N.R.*[3], since the appellant owed no more or less by reason of the purchase of the bonds and the purpose in purchasing them was simply to fulfill the requirements of the particular contract as cheaply as possible or to the least disadvantage. The point is purely negative and as I see it leads to no conclusion.

Finally it was submitted that the loss was not one of fixed or permanent capital but one of circulating capital. In *Reynolds & Gibson v. Crompton*[4] Jenkins L.J. referring to the distinction between fixed and circulating capital in a business said at p. 511:

> For my part, however, I do not think the importation into the Case of the somewhat debatable distinction between fixed and circulating capital really contributes anything to the solution of the question in issue. After all, if I understand the cases correctly, "circulating capital" is simply an expression used to denote capital expended in the course of the trade with a view to disposal at a profit of the assets produced or acquired by means of such expenditure, and represented at different stages of its career by cash, assets into which the cash has been converted, and debts owing from customers to whom those assets have been sold.

If this definition is applied to the facts of the present case the loss does not appear to me to be one of circulating capital for the bonds were not purchased in the course of trade with a view to disposal of them at a profit. Moreover,

[1] [1957] S.C.R. 121.
[2] [1926] A.C. 205.
[3] [1948] S.C.R. 287.
[4] [1950] 2 All E.R. 502.

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as already pointed out, they were not purchased to be used in discharging trading obligations nor were they used for that purpose. They were simply deposited as a security against eventualities which might but did not arise. Thus even assuming that it would favor the appellant's case to regard the loss as one of circulating capital, I do not think a case for so regarding it has been made out. To say that the loss was one of circulating capital is however in my opinion of no significance. The question is not what kind of capital was lost but whether the loss arose from the circulation of capital in the course of trading, and that to my mind merely raises again the question which has already been dealt with, of whether the loss arose from transactions in the course of trading or from transactions on capital account.

I am accordingly of the opinion that the loss in question was a loss of capital the deduction of which in computing income for tax purposes is prohibited by s. 12(1)(*b*) of the Act and that its deduction was properly disallowed.

The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.

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Apr. 25

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Jan. 14

BETWEEN:

NATHAN ROBINS ..... APPELLANT;

AND

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

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 21(1), 139(1)(e)—Husband and wife—Agency—Money owing by husband to wife—Profit on real estate transaction by wife not attributal to husband—Observation on law of evidence in Province of Quebec—Section 21(1) applies to transfer of income producing property only and not to profit on real estate transaction—Appeal allowed.

Appellant, a resident of Quebec, in 1952 provided his wife with $6,900 to permit her participation in an attractive real estate investment. She became party to a partnership agreement which was entered into for the purchase of the property and paid her share of municipal and school taxes and real estate commission from her own funds and received her share of the proceeds of the sale of the property in 1954

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and retained it. Respondent assessed the appellant for the profit on the real estate transaction and taxed him accordingly, attributing such profit to him on the ground that his wife was only his agent in the undertaking and that the profit was taxable in his hands. The respondent also contended that s. 21(1) of the Act applied and that the tax on income derived from property which has been transferred from one spouse to another is assessable to the transferor. An appeal to the Income Tax Appeal Board was dismissed and a further appeal was taken to this Court.

The Court found that the money paid out by the appellant on behalf of his wife was money owing to her since their marriage contract entered into in 1948 by which he had obligated himself to supply furnishings up to a value of $10,000 for their house and which had been supplied by her and paid for by her from her own money.

Held: That the appeal must be allowed.

2. That the marriage contract together with certain invoices and a cancelled cheque indicating payment by the wife of furnishings which the taxpayer had undertaken to purchase under the marriage contract was documentary evidence sufficient to render probable the alleged loan from the wife to the husband and was a "commencement of proof in writing" which made it possible for the taxpayer to complete this proof by oral testimony.

3. That the wife did not act as the husband's agent or alter ego and that neither the source of the money used to effect the investment nor the advice and direction which the wife received from the appellant with respect to the property were factors which proved the appellant's position as principal in the venture.

4. That s. 21(1) of the Act does not apply in the circumstances as that section as well as sections 22 and 23 is designed to prevent avoidance of tax by transfer of income producing property to persons who are normally in close relationship with the transferor and relate to income from property only and do not refer to income from a business as in this case and s. 21(1) does not assist in determining if the profit from the real estate transaction is taxable as income of the appellant or of his wife.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Noël at Montreal.

Philip Vineberg, Q.C. for appellant.

John Cerini, Q.C. and *Paul Boivin, Q.C.* for respondent.

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

NOËL J. now (January 14, 1963) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1] dated November 29, 1960, dismissing the taxpayer's appeal from reassessments made upon him by

[1] 25 Tax A.B.C. 353.

the Minister increasing his declared income by an amount of $8,956.11 and $4,276.05 for the taxation years 1954 and 1955 respectively as profits resulting from the sale of his wife's interests in a real estate joint venture or partnership in which he had supplied his wife's equity.

The amounts added to the appellant's income are similar to those received by one of the other parties in the partnership, one Jacob B. Fisher which were held to be in *Jacob B. Fisher v. M.N.R.*[1] amounts received as income from a business as defined in s. 139(1)(*e*) of the *Income Tax Act*.

The appellant's appeal to the Tax Appeal Board was rejected, Mr. Fordham being of the opinion that the taxpayer was not allowed to establish by verbal evidence that the amount he supplied to his wife as her participation in the real estate partnership was owed her as a result of a verbal agreement which was alleged to have taken place shortly after their marriage whereby, although the taxpayer had in their marriage contract undertaken to supply household furniture and effects up to an amount of $10,000 and maintain such a value throughout their married life, his wife consented at the time to purchase such furniture and effects with her money as the taxpayer had no funds available at the time to do so, having just purchased a new business. It was indeed stated by both the taxpayer and his wife that the monies expended by the latter to purchase these furniture and effects were a loan which the husband had promised to repay as soon as he could.

An objection was entered by Counsel for the respondent to verbal proof of such a loan on the basis of article 1233 of the Civil Code of Quebec which requires that proof of all juridical acts must be made in writing unless they fall within one of the exceptions provided in the article. As Mr. Fordham held that the establishment of a loan did not fall within one of these exceptions, he disregarded the verbal evidence with respect to the alleged loan of funds for the purchase of furniture. On the other hand, as the taxpayer had supplied the money necessary to enable his wife to invest in her portion of the joint venture, the Minister treated the gain made from the real estate transaction as being income to the appellant rather than to his wife who was taken to be merely the taxpayer's agent or *alter ego*.

[1] 24 Tax A.B.C. 313.

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Mr. Fordham, in the above tax appeal decision, states that it was with some reluctance that he found that the reassessments forming the subject of this appeal had not been dislodged and that he should affirm them but that because of the requirement of article 1233 of the Civil Code of Quebec and its mandatory application he had no choice in the matter. He realized indeed that this would place a Quebec resident in a position different from that of a resident of Ontario for instance which has no such requirement as article 1233 C.C., and where such testimonial evidence of such facts is permissible, although the circumstances of each such resident's case may happen to be the same in any material respect. He added, and with reason, that such a situation would appear to be at variance with the fundamental rule mentioned by Viscount Haldane in *Minister of Finance v. Smith*[1]:

> Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the existence of taxation depend on the varying and divergent laws of the particular provinces.

From that decision, the appellant now appeals to this Court and he has the burden of establishing that there is error in fact or in law in the reassessments under appeal. cf. *M.N.R. v. Simpsons Limited*[2].

Before, however, reviewing the facts which gave rise to the present appeal, it may be helpful to deal at the outset with a submission made by Counsel for the respondent that as the appellant had transferred what was originally his land to his wife s. 21(1) of the *Income Tax Act* applied to the present case. This section reads as follows:

> 21. (1) Where a person has, on or after August 1, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall, during the lifetime of the transferor while he is resident in Canada and the transferee is his spouse, be deemed to be income of the transferor and not of the transferee.

It can be seen that should the above section apply, the income for a taxation year from the property transferred from husband to wife, as in this case, or from any property substituted therefor, is deemed to be the income of the husband (the transferor) and not of the wife (the transferee) and, of course, the word "deemed" in the above sec-

[1] [1927] A.C. 193 at 197. [2] [1953] Ex. C.R. 93.

tion has in many cases been held to be inflexible in its purport. cf. *Regina v. Norfolk*[1] and *Rogers v. McFarland*[2]. Indeed it does not merely create a rebuttable presumption, but an irrebuttable one, providing of course all the conditions mentioned in the section are met.

Section 21 as well as sections 22 and 23 are designed to prevent avoidance of tax by transfer of income producing property to persons who are normally in close relationship with the transferor. But what is deemed to be the income of the transferor, and this is clearly stated, is income from property only. Indeed there is no mention of income from a business such as we have here and, therefore, this section can be of no assistance in determining whether the business profit resulting from the real estate transactions is taxable as income of the appellant or of his wife. May I also add that there is no evidence, and I have gone through the transcript very thoroughly, that land belonging to the appellant was transferred to his wife. Indeed what the transcript discloses is that the husband forwarded a cheque in the amount of $6,900 to a Mr. Rozanski in trust, one of the co-partners of his wife, for her participation in the real estate partnership and this took place a few days after the partnership document was signed. What the appellant did do was to pay for his wife's equity in the joint venture and the property transferred was money and not land. This may be of some importance in dealing later in this judgment with the matter of a loan.

It follows that the only matter in issue here is therefore whether the Minister, with respect to this business profit was right in assessing the appellant instead of his wife. That question is to be answered by a consideration of all the facts and a determination as to whether the appellant's wife or himself were the real parties to the transactions which gave rise to the realized profits.

With this in mind it will now be convenient to consider the facts and exhibits produced at the hearing before the Tax Appeal Board and which by consent were produced in the present appeal.

On November 12, 1952, Messrs. James D. Raymond, Jacob B. Fisher, Moses Wigdor, Matus Rozanski and Dame Bina Sukiennik (Mrs. Robins, the taxpayer's wife) entered

[1] (1891) L.J.Q.B. 379 at 380.
[2] (1909) 19 O.L.R. 414 at 416, 418, 420.

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into a real estate partnership agreement for the purchase of subdivisions 220 to 229 inclusive and 349 to 371 inclusive of lot 366 of the Town of St-Michel which was effectively purchased by the partnership on November 14, 1952, (Exhibit R-1) for the sum of $31,229. The taxpayer supplied Mr. Rozanski in trust with a cheque dated November 17, 1952, in the amount of $6,900, which the taxpayer admitted was for his wife's participation in the partnership.

On August 3, 1953, due to an apparently founded suspicion that Messrs. Raymond and Rozanski had deceived the other partners, including Mr. Fisher and Mrs. Robins, in purchasing the property on behalf of the partnership in an amount much higher than its listing, the partnership was dissolved and the lots were partitioned between the parties, Mrs. Robins and Mr. Fisher receiving subdivisions 349 to 371 inclusive of original lot 366 on the official plan and book of records of the parish of Sault-au-Récollet, Ville St-Michel, P.Q., on a two-third/one-third basis respectively. On October 26, 1954, Mr. Fisher and Mrs. Robins sold the above lots (Exhibit A-4) to Messrs. E. Finestone, A. R. Isaacs, Elie M. Solomon and Moses Tupnik for the price of $45,705.60 of which $22,852 in cash and the balance payable in eighteen months and of which Mrs. Robins, after expenses, received two-thirds and Mr. Fisher one-third. The profit realized in this transaction totalled $13,232.16 of which $8,956.11 was received in 1954 and $4,276.05 in 1955. A cheque is attached to this Exhibit A-4 in the amount of $1,218.80 signed by Mrs. Robins, the taxpayer's wife and made out to the order of Capital Realties as payment in full for the real estate agent's commission on the sale of the land held jointly by both Mrs. Robins and Mr. Fisher.

School and municipal tax bills for the St-Michel property, Exhibit A-13, were sent to Mr. Jacob B. Fisher and Mrs. Nathan Robins and the latter signed a cheque dated November 11, 1954, for the sum of $1,213.12 for the payment of the above tax bills.

Mrs. Robins had some means, as evidenced by Exhibits A-5, A-6, A-7, and A-8 which are all written agreements dated January 30, 1948, whereby she sold a number of common and preferred shares in a company called Stuart Busby & Asgo Co., Limited, as well as a number of Dominion bonds, both of which she had inherited from a former husband and the sale price of which totalled $12,025. She also,

according to Exhibit A-11, which is a copy of her bank ledger from June 27, 1947, to April 29, 1949, had in her bank account amounts varying from $17.57 to $4,270.

The taxpayer's marriage contract with Mrs. Bina Sukiennik, wherein it is stated that the parties are separate as to property, is dated December 23, 1948, and comprises *inter alia* clauses 6-1 and 2 which read as follows:

(6) In consideration of the foregoing stipulations, and of the love and affection which the Party of the First Part (the husband) has for the Party of the Second Part (the wife), he does hereby settle upon, give and grant by way of donation "inter vivos" and irrevocably unto the Party of the Second Part (the wife) thereof accepting:

1. Articles of household furniture of a value of $10,000 which the Party of the First Part binds and obliges himself to pay to the Party of the Second Part at any time within thirty years from the date of the solemnization of the intended marriage for the purpose of furnishing their home, and he further binds and obliges himself to maintain and renew the same when necessary during the intended marriage, and the Party of the Second Part shall become absolute owner of the aforesaid effects and/or any replacements thereof as soon as and at the moment they are brought into the common domicile, subject to the joint use thereof by both parties thereto;

2. And the sum of $25,000 shall be paid to the Party of the Second Part during the intended marriage and at the option of the Party of the First Part either in cash or by "dation en paiement", of moveable or immoveable property.

It is suggested by the appellant that his wife had supplied furniture in an amount of approximately $10,000 of which documentary evidence in an amount of $5,463.58 was established. Indeed a cheque in the amount of $1,028.50 dated January 22, 1949, made to the order of Joe Brenner, was signed by Mrs. Robins. This was for the purchase of carpets which are now in the common domicile of the taxpayer and his wife. A floor lamp and shade, valued at $31.20, was bought by Mrs. Robins in 1949 as well as a long list of furnishings and furniture, on February 5, 1949, in an amount of $4,403.88. She, therefore, established by receipted invoices that she had purchased furniture in a total amount of $5,463.58, although, as we have seen, under the marriage contract, her husband, the taxpayer, was obligated to supply the funds necessary for the furnishing of the common domicile.

A letter dated June 12, 1956, addressed to the taxpayer and signed by Gregory Charlap, Advocate, was produced as

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Exhibit A-14 and Counsel for the respondent admitted that if Mr. Charlap was heard as a witness he would testify in accordance with this letter which reads as follows:

Mr. N. Robins,
1405 Maisonneuve St.,
Montreal, Que.

Dear Mr. Robins,

Referring to our telephone conversation, I hereby confirm that, in the fall of 1952, you consulted me in connection with a proposed purchase of land by your wife.

At the time you explained to me that you were indebted to your wife for monies which she laid out on your behalf out of her own personal funds in connection with the furnishing of your home and that you were prepared to repay to her the sum of, approximately, $10,000.

I advised you that you could effect such repayment by issuing your personal cheque to the order of the Vendors of the land she was buying, for her account and on her behalf, it being obvious that the payment was so being made, in view of the partnership agreement between your wife and her associates, in connection with the purchase of the land in question, which I myself drew up prior to our consultation.

Should you require any further information, kindly do not hesitate to call upon me.

Yours very truly,
Gregory Charlap.

In addition to the above documentary evidence, Mr. J. B. Fisher, Mrs. N. Robins and Mr. Robins, the taxpayer, all testified before the Tax Appeal Board.

Mr. Fisher, the taxpayer's auditor, stated that he came into the joint venture on the invitation of Mr. Robins in whom he had a great deal of faith and, as he repeatedly said, because of Mr. Robins; that the latter was associating himself with a number of people, two of whom were James Raymond and a Mr. Rozanski. The latter as well as the taxpayer and Mr. Fisher became interested in a company called Carnival Amusements which purchased a number of lots situated alongside the lots purchased by the partnership in which Mr. Fisher, Mr. Raymond, Mr. Rozanski and Mrs. Robins and others became interested. The only transaction involved in this appeal is the one in which Mrs. Robins was involved and not the Carnival Amusements Company which is mentioned here merely to clarify some parts of the evidence which otherwise would be confused. When Mr. Fisher and Mrs. Robins started suspecting that their partners Raymond and Rozanski had deceived them on the price of the lots purchased by the partnership, Fisher states that he came to Mr. Robins and began to go over a

lot of the information he had and as he said, "We reviewed our transaction with this Mr. Raymond and Mr. Rozanski when information was received to the effect that the seller of the lots to the partnership could not be identified." He added that, "I took the information to Mr. Robins and he was upset, highly upset to say the least because he felt perhaps that I was implying some reflection on his own integrity because there seemed to be such an excessive difference." He was here referring to the price paid by the partnership and that at which it was listed immediately prior thereto, which happened to be much less than what the partnership paid for the lots. With respect to the separation of Mr. Fisher and Mrs. Robins from the other partners as a result of their suspicions that the latter had deceived them, Fisher stated, "As a matter of fact, the subsequent history when Robins and I felt we wanted to separate this land in Ville St-Michel as a result of what happened, we separated our land and there were no buyers." With respect to the partition of the lots at the dissolution of the partnership, Fisher stated: "I have a third with Mr. Robins."

When there was some question of taking legal action against the other two partners, Raymond and Rozanski, Fisher states that he left the decision to Mr. Robins and added at p. 19 of the transcript:

> A. Senator Monet felt he had a case for legal action. Very shortly thereafter Mr. Robins, to whose opinion I deferred particularly since I became involved in this largely through him because curiously enough one of these two parties Raymond was a person I had known about, but he had never approached me in any manner about any possible property deal and apartment construction previously. I left the question pretty largely to Mr. Robins about taking legal action. We were quite concerned at the time not about the title of the land but about whether we would ever be able to recover what we had originally expended.

And in view of Raymond and Rozanski's alleged breach of trust, Fisher in answer to the Chairman's question at p. 21 stated:

> Q. You got rid of the others and you and Robins were left?
> A. Yes.

It would appear from the transcript that there was some confusion in the mind of the witness as to which real estate transaction was being dealt with as Fisher was indeed involved in two deals at the same time, in one he was in

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with the appellant which would be the Carnival Amusement transaction which has nothing to do with the present instance, and in the other with Mrs. Robins which, of course, is the one involved here. If one, however, reads a little further down the transcript, at p. 22, the Robins mentioned by the Chairman would appear to be Mrs. Robins. Indeed, the appellant's Counsel states in a question that such is the case and the witness does not deny it.

> Q. At the time of your agreement, Exhibit A-2, you and Mrs. Robins were left with the property, what did you then do with it?

Fisher's evidence is confirmed entirely by the taxpayer himself at p. 53 of the transcript:

> Q. Have you heard Mr. Fisher's evidence this morning?
>
> A. Yes.
>
> Q. Would you agree with what he said in so far as . . .
>
> A. 100%.
>
> Q. Are there any changes you would make, or would you say he was correct in what he said?
>
> A. I do not think so; what he said is correct.

Fisher's evidence is also confirmed by Mrs. Robins at p. 49 of the transcript.

On the other hand, Fisher admits that when the partnership was dissolved, he and Mrs. Robins took one-third of the property in the partnership and that subsequently the sale price of the property was divided between himself, his silent partner Mr. Yelin and Mrs. Robins. Mrs. Robins testified that when she acquired an interest in the joint venture she was the owner and that her purpose in so acquiring such an interest was to build some apartment houses. With respect to supplying the funds necessary to invest in this joint venture by her husband she added, "my husband wanted to give me back my money and this was an opportunity." Evidence with respect to this alleged previous loan by her to her husband, as mentioned above, was strongly objected to under article 1233 of the Civil Code of Quebec and this objection was taken under advisement, and later as already mentioned, sustained by the Tax Appeal Board. We will deal with this matter later on in this judgment.

At p. 50 of the transcript Mrs. Robins declares that she kept the part that came to her when the property was sold. This is confirmed by her husband, the taxpayer, who swore

that he had received nothing from this real estate transaction. She admits that the money that went into paying her share was provided by her husband, the taxpayer, who also admits this at p. 65 of the transcript:

Q. To get back to the question of the $6,900 do you say you paid the purchase price or your wife's equity in the purchase price of this property?

A. I paid for my wife.

With respect to the reasons why the taxpayer paid out this sum of $6,900 under reserve of the objection to verbal evidence based on article 1233 of the Civil Code, he stated in answer to his Counsel at p. 57 of the transcript:

Q. How much money had she spent?

A. I do not know exactly, but I think about $10,000.

Q. What had the money been spent for?

A. Carpets, furniture. At that time I could not spend that money because I had just bought out my partners.

Q. In what firm?

A. Tarkor.

Q. What arrangements did you make?

A. As soon as ever I had it I would pay it back.

Q. What is the connection between the monies you paid in this connection we are now talking about, in this particular case, and the money spent by your wife.

A. I do not understand the question.

Q. Were you lending your wife the money you advanced?

A. No I paid it back and she bought this land.

Q. To whom did the money belong then?

A. To her.

Q. You understand you were paying back what she laid out?

A. We had no written agreement, but I promised to pay her back and I did.

The appellant argued, and rightly so, that the documentary evidence shows that his wife was the partner in the partnership agreement relating to the property which gave rise to the profit and that she was the one who acquired an interest in the property; that she paid out of her own money the municipal and school taxes on the property and the real estate agent's commission on the sale of the property and finally that she received the monies from the sale of the property and retained them. This is also confirmed by her husband.

The respondent, on the other hand, submitted that it was not unreasonable for the Minister to consider the appellant as the owner of the land since he had provided money for

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its purchase. He added that it therefore follows that if the appellant were the owner, any and all profits derived from the sale of his property should accrue to him and be taxed in his hands. He admits on the other hand that the appellant has produced a partnership document in which it appears that his wife is one of the individual owners of the land and that, therefore, a conflict exists. He, however, urges that this conflict should be decided in his favour unless and until the appellant can show the existence of a juridical relationship between husband and wife which allowed the transfer of what was originally the land of the appellant to the property of his wife and that this relationship should not only be shown to exist but it must be brought in evidence, according to the rules which govern evidence under s. 1233 C.C. of the Civil Code of Quebec. Now I have already pointed out that the husband did not transfer any land that belonged to him to the property of his wife but merely supplied her with the money necessary to pay for her participation in the real estate partnership and that, therefore, the respondent's submission in this regard is unfounded.

Respondent's argument to the effect that the appellant must establish the juridical relationship between himself and his spouse, important and useful as this may be to assist the Court in deciding who was the real participant in the present transaction, is not the only and an indispensable element in this regard. Indeed, there are many other facts which must also be taken into consideration in determining the real party interested in this transaction.

I would add, however, that it must be possible to consider that this transfer of funds was legal and if such an explanation is not possible, it follows that the amount was the property of the husband, and still is, and of course this fact may have a strong bearing in the appreciation of the facts necessary to establish the real party to the transaction.

As we have seen, the appellant and his wife both attempted to establish that the payment by the taxpayer of the sum of $6,900 for his wife was a partial reimbursement of an amount loaned by the wife previously in purchasing furniture for the common domicile.

An objection to proof of such a loan entered by Counsel for the respondent based on article 1233 of the Civil Code

of Quebec was maintained by the Tax Appeal Board and the evidence of such a loan was completely disregarded.

Article 1233 of the Civil Code of the Province of Quebec reads as follows:

Art. 1233. Proof may be made by testimony:

1. Of all facts concerning commercial matters;—R.S.C., c. 213, s. 2.
2. In all matters in which the principal sum of money or value in question does not exceed fifty dollars;
3. In cases in which real property is held by permission of the proprietor without lease, as provided in the title of Lease and Hire;
4. In cases of necessary deposits, or deposits made by travellers in an inn, and in other cases of a like nature;
5. In cases of obligations arising from quasi-contracts, offences and quasi-offences, and all other cases in which the party claiming could not procure proof in writing;
6. In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced;
7. In cases in which there is a commencement of proof in writing.

In all other matters proof must be made by writing or by the oath of the adverse party.

In short, this article establishes that, except in commercial matters, written evidence is the rule and verbal evidence the exception. If proof of a juridical act, i.e. an act having juridical consequences, does not fall within one of the exceptions of the above article, then without a written document it cannot be proven.

There is no question that the laws of evidence of the Province of Quebec, and particularly article 1233 of the Civil Code, apply to the present case. Indeed, ss. 2 and 36 of the *Canada Evidence Act*, R.S.C. 1952, c. 307, read as follows:

2. This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpeona or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

As the *Canada Evidence Act* and the *Income Tax Act* do not mention any rules of evidence in connection with any proceedings taken under these Acts, there is no doubt that the laws of evidence of the province where the proceedings are taken apply.

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It might be of some assistance to point out here that there is a basic difference between the English law of evidence and both the French and the Quebec laws particularly with respect to article 1233 C.C.

In the English law there are various rules requiring written evidence in specific instances only. In Quebec, however, written evidence is the rule and testimony the exception and this requirement of written evidence appears to be more so here than in France. The practical effect between the Quebec law of evidence and the English law would appear to be that in Quebec the admissibility of verbal evidence must be justified by the party proposing it whereas in England, or in the common law provinces, the party objecting to verbal evidence would have to justify his objection. In short, verbal evidence in the common law provinces is the rule and is only exceptionally refused. Because of these differences, and as pointed out by Mr. Fordham, of the Tax Appeal Board, in his decision, the incidence of taxation may in some cases be different for a taxpayer in Quebec as compared to a taxpayer in another province and this is something which I respectfully submit, if I may venture so to say, should be corrected by Parliament, as it may well, in some instances, deprive a Quebec taxpayer of a right which is enjoyed by the taxpayer of the other provinces.

May I also add that although the greater part of article 1233 may be traced to the French Ordonnance of de Moulins, of 1566, the context and phraseology differ in many respects from the corresponding sections of the French Code, namely article 1341 C.N. and the following articles. In some instances the law in Quebec comes from the laws of England. Indeed, English rules in commercial matters were introduced to Quebec law by an ordonnance of 1785 (25 George III, c. 2, s. 10) and the rule in this respect in the English law is that verbal evidence is admitted except when there is a writing.

One difference of importance between the Quebec law under article 1233 C.C., and its corresponding French counterpart, can be found in s-s. 7 of article 1233 C.C. and article 1347 of the French Code which both state that verbal evidence can be permitted when there is a commencement of proof in writing. Indeed, under our Quebec law there is

no definition of what is a commencement of proof in writing, whereas in the French text it is expressed as being "an instrument in writing which proceeded from the party against whom the claim is made, or the party whom he represents and which renders probable the fact alleged."

There is no question that proof of a loan does not fall within any of the exceptions of article 1233 C.C. unless there is of course a commencement of proof in writing. We have seen *supra* that the French law defines a commencement of proof in writing and that the Quebec counterpart does not. If one should accept this French definition it would appear that the writing must have emanated from the party sought to be charged. He need not be the absolute author of the writing; he need not have been even signed it but he must have appropriated to himself the contents of it by express or tacit consent. The writing also should render probable the fact alleged. This is a question of fact which is left to the Court to determine according to the circumstances of each particular case.

As stated by the late Justice C. E. Dorion in a thesis entitled "De l'admissibilité de la preuve par témoins en droit civil", p. 90:

> Il n'est même pas nécessaire qu'elle (cette personne) ait pris aucune part à sa confection, si elle s'est approprié l'écrit depuis, par exemple, en l'invoquant à l'appui d'une demande. Le notaire qui dresse un acte, le commis qui écrit sous la direction de son maître, ne sont pas liés eux-mêmes par ces écrits et on ne pourrait pas les invoquer contre eux comme commencement de preuve par écrit; en réalité ils n'émanent pas d'eux. Mais les faits que le notaire constate par lui-même dans l'acte, pourront être invoqués contre lui, *de même que les énonciations des parties qui y sont intéressées.* Si l'acte était nul parce que le notaire était intéressé (S.R.Q. 3540), il ne vaudrait pas même comme acte sous seing privé, car la signature du notaire, partie contractante, est nulle (C.C. 1221); il vaudrait cependant comme commencement de preuve par écrit contre ceux qui l'ont signé, même le notaire. Il serait difficile en effet de trouver un acte qui rende plus probable les faits qu'il constate.

Under the above interpretation, the only document which would qualify as one emanating from the party against whom the claim is made in the present instance, i.e. against the appellant, is the authentic marriage contract between himself and his wife which, of course, does not establish a loan but states that the husband had undertaken to supply the funds necessary for the furnishing of the common domicile. This document alone, of course, does not render probable the verbal allegations by both husband and wife

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that a loan took place between the wife and the husband. However, there is further documentary evidence adduced in this case by the wife. She indeed produced several receipted invoices totalling $4,403.88 from a furniture supplier and a cheque in an amount of $1,028.50 for carpets which unquestionably is admissible under Quebec law as there is documentary evidence to support it and besides it could also be proven by verbal evidence as it is not a juridical act but merely a material fact which can always be proven by testimony. However, this evidence emanates from a third party to the proceedings, the appellant's wife and we may now well consider whether a writing emanating from a third party could be used in association with the marriage contract, as a commencement of proof in writing sufficient to establish by verbal evidence the loan of the wife to the appellant. The late Mr. Justice C. E. Dorion in the above mentioned thesis "De l'admissibilité de la preuve par témoins en droit civil", pp. 94 to 99, has this to say with regard to writings emanating from third parties:

> Ceci nous amène à examiner une question très débattue dans le droit français. Il s'agit de savoir si l'écrit émané d'un tiers parti peut servir de commencement de preuve par écrit. Disons d'abord qu'on ne peut trouver la solution de cette question ni dans les auteurs français modernes, ni dans les auteurs sur l'ancien droit.
>
> * * *
>
> Voici le cas: A. revendique contre B. qui n'a pas de titre, un immeuble, et il invoqua une vente verbale qu'il demande à prouver par témoins en produisant une promesse de vente à lui consentie par C. qui, lui, était bien propriétaire. A. sera-t-il admis à faire la preuve par témoins?
>
> Nous pensons que oui. Si un acte de vente par C. à A. suffirait pour établir la propriété de A., pourquoi la promesse de vente ne suffirait-elle pas à en faire un commencement de preuve par écrit?
>
> Le Code Civil ne définit pas ce que c'est qu'un commencement de preuve par écrit; à première vue on est donc justifiable de croire que c'est une preuve par écrit incomplète, et le Code ne distingue pas entre la preuve qui vaut contre la partie et celle qui vaut contre les tiers.
>
> * * *
>
> Le Code Napoléon exige que le commencement de preuve par écrit ait le caractère d'un aveu, c'est-à-dire qu'il émane «de celui contre lequel la demande est formée.» Les auteurs français s'en tiennent à la lettre du Code et leur opinion ne saurait être invoquée dans notre droit qui ne contient pas cette restriction. En droit français il faudrait donc probablement décider le cas posé contrairement à l'opinion que nous soutenons, malgré l'autorité de Toullier (Toullier, t. 8, n° 69 et suiv.).

In view of the difference between the Quebec text and the French one with respect to what a commencement of proof in writing is and the absence of a definition in the Quebec

law in this regard it would appear that the French definition may not necessarily apply to our Quebec law with the result that what a commencement of proof in writing would be here is left to the appreciation of the Court on the basis of any documentary evidence which would render probable the fact or facts alleged. The late Justice C. E. Dorion's opinion in this regard, as quoted above, would, I believe be sufficient authority to sustain the above proposition.

The marriage contract between the appellant and his wife together with the invoices and cheque produced by the wife indicating that she did purchase furniture for the common domicile, although this obligation was that of the appellant would, in my opinion, be documentary evidence sufficient to render the allegation of a loan from the wife to the husband probable. This would, therefore, constitute a commencement of proof in writing which would enable the appellant to complete this proof by verbal evidence. The verbal evidence adduced to the effect that the supplying of a cheque in the amount of $6,900 by the appellant to his wife as her participation in the joint venture is the reimbursement for the previous loan made to the appellant for the purchase of the furniture in the common domicile becomes therefore admissible and establishes the juridical relationship of the appellant and his wife with respect to this amount.

The contract of prête-nom which is really a contract of agency has been suggested by the respondent as existing in the present case. No such contract has been proven here. There is no evidence that Mrs. Robins agreed to act as agent or prête-nom of her husband nor that the latter undertook to guarantee and indemnify his wife in respect of all the liabilities that she personally assumed under the Deed of Sale. Indeed, the evidence is quite the reverse.

May I also add that the partnership document which to all intents and purposes establishes that the appellant's wife is the person interested in this partnership, has not been contradicted. The only attempt by the respondent to challenge this particular document was by producing the appellant's cheque and the admission that he had paid the amount of $6,900 for his wife. We have seen that this fact alone is not sufficient to set aside this document and that the amounts so paid can be otherwise justified.

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In a judgment of the Supreme Court of Canada in *La Corporation de la paroisse St-Joseph de Coleraine v. Colonial Chrome Co. Ltd.*[1] it was held:

> . . . that the declarations and statements contained in authentic deeds as well as in deeds under private seal are considered as proved until they are challenged and contrary evidence is adduced, and it is so, not only as between the parties to the deeds, but also against third parties.

The partnership document not having been successfully challenged, becomes a very significant element which goes far to establish that the appellant's wife is the real party to the transaction.

The evidence adduced and particularly that of Jacob B. Fisher, who as we have seen in the recital of facts *supra* refers constantly to the appellant in his dealings with the partnership, has given me some trouble. Indeed, I did not have the advantage of seeing and hearing the witnesses and the fact, as mentioned above, that the appellant was interested with the same Mr. Fisher in another real estate deal conducted by a company called Carnival Amusements, around the same time, and which had purchased lots situated next to those purchased by the partnership in which Mrs. Robins was interested, has created a certain amount of confusion. Indeed if one relies on Mr. Fisher's evidence, Mr. Robins, the taxpayer, was a very close and continuous adviser to both Mr. Fisher and his wife during the transactions.

However, the fact that the appellant had counselled his wife in her venture is nothing to be surprised of and a very natural thing indeed. I might even add that this may be considered as part of the obligations of a husband towards his wife in investment matters. Any action of the husband in this regard, even when he supplies the funds necessary to his wife, should not necessarily be interpreted as establishing that she was acting as her husband's agent or *alter ego*.

In a Quebec case *Déry v. Paradis*[2] the husband acted throughout as the agent for his wife and even advanced the funds for the purchase of the property. The Appeal Court nonetheless clearly validated the wife's title to the property and Mr. Justice Wurtele observed at p. 230:

> There is nothing either in the prohibition against consorts benefiting each other during marriage, to prevent a husband who is separate as to

[1] [1933] S.C.R. 14.

[2] 10 Que. K.B. 227.

property, giving his advice and his spare time to his wife for the purpose of buying and selling immovable property on her behalf and acting as her agent in such transactions, when they are genuine and when, although they are beneficial to the wife, they abstract nothing from the property or estate of the husband. A man may give his time and services to another person gratuitously if he chooses, and there is no provision of the law which forbids or prevents him from doing so for his wife. Then a husband who is separate as to property, can validly administer the property of his wife, and this right is recognized by article 1425 of the Civil Code. In the absence of clear evidence of fraud, the fact of a husband having acted as the agent of his wife in transactions whereby real estate was acquired by her, and of having afterwards administered such property as her agent, does not attaint the transactions by which such real estate was acquired as fraudulent nor the deeds and titles under which it is held as simulated.

I therefore must conclude that the fact the appellant, under the circumstances, supplied his wife with the funds necessary to purchase her equity in the partnership and assisted her in the transaction is not sufficient to overcome the evidence from the documents produced by the appellant and his wife as well as their testimony. Indeed, a thorough examination of this documentary and verbal evidence has brought me to accept the verbal evidence of both the appellant and his wife on the basis of a commencement of proof in writing contained in both the marriage contract and the cheques and receipted invoices of the wife which establishes the loan from the wife to the husband and, therefore, that the payment by the husband of an amount of $6,900 is a reimbursement of this loan.

However, should the acceptance of such a commencement of proof in writing be not valid and that I should disregard entirely the verbal evidence adduced regarding this alleged loan, I can still see one of two things to explain the payment of this amount of $6,900. It must be inferred that it is either a loan or a donation of the husband to his wife.

A loan between husband and wife is not prohibited under any of the laws of Quebec. Indeed, it has been so decided in many cases such as *Denis v. Kent & Turcotte*[1]; *Fry v. O'Dell*[2]; *Irvine v. Lefebvre*[3]; *Allard v. Legault*[4] and *L. P. Sirois: contrat entre époux*[5]. Even in cases where, in addition to supplying the funds, the husband had offered assistance to his wife, this would not in the slightest impugn her title to the property. Such a decision was rendered in *Rhéaume v. Hurtibise*.[6]

[1] 18 Que. S.C. 436.
[2] 12 Que. S.C. 263.
[3] 4 Que. S.C. 75.
[4] [1945] Que. S.C. 287.
[5] 1 R.L.N.S. 293.
[6] 28 R.L.N.S. 465.

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Le mari ne peut faire déclarer qu'un acte de vente d'une immeuble par un tiers à sa femme négocié par lui, passé depuis 13 ans et exécuté sous sa direction, est simulé, que sa femme n'est que son prête-nom et qu'il est le véritable propriétaire des biens-fonds, en établissant qu'il avait fait cette transaction au nom de sa femme vu qu'il avait l'intention de faire commerce, et pour se protéger dans l'avenir, contre les accidents et la déconfiture.

In *Saint-Amour v. Lalonde*[1] it was held:

A husband may validly lend his wife, who is separate from him as to property, the purchase price of an immovable that is sold to her, and he, thereby, becomes her creditor for the amount. His heirs, if he dies, or his creditors, if he becomes insolvent, have no other action arising from the transaction, but a personal one to recover the money lent.

In *Côté v. Didier*[2] it was held that:

Lorsqu'une femme, dûment autorisée, achète un immeuble en son nom, quand même elle le paierait avec de l'argent fourni par son mari, cette propriété n'en est pas moins la sienne. Dans ce cas, le recours des créanciers est par une saisie-arrêt, entre les mains de la femme pour ce qu'elle doit à son mari.

Leblanc v. Gamache[3] is to the same effect.

Kladis v. Pulos[4]:

Un acte authentique de société ne peut être contredit par une preuve testimoniale dans une contestation entre un tiers, créancier du mari de l'une des associées, et les deux autres associés, pour faire déclarer que la femme associée n'est que le prête-nom de son mari.

Le mari peut représenter sa femme dans le commerce que fait cette dernière, et lui prêter son intelligence, son expérience, ses aptitudes et son temps, sans être considéré tenir le commerce lui-même ou en société avec son épouse; ses créanciers n'ont pas le droit de faire saisir, pour cette raison, les biens de la femme sous prétexte qu'elle n'est qu'un prête-nom.

In *Rhéaume v. Hurtibise (supra)*:

Simulation is practised to give legal colour to a disposition or contract prohibited by law and to evade the law or defraud third parties. Nothing of the kind occurred here. It was a real sale. The vendors intended to sell. The respondent, authorized by her husband, intended to buy and bought. Title was taken in the name of respondent with appellant's authorization. She was the real owner under a real sale, not a sham one. The hypothecs in favour of Dame Celina Cayer, appellant's mother, and J. N. Constantin were given by respondent, authorized by her husband.

A donation under the laws of Quebec can be made between husband and wife only by a marriage contract. After the marriage such donations are prohibited (s. 1265 C.C.). If the transfer of the amount of $6,900 is a donation, it might, if the appellant had so asserted, have been a partial payment of the sum of $25,000 donated by the husband

[1] 10 Que. K.B. 227.
[2] 44 Que. S.C. 39.
[3] 14 R. de J. 1.
[4] 24 R.L.N.S. 482 (confirmed by Supreme Court, (1919) 59 S.C.R. 688).

to the wife in their marriage contract which, of course, is the only legal way in Quebec by which a husband may donate to his wife after the marriage.

If such is not the case, it therefore can be but a loan from the husband to the wife which the Court can properly infer as the only other possibility would be a donation not covered by the marriage contract which, of course, is forbidden under Quebec law. There would, therefore, be a strong presumption that this would be a loan on the basis that this is the only possible legal transaction it could be under Quebec law and of course one must conclude in favour of the parties presumably entering into a valid transaction rather than an invalid one.

Before concluding may I add here that should it be a loan, or the reimbursement of a loan, it would in both cases fall within the *Jacob B. Dunkelman v. M.N.R.*[1] case where Thurlow J. decided under s. 22(1) of the *Income Tax Act* that the expression "has transferred property" must be given its natural meaning and cannot include the loan made by the appellant to the trustee.

Section 22(1) of the *Income Tax Act* is similar to s. 21(1) of the Act which I dealt with at the beginning of this judgment and this would be an additional reason in deciding that s. 21(1) of the Act cannot assist the respondent here and has no application to the present case.

On the whole and after a careful analysis of all the evidence I arrive at the conclusion that the appellant has discharged the burden cast upon him by the reassessments and that it therefore follows that the appeals must be allowed; consequently, the amounts of $8,956.11 and $4,276.05 for the taxation years 1954 and 1955 respectively should not be added to the appellant's income for the above taxation years and the assessments are referred back to the Minister to be revised accordingly.

The appellant is entitled to his costs.

Judgment accordingly.

[1] [1959] C.T.C. 375.

1961
janvier 18
1962
juillet 25

ENTRE:

GEORGES ST-AUBIN .....APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL ..... INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'Impôt sur le Revenu, 1948, ch. 52, art. 127(1)(e)—Achat de terrain—Projet non réalisé—Intention de vendre à profit—Profit imposable—Entreprise—Initiative—Affaire—Caractère commercial—Appel rejeté.

L'appelant, par l'entremise d'une tierce personne, achetait le 4 janvier 1951, pour le prix de $35,000, un lot situé ville Mont-Royal, P.Q., qui originairement, faisait partie d'une ferme, se proposant d'ériger ou d'y faire ériger un bâtiment industriel pour fins locatives. Forcé, d'après sa seule version, d'abandonner son projet, l'appelant revendait, par parcelles du 3 mai au 13 août 1951, le terrain en question, réalisant un profit de $80,070.32 qu'il ne déclara pas pour l'année d'imposition 1951. Le Ministre corrigea cette omission au moyen d'une cotisation revisée. D'où le présent appel à cette Cour.

Jugé: L'appel est rejeté.

2. C'est par une déduction raisonnable des faits mis en preuve que la Cour doit déterminer s'il s'agit, en l'instance, de revenus imposables ou non. En plus d'avoir failli dans la preuve de son intention d'ériger sur le terrain un édifice comme placement, il est évident, compte tenu de la preuve, que l'appelant avait également l'intention de vendre à profit à défaut de réaliser son projet. Dès lors, le profit en provenant, est imposable comme résultant d'une entreprise, d'une initiative ou affaire d'un caractère commercial conformément à la Loi de l'Impôt, 1948, ch. 52, art. 127(1)(*e*) qui s'applique à l'année 1951 mais en tout point semblable à l'art. 139(1)(*e*) de la Loi d'Impôt, S.R.C. 1952, art. 139(1)(*e*). Telle interprétation a été appliquée dans la cause de *Regal Heights Ltd. v. Minister of National Revenue* [*1960*] *S.C.R. 907.*

APPEL d'une cotisation revisée par le Ministre du Revenu National, division de l'impôt.

L'appel a été entendu par l'Honorable Juge Noël à Montréal, P.Q.

René Duranleau c.r. pour l'appelant.

Paul Boivin c.r. pour l'intimé.

Les faits et les questions de droit sont exposés dans les motivés de la décision que rend maintenant (25 juillet 1962) monsieur le juge Noël:

Pour l'année 1951, M. Georges St-Aubin, de Montréal, qui se déclare industriel mais qui en fait de marchand de fourrures est devenu hôtelier, se vit imposer sur son revenu

une taxe additionnelle afférent à un profit de $80,070.32 réalisé sur des ventes de terrains situés dans Ville Mont-Royal et connus comme partie du lot 579 de la paroisse de St-Laurent. St-Aubin, qui n'avait pas rapporté cette rentrée de fonds reçut avis, le 13 décembre 1956, que le Ministre du Revenu national entendait corriger cette omission d'où l'actuel pourvoi, St-Aubin excipant de la revision officielle.

Il est admis que la partie dudit lot 579 fut achetée le 4 janvier 1951 au coût de $35,000 plus $39.05 pour frais de notaire et revendue par parties comme suit:

3 mai 1951 à Cockshutt Plow Co. Ltd.	$ 5,397.00
7 juin 1951 à Frank W. Horner Ltd.	100,080.12
13 août 1951 à Watt & Scott (Montreal) Ltd.	3,768.00
10 mai 1951 à Ville Mont-Royal	5,864.25
	$115,109.37

laissant par conséquent un profit net de $80,070.32.

L'appelant s'était porté acquéreur de cette partie dudit lot en question dans les circonstances suivantes. Son oncle, Prospère St-Aubin, décéda dans le cours du mois de juillet 1950 et par son testament légua à titre de legs particuliers à sept de ses neveux et nièces ladite partie du lot 579 nommant comme co-exécuteur testamentaire son neveu, l'appelant, qui était également légataire universel avec d'autres neveux et nièces.

Ne pouvant acheter ladite partie du lot numéro 579 ouvertement sans dévoiler à ses cousins ses intentions et aussi parce qu'il était temporairement à court d'argent, il s'aboucha avec un nommé Paul Demers, courtier en immeubles, et ami, de qui il emprunta $15,000 pour compléter le prix d'achat et tous deux signèrent une lettre non datée à l'adresse du Montreal Trust Company, produite comme pièce I-2, par laquelle ils s'engagèrent à acheter conjointement des héritiers St-Aubin partie dudit lot 579, demandant et autorisant la compagnie de fiducie de l'acquérir en son nom, de le détenir pour leur compte sujet à leurs instructions et s'engageant de plus conjointement et solidairement à garantir et indemniser la compagnie de fiducie de toutes réclamations ou pertes qu'elle pourrait subir résultant du fait que ladite propriété soit enregistrée en son nom. Notons que, nonobstant la pièce I-2, Demers, dans la transaction qui concerne le lot 579, n'agit que comme

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l'agent de l'appelant et son bailleur de fonds pour un montant de $15,000, recevant en retour une commission de $1,500 pour l'obtention de l'option et une autre commission de $3,500 pour la vente de partie de son terrain à Frank W. Horner Ltd.

Dans cette pièce I-2 le terrain en question est décrit comme suit:

> A parcel of land situate in the TOWN OF MOUNT ROYAL, being PART OF ORIGINAL LOT NUMBER FIVE HUNDRED AND SEVENTY-NINE (Pt. 579) of the Official Cadastre of the PARISH OF ST. LAURENT (Jacques Cartier), and bounded as follows. To the South-East, by part of said Lot No. 579 belonging to the "Canadian Pacific Railway"; to the South-West, by another portion of said Lot No. 579 belonging to the Estate of Mrs. Daniel St. Aubin; to the North-West partly by the property belonging to the "Canadian Pneumatic Tool Co. Ltd." and partly by the property belonging to "Le Petit Journal" to the North-East, partly by a portion of Lot Number 580 of said Cadastre belonging to the "Canadian Pacific Railway" and partly by another portion of said Lot No. 580 *being a proposed street in the Town of Mont Royal;* THE WHOLE containing an area of approximately SEVEN (7) ARPENTS and shown on the attached sketch Plan, outlined in red.

L'appelant déclare que lorsqu'il a acheté ce terrain qui faisait originairement partie d'une ferme appartenant à son grand-père, il voulait y ériger une bâtisse industrielle.

En effet, il affirme: «Je voulais bâtir une bâtisse industrielle dans ce bout là; ce sont toutes des industries et Ville Mont-Royal a réservé cela pour des industries. Il y en avait d'autres qui louaient et ça avait l'air à rapporter bien, alors j'avais envie de faire une bâtisse et la louer à long terme.»

Il ajoute qu'à sa connaissance il y avait dans les alentours de son terrain des immeubles qui avaient été construits et loués et il donne comme exemple les bâtiments d'Alexis Nihon et de Laurion Equipment.

D'autre part il admet qu'il n'avait aucune expérience dans la construction, qu'il n'a pas personnellement fait enquête pour voir s'il pouvait placer son argent sur des bâtiments industriels, ni n'est allé voir personne pour faire faire des plans, s'en remettant entièrement quant au projet à son ami Demers.

Il déclare d'une façon peu convaincante à la question de savoir si à sa connaissance personnelle Demers serait allé voir des architectes pour faire faire des plans pour la construction d'un bâtiment sur son lot: «Il m'en a parlé, oui. Mais au juste qui il est allé voir; je ne le sais pas; il m'a parlé de ça qu'il était allé voir des types.»

La preuve révèle que peu de temps après l'achat du lot, une rue fut ouverte, soit la continuation de la rue Ferrier, grâce à la vente le 10 mai 1951 par l'entremise du Montreal Trust de l'assiette de ladite rue à la ville de Mont-Royal pour la somme de $5,864.25. Cette rue projetée apparaissait d'ailleurs comme nous l'avons vu à la pièce I-2.

L'appelant admet aussi qu'il y avait au moment où il acheta le terrain un développement progressif qui se faisait dans cette région de Ville Mont-Royal mais précise que près de son terrain c'était encore tout un champ.

A tout événement, malgré la déclaration de l'appelant de son intention d'ériger sur son terrain un bâtiment industriel qu'il louerait pour fins de revenu, il prétend qu'il a dû abandonner son projet à cause de la continuation de la rue Ferrier qui divisait son terrain, et parce qu'il n'a pu trouver une industrie assez grande pour utiliser tout le terrain et aussi parce que Demers l'aurait conseillé de vendre à Frank W. Horner Ltd. en lui disant: «J'ai Horner, si tu ne veux pas être pris avec ce terrain trop longtemps tu es mieux de vendre» et ajoutant «si ça ne se vend pas tout de suite ça peut prendre dix ans avant que ça soit vendu; il peut arriver bien des affaires d'ici ce temps-là.»

Comme nous l'avons vu plus haut, le terrain ayant été acheté par l'appelant le 4 janvier 1951 fut vendu par parcelles du 3 mai 1951 au 13 août de la même année de sorte qu'à cette date, soit moins de huit mois après l'achat, il avait tout vendu.

Voyons dans quelles circonstances ces ventes eurent lieu.

La première eut lieu le 3 mai 1951 à Cockshutt Plow Co. Ltd. pour la somme de $5,397, la seconde, sept jours plus tard, le 10 mai 1951, à Ville Mont-Royal pour la continuation de la rue Ferrier, pour la somme de $5,864.25, la troisième, le 7 juin 1951 à Frank W. Horner Ltd. pour la somme de $100,080.12, et enfin la quatrième, le 13 août 1951 à Watt & Scott (Montreal) Ltd. pour la somme de $3,768.

L'appelant déclare que Watt & Scott et Cockshutt Plow Co. Ltd. étaient tous deux des clients du C.P.R. qui possédait des terrains au sud du sien sur lesquels il voulait les établir; pour leur donner accès à la rue Ferrier qu'on venait de continuer, il leur fallait acheter deux petites lisières de terrain de l'appelant. Le C.P.R. a demandé à l'appelant que les transactions pour ses deux clients se fassent directement avec le vendeur au lieu que le C.P.R.

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achète le terrain et le revende à son tour, de sorte que l'appelant prétend que l'on n'a ici en fait qu'une seule transaction.

Il appert cependant que le 15 décembre 1950, soit quinze jours avant l'achat du lot 579, l'appelant et Paul Demers achetèrent aussi mais cette fois à parts égales partie du lot 578 situé près du lot 579 qui était plus petit cependant que le lot 579. En effet, le lot 578 comportait 253,900 pieds carrés et le lot 579 en comprenait 309,646, de sorte que l'explication donnée par l'appelant à l'effet que le terrain 579 était trop grand pour qu'un projet industriel s'estompe lorsqu'on considère qu'il aurait pu utiliser le lot 578 (ou du moins sa moitié indivise) qui était plus petit bien qu'il soumette que ce n'était pas son intention de vendre sa partie dudit lot mais qu'il a dû cependant en vendre une partie en 1953 à la Ville de Mont-Royal au prix de $27,877.83 pour l'ouverture des rues Royal Mount Ave., Devonshire Road et Ferrier et la balance en 1956 à la même ville pour la somme de $125,000 pour y ériger des bâtiments municipaux, sans quoi il aurait été exproprié. L'autre partie indivise de ce lot appartient encore à Demers qui y a installé une enseigne comportant une offre de le louer ou de l'utiliser pour fins de construction industrielle. Cette dernière transaction a été faite pour l'appelant par l'entremise d'une autre compagnie de fiducie la National Trust bien que dans ce cas il n'était aucunement nécessaire de cacher l'identité de l'acheteur comme dans le cas du lot 579.

Il est en preuve qu'on ne fit aucune sollicitation ni annonce pour la vente de ces terrains.

La question de savoir si le profit réalisé par l'appelant est sujet à taxation dépend de la véritable nature de l'opération ou des opérations dans lesquelles l'appelant s'est engagé. L'achat du terrain a-t-il été fait (i) dans l'intention de le revendre à profit ou (ii) pour y construire ou y faire construire et détenir un bâtiment industriel comme placement ou (iii) pour les deux fins à la fois?

C'est par une déduction raisonnable des faits mis en preuve que l'on doit déterminer s'il s'agit ici de revenus imposables ou non.

La preuve quant à l'intention de l'appelant d'ériger ou de faire ériger sur son terrain un bâtiment industriel se résume à sa déclaration. Demers n'est pas entendu comme témoin parce qu'il est sérieusement malade et l'appelant ne fait

entendre aucun autre témoin. Il me semble que si réellement l'intention de l'appelant avait été telle qu'il le déclare, il aurait pu obtenir le témoignage d'un constructeur, d'un prêteur ou d'un architecte ou, du moins, des échanges de correspondance qui auraient pu étayer sa prétention. Or rien de tel et l'on n'a que la seule déclaration de l'appelant sur ce point.

Quant à Demers qui agissait comme l'agent de l'appelant pour ces transactions, ce dernier déclare tout au plus que Demers serait allé voir certaines personnes qu'il ne connaît pas.

L'explication donnée par l'appelant qu'il n'avait pu trouver une industrie assez grande pour occuper tout son terrain ne tient pas non plus puisque l'appelant possédait un terrain plus petit, soit la partie du lot 578 qu'il aurait pu utiliser pour y ériger un bâtiment industriel mais qu'il a vendu à Ville Mont-Royal en 1956 pour la somme de $125,000. Notons ici que l'appelant déclare en réponse à son procureur qui lui demande s'il avait cherché des acquéreurs possibles pour le lot 578 qu'il n'en a pas cherché mais qu'«il y avait peut-être pour une industrie si on avait eu une industrie.»

Ceci à mon sens dispose des raisons données par l'appelant pour expliquer pourquoi il n'a pas pu exécuter son projet.

D'ailleurs, même s'il fallait accepter la déclaration de l'appelant à l'effet que son but était d'ériger sur ce terrain un bâtiment industriel comme placement, ce qui comme nous venons de le voir est loin d'être établi, il faudrait, compte tenu de la preuve, en venir à la conclusion qu'il avait également l'intention de vendre à profit s'il ne pouvait réaliser son projet. En effet, si les opérations de l'appelant sont d'une nature telle qu'elles comportent en plus de l'intention d'en faire un placement l'intention également de revendre à profit au cas où son projet ne se matérialiserait pas, les profits provenant de la vente des terrains seraient quand même imposables comme résultant d'une entreprise, d'une initiative ou affaire d'un caractère commercial conformément à la s. 127(1)(*e*) de la *Loi de l'Impôt sur le revenu* de 1948 qui s'applique à l'année 1951 mais qui est en tout point semblable à l'article 139(1)(*e*) de la loi de

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1952 et tel que décidé par la Cour Suprême in re *Regal Heights Limited v. The Minister of National Revenue*[1]. En effet, le juge Judson, aux pages 905-907 déclare:

> There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim.
>
> There is no evidence that these promoters had any assurance when they entered upon this venture that they could interest any such department store. Their venture was entirely speculative. If it failed, the property was a valuable property, as is proved from the proceeds of the sales that they made. There is ample evidence to support the finding of the learned trial judge that this was an undertaking or venture in the nature of trade, a speculation in vacant land.

Nous devons également souligner ici le court intervalle de temps qui s'est écoulé, soit environ huit mois, entre l'achat du terrain de l'appelant et la vente du même terrain ainsi que l'admission par l'appelant qu'il savait que ce secteur de la ville de Mont-Royal était en plein développement confirmée d'ailleurs par le fait que le terrain acheté était borné par une rue projetée que mentionne la pièce I-2, document que l'appelant et Demers ont tous deux signé.

Il nous paraît donc à la lumière des faits de la loi et de la jurisprudence que nous sommes ici en présence d'une entreprise ou affaire d'un caractère commercial et spéculatif et par conséquent nous en venons à la conclusion que le profit en résultant est imposable conformément aux ss. 3, 4 et 127(1)(*e*) de la *Loi de l'Impôt sur le revenu* de 1948. L'appel est donc rejeté avec dépens.

Jugement conforme.

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janvier 15, 16

février 13

ENTRE:

J.-EUCLIDE PERRON, LIMITÉE .....APPELANTE;

ET

LE MINISTRE DU REVENU NATIONAL ...INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 3(a), 139(1)(e)—Transaction immobilière—Profit en résultant—Gain de capital—Initiative ou affaire d'un caractère commercial—«Intentions frustrées»—Appel rejeté.

[1] [1960] C.L.R. 902.

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En novembre 1955 la compagnie appelante se portait acquéreuse d'un immeuble qu'elle se proposait d'affecter à des fins locatives. Ce projet ayant échoué du fait que l'immeuble, tel quel, s'était avéré impropre à de telles fins, l'appelante qui, dès janvier 1956, était entrée en pourparlers de revente le vendait effectivement, le 28 mars 1956, réalisant sur cette vente un profit substantiel. Ce profit fut omis dans le rapport d'impôt de l'appelante pour l'année d'imposition 1956, cette dernière l'ayant considéré comme un gain de capital. Assimilant cette transaction à une affaire de nature commerciale, le Ministre ajouta le gain ainsi réalisé au revenu réel déclaré par l'appelante. Portée en appel à la Commission d'Appel de l'Impôt la recotisation fut confirmée. D'où le présent appel à cette Cour.

Jugé: L'appel est rejeté.

2. Le facteur décisif, dans ce litige, est d'ordre commercial, lors même que l'appelante ait dû se résoudre à une ligne de conduite différente de celle qu'elle s'était traçée initialement. La défense dite d'«intentions frustrées» accorde trop de poids à l'objectif allégué mais irréalisé, et trop peu à la transaction subséquemment intervenue. Telle interprétation a été appliquée dans les causes *Bayridge Estates Ltd. and Minister of National Revenue* [*1959*] *Ex. C.R. 248; Hersch Fogel and Minister of National Revenue* [*1959*] *Ex. C.R. 363; Regal Heights Ltd. v. Minister of National Revenue* [*1960*] *S.C.R. 907.*

APPEL d'une décision de la Commission d'Appel de l'Impôt.

L'appel a été entendu par l'Honorable Juge Dumoulin à Chicoutimi, Qué.

Richard Dufour pour l'appelante.

Maurice Paquin c.r. et *Pierre Michaud* pour l'intimé.

Les faits et les questions de droit sont exposés dans les motivés de la décision que rend maintenant (13 février 1962) monsieur le juge Dumoulin:

La compagnie J.-Euclide Perron Limitée, de Chicoutimi, province de Québec, excipe devant cette Cour d'une décision de la Commission d'Appel de l'Impôt, datée le 2 mai 1961, qui rejetait sa contestation d'une recotisation de son revenu imposable pour l'année 1956 émise par le ministère intimé, le 12 décembre 1958.

Pour l'année d'imposition 1956, la compagnie J.-Euclide Perron déclarait un revenu réel de $34,512.51, abstraction faite, toutefois, «d'un profit au montant de $40,673.22, réalisé en 1956 par l'appelante, sur la vente d'un immeuble dit: de la Filature du Saguenay», selon les termes de l'article 3 de l'avis d'appel. L'omission de cette dernière somme dans le rapport annuel de l'appelante a donné lieu à la difficulté qu'il me faut aplanir.

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L'article 4 de l'avis d'appel dit que:

4. L'appelante avait considéré ce profit, comme un profit à capital et conséquemment ne l'avait pas considéré comme un revenu imposable.

Nous lirons tantôt l'exposé des motifs qui auraient induit la compagnie Perron à croire que ce bénéfice de quarante mille dollars sur la revente d'un immeuble, dans les conditions de ce cas particulier, constituât un gain de capital et non «une initiative ou affaire d'un caractère commercial», au gré du sous-paragraphe (*e*) de l'article 139(1) de la Loi de l'Impôt sur le revenu (S.R.C. 1952, c. 148). Mais préalablement, il convient d'indiquer que, par suite de cette révision de la cotisation, les revenus de l'appelante passaient de l'ordre de $34,512.51 à celui de $75,484.46, nouveau total formé des postes ci-dessous:

a) le revenu réel certifié par l'appelante $34,512.51
b) le profit provenant de la vente de l'immeuble 40,673.22
c) correction apportée à l'item dépréciation ... 298.73.

Corrélativement, la taxe exigée de la compagnie Perron était majorée d'une somme de $16,269.29, ce qui en haussait l'indice de $8,405 à celui de $24,793.78.

Le litige, comme déjà indiqué, porte tout entier sur l'élucidation de la spécification que doit revêtir, au regard de la loi fiscale, le gain de $40,673.22. L'appelante le considère comme la simple plus-value d'un actif en capital (enhancement of a capital asset), l'intimé, au contraire, ne voit dans cette transaction qu'une affaire de nature commerciale (an adventure or concern in the nature of trade).

Les raisons mises de l'avant pour étayer la prétention de la compagnie Perron sont formulées à l'article 31 de l'avis d'appel, je cite:

31. «En effet, l'appelante se proposait en achetant cet immeuble de faire le commerce d'entreposage, de location de bureaux et d'entrepôts, et se proposait également de garder le dit immeuble pour les fins de son commerce d'entrepreneur en construction».

Joignons que les articles 21, 22 et 30 des procédures d'appel allèguent subsidiairement, mais sans établir de connexion légale entre les parties, l'explication suivante:

21. «Le président de la compagnie-appelante, se trouvait en 1955, en même temps directeur de la Filature du Saguenay Ltée; et était endosseur pour cette dernière d'une dette au montant de $18,000, et ce avec d'autres personnes.

22. La Filature du Saguenay Ltée, étant en défaut vis-à-vis des obligataires, dut remettre les biens faisant l'objet de la garantie au Fiduciaire pour réalisation de garantie;

30. Le fait par l'appelante d'acheter cet immeuble solutionnait le problème des obligations échues et constituait pour l'appelante un placement qu'elle prévoyait rentable;».

Cette citation n'est incluse que par acquit de conscience; les endossements souscrits par le président de la compagnie Perron en faveur de la Filature du Saguenay, en faillite, demeurent absolument étrangers au litige.

Quelques précisions, maintenant, au sujet de la bâtisse acquise par l'appelante. Il s'agit d'un immeuble comprenant 20,000 pieds carrés «de plancher», qui fit l'objet d'une première offre d'acheter de la part d'un dénommé Gérard Galand, de Québec. Prix alors soumis au fiduciaire des biens de la Filature du Saguenay: $20,000.

Après le refus de cette offre, survint celle de l'appelante, le 18 octobre 1955, d'un prix de $70,500, qui incluait aussi «une résidence à logements sise aux environs des immeubles principaux de la Filature» (avis d'appel, art. 27).

L'acceptation par le fiduciaire de cette surenchère fut constatée par acte authentique, le 14 novembre 1955, mais l'appelante insiste sur la date du 18 octobre comme étant celle de l'acquisition véritable (Code civil, art. 1472).

Bien que l'appel soit uniquement fondé sur l'intention d'affecter ce bâtiment à des fins locatives, excluant l'idée d'une revente à brève échéance, ce fut cependant cette seconde conjoncture qui se réalisa, le 28 mars 1956, alors que la firme Pierre Joron Service Limitée, de Chicoutimi, se porta acquéreur de l'immeuble pour un prix de $100,000, payable $5,000 comptant, et la balance par versements échelonnés sur une période de plusieurs années. Il importe, dès ici, de souligner que selon le contexte des articles 42 et 43 de l'avis d'appel, il ressort clairement que les pourparlers de revente à la compagnie Joron Ltée, furent engagés au début de janvier 1956, moins de deux mois après l'acte notarié d'achat du 14 novembre précédent. Sans autres commentaires, consignons que l'appelante renonça assez tôt à son espoir initial de louer cette propriété.

Exception faite d'une très brève apparition de M. Pierre Joron, l'audition ne souleva que des questions de droit, la transcription de la preuve orale entendue devant la Com-

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mission d'Appel de l'Impôt étant versée de consentement mutuel au dossier; les citations rapportées ci-après proviendront donc de cette source d'information.

Avant de commencer l'examen des témoignages pertinents, je signalerai une anomalie, répétée en maints endroits de l'avis d'appel, qui mentionne un profit de $40,673.22, écart excédentaire entre un prix d'achat de $70,500 et celui de la revente, au montant de $100,000, à Joron Service Ltée. La comparaison de ces trois sommes devrait établir, semble-t-il, un résultat de $29,500.

Que nous apprend la preuve relativement aux démarches tentées par la compagnie Perron en vue de louer sa récente acquisition immobilière et aux possibilités de succès qu'elle pouvait raisonnablement espérer?

M. Pierre Joron se désigne comme camionneur et entreposeur à Chicoutimi. Son commerce de camionnage ayant pris une extension considérable depuis la conclusion de certains arrangements avec la compagnie Baillargeon Express de Montréal, un entrepôt qui satisfît aux exigences de sécurité requises par la Canadian Warehousemen Association était devenu indispensable. M. Joron n'avait pas écarté l'idée d'entreprendre la construction d'un vaste hangar quand, dit-il, «vers la fin de 1955, je crois que c'est en novembre, octobre ou novembre, surtout vers la fin, monsieur Fernand Perron, (le fils de J.-Euclide Perron) est venu me voir disant qu'ils avaient acheté La Filature du Saguenay et m'offrant de me louer à un dollar du pied carré».

Ce loyer parut trop élevé à Joron; mais sur réception, au début de 1956, d'une sommation finale de la Canadian Warehousemen Association, menaçant d'annuler leur contrat d'agence si un entrepôt moderne n'était pas construit sans tarder, le témoin explique qu'à la suggestion du représentant des Prévoyants du Canada, M. Beaulieu, neveu de J.-Euclide Perron, il s'ouvrit de nouveau auprès de celui-ci de son projet d'acheter l'immeuble de la défunte Filature du Saguenay, si on lui consentait des termes de contrat appropriés à ses ressources financières.

Joron dit bien que Perron préférait louer, mais dût céder à ses instances d'acheter, et que la vente fut conclue vers la fin de mars au prix de $90,000.

A ce moment, l'immeuble était partiellement occupé par deux locataires: Isolation Générale, bénéficiaire d'un bail de courte durée et qui payait un loyer mensuel de $175, puis Simpsons-Sears dont le loyer était de $55 par mois.

Une des conditions de la vente à Joron prévoyait la cessation de ces deux baux au gré absolu du nouvel acquéreur.

M. J.-Euclide Perron, ingénieur professionnel, est le président de la compagnie appelante dont la principale opération, selon le témoin, «est une entreprise de construction générale, entrepreneur général». M. Perron, très au courant, et pour cause, de l'état précaire de la Filature du Saguenay Limitée, entrevit la rentabilité d'une exploitation d'entreposage, s'il pouvait acheter les immeubles de cette compagnie en déconfiture. Nous savons que cette transaction fut effectivement conclue le 14 novembre 1955.

En réponse à cette question de son avocat, Me Richard Dufour: «Subséquemment, avez-vous loué une partie du plancher qui était disponible?» M. Perron dit: «Oui. Après le Jour de l'An, quelque temps après l'achat, on s'est mis en train de louer ça et on a loué une couple de petits locaux, et on a fait un peu de démarches pour trouver d'autres locataires».

Le président de l'appelante, on le constatera, n'insiste guère sur les efforts déployés afin d'intéresser des locataires éventuels. Nous avons vu, du reste, que dès le début de janvier, des négociations de vente étaient engagées entre la compagnie J.-Euclide Perron et Joron Service Limitée, négociations qui devaient amener une mutation de propriétaires, le 28 mars 1956.

Je rapporterai encore quelques lignes, extraites du témoignage de l'ingénieur Perron, répondant à Me Paquin, procureur de l'intimé, qui lui demandait s'il avait effectivement fait le commerce d'entreposage.

R. On a commencé à louer une couple de locaux mais ça ne décolle pas du jour au lendemain. Il fallait partir ça, ça ne part pas sec. Il fallait prendre des contacts avec des compagnies d'entreposage; c'est une affaire de longue main que de partir ça.

D. Avez-vous songé que vous pourriez vendre ça si ce n'était pas de votre goût?

R. Ça, c'est toujours une possibilité quand une affaire ne marche pas.

Cette toute dernière admission s'intègre parfaitement dans la catégorie d'objectifs secondaires qui ont suffi, dans au moins trois causes dont il sera fait mention, pour tenir

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que des transactions de cette nature étaient «une initiative ou une affaire d'un caractère commercial».

M. Fernand Perron, secrétaire-trésorier de la Compagnie, confirme la présence de deux locataires dans l'immeuble quand l'appelant en devint propriétaire. Il ajoute que, postérieurement au 14 novembre 1955, une dizaine de négociants furent approchés par correspondance ou par démarches individuelles, mais que tous refusèrent de louer de l'espace dans cette bâtisse.

Enfin, M. Aimas Brassard, courtier en immeubles à Chicoutimi, relate que, dans le cours du mois de mai 1955, J.-Euclide Perron lui aurait dit: «Essayez de me trouver de bons locataires. Si on a plusieurs locataires, on achètera cette affaire-là pour faire de l'entreposage». On aura compris évidemment que l'à-peu-près «cette affaire-là» désigne l'entrepôt qui appartenait alors à la Filature du Saguenay Ltée. Brassard tenta vainement de trouver des locataires. Me Paquin lui demande: «Durant cette période de mai jusqu'à la fin de l'année 1955, est-ce que vous avez trouvé des locataires?

R. Non. Parmi les clients sollicités, tous ont répondu que c'était regrettable qu'il n'y ait pas de sortie sur la rue Montcalm, et c'était un de nos plans d'avoir un passage sur la rue Montcalm».

Une double conclusion ressort de cette preuve à savoir que ce bâtiment ne convenait pas, tel quel, à des usages locatifs puis, que les projets de location, dont il m'est permis de prendre acte, furent de brève durée, allant du 14 novembre 1955 au début de janvier 1956, quand la vente à Joron Ltée offrit une possibilité prometteuse.

Cette cause ne soulève guère de problèmes; elle se range dans la liste déjà longue de ce que l'on est convenu d'appeler «les intentions frustrées», traduction presque littérale de l'anglais «Frustration Cases».

En pareil cas, le contribuable, société commerciale ou particulier, déclare que son intention d'affecter une propriété à tel ou tel genre d'exploitation fut déjouée par des complications imprévisibles, rendant ainsi inévitable la disposition de ce bien au moyen d'une ou de plusieurs ventes. Un tel raisonnement accorde trop de poids à l'objectif allégué mais irréalisé, et trop peu à la transaction subséquemment intervenue. La jurisprudence attache une importance con-

sidérable à l'intention prédominante: la poursuite de bénéfices pécuniaires. Il importe assez peu que l'obtention d'un profit résulte d'une transaction financière différente du projet qui avait initialement inspiré la mise de fonds.

Cette interprétation fut appliquée par l'honorable Juge Thurlow, de cette Cour, dans deux causes récentes: *Bayridge Estates Ltd. and Minister of National Revenue,* et *Hersch Fogel and Minister of National Revenue.*

Dans l'instance: *Bayridge Estates Ltd. and Minister of National Revenue*[1], les faits sont très simples: la compagnie Bayridge, qui projetait de faire le commerce de lots résidentiels, avec maisons dessus construites, et aussi l'installation d'un poste d'essence, ne put obtenir l'assistance financière indispensable. Force lui fut donc de revendre les lots, ce qu'elle fit avec des bénéfices appréciables. La défense opposée au fisc, qui avait taxé ces profits, recourait à l'échappatoire de «l'intention frustrée». Le savant Juge décida que:

> ... the sale of the property for profit was one of the several alternative purposes for which the property was acquired, and it was in the carrying out of that alternative purpose, when it became clear that the preferred purpose was unattainable, that the profit in question was made. It was, accordingly, a profit made in an operation of business in carrying out a scheme for profit-making and was properly assessable.

Les faits sont sensiblement identiques dans l'autre cause, *Hersch Fogel and Minister of National Revenue*[2], où nous lisons ce qui suit:

> Held: That the lots in question were never at any time solely a capital investment as distinct from a revenue asset; the intention at the time of purchase and the course to be followed were precisely the same as applied in the case of any other parcels of land which the partnership had, namely, to turn them to account for profit by building on them for sale or by sale of the vacant land itself, as might appear expedient, if for any reason the proposed building could not be built; they were not an investment at the time they were acquired nor did they acquire that character from anything that occurred thereafter, any expenditures of money or effort made to carry out that purpose were quite insufficient to give them such a character to the exclusion of any other.

Une troisième instance, encore plus récente, celle de *Regal Heights Ltd. v. Minister of National Revenue*[3] se rapproche davantage du cas présentement à l'étude. Un groupe de spéculateurs de Calgary, Alberta, avaient entamé d'actives démarches auprès de la compagnie Simpsons-Sears en vue

[1] [1959] Ex. C.R. 248-249.
[2] [1959] Ex. C.R. 363-364.
[3] [1960] S.C.R. 907.

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d'induire cette firme à construire un centre commercial (Shopping Centre) sur des terrains acquis pour cette fin précise par ce groupe de financiers. Il advint que Simpsons-Sears opta pour un autre site, deux milles plus à l'ouest. Déçus dans leur projet, les sociétaires de Regal Heights s'empressèrent de revendre, avec profit toutefois, les terrains de cet actif immobilier. L'honorable Juge Judson, rendant l'arrêt de la Cour suprême du Canada, (le Juge Cartwright dissidant), statua que:

> Throughout the existence of the appellant company, its interest and intentions were identical with those of the promoters of this scheme. One of the objects stated in the memorandum of association of the company was
>
> > To construct and operate apartment houses, blocks, shopping centres and to otherwise carry on any business which may be conveniently carried on in a shopping centre.
>
> Nothing turns upon such a statement in such a document. The question to be determined is not what business or trade the company might have carried on but rather what busines, if any, it did in fact engage in. (Sutton Lumber and Trading Co. Ltd. v. Minister of National Revenue). What the promoters and the company did and intended to do is clear to me on the evidence, as it was to the learned trial judge. They failed to promote a shopping centre and they then disposed of their speculative property at a profit. This was a venture in the nature of trade and the profit from it is taxable within the meaning of ss. 3, 4 and 139(1)(*e*) of the Income Tax Act. These cases must all depend on their particular facts and there is no analogy between the sale of long-held bona fide capital assets, as in the Sutton Lumber case, and the realization of a profit from this speculative venture in the nature of trade.

Une dernière citation, extraite du traité de Hannan and Farnsworth intitulé: The Principles of Income Taxation, p. 186, semble bien au même effet que les décisions ci-haut rapportées:

> Where a company has been formed for the purpose of acquiring real property and turning it to account—whether by holding the property and deriving rents therefrom, or by disposing of it to advantage—the courts in this country (England) lean strongly to the view that the whole of the company's activities amount to the conduct of a business. Consequently, the fact of incorporation assumes great significance, while the motives of the persons who formed the company are treated as of little or no consequence.

Il va sans dire que la compagnie J.-Euclide Perron se proposait de réaliser des profits en conséquence de l'achat de l'entrepôt, naguère propriété de la Filature du Saguenay. Cette transaction, du reste, s'écartait peu des activités normales d'une compagnie de construction et d'entreprises par devises et marchés. De toute façon, le facteur décisif, ici,

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est d'ordre commercial, lors même que l'appelante ait dû se résoudre à une ligne de conduite différente de celle qu'elle s'était tracée initialement.

Je dois donc conclure à la réalité d'une initiative ou affaire d'un caractère commercial, d'après l'article 139(1)(*e*) de la Loi de l'Impôt sur le revenu, assimilant une activité de ce genre à une entreprise, ce qui rend le bénéfice obtenu sujet à taxation, selon l'article 3 de ladite loi édictant que: «le revenu d'un contribuable pour une année d'imposition . . . est son revenu pour l'année de toutes provenances . . . et, . . . comprend le revenu pour l'année provenant
a) d'entreprises . . .».

Par ces motifs la Cour ordonne et décrète que le revenu de l'appelante, pour l'année d'imposition 1956, a été correctement computé et légalement imposé par l'intimé.

L'appel est rejeté, l'intimé ayant droit de recouvrer les dépens encourus après taxation.

Jugement conforme.

BETWEEN:

RAYMOND PHILIP CARDWELL .....PLAINTIFF;

AND

PHILIPPE LEDUC AND JEAN PELLETIER ..... DEFENDANTS.

1961

Nov. 22, 23

1962

Dec. 5

Trade Mark—Copyright—Infringement—Unfair competition—Injunction—Damages—Trade Marks Act, R.S.C. 1952-53, c. 49, s. 7(b)—The Copyright Act, RS.C. 1952, c. 55, s. 2(n, j), 20(3), 36(1), (2)—Speed-L-Opes—Stato-L-Opes—Graphic-Loppes—Similarity of wares.

Plaintiff brings his action for a permanent injunction restraining defendants from infringing his trade mark and for damages or an accounting as he elects. Plaintiff carried on business in Montreal, Quebec, under the trade name of National Men's Business Speed-L-Opes, which business consisted of selling to creditors a set of letters to be sent to their debtors and which were calculated to facilitate and expedite the collection of overdue accounts. These letters were inscribed on return addressed envelopes. In 1959 plaintiff began selling a single and less pretentious type of remittance envelope called *Stato-L-Opes* which included a detailed statement of the debtor's account. Defendants had been engaged for over three years in selling plaintiff's wares on commission. In 1960 the defendant Leduc quit the plaintiff's employ and

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set himself up in Quebec City in the same line of business under the name Graphic-Loppes Reg'd. Defendant Pelletier was discharged by plaintiff and entered the employ of Leduc and has ever since been engaged in selling his wares. Plaintiff alleges that the defendants offered for sale two sets of envelopes called *Graphic-Loppes* which are identical with *Speed-L-Opes* and *Stato-L-Opes* and that they used order forms which are duplicates of plaintiff's order forms, and by so doing they have been directing, to the detriment and loss of the plaintiff, public attention to their wares and services in such a way as is likely to cause, and has caused, confusion between plaintiff's and defendants' wares in contravention of the *Trade Marks Act*, R.S.C. 1952-53 (2 Elizabeth II), c. 49, s. 7(b). Plaintiff further alleges that defendants have infringed his registered trade mark and copyrights of his two sets of envelopes *Speed-L-Opes* and *Stato-L-Opes* in contravention of the *Copyright Act*, R.S.C. 1952, c. 55. The Court found that both defendants in directing public attention to Leduc's wares, services and business, consisting of the sale of *Graphic-Loppes*, did so in such a way as to cause or to be likely to cause confusion in Canada between defendants' *Graphic-Loppes* and plaintiff's *Speed-L-Opes* and *Stato-L-Opes*.

Held: That defendant Leduc, by making use of the trade name *Graphic-Loppes* and by copying the colour, the form and the printed matter of plaintiff's wares entitled *Speed-L-Opes* and *Stato-L-Opes*, and his requisition form, has directed public attention to his business in such a way as to be likely to cause confusion between his business and that of the plaintiff, and that defendant Pelletier, as Leduc's agent, has been a party thereto.

2. That plaintiff is entitled to an injunction restraining both defendants from infringing plaintiff's copyright.

3. That both defendants be enjoined from directing attention in Canada to their business and from selling debt collection letters as *Graphic-Loppes* or any other letters likely to cause confusion between their wares and business and the wares and business of the plaintiff.

4. That plaintiff is entitled to damages or an accounting of profits at his election.

ACTION for injunction and damages for alleged infringement of plaintiff's trade mark and copyright.

The action was tried before the Honourable Mr. Justice Kearney at Montreal.

Maurice Jacques for plaintiff.

Marcel Turgeon for defendants.

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

KEARNEY J. now (December 5, 1962) delivered the following judgment:

This case is one wherein the plaintiff seeks a permanent injunction against the defendants who are former employees

of his and an order for payment of damages or an accounting, as he may elect. The grounds of action are briefly as follows.

The plaintiff, since 1956, has carried on a business with offices in the city of Montreal, province of Quebec, under the trade name of National Business Men's Speed-L-Opes, which business consisted of selling to creditors a set of letters to be sent to their debtors and which were calculated to facilitate and expedite the collection of overdue accounts. Instead of being printed on a sheet of paper, the letters in question were inscribed on return addressed envelopes. Beginning in 1959, the plaintiff commenced selling a single and less pretentious type of remittance envelope called "Stato-L-Opes", which included a detailed statement of the debtor's account.

The defendant Philippe Leduc who, like the defendant Jean Pelletier, had been engaged for over three years in selling the plaintiff's wares on commission, upon quitting his employ, in the fall of 1960, set himself up in the city of Quebec, in the same line of business as that of the plaintiff, under the name of Graphic-Loppes Reg'd. The defendant Jean Pelletier, on being given notice by the plaintiff that his services were no longer required, entered the employ of Philippe Leduc and has ever since been engaged in selling the latter's wares.

According to the plaintiff, the defendants have been offering for sale two sets of envelopes called "Graphic-Loppes" which, for all legal purposes, are allegedly identical with the "Speed-L-Opes" and "Stato-L-Opes" sold by the plaintiff and have been making use of order forms which are practically duplicates of the plaintiff's order forms. The plaintiff also alleges that by so doing they have been directing, to the detriment and loss of the plaintiff, public attention to their said wares and services in such a way as is likely to cause, and has caused, confusion between the plaintiff's and the defendants' wares, in contravention to s. 7(*b*) of *An Act relating to Trade Marks and Unfair Competition* (commonly referred to as "the *Trade Marks Act*"), R.S.C. 1952-53 (2 Elizabeth II), c. 49.

As additional grounds for the issuance of an injunction the plaintiff avers that the defendants have infringed his

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registered trade mark, consisting of the term "Speed-L-Opes", by making use of the name "Graphic-Lappes" in violation of the *Trade Marks Act* (*supra*), and that, furthermore, the plaintiff is the registered owner of separate copyrights in respect of his two sets of envelopes entitled "Speed-L-Opes" and "Stato-L-Opes" and against which the defendants have also committed acts of infringement in contravention of the *Copyright Act*, R.S.C. 1952, c. 55.

By way of defence Philippe Leduc denies that he has committed any act amounting to unfair competition, because the two sets of envelopes complained of are dissimilar to those sold by the plaintiff. The said defendant denies that the name "Graphic-Loppes" infringes the plaintiff's trade mark entitled "Speed-L-Opes". Insofar as the alleged infringement of the plaintiff's copyrights is concerned, the defendant Philippe Leduc denies having copied them or otherwise infringed them and contests the validity of the said copyrights, more particularly on the grounds that neither the collection envelopes called "Speed-L-Opes" nor the remittance envelopes entitled "Stato-L-Opes" are literary works, that they are lacking in originality and consequently not susceptible of protection under the *Copyright Act*.

The defendant Jean Pelletier, apart from denying generally the plaintiff's claim, asserts that the envelopes called "Graphic-Loppes" which he sells for and on behalf of the defendant Leduc are far from being identical to those he sold when in the employ of the plaintiff, and that, in any event, the plaintiff has no right of direct action against him because he was merely a salesman in the employ of Philippe Leduc and had no proprietary interest in the latter's business called Graphic-Loppes Reg'd., nor did he assist him financially or otherwise in bringing it into existence.

Much of the proof offered has been either of a documentary nature or has been admitted and except in regard to the similarity or dissimilarity of the wares sold by the plaintiff and defendants respectively there is little difference between the parties insofar as the facts of the case are concerned.

The plaintiff filed a French version of "Speed-L-Opes" as Exhibit $P^{5-A, B, C, D}$ and an English version as $P^{5-F, G, H, I}$. The

plaintiff also filed, as Exhibit $P^{5-E, F}$, a French and an English version of "Stato-L-Opes".

The Certificate of the Registrar of Trade Marks dated June 7, 1957 evidences the fact that the plaintiff is the proprietor of the trade mark entitled "Speed-L-Opes" Exhibit P^{11}. As appears by Exhibits P^{12} and P^{13}, the plaintiff has been the owner of a copyright on "Speed-L-Opes", which was first published in July 1955 and registered on March 29, 1956, and on "Stato-L-Opes", which was first published in 1959 and registered on April 19, 1961.

It is admitted that after both the defendants had left the plaintiff's employ the defendant Philippe Leduc, on November 29, 1960, registered at the Prothonotary's office, in the city of Quebec, as carrying on business alone under the name of Graphic-Loppes Reg'd., as more fully appears by Exhibit P^1. I might also add in passing that the same defendant, on February 27, 1961, registered at the same office as also doing business under the firm name of Business Credit Bureau Reg'd. (Ex. D^7).

It is also admitted that during the month of November 1960 the defendant Jean Pelletier became an employee of Graphic-Loppes Reg'd. and that both defendants began selling and have continued to sell, under the name of Graphic-Loppes Reg'd., in the territory covered by the plaintiff, a set or series of four coloured envelopes called Graphic-Loppes, written in the French language, a sample copy of which was filed as Exhibit P^2 and a sample in English is contained in Exhibit $D^{2-A, B, C, D}$.

The above-referred to Speed-L-Opes and Stato-L-Opes are adequately described in the plaintiff's amended statement of claim as follows:

> The Speed-L-Opes consist of four double sets of envelopes in each set an outer "Window" envelope bearing printed thereon the name and return (address) of the merchant and an inner folder to be addressed to the debtor bearing printed therein the signature of the merchant under a message requesting payment, which folder may be used to include the remittance due and becomes, when sealed with the gummed edge provided, in turn an envelope already addressed to the same merchant creditor. The first set of Speed-L-Opes is blue in colour and the message therein a polite reminder; the second set is buff or peach in colour with a more direct request; the third set is green, with a more insistent message; and the fourth set is yellow, with a final notice. The "Stato-L-Opes" consist of two envelopes, one of which is an outer "Window" envelope bearing printed thereon the name and return address of the merchant and an inner folder to be addressed to the debtor bearing printed thereon a statement of

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account, which folder may be used to include the remittance due and becomes, in turn an envelope already addressed to the creditor; this set of envelopes is gray in colour;

I might here remark that the plain outer "Window" envelopes which are used by the plaintiff to enclose his inner envelopes called Speed-L-Opes and Stato-L-Opes and by the defendants to enclose their Graphic-Loppes, respectively, were apparently regarded by counsel as unimportant, since they have not been included in Exhibits P^2, P^5 or D^2. Also that in most instances in the exhibits filed by the parties as samples of their wares, the address of the debtor and the return address of the creditor, which are customarily included in their finished product, have been left in blank. The copies of the requisition forms which the plaintiff and the defendants ask the purchasers of their respective wares to sign, the similarity of which of course is disputed, were filed for comparison purposes as Exhibits D^1 and P^4.

Since, in my opinion, in order for a person to obtain the protection afforded by s. 7(*b*) of the *Trade Marks Act*, it is not necessary that his trade name be registered under the *Trade Marks Act* or that the literature found on the wares which he sells be registered under the *Copyright Act*, it follows that the first and perhaps the only question requiring consideration in this case is whether on the proven facts the defendants have contravened the broad provisions above referred to of the *Trade Marks Act*, which reads as follows:

> 7. No person shall
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

For the sake of making the record more complete, I will refer to the following supplementary evidence.

The plaintiff also registered in the Prothonotary's Office of the Superior Court of the district of Montreal, on August 31, 1959, as carrying on business alone under the firm name and style of National Business Men's Speed-L-Opes (Ex. P^{12}).

The defendant Philippe Leduc stated that he hardly sold any of his Graphic-Loppes which were printed in English and that his sales consisted, to all intents and purposes,

entirely of Graphic-Loppes in the French language, as per the samples contained in Exhibit P^2.

From the foregoing it can be seen that the important issue in this case is reduced to a simple question of fact—namely: are the envelopes, particularly those written in the French language, sold by the defendants sufficiently similar to those of the plaintiff to entitle the latter to the relief provided in s. 7(1)(*b*) of the *Trade Marks Act*?

When one compares Exhibit P^2, French version, with the four first envelopes described in Exhibit P^5 as A, B, C and D, in my opinion one is immediately struck by their similarity: They are indistinguishable in point of colour; the form of each envelope is identical; the type of printing used is similar as is the disposition of the text; when the writing on the Speed-L-Opes is in large print or ordinary print, the defendant's Graphic-Loppes follow suit; when the plaintiff made use of capital letters, so did the defendant. If one compares closely the text used in the two exhibits, certain differences between them can be noted but such differences consist principally of inverting somewhat the sequence of the ideas contained in the plaintiff's text; the choice of words is to a large extent the same and those words which are not identical express the same idea.

It was said in *Battle Pharmaceuticals v. The British Drug Houses Ltd.*[1] "that the answer to the question whether two word marks are similar must nearly always depend on first impression", and I think the above dictum is applicable in the present instance.

The get-up of the exhibits in issue, when they are looked at in their totality, in my opinion, makes them appear at first blush to be indistinguishable one from the other.

We are not here dealing with a case where there is only a single instance of what could be termed copying. But apart from the similarity already noted, I consider that the defendant Leduc has gone to unusual lengths in copying the plaintiff's Speed-L-Opes. This is seen, for instance, in the use he made of the trade name Graphic-Loppes Reg'd. He admitted in evidence that, when he was considering registering in the Prothonotary's Office a trade name, he wanted to make use of the name "Rapid-L-Opes" and he altered it

[1] [1946] S.C.R. 50.

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somewhat only because he happened to mention the matter to a lawyer whom he met by chance on the street, who advised him to use the word "Graphic" instead of "Rapid" because the latter was excessively similar to the plaintiff's registered name.

The plaintiff made use of the following slogan emphasizing how important it was for a debtor to preserve his credit:

PROTEGEZ-VOUS EN PROTEGEANT VOTRE CREDIT.

The defendant made use of the same theme by using the slogan:

VOTRE BON CREDIT FERA VOTRE RENOMMEE.

I will now pass on to deal briefly with plaintiff's Exhibit P^{5-E}, which is a sample of his Stato-L-Opes.

When I place the above exhibit alongside the corresponding defendant's Exhibit P^3, my immediate impression is that it would be difficult to imagine how the defendant could make a more deliberate and a more successfully deceitful imitation of the plaintiff's Stato-L-Opes.

Not content with the imitations made of the above-mentioned Speed-L-Opes and Stato-L-Opes, the defendant Leduc went to the length of making use of a requisition or order form (Ex. P^4) which he, like the plaintiff, asked the purchasers of their wares to sign—which, in my opinion he could never have devised unless he made deliberate use of the plaintiff's requisition form Exhibit D^1.

The plaintiff, when asked how he came to publish his work entitled "Speed-L-Opes", stated that, after working on it for about eight months, he was able to complete it in its final form, and that when it started to sell he had it copyrighted and that at the date of trial his sales of Speed-L-Opes were about one million and a quarter sets a year. He did not offer, however, any evidence as to the extent, if any, his sales had been adversely affected by reason of the competition met with from the defendants. But, as may be seen from the authorities conveniently gathered at page 455 in Fox—The Canadian Law of Copyright, ed. 1944, actual damage need not be proved, and failure to do so will not defeat an author's right to an injunction if it be otherwise justified.

The plaintiff also testified that after the defendants had approached some people who had previously purchased through them the plaintiff's Speed-L-Opes with a view to selling such clients the defendant's Graphic-Loppes, several of such parties were confused and telephoned the plaintiff to ascertain if the defendants were still in his employ.

For the above reasons, I consider that both the defendants have at the time they commenced directing public attention to defendant Leduc's wares, services and business, consisting of the sale of Graphic-Loppes, did so in such a way as to cause or be likely to cause confusion in Canada between the defendant's Graphic-Loppes and the plaintiff's Speed-L-Opes and Stato-L-Opes, contrary to the provisions of s. 7(*b*) of the *Trade Marks Act*.

I do not consider that the defendant Jean Pelletier can escape liability on the ground that he was merely a selling agent and not a partner of Philippe Leduc. As appears from Exhibit P[14], when the plaintiff notified Jean Pelletier that his services were no longer required, he advised the plaintiff that, unless he was willing to pay him a commission on any renewal contract that the plaintiff might receive in respect of orders for Speed-L-Opes which he (Jean Pelletier) had been instrumental in obtaining, he would join a Quebec firm (which turned out to belong to the other defendant) and sell the latter's ware in substitution of those of the plaintiff. In my opinion, the defendant Jean Pelletier knowingly and deliberately aided and abetted his co-defendant in violation of the above-mentioned provisions of the *Trade Marks Act*.

In view of the foregoing conclusion which I have reached, I do not think it necessary to determine whether or not the defendants, contrary to the provisions of the *Trade Marks Act*, infringed the plaintiff's registered trade mark "Speed-L-Opes" or his registered copyrights entitled "Speed-L-Opes" and "Stato-L-Opes". However, seeing that counsel for the defendants placed great store on the latter's registered copyright in respect of Speed-L-Opes and in his argument dwelt on this aspect of the case almost to the exclusion of the other remaining issues raised, I propose to deal with the validity of the plaintiff's Registered Copyright No. 31, Serial No. 116642, dated March 29, 1956, in respect of Speed-L-Opes, and, in the event of an affirmative finding, to resolve

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the question of whether such rights have been infringed by the defendants.

In considering the questions of the validity and (if necessary) the infringement of the Copyright entitled "Speed-L-Opes", the provisions of the *Copyright Act*, R.S.C. 1952, c. 55, relevant thereto read as follows:

Section 2(*n*) "literary work" includes maps, charts, plans, tables and compilations;

Section 2(*j*) "infringing", when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act;

Section 20(3): In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,

(*a*) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and

(*c*) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;

36. (1) Every register of copyrights under this Act shall be *prima facie* evidence of the particulars entered therein and documents purporting to be copies of any entries therein or extracts therefrom, certified by the Commissioner of Patents or the Registrar of Copyrights and sealed with the seal of the Copyright Office, shall be admissible in evidence in all courts without further proof or production of the originals.

(2) A certificate of registration of copyright in a work shall be *prima facie* evidence that copyright subsists in the work and that the person registered is the owner of such copyright. R.S., c. 32, s. 36.

I will first deal with the question of whether the four serial envelopes in issue constitute a literary work.

As pointed out by counsel for the defendants, it is well established that both in Canada and Great Britain a distinction must be drawn between the prerequisites necessary to warrant protection under the *Copyright Act* from those required under the *Patent Act*. The latter affords protection to ideas themselves while the former pertains to the manner in which they are expressed. As the learned President of this Court, following the leading case in *Hollinrake v. Truswell*[1], said in the case of *Moreau* and *St. Vincent*[2]:

That no person has any copyright in any arrangement or system or scheme or method for doing a particular thing even if he devised it himself. It is only in his description or expression of it that his copyright subsists.

Now, looking at the evidence, the plaintiff testified (and I have no reason to doubt his veracity) that since 1922 he

[1] [1894] 3 Ch. D. 420 at 427. [2] [1950] Ex. C.R. 198 at 204.

had been engaged in the credit and collection field in the city of Montreal and that in 1955 he conceived the idea of providing clients with a series of letters, to be sent to their debtors, which were calculated to improve collection returns. This idea, he said, was expressed on four coloured envelopes called Speed-L-Opes in language which was "all my own composition, complete, everything in there except the French, which was translated by my secretary."

His evidence also shows that, apart from the choice of wording or composition found on the four envelopes, the plaintiff gave considerable time and attention to what is often referred to as the "get up" of his work. Thus, he carefully selected the size of the envelopes, the sequence of colours, the various types of print and the arrangement thereof, terminating in a slogan calculated to inspire the debtor to meet his obligations—which reads:

PROTECT YOUR CREDIT AND IT WILL PROTECT YOU, all of which required eight months to complete to his satisfaction.

I propose to leave aside such features as the size, shape and the kind of type setting which the plaintiff chose because these features, while relevant when unfair competition or infringement is at issue, are not of the essence when one is concerned with the validity of a copyright, and in considering this latter aspect one must necessarily have regard to the composition of the reading matter appearing in the body of the Speed-L-Opes.

I will observe first of all that, in my opinion, it is not a simple task but one which requires thought, a good and tactful sense of balanced phrasing, to compose a series of succinct messages the subject-matter of which is bound to be disagreeable to the recipient, in language which is mild enough not to give offence, yet sufficiently stern to promote quick results. Assuming for a moment that originality is conceded, I think, particularly as literary merit need not be of a high order, the plaintiff's composition discloses at least a modicum of literary merit attributable to his skill and ingenuity. This added to the considerable time, care and effort which he devoted to it, in my opinion, is more than sufficient to endow the plaintiff's Speed-L-Opes with the quality of "a literary work" as defined in the foregoing s. 2(*n*).

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I will now pass on to the evidence of two witnesses heard in support of the defendant's second line of defence, viz., that the plaintiff's four Speed-L-Opes lack originality, on the ground that they belong to the public, because long before 1956 identical or similar sets of envelopes had been in common use in the United States and Canada and more particularly in the city of Montreal, province of Quebec.

Mr. Jean Piquette testified that in 1956 he caused to be incorporated Pan American Service Inc. and that prior thereto he had been carrying on a collection agency business in the province of Quebec under the registered name of Pan American Credit Service. Beginning in 1958 he caused to be printed a system for collecting debts through a series of four letters (Ex. D^5) which he began selling to and for the use of merchant creditors throughout the province of Quebec.

The witness also testified that he obtained the said idea of the above-mentioned method of debt collection when he saw in the city of New York, as far back as 1952, a type of such envelopes which was being sold in the United States by a company called Triple-Duty Envelopes Inc. No sample of the so-called triple-duty envelopes was produced but Mr. Piquette said he was not aware whether they were protected by copyright and pointed out that they were printed in English, adding naïvely that his envelopes were only printed in the French language.

The above-mentioned evidence might be helpful in establishing that Mr. Piquette's Exhibit D^5 was not copied from the plaintiff's Speed-L-Opes—but with this we are not here concerned—and in other respects his evidence has little worth. His evidence, far from establishing that "the Piquette collection letters" made their appearance in Canada prior to the date of the plaintiff's copyright, proves this occurred two years subsequent thereto and does not supply any convincing evidence that the composition of the plaintiff's Speed-L-Opes was not his own but was copied from literature emanating from the United States or elsewhere.

Mr. Gordon McKenzie, the second witness, who is chief buyer in Montreal for a large oil company, stated that a series of four remittance envelopes were used by his employer, a sample of which was produced as Exhibit D^6. The exhibit consists of four envelopes, marked A, B, C and

D, printed in French. The distinctive colours employed are the same as the plaintiff's Speed-L-Opes but are used in an inverted order. The witness stated that it was not he who gave the printing order, that they were first used in 1959 and that he does not know who was responsible for the choice of their text. If one should go to the length of making a minute comparison, particularly between the phraseology used in envelopes C and D of Exhibit D^6 with the corresponding Speed-L-Opes marked P^5 C and D, one finds that their similarity is even more marked than is the case with the defendant's corresponding Graphic-Loppes, and it becomes apparent that one was copied from the other. Bearing in mind that the envelopes of the above-mentioned oil company only made their appearance three years later than the plaintiff's corresponding Speed-L-Opes, one is almost compelled to conclude that Exhibit D^6 was copied from Exhibit P^5, which may explain why the witness added in his testimony that his company had ceased to make use of them.

The evidence of the two above-mentioned witnesses, in my opinion, is insufficient to rebut even the *prima facie* evidence arising from the production of the plaintiff's certificate of registration, as mentioned in s. 36(2), that the plaintiff is the owner of the copyright in question, and I think it should be disregarded entirely, more particularly in the light of the evidence given by the plaintiff.

In conclusion, I wish to make some short observations in respect of infringement and its necessary constituents.

As Orde J.A. said in *Deeks v. Wells*[1], in order to constitute infringement there must be identity or similarity of language, phraseology or literary style or form. Likewise, it was said in *Kantel v. Grant, Nisbet & Auld Ltd.*[2] that there is no infringement unless a substantial part of a work is copied.

Over a century ago, Shadwell, V-C., made the following observations in *Sweet v. Cater*[3]:

> Under the question of whether there has been a piracy it is not a question of one small passage here and another there, but when such a point is raised as to the quantity of the matter copied, I have always understood that the court at the time of trial, is to look at the two works and satisfy itself, as well as it can, whether there has been such an abstraction as forms a fair subject of complaint.

[1] [1931] O.R. 818 at 840. [2] [1933] Ex. C.R. 84 at 96.
[3] (1841) 11 Sim. 572.

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In view of my previous observations concerning the similarity between the plaintiff's Speed-L-Opes and the Graphic-Loppes sold by the defendants, I do not think I need to dwell on this aspect of the case because, in my opinion, there is abundant evidence that the close resemblance between the plaintiff's and the defendants' wares has been brought about because the defendants have made direct, multiple and, hence, illegitimate use of the plaintiff's copyrighted material.

I might add that it is well recognized that a work may be infringed by a colourable imitation of the whole or any part of it, and, in my opinion, the defendants have been guilty of infringement by making a colourable imitation of the plaintiff's copyrighted work, both in the literal and figurative sense of the term.

For the foregoing reasons I find that the defendant Philippe Leduc, by making use of the trade name Graphic-Loppes and by copying the colour, the form and the printed matter of the plaintiff's wares entitled Speed-L-Opes-Stato-L-Opes and his requisition form, which he has, at all relevant times, used and is continuing to use, has directed public attention to his business in such a way as to be likely to cause confusion between his business and that of the plaintiff, and that the defendant Jean Pelletier, as his agent, has been a party thereto.

In addition I find that the plaintiff is the owner of the sole right to offer for sale or sell in Canada his literary work entitled Speed-L-Opes and that the defendant Philippe Leduc has infringed the plaintiff's copyright in the literary work aforesaid.

In consequence, an order will issue enjoining the defendant Philippe Leduc and his servants, workmen or agents, and particularly his agent Jean Pelletier, from directing attention in Canada to their business and selling debt collection letters of the kind heretofore referred to as Graphic-Loppes or any other letters so designed as to be likely to cause confusion between their wares and business and the wares and business of the plaintiff; and I further direct that both defendants be restrained specifically from infringing the plaintiff's copyright entitled "Speed-L-Opes" by offering for sale letters in any form which would constitute an infringement of the plaintiff's aforementioned copyright.

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The plaintiff is entitled to damages or an accounting of profits, as he may elect, and there will be a reference to the Registrar or the Deputy Registrar to inquire into and report on the amount of such damages or profits for which the defendant Leduc is responsible and as any portion thereof for which the defendant Pelletier is also liable.

The plaintiff is entitled to his taxable costs against both defendants.

Costs of the reference are reserved.

Judgment accordingly.

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Jan. 26, 27

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Dec. 19

BETWEEN:

TURNBULL ELEVATOR CO. OF CANADA LTD. (formerly Gutta Percha and Rubber Ltd.) ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Revenue—Sales Tax—Excise Tax Act R.S.C. 1952, c. 100, ss. 2(a)(ii), 30(1)(a)(i) and 46—Petition of Right to recover a refund under s. 46 of Excise Tax Act for sales tax allegedly overpaid—Company selling footwear made by another Company—Whether selling company the "Manufacturer or Producer" of such footwear—Petition of Right dismissed.

Suppliant company sold several types of footwear manufactured for it by Dominion Rubber Co. Ltd., some of which was made to the designs and specifications of the suppliant, but most being selected from lines produced by Dominion for itself or for other customers. All bore the suppliant's trade mark. The contract entered into between these parties provided, *inter alia*, that Dominion would manufacture and deliver all the suppliant's requirements and that suppliant would purchase and receive all its requirements from Dominion, and that all the footwear would bear brands, markings and designs specified by the suppliant, that certain dies and moulds could be furnished by the suppliant and that suppliant would finance the inventory of goods held for it by Dominion under certain conditions. Suppliant paid the sales tax levied on the basis of the prices of the footwear paid to it by its customers. It admitted that the tax on the footwear made to its own designs and specifications was properly payable by it but contended that the balance of the tax had been paid by mistake of law or fact since Dominion was the manufacturer of the balance of the footwear. The Crown refused an application by suppliant for a refund of tax paid contending that suppliant was the manufacturer, within the meaning of

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manufacturer in the *Excise Tax Act*. Suppliant brings its Petition of Right to recover the sales tax which it claims had been paid in error.

Held: That the Petition be dismissed.

2. That suppliant was the manufacturer of all the footwear made for it by Dominion within the extended meaning of "manufacturer" in s. 2(*a*)(ii) of the *Excise Tax Act*.

3. That the sales tax paid by suppliant was paid in accordance with the terms of the Act.

4. That suppliant owned, held or used a proprietary sales or other right to the footwear manufactured on its behalf by Dominion.

5. That the suppliant held a sales right to the goods manufactured, as Dominion could not sell the goods to others but was required by the contract to sell and deliver them to suppliant only, and suppliant was bound by the contract to buy such goods.

6. That suppliant also used another right to the goods, its trade mark, which was used by its direction on all the footwear manufactured for it by Dominion.

PETITION OF RIGHT to recover sales tax allegedly paid in error.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

J. F. Howard for suppliant.

D. S. Maxwell and *D. H. Aylen* for respondent.

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

CAMERON J. now (December 19, 1962) delivered the following judgment:

In this Petition of Right, the suppliant asks for a declaration that it is entitled to a refund under s. 46 of the *Excise Tax Act* R.S.C. 1952, c. 100, of sales tax allegedly overpaid by it during the period May 20, 1951 to December 31, 1954. In the Petition of Right, the suppliant's name was given as Gutta Percha & Rubber Ltd., but at the trial, counsel for the suppliant stated that its name had been changed to Turnbull Elevator Co. of Canada, Ltd., and, by consent, the style of cause was amended accordingly.

The suppliant is a corporation incorporated under the laws of Canada, having its principal place of business at Toronto. Until August 1, 1950, it manufactured and sold, *inter alia,* certain types of footwear. Shortly before that date, it was decided that it would be advantageous for the company to discontinue the manufacture of such footwear,

acquire them from other sources, and sell them to its customers. Accordingly, on July 27, 1950 the suppliant entered into a contract (Exhibit 8) with Dominion Rubber Co. Ltd. of Montreal (hereinafter to be called "Dominion"), under which Dominion would manufacture and sell certain footwear to the suppliant. That contract was in effect from about August 1, 1950, to December 31, 1954, and during that period the suppliant manufactured no footwear, but acquired very substantial quantities from Dominion which it sold to retailers or jobbers.

The suppliant alleges that during that period, and by mistake of law or fact, it paid the sales tax levied by s. 30 on the basis of the prices paid to it by its customers; that it was not the "manufacturer or producer" of the footwear within the meaning of that term in s. 2(*a*)(ii) of the Act, but that Dominion was such manufacturer; that the sales tax should therefore have been levied only upon the prices at which Dominion sold the footwear to the suppliant; that applications for refund of the overpaid taxes have been duly made but have not been granted. Accordingly, in the Petition of Right the suppliant asks for (a) a declaration that during the said period Dominion was the manufacturer of the footwear purchased from it by the suppliant pursuant to the said agreement (Exhibit 8); and (b) that a refund to the suppliant be directed of taxes overpaid in the period between May 20, 1951 and December 31, 1954 (that amount being stated in the Petition of Right as $231,979, but substantially reduced at the trial as will appear later). It will be noted that no claim is made for a refund in respect of the period August 1, 1950 to May 19, 1951, presumably because the first letter on which the suppliant relies as being a claim for a refund is one from Dominion to the Department of National Revenue dated May 20, 1953 (Exhibit 9) and by the provisions of s. 46, applications for refunds must be made in writing within two years after such moneys were paid or overpaid.

In the Statement of Defence, it is admitted that sales tax was imposed, levied and collected on the sale price of the footwear on prices at which the footwear was sold by the suppliant to its customers. Therein, it is alleged that the suppliant was the manufacturer or producer of the footwear within the meaning of that term in the Act and that the

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sales tax which was paid was properly payable by the suppliant; and that no application in writing for and on behalf of the suppliant for a refund was made as alleged in the Petition of Right.

It may be noted here that for the first part of the period August 1, 1950 to December 31, 1954, sales tax was levied under the former *Special War Revenue Act,* R.S.C. 1927, c. 179, as amended (in 1947 its name was changed to the *Excise Tax Act*) and that for the latter part of that period it was levied under the *Excise Tax Act,* R.S.C. 1952, c. 100. The parties, however, are in agreement that the sections of those Acts which are here relevant are identical and it will therefore be understood that all references herein to the Act will be intended to refer to the latter Act.

The sales tax is imposed on the manufacturer or producer by s. 30(1), and by s. 2(*a*) "manufacturer or producer" is given an extended meaning. The applicable parts of those sections read:

> 30. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
>
> (*a*) produced or manufactured in Canada
>
> (i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier,
>
> 2. In this Act,
>
> (*a*) "manufacturer or producer" includes
>
> * * *
>
> (ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, form or corporation sells, distributes, consigns, or otherwise disposes of the goods or not,

The first question to be determined is whether the suppliant was the manufacturer or producer of the footwear within the extended meaning of that term in s. 2(*a*)(ii). In opening his case, counsel for the suppliant stated that two types of transactions took place under the contract with Dominion. He conceded that in some cases the suppliant asked Dominion to make footwear to the designs and specifications of the suppliant; that those goods were made for Gutta Percha only; and that as Dominion, in manufacturing that type of footwear, was acting as the agent of

Gutta Percha, no claim for refund of sales tax was now being made in respect thereof. The claim for a refund would therefore be confined to the other type of transaction in which, as he submitted, the footwear was made to the design and specification of Dominion, that the product was the same or substantially the same as Dominion made for itself and other customers; that the relationship of the suppliant and Dominion in regard thereto was that of vendor and purchaser only; and that the suppliant had no sale, proprietary or other right in the goods until they were delivered.

Mr. A. E. Ruthven, who was employed by the suppliant as assistant manager of the footwear department during the years 1950 to 1954 but is now employed by Dominion, gave evidence for the suppliant. In the course of his duties, he accompanied the manager of that department (now deceased) on his semi-annual visits to Dominion's head office at Montreal to determine the type of footwear that the suppliant would require in succeeding months, but they placed no orders at that time. He stated that in some cases the suppliant supplied specifications and the designs of the footwear it required, and as to these no claim for refund is now made. In regard to the remainder, forming the larger part of the purchases, he said that the representative of Dominion would show them samples of footwear which it was planning to produce for itself or for its other customers, and that he and his superior would select the styles they required. I gather that in some cases they would choose footwear identical with the samples produced and, in others, a similar style, but with a different type of sole tread or with a different foxing, or with an added simulated bow or similar adornment, also chosen from samples or designs in the possession of Dominion. As an instance only of what was done, he referred to Exhibit 1, a lady's rubber manufactured by Dominion for itself and bearing its own mark. He said that another lady's rubber (Exhibit 2) was made for the suppliant by Dominion and that it differs from Exhibit 1 only in the tread design, has added a simulated bow by way of adornment and instead of the Dominion label, has that of Gutta Percha. He stated that all footwear made by Dominion for the suppliant bore one of the trade marks of the suppliant, either "Gutta Percha" or "G. P.", with or without a

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medallion; and that the labels in the case of rubber footwear at least were added to the footwear during the course of manufacture and at the time of curing. Even in cases where the suppliant chose footwear identical to that being manufactured by Dominion for itself or others, the product when delivered to the suppliant would be identifiable as that of the suppliant. Such an instance would be boots and lumbermen's boots which had a small top bind bearing the suppliant's name in fine print.

Mr. Ruthven did not think that Dominion in making the footwear used any of Gutta Percha's patents; he was unaware of any written contract between the suppliant and Dominion. At no time did any one representing Gutta Percha supervise the manufacture of the footwear by Dominion. To the knowledge of this witness, no footwear bearing the Gutta Percha marks were ever sold or transferred by Dominion to any one except to Gutta Percha.

I turn now to the contract (Exhibit 8) which governed the relationship between the suppliant and Dominion regarding the manufacture, sale and purchase of the footwear. It is a lengthy document of seventeen pages, but I shall limit my consideration of it to those provisions which are relevant to this particular issue.

The preamble is short and reads:

> WHEREAS Gutta Percha is desirous of entering into an agreement with Dominion, whereby Dominion will manufacture and sell certain footwear to Gutta Percha;

Clause 1 relates to quantities. The first sentence reads:

> Dominion will manufacture, sell and deliver to Gutta Percha and Gutta Percha will purchase and receive from Dominion and pay for all its requirements for sale in Canada and export therefrom, of rubber and canvas footwear and leather stitchdown shoes, hereinafter referred to as "footwear", subject to the terms and conditions set forth hereinafter.

It may be noted here that under cl. 13, the term of the agreement, in so far as it relates to canvas and rubber footwear, continued until February 31, 1957, and unless terminated then by six months' notice, would continue thereafter for yearly periods subject also to termination by six months' notice. The term of the contract, in so far as is related to leather stitchdown shoes, continued to December 31, 1952, with a proviso that it would be extended on

the same terms as mentioned for canvas and rubber footwear. Actually, the whole contract was terminated as of December 31, 1954.

Clause 1 further provides that Gutta Percha in each quarter would furnish long-range monthly forecasts (up to but not beyond one year) of its requirements and that on or before the first day of each month it would furnish Dominion with a firm order for such footwear "as is to be manufactured by Dominion and shipped to Gutta Percha hereunder" in the next month, which firm order was to be within 20 per cent. more or less of Gutta Percha's most recent long-range forecast for that month. Dominion, however, was not required to manufacture in any one month *for* Gutta Percha's account footwear by styles and genders in excess of Dominion's then capacity to produce such styles and genders.

By cl. 2 certain warranties were given, in part as follows:

> All footwear manufactured and sold hereunder, other than seconds, shall be substantially of and in no event inferior to the constructions and qualities of the corresponding grades, respectively, as agreed upon by both parties from time to time, of footwear regularly manufactured by Dominion and sold under its regular brands. The same warranty shall apply to such special lines or grades of footwear manufactured by Dominion for Gutta Percha as may be agreed upon by both parties from time to time, but the footwear manufactured and sold hereunder shall bear the brands, markings and designs from time to time specified in writing by Gutta Percha, not including, however, any of Dominion's brands, markings or designs, or brands, markings or designs of Dominion's special brand customers.

Clause 3 sets out a formula on which prices would be determined, but no actual amounts were stated. Roughly, the aggregate price to be paid by Gutta Percha was on the basis of all costs of Dominion (including factory costs, overhead, commercial and administrative expenses) plus profit, which consisted of stated percentages of other costs, but which percentages varied at fixed dates from 3 to 6 per cent. for canvas and rubber footwear, and was fixed at 3 per cent. for leather stitchdown shoes. Provision was also made by which Dominion regularly estimated in advance its prices for the footwear to be sold and delivered in the next season. "Billing prices" were to be submitted to the suppliant quarterly by Dominion (subject to revision in the event of contingencies), consisting of its estimate of the cost of the footwear in the following quarter, and the suppliant agreed

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to pay on the basis of such billing prices. It was also provided that at the end of each calendar year Dominion would compute and render to the suppliant a statement showing the exact aggregate price of the footwear, computed no doubt on the basis of the formula earlier referred to, and payment of any deficiency would be made by the suppliant, or Dominion would reimburse the suppliant for any actual over-payment which it had made on the "billing prices".

Under cl. 3, the suppliant also had the right at certain times to examine the books and records of Dominion, entering into the computation of the "aggregate price". The evidence is that this was done on one occasion only and as it was found to be burdensome, the suppliant thereafter relied on the good faith of Dominion.

By cl. 4, Gutta Percha was to pay the billing prices before the last day of any month for goods shipped during the preceding month and deliveries were f.o.b. at the plants or warehouses of Dominion.

By cl. 5, if shipping instructions of the suppliant so provided, Dominion would ship direct to the suppliant's customers, the freight pre-paid by Dominion thereon being for the suppliant's account. This clause was frequently carried out.

Clause 6 provided:

> A 30 day inventory of finished goods will be carried by Dominion with no charge to Gutta Percha. If, however, at the end of any month shipments during such month are less than the inventory position on the last day of the preceding month, then Gutta Percha will keep Dominion in funds for such excess inventory; to the extent only that payments on account of such excess inventory have been made by Gutta Percha then Dominion will remit to Gutta Percha the amount in any month by which shipments exceed the inventory position as above set out.

The first sentence of cl. 7 reads as follows:

> At its own cost and expense, and as and when needed for use hereunder, Gutta Percha will furnish or make available to Dominion, all sole rolls, heel moulds or last and die equipment required by Dominion for the specific manufacture of Gutta Percha footwear hereunder, and all art work, plates, etchings and other services and materials deemed by Dominion advisable for the reproduction of the markings and letterings required by Gutta Percha upon its said equipment and upon the labels, wrappings and containers for all footwear to be manufactured hereunder.

The oral evidence indicates that these articles to the value of about $100,000 were provided by the suppliant. I gather

from Mr. Ruthven's evidence that while these articles in the main would be used for the manufacture of footwear designed and specified by the suppliant, there were occasions when the suppliant supplied equipment which was used to supplement that of Dominion in the manufacture of footwear similar to that made by Dominion for its own uses or for other customers, and that it is impossible to draw the line between the two types of such user. The title to such goods remained in the suppliant and the cost of insurance thereon was to be borne by the suppliant.

By cl. 9, Gutta Percha assumed and agreed to indemnify Dominion from all liability resulting from the use or alleged invalidity of all copyright, trade marks, trade names and designs which the suppliant had authorized Dominion to use in manufacturing the footwear. Dominion recognized the ownership and exclusive right in Gutta Percha to use the word "Gutta Percha" and such other trade marks, figures and designs used on the footwear processed under the contract in so far as they were not the property of Dominion or others, and "agrees not to manufacture for or sell to others, footwear bearing any of the said trade marks or designs of Gutta Percha, excepting such seconds as Dominion may dispose of as in this agreement provided". I have examined the contract carefully and can find no provision therein which gives to Dominion the right to sell "seconds". Indeed, by cl. 10 Gutta Percha agreed to purchase "all seconds accumulated in the manufacture hereunder" on the terms therein set out.

By cl. 11 Gutta Percha, upon the expiration or termination of the agreement, agreed to purchase all footwear theretofore ordered, and also to purchase all labels, boxes, containers, cartons, wrappings, tags and other materials and supplies on hand, and intended for use in connection with the footwear to be sold under the contract.

Then cl. 12 reads as follows:

> Gutta Percha shall be responsible for and shall pay directly on its own account any and all taxes in the nature of excise or sales taxes now or hereafter imposed by the Dominion of Canada or by any Province or local subdivision or municipality thereof, in respect of footwear sold hereunder.

On this evidence there can be no doubt that Dominion, in manufacturing all the footwear, was manufacturing such goods for or on behalf of the suppliant. I have also reached

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the conclusion that the suppliant was the "manufacturer" of all the footwear within the extended meaning of "manufacturer" as in s. 2(*a*)(ii) (*supra*), as being a corporation that owns, holds or uses a proprietary, sales or other right to the footwear being manufactured.

In the first place, I think the suppliant held a sales right to the goods being manufactured. From what I have said above, it is clear that Dominion could not sell the goods to others, but was required by the contract to sell them to the suppliant only, and to deliver them to the suppliant or to the suppliant's customers, if directed to do so. Likewise, the suppliant not only had the right to buy the goods being manufactured, but was bound by contract to do so. It is particularly significant that the suppliant financed the inventory of the goods held by Dominion after thirty days. The essential facts here are similar in many ways to those in *The King v. Shore*[1], in which I held that the defendant had a sales or other right in the goods being manufactured for him by a corporation, and that he was therefore the manufacturer or producer of such goods. That decision was expressly approved in the *Rexair* case.

But in my view, the suppliant also used another right to the goods, namely, its trade mark rights, which were used by its direction on all the footwear manufactured for it by Dominion.

The section in question was considered by the Supreme Court of Canada in *Rexair of Canada, Ltd. v. The Queen*[2]. In many respects, that case was similar to the instant case. There the appellant (the defendant) entered into a contract with Canadian Radio to manufacture 10,000 vacuum cleaners for it. The appellant was a wholly-owned subsidiary of an American Corporation which owned certain patents and trade marks which the appellant had the right to use in Canada and which were used by Canadian Radio with the consent of the appellant and its parent company in the manufacture of the vacuum cleaners; the contract also contemplated that certain tools in the manufacturing operation would be supplied by the parent company. Unlike the present case, the appellant there had the right to maintain an inspector in the plant of Canadian Radio with the right to reject articles not conforming to the appellant's

[1] [1949] Ex. C.R. 225. [2] [1958] S.C.R. 577.

drawings and standards. The appellant there undertook to indemnify Canadian Radio against any claims for infringement of patent and in the present case the suppliant gave a similar indemnity in regard to the use of its trade marks by Dominion. In that case, Kerwin C.J.C., in delivering judgment for the majority of the Court, said at p. 580:

> Subsection (2) of s. 23 refers to "when goods are manufactured or produced and sold in Canada", but clearly the Rexairs were so manufactured or produced and the question is whether the appellant was the manufacturer or producer. On the evidence referred to above that question must be answered in the affirmative. Canadian Radio agreed to manufacture them "for" the appellant and the control exercisable and in fact exercised by the appellant over the production leads to the same conclusion. Even if the appellant did not own or hold a patent right (which is an affirmative, and not merely a negative, right) it used a patent right and also an "other right" being the trademark right; and both of these were rights to goods being manufactured for or on their behalf by Canadian Radio and so bring the appellant within the extended meaning of "manufacturer or producer".

I cannot find any difference between the use of the trade marks in the instant case and the use of the trade marks in the *Rexair* case which was found to be the use of an "other right" within s. 2(*a*)(ii). I must therefore find that in this case the suppliant used an "other right" being its trade mark right and that right was used in respect of all the footwear manufactured by Dominion for the respondent.

I am fully aware of the opinion of the President of this Court on this point as stated in *The Goodyear Tire & Rubber Co. of Canada, Ltd. et al. v. The T. Eaton Co. Ltd. et al.*[1], and relied on by the suppliant herein. In that case, the President affirmed a declaration of the Tariff Board (made on a reference to it by the Deputy Minister of National Revenue for Customs and Excise under s. 57 of the *Excise Tax Act*) that the T. Eaton Company was not the manufacturer or producer of certain "special-brand" automobile tires made by Dominion Rubber Company and sold to Eaton's and which tires were then sold by Eaton's at retail or used by the firm for its own purposes. He also found that the Tariff Board had jurisdiction to determine the question submitted to it. An appeal from that judgment was allowed by the Supreme Court of Canada[2] on the ground that the Tariff Board had no jurisdiction to make the declaration, and accordingly its declaration and the judgment in the Exchequer Court were set aside. The merits of the case

[1] [1955] Ex. C.R. 229. [2] [1956] S.C.R. 610.

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were consequently not considered in the Supreme Court of Canada.

In the circumstances of that case, the learned President stated at p. 238:

> Nor did the putting of Eaton's trade marks into the molds and curing them into the tires give Eaton's any sales or other right to them.

The facts of that case were substantially different from those of the case at bar. In any event, and with respect, I feel that I must follow the decision of the Supreme Court of Canada in the *Rexair* case.

My conclusion, therefore, is that the suppliant was the "manufacturer" of all the footwear manufactured for it by Dominion within the extended meaning of "manufacturer" in the Act, and that the sales tax paid by the suppliant was paid in accordance with the Act. It is unnecessary, therefore, to consider the question as to whether the alleged applications for refund were made in accordance with the provisions of s. 46; or the other question that arose at the trial, namely, whether the suppliant had established by valid and admissible evidence the amount of the refund which it claimed.

Accordingly, and for these reasons, the Petition of Right will be dismissed and there will be a declaration that the suppliant is not entitled to any of the relief claimed therein. The respondent is entitled to costs after taxation.

Judgment accordingly.

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Sept. 10, 11, 12, 13

Nov. 16

BETWEEN:

RODI & WIENENBERGER AKTIENGESELLSCHAFT ..... APPELLANT;

AND

METALLIFLEX LTD., ... RESPONDENT.

Patent—Patent Act R.S.C. 1952, c. 203, ss. 2(j), 67 and 68—Infringement—Royalty—Power of Commissioner of Patents to grant a licence—Failure to work invention in Canada—Appeal from order of Commissioner dismissed.

Appellant's patent granted on September 7, 1954, is for an invention of a particular type of extensible chain band, more particularly a wrist watch bracelet. Respondent obtained from the Commissioner of Patents

a compulsory non-exclusive licence to manufacture and sell in Canada extensible watch bracelets embodying the features of the invention granted to appellant.

The appellant appeals to this Court from the order of the Commissioner of Patents granting the licence and further on the ground that he erred in fixing the amount of the royalty to be paid by respondent.

Held: That no satisfactory reason for failure to work the invention in Canada on a commercial scale was established and that abuse was shown to have existed before and at the time of the presentation of the respondent's application and to have persisted though somewhat alleviated up to the time of the hearing of the application.

2. That the Commissioner had exercised his discretion in favour of granting a licence and there is no good reason to interfere with his decision.

3. That the appeal be allowed as to the royalty to be paid by the respondent on the watch bracelets other than type B, and referred back to the Commissioner.

APPEAL from an order of the Commissioner of Patents.

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

Christopher Robinson Q.C. and *S. Godinsky Q.C.* for appellant.

Gordon F. Henderson Q.C. and *R. G. McClenahan* for respondent.

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

THURLOW, J. now (November 16, 1962) delivered the following judgment:

This is an appeal from a decision of the Commissioner of Patents ordering the grant to the respondent of a compulsory non-exclusive licence to manufacture and sell in Canada extensible watch bracelets embodying the features of the invention claimed in Canadian Patent No. 505676. There are two main issues in the appeal, the first being that of whether or not the Commissioner erred in concluding that the grant of a licence should be ordered and the other, which arises only if the licence was rightly ordered, being that of whether he erred in fixing the amount of the royalty to be paid by the respondent.

The patent in question which is for an invention of a particular type of extensible chain band, more particularly a wrist watch bracelet, was granted to the appellant on September 7, 1954. In this type of bracelet, the parts consist of a number of metal sleeves, leaf springs and U-bows with the addition of two end pieces for coupling the bracelet to

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the watch. Apart from the manufacture of suitable materials and tools with which to make the parts, the production of these bracelets consists of the relatively commonplace operation of stamping out the required parts by means of presses the assembling of the parts into bracelets and the cleaning, polishing and mounting or packaging for sale of the end product. The assembly portion of the operation is one which can be carried out by men or women after a comparatively short period of training and practice.

The respondent's application for a licence was made under s. 67 of the *Patent Act* R.S.C. 1952, c. 203, s-s. (1) of which provides that the Attorney General of Canada or any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging that there has been an abuse of the exclusive rights under the patent and asking for relief under the Act. Under s. 68 the Commissioner "on being satisfied that a case of abuse of the exclusive rights under a patent has been established" is authorized to exercise as he may deem expedient in the circumstances several powers which are then particularly defined, one of which is the power to order the grant to the applicant of a licence on such terms as the Commissioner may think expedient.

What is to be regarded as abuse in proceedings under these provisions is dealt with in s-ss. (2) and (3) of s. 67. Subsection (2) contains six clauses each of which defines a situation or situations in which the exclusive rights under a patent are to be deemed to have been abused and s-s. (3) declares a policy or purpose to be taken into account in determining whether there has been an abuse within the meaning of these clauses. While the respondent's application to the Commissioner alleged abuses under three of the clauses of s. 67(2) viz., clauses (*a*), (*b*) and (*d*), it will be necessary in view of the conclusion which I have reached to refer only to clause (*a*). This clause provides that:

> 67 (2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:
>
> (*a*) if the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working, but if an application is presented to the Commissioner on this ground, and the Commissioner is of opinion that the time that has elapsed since the grant of the patent has by reason of the nature of the invention or for any other cause been insufficient to

enable the invention to be worked within Canada on a commercial scale, the Commissioner may make an order adjourning the application for such period as will in his opinion be sufficient for that purpose;

The policy subsection is as follows:

(3) It is declared with relation to every paragraph of subsection (2) that, for the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.

In *Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Limited*[1] Maclean P. commented on the legislative background of these provisions as follows at p. 129:

Before referring to the provisions of the *Patent Act* relevant to the issues here, which are sections 65 to 70 inclusive, I might observe that prior to the enactment of such sections, the *Patent Act* provided that any person might apply to the Commissioner, at any time after three years from the date of a patent, for the revocation of such patent on the ground that the patented articles or process was manufactured or carried on exclusively or mainly outside Canada, to supply the Canadian market with the invention covered by the patent. The Commissioner, in the absence of satisfactory reasons as to why the article or process was not manufactured or carried on in Canada, was empowered to make an order revoking the patent forthwith, or after a reasonable interval. This provision was enacted with a view to establishing new industries in this country, but it was evidently found at times impractical, or oppressive, and it was superseded by the provisions of the *Patent Act* to which I am about to turn, which are almost identical with section 27 of the English *Patent Act*.

The development of the provisions of the English *Patent Act* referred to by Maclean P. is set out in *The Brownie Wireless Company Limited* case[2] at pages 469 to 472. In the *McKechnies Bros. Ltd.* case[3] Luxmoore J. referring to the several clauses of s. 27 of the English Act corresponding to those in s. 67(2) said at p. 446:

The Section itself defines the classes of cases in which monopoly rights under a patent shall be deemed to have been abused. These classes are obviously not mutually exclusive, and there may be considerable overlapping owing to the elasticity of the definitions contained in the Section; but it is plain that there can be no ground for relief under the Section unless the particular case can be brought within one or other of the classes defined. The classes are five in number and are set out in paragraphs (*a*) to (*e*) inclusive of subsection (2) of Section 27. In the present case *McKechnies* allege that there has been abuse of monopoly rights under three of the defined classes, namely, those under the sub-paragraphs (*a*), (*b*)

[1] [1939] Ex. C.R. 128.
[2] (1929) 46 R.P.C. 457.
[3] (1934) 51 R.P.C. 461.

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and (*d*). Paragraph (*a*) is as follows: "The monopoly rights under a patent shall be deemed to have been abused . . . if the patented invention (being one capable of being worked in the United Kingdom), is not being worked within the United Kingdom on a commercial scale, and no satisfactory reason can be given for such non-working." To fall within this class the applicants must establish, first, that the patented invention is capable of being worked in the United Kingdom, and, secondly, that it is not being worked in the United Kingdom on a commercial scale. If these points are established, the patentee is given an opportunity of establishing that there is a satisfactory reason for the non-working. It is admitted in the present case that the invention is one capable of being worked in the United Kingdom, and therefore *McKechnies* have to establish that the Patent is not being worked "on a commercial scale".

The expression "work on a commercial scale" is defined by s. 2(j) as meaning:

> the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent, in or by means of a definite and substantial establishment or organization and on a scale that is adequate and reasonable under the circumstances.

The English *Patent Act* referred to in the *McKechnie* case contained a similar definition of "working on a commercial scale" as to which Luxmoore J. commented as follows at p. 468:

> The question therefore arises, What is the meaning of the phrase "working on a commercial scale"? In ordinary parlance the phrase is used in contradistinction to research work, or work in the laboratory, but in the Section under consideration the words "worked on a commercial scale" must be read in the light of the statutory definition contained in Section 93 of the Consolidated Acts. The definition is in these words: '"Working on a commercial scale" means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent in or by means of a definite and substantial establishment or organisation, and on a scale which is adequate and reasonable under all the circumstances.' This definition is again drawn in the widest and most elastic terms, "on a scale which is adequate and reasonable in all the circumstances". I am not going to attempt any delimitation of the necessary scale beyond pointing out that it must have a definite relation to all the circumstances of the particular case. It must be adequate with reference to some particular circumstances. "Adequate" is a word imputing equality or sufficiency in a proportionate sense. In ordinary circumstances, where there is no difficulty in the way of working an invention in this country and there are no other circumstances to be considered, "adequate" would, I think, suggest a reasonably close relationship to the demand for the particular article in this country.

In the present case there is in my opinion abundant evidence that the invention is one capable of being worked in Canada and the first question to be determined is whether it was established before the Commissioner that the inven-

tion was not being worked in Canada on a commercial scale within the meaning of the statutory definition. In approaching this question a preliminary point arises as to whether the material time referred to in s. 67(2)(*a*) is the date of the filing of the application or the date of the hearing before the Commissioner. In *The McKechnie Bros. Ltd.* case Luxmoore J. considered this point and ruled that on the true construction of the paragraph corresponding to s. 67(2)(*a*) the working between the date of the filing of the application and the date of the hearing could properly be considered in arriving at a conclusion with regard to the existence or otherwise of abuse of monopoly rights and after discussing the evidence he reached the conclusion that in the particular case abuse had been established because there was not at the date of the hearing a working of the invention on a commercial scale as defined in the statute. In view of the course which the argument took in the present case it is I think worthy of note that Luxmoore J. did not hold that as a matter of construction of the section the date of the hearing was necessarily the material date or the only material date to be considered and since the case before him was one in which there had been no adequate working at any time either before or at the time of the hearing, it was unnecessary to rule in any greater detail on the question. The clause does appear to contemplate cases in which at the date of the hearing it may appear to the Commissioner that for particular reasons insufficient time has elapsed to enable the invention to be worked on a commercial scale and to empower him in such cases to postpone the proceeding and consider the situation as it may exist at a later date. To say, however, that as a matter of construction of the clause the question in every case is simply whether at the date of the hearing or of the postponed hearing, the working is on a commercial scale is I think to encourage patentees who for one reason or another may prefer not to work their inventions in Canada, to mock the statute and defeat the policy declared by s. 67(3) by doing little or nothing in the way of working the invention in Canada until an application under s. 67 is presented and then hustling to get working under way before a hearing takes place. There is no authoritative pronouncement on the point in this country and if it were necessary to rule on it, I would hesitate before adopting such an interpretation.

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On the facts of the present case, however, it is unnecessary in my view to go any further into the interpretation of the provision than Luxmoore J. went for while the picture as to working of the invention in Canada changed considerably in the period of eleven months which elapsed between the filing of the application and the hearing before the Commissioner, the result is I think the same even when the matter is viewed at the later date.

The facts with respect to the working of the invention in Canada are first that there was no working at all in the first three years following the grant of the patent except that in 1956 the respondent made some 2,200 bracelets and parts for several thousand more according to a patent which it held, but was prevented from going into full production and putting them on the market by an interlocutory injunction granted in an action brought by the appellant for infringement of the patent here in question. In November of the following year shortly after the filing by Watchstraps Inc. of an application to the Commissioner alleging abuse of the patent and asking for a compulsory licence to manufacture under it in Canada the appellant organized a Canadian subsidiary company known as Rowi Limited which at some point thereafter in 1957 or in 1958 began assembling bracelets of the patented type from parts made by the appellant in Germany. The evidence does not clearly show what facilities Rowi Limited had at the time other than an office or how many employees it had engaged in assembling bracelets. Nor is there satisfactory evidence as to the extent to which the bracelets were assembled from parts as opposed to the mere attaching of end pieces made in Germany to bracelets made and otherwise assembled in Germany. It is conceded that the mere attaching in Canada of end pieces to bracelets otherwise assembled in Germany could not be regarded as manufacture of the bracelets in Canada. In 1958 Henry Amsell, who carried on business in Montreal under the firm name of Amsell Brothers, also began assembling bracelets of the patented type for Rowi Limited and installed in the cellar of his premises several machines which had been sent by the appellant to Rowi Limited. These were presses which could be

used to make the parts for the bracelets but they were not put in use. There is evidence which I think is corroborated by the course of events which followed and which I would regard as credible that the machines were in fact brought to Canada and installed in the premises of Amsell Brothers not for the purpose of producing parts but as a camouflage in the hope of making it appear whenever necessary that the patented bracelets were being manufactured in Canada. I pause at this point to note that in considering the evidence of Mr. Loeffler who throughout this period was the sales representative of the appellant in Canada as well as the President and Managing Director of Rowi Limited, I have assumed that both Mr. Katz and Mr. Frank, the Directors of the appellant to whom he referred in his evidence, died prior to the hearing before the Commissioner. The situation as described continued until mid-February of 1961 when a change in the management of Rowi Limited and of the sales representation of both Rowi Limited and the appellant in Canada as well as a marked change in the appellant's sales and pricing policies occurred. Sales made by Rowi Limited in the years in question were as follows:

Year	*Number*	*Value*
1958	46,021	$106,215.71
1959	69,561	206,296.21
1960	5,004	15,273.05
	120,586	$327,784.97

In addition at mid-February 1961 when the change in the management of Rowi Limited took place, it had on hand 33,725 completed bracelets, 1,485 bracelets which had been assembled but not washed or polished and parts for 3,660 more. On such evidence as there is relating to the scale of Mr. Amsell's operation and to the facilities available at the premises of Rowi Limited it seems unlikely that a total of 155,796 bracelets were actually assembled in Canada in the period in question but assuming that they were so assembled the figures may be compared with the following which give the sales made by the appellant to Canadian customers of bracelets made in Germany to the end of 1960 and thus

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indicate the size of the market which was available to the appellant in Canada:

Year	*Number*	*Value*	
1953	29,261	$ 60,597.00	(U.S.)
1954	103,080	203,388.00	"
1955	177,464	346,137.00	"
1956	217,600	442,754.00	"
1957	160,170	335,800.00	"
1958	100,676	263,532.80	"
1959	61,123	104,726.77	(Can.)
		29,851.70	(U.S.)
1960	108,310	235,914.90	(Can.)
	957,684	$2,022,702.17	

In fact what was happening in the years 1958, 1959 and 1960 was that the appellant and Rowi Limited were both selling to Canadian customers. In 1958 and part of 1959 while the appellant's prices were somewhat lower than those of Rowi and in addition the appellant allowed a 5 per cent. quantity discount which Rowi could not offer the differences were apparently not of enough significance to greatly outweigh the advantage which Rowi possessed of being able to deliver more promptly and sales by Rowi increased to the point where in 1959 they were somewhat higher than those made in Canada by the appellant. In September 1959, however, the prices of bracelets sold by Rowi Limited were raised by 20 per cent, while those of the appellant remained the same and this gave the bracelets supplied by the appellant a marked advantage. Thereafter sales by Rowi Limited declined sharply while those of the appellant increased. This price policy remained in effect until March of 1961, when following the presentation of the respondent's petition, and the change in the management personnel of Rowi Limited and its sales representation and that of the appellant in Canada, arrangements were made to divert to Rowi Limited all Canadian orders for patented bracelets of the kinds which the appellant and Rowi Limited had theretofore sold on the Canadian market, all of which carried the trade mark "Fixoflex", and the prices therefor were reduced to the point where they were lower than any previous Rowi prices and only slightly above those at which the same articles had been supplied by the appellant from Germany. About the middle of March 1961 Rowi Limited acquired from another bracelet manufacturer a plant in Montreal which

included several machines and shortly afterwards the machinery formerly installed in the premises of Amsell Brothers was moved to the new location and installed there. An automatic feeding device for one of these machines was then obtained, in Montreal, and commencing in July it and the machines acquired from the other bracelet manufacturer were used to make parts for the production of the patented bracelets. In the period from the change-over to the end of November 1961, Rowi Limited sold 76,904 of the patented bracelets. In the same period, together with about three weeks of December, 1961, it produced a total of 38,954 bracelets some from parts which it had made and some from German made parts and it imported from Germany some 25,992 bracelets complete except for the attachment of end pieces which were attached in Montreal. During the same period, but commencing in June, 1961, the appellant also sold in Canada under the trade mark "Supra Fixoflex" some 13,986 bracelets of a new and more attractive type. None of this type of bracelet had been made or assembled in Canada up to the time of the hearing and there was no evidence of so much as plans to manufacture it in Canada.

The following table of production, importations and sales, month by month, for the period in question will serve to show the situation in 1961 as it appears from the evidence:

	Fixoflex Bracelets produced by Rowi	*Fixoflex Bracelets imported by Rowi*	*Supra Fixoflex Bracelets sold to Canadian customers by appellant*	*Total Fixoflex and Supra Fixoflex Bracelets imported*	*Sales of Fixoflex by Rowi*	*Total Sales by Rowi and Appellant*
Feb.					302	302
Mar.					3,561	3,561
Apr.		10,400		10,400	5,921	5,921
May	2,404				3,922	3,922
June	3,268		456	456	8,538	8,994
July	2,909		969	969	8,908	9,877
Aug.	2,977		2,846	2,846	6,933	9,779
Sept.	4,762		3,320	3,320	8,765	12,085
Oct.	6,459	6,901	220	7,121	17,864	18,084
Nov.	8,112	8,656	5,603	14,259	12,190	17,793
Dec.	6,463		572	572	(no figure given)	572
	37,354	25,957	13,986	39,943	76,904	90,890

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Leaving aside the question whether the assembly of bracelets in Canada from parts made in Germany should be regarded as manufacture of the patented invention in Canada within the meaning of the definition of s. 2(j) it is to my mind apparent that up to the time of the filing of the respondent's petition for a compulsory licence there never had been anything in the way of working the invention in Canada that could be characterized as proportionate to or as bearing any reasonably close relationship to the demand for the patented article in this country and that while the situation changed somewhat after mid-February 1961, and particularly in the latter half of that year, even then the production of the patented bracelets in Canada whether assembled from parts made in Canada or from parts made in Germany was only 38,354 against a total market enjoyed for the period of 90,890 and that even in the months of September, October and November when production was at something of a peak, it still amounted in each month to less than half of the total quantities of patented bracelets sold on the Canadian market and also to considerably less than the quantities of Fixoflex bracelets sold in Canada.

It was submitted that by some time in November production of bracelets by Rowi Limited had reached 2,150 per week which multiplied by 52 would yield a number sufficient to meet the yearly Canadian market then available to the appellant and that accordingly at the time of the hearing the scale of manufacture by Rowi was adequate within the meaning of the definition. As to this it may first be observed that the production figures show that if the scale actually reached 2,150 in a week in November it was not maintained for the whole month, though it may have been maintained for the first three weeks of December. I do not think however that the problem is to be resolved by directing attention to a scale of production over so short a period for if working for a short period were sufficient it would be just as logical to say that the scale was adequate because on the day or in the last hour or minute before the hearing so many articles were produced, which to my mind would be absurd. Capacity to manufacture on an adequate scale is one thing. Actual manufacture is quite a different thing. The evidence that in the last three or four weeks before the hearing Rowi had produced on a scale of 2,150 per week

may well indicate that at the time of hearing it had the capacity to produce on a scale sufficient to supply the available Canadian market for a year. But though Rowi had been in existence for upwards of four years it had never operated for a year on anything approaching such a scale and it is only if the expectations of the production manager of Rowi Limited, who was not a policy maker, are taken as fact (an assumption which on the evidence I would not regard as justified) that one could be led to think that Rowi's production was in fact on a scale approximately equal to the available Canadian market. The cold facts are that in no year and in no month or season for which figures were given in the whole four-year history of Rowi had its scale of production equalled or even approached the market for that year or that month or that season.

In view of these facts and having regard also to the nature of the invention, the comparatively short time required to establish a plant for the manufacture of it in Canada, and to the time which had elapsed since the grant of the patent as well as to the size of the Canadian market which is shown to have been available to the appellant during that period, I am of the opinion that it has been established that the invention was not being worked on a scale that was adequate in the circumstances within the meaning of s. 2(j) either before or at the time of the presentation of the respondent's application or at the time of the hearing.

Having reached this conclusion, from which it follows that the invention was not being worked on a commercial scale within the meaning of the statutory definitions, it becomes necessary to consider whether the failure to work the invention on a commercial scale amounted to abuse within the meaning of s. 67(2). At this point, as pointed out by Luxmoore J. in the first of the passages cited from the *McKechnie* case, the patentee is given an opportunity of establishing that there is a satisfactory reason for the non-working. The position taken by the appellant on this question was that the provisions of the *Patent Act* respecting abuse are founded upon an underlying assumption that the patent is effective in affording to the patentee quiet enjoyment of the monopoly, that in the period from 1954 to the end of 1960 the appellant was faced with the competition of massive importations into Canada of cheap bracelets which infringed the patent and until December

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1960 was engaged in litigation with the respondent and others in which the validity of the patent was in issue, that the cheap infringing imports in effect took two-thirds of the Canadian market and except in the Province of Quebec could not be effectively stopped because interlocutory injunctions could not be obtained in infringement actions while the validity of the patent had not been established, that this afforded a sufficient reason to justify no working at all in Canada until the patent's validity was firmly established by the judgment of the Supreme Court of Canada in December 1960, that the assembling of bracelets in Montreal by Rowi Limited and Amsell Brothers however constituted some working of the invention even in that period when the patent was not effective to afford a full monopoly and that in the meantime sales of the patented bracelets in Canada had been falling and by the time of the hearing of the respondent's application before the Commissioner in December 1961 the production of bracelets by Rowi Limited had been increased and had reached a scale substantially equivalent to the Canadian market which the appellant and its subsidiary enjoyed.

There is on the evidence no reason to doubt that not long after the grant of the patent imported bracelets which infringed the patent made their appearance on the Canadian market and though the situation improved to some extent after a number of infringement actions had been brought by the appellant, in three of which interlocutory injunctions effective in the Province of Quebec were obtained, in general it continued throughout the period to the end of 1960 and reached a high point in 1958 and 1959. None of the actions had, however, come to trial when in October 1957 Watchstraps Inc., one of the parties against whom an injunction had been obtained, filed an application alleging abuses of the patent under clauses (a), (b) and (d) of s. 67(2) and asking for a compulsory licence. In April 1958 the action against Watchstraps Inc. as well as that brought against the respondent came to trial but judgment was reserved and had not been delivered when in July 1958 the appellant filed its counterstatement opposing the application for a compulsory licence. In it the appellant asserted that the patented invention was being worked in Canada on a commercial scale since November 8, 1957 by Rowi Limited and consisted in the assembly to form the

patented bracelets of sleeves, U-shaped bows, leaf springs and connecting members obtained from the appellant in Germany, that since the date such manufacture began importations of the patented bracelets had gradually declined until at that time about half the entire Canadian demand for the patented bracelets was being supplied exclusively with bracelets manufactured by Rowi Limited, that a major proportion of then present importations were on the basis of contracts entered into for the year 1958 before manufacture in Canada had been established, that at the beginning of 1958 Rowi Limited bought from the appellant a manually operated machine and dies for the production in Canada of parts for the bracelets which machines were received in March or April and experimental operations were caried on with them but it was found that having regard to the wages required to pay operators of the machines the price of the parts would be substantially in excess of the duty paid price of parts imported from Germany, that following such experimental operations arrangements had been made for the appellant to supply to Rowi Limited automatic machinery for the production of the parts, that such machinery had been ordered and delivery of it was expected in August when it would be put into operation by Rowi Limited promptly and would thereafter be used to produce the parts in Canada and that it was expected that by the end of 1958 the entire Canadian demand for the patented bracelets would be supplied by bracelets made in Canada from component parts also made in Canada. The statement went on to say that the appellant had asserted its patent against the sale by the applicant of watchstraps alleged to embody the invention of a patent of which the applicant claimed to be the owner, and that the appellant was awaiting the judgment of the Superior Court of the Province of Quebec in the action which had been tried at Montreal in April 1958, but nowhere in the statement is there any suggestion whatever that either infringing imports or challenges to the validity of the appellant's patent had anything to do with the failure to work the invention in Canada on a commercial scale within the meaning of the statutory definition. Nor was any explanation offered as to why there had been nothing in the way of working the invention in Canada or of preparation for such working in the three-year period from

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the grant of the patent in September 1954 to November 7, 1957.

What happened afterwards with respect to the application does not appear in the record of these proceedings but as no mention was made of any licence or of any working of the invention in Canada by any licencee other than Rowi Limited, it is a safe assumption that no licence had been granted on it up to the time of the hearing before the Commissioner in the present proceedings.

In September 1958 judgments were given in the actions tried in April 1958 and by these it was held that claims 1 and 2 of the appellant's patent were invalid and that while claim 3 was valid, it had not been infringed except by certain of the bracelets sold by Watchstraps Inc. The appellant thereupon appealed to the Court of Queen's Bench in both cases and the interlocutory injunctions were continued in effect but apparently following the trial judgment competition from infringing imports increased. In June of the following year, the judgment in the case of the respondent was reversed and claims 1 and 2 were held to be valid and infringed by a bracelet made according to a patent held by the respondent. Shortly after this success, in September 1958, the price difference which had already been referred to was established. The customers were advised that the increase in the price of bracelets assembled in Canada was due to "augmentation of costs for wages, manufacturing improvements (installation of modern automatic machinery), general overhead, advertising, etc., which price increase was long since due to appear." That these were in fact the reasons for the increase was not established. On the contrary the evidence shows that they were not the reasons. At that time the policy being followed was to divert the orders as far as possible to the appellant and the establishment of the price difference was one of the ways adopted to carry the policy into effect.

It was also submitted in argument that the reason was that Rowi Limited was not making a profit. While there was general evidence that Rowi Limited was not showing a profit and at times could not pay the 50¢ per bracelet royalty imposed by the appellant no evidence of its profit and loss accounts, from which one might assess its profit or loss situation, was given and having regard also to the unexplained substantial price reduction put into effect in

March 1951 when the changeover took place, I do not regard it as established that Rowi Limited either did not or could not operate at a reasonable profit or that its failure to make a profit was the reason for the price increase.

While the price increase was in effect an appeal from the judgment of the Court of Queen's Bench of the Province of Quebec was taken by the respondent to the Supreme Court of Canada and on December 19, 1960 the judgment was affirmed. About a fortnight later, on January 7, 1961 the respondent's application for a compulsory licence was filed.

Turning now to the particular reasons for non-working advanced by the appellant, it is first to be observed that neither the infringing imports nor the challenge to the validity of the patent was mentioned in the counter-statement filed in July 1958 in opposition to the application of Watchstraps Inc. for a compulsory licence nor was evidence led that these were in fact the reasons why the invention was not worked in Canada to an extent commensurate with the available market in the period from the grant of the patent in 1954 to the end of 1960. On the evidence the failure to work appears to me to have been entirely a matter of choice on the part of the appellant for as I view it there was never any real difficulty in obtaining a substantial market or in organizing manufacture in Canada and the fact that the appellant when spurred by an application for a compulsory licence sent machinery to Canada and in its counterstatement opposing the application referred to plans to manufacture on a scale sufficient to meet the whole Canadian market appears to me to indicate that it recognized at the time that it had no saisfactory reason for not working the invention on a scale to supply the market available to it. Moreover, while the judgment of the Quebec Superior Court in September 1958 holding claims 1 and 2 of the patent invalid may have afforded some reason for not immediately pursuing the plans which had been set out in the counterstatement, if indeed such plans ever existed, on the evidence there was no justification following the reversal of that judgment in June 1959 either for failure to proceed with the plans or for the appellant's conduct in so raising the price of Rowi produced bracelets as to make it impossible for them to compete on the Canadian market

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with those made by the appellant in Germany. It is also clear that the patent was never entirely ineffective for even while the litigation was in progress it served to prevent at least one Canadian manufacturer from producing bracelets embodying the features of the invention who but for the injunction obtained by the appellant would undoubtedly have been producing such bracelets for the Canadian market on a considerable scale, and it is not improbable that it served to deter others as well. It is apparent as well that regardless of the extent of infringing imports on the Canadian market the appellant throughout this period in fact enjoyed a very sizeable market for its patented bracelets and while I am not prepared to adopt the appellant's submission that there is any unexpressed assumption such as that suggested underlying the abuse provision of the *Patent Act* on the facts of the present case even assuming that the presence of the infringing bracelets on the market which the patentee was temporarily unable to prevent constitutes a satisfactory reason for failure to manufacture in Canada to an extent sufficient to supply the whole Canadian demand, in the circumstances of this case it affords, in my opinion, no satisfactory reason for failure to work the invention on a scale sufficient to meet the market which the patentee in fact enjoyed in Canada. Finally, with respect to 1961, the facts as to production of the bracelets in Canada which have already been set out do not bear out the submission that such production was sufficient to supply the market available to the appellant in Canada which even though it had been declining to some extent since the peak year 1956 still remained a very considerable market accounting in less than ten months for sales in excess of 90,000 bracelets. On the facts disclosed and having regard to s. 67(3) I am of the opinion that no satisfactory reason for failure to work the invention in Canada on a commercial scale has been established and that the case is one in which abuse within the meaning of s. 67(2)(a) is shown to have existed both before and at the time of the presentation of the respondent's application and to have persisted, though alleviated to some extent in the meantime, up to the time of the hearing.

Moreover, having regard to the length of time which had elapsed from the grant of the patent and also to the length of time which had elapsed from the time of the presentation of the petition as well as to the comparatively short time required and the other factors involved in getting into full production and to the other features of the case appearing from the evidence, I would have no confidence that production by Rowi would ever reach an adequate scale over a prolonged period or even be maintained at the scale it reached in the latter part of 1961 if the respondent's application were dismissed and because of the prior conduct of the appellant with respect to its statutory obligations I would not regard the case as one in which delay in exercising the powers committed to the Commissioner by s. 68 was warranted. The Commissioner exercised his discretion under that section in favor of granting a licence and in my opinion there is no good reason to interfere with his decision. On the main issue the appeal accordingly fails.

There remains the question whether the Commissioner erred in fixing the royalty to be paid by the respondent at 10¢ per bracelet. The Commissioner gave no reasons for his decision on this point other than that a straight royalty on pieces would involve easier computation and accounting than one based on selling price. The appellant submitted that the amount fixed was unreasonably low, that the royalty should have been a percentage of the selling price and that it should have been set at not less than 10 per cent. thereof. It is to be observed, however, that the appellant had offered no evidence to support such a claim. Vide the comments of Rand J. in *Parke Davis & Co. v. Fine Chemicals of Canada Limited*[1] at p. 223.

As the selling prices of both stainless steel and rolled gold plate bracelets exceed $1, a 10 per cent. royalty on such sale price would in all cases yield more than the 10¢ fixed by the Commissioner. According to the cost figures of the Bandmaster bracelet put in evidence by the respondent such a royalty would take all the 24¢ per bracelet profit to be expected from production of rolled gold plate bracelets leaving the licencee to operate at a loss of 1¢ per bracelet

[1] [1959] S.C.R. 219.

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if the bracelet were to be sold at the proposed price, and it would take 15¢ out of an anticipated profit of 26¢ per bracelet to be realized on sale of stainless steel bracelets at the proposed price. The Fixoflex and Supra Fixoflex bracelets sell at prices somewhat higher than the proposed prices of the Bandmaster bracelet but it was not suggested that the latter would be able to compete with the Fixoflex or Supra Fixoflex bracelets if the proposed prices of Bandmaster bracelets were raised and having compared the samples put in evidence I would not expect that the Bandmaster bracelets could compete with them except at a lower price. The figures given by the respondent related however only to the cost of producing the Bandmaster bracelets which are made according to the respondent's patent and I would not assume that they are applicable as well to production of bracelets similar to the Fixoflex or Supra Fixoflex. On the whole, there appears to me to be sufficient evidence to support, and I see no sufficient reason to interfere with, the Commissioner's decision, so far as the Bandmaster bracelets are concerned, to fix the royalty on a per bracelet basis, and to set it at 10¢ per bracelet but as there was in my opinion no sufficient evidence led by either party on which to base, having regard to the considerations mentioned in s. 68(a) of the Act, a determination of royalty to be paid in respect of other types of bracelets of the patented kind with respect to them I shall follow the course adopted by the Supreme Court in *Parke Davis & Co. v. Fine Chemicals of Canada Ltd.*[1] and refer the matter back to the Commissioner.

The appeal will be allowed to the extent indicated and the matter of the royalty on bracelets made according to the appellant's patent other than "Bandmaster" bracelets made according to the respondent's patent will be referred back to the Commissioner. In other respects the appeal will be dismissed. There will be no order as to costs of the appeal.

Judgment accordingly.

[1] [1959] S.C.R. 219.

ENTRE:

1962

septembre 14

octobre 30

LE MINISTRE DU REVENU NATIONAL ..... APPELANT;

ET

EASTERN ABATTOIRS LIMITED ..... INTIMÉE.

Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, arts. 3, 6 a)(iv), 139(1)(ar)—Employeur et employé—Fonds de pension—Plan de pension de retraite—Prestations de pension de retraite—Appel rejeté.

De 1946 à 1955 inclusivement l'intimée, alors une filiale de la compagnie de chemin de fer Pacifique Canadien, et ses employés qui y avaient préalablement consenti, versaient chacun, de leur côté, au fonds de pension de cette compagnie ferroviaire la part requise d'eux par les règlements du fonds. Par suite de la vente de son capital-actions en avril 1955 à des tiers, l'intimée cessait d'être une filiale du Pacifique Canadien et ne pouvait plus se prévaloir tant pour elle-même que pour ses employés dudit plan de pension. La compagnie ferroviaire désireuse de faire bénéficier l'intimée de la réserve en sa faveur au fonds de pension, lui proposa d'en continuer un autre, en dehors et différent du premier et sans la participation du Pacifique Canadien, après consultation avec ses employés qui auraient à choisir entre la continuation d'un tel plan de pension ou le remboursement de leurs souscriptions. Ces derniers ayant opté pour la seconde alternative, le montant ainsi versé par l'intimée au fonds lui fut remboursé moins certaines retenues pour fins de contingence dudit plan de pension. Soutenant que ce montant était imposable par le jeu de l'art. 3, et de l'art. 6 *a*)(iv) combiné avec l'art. 139(1)(*ar*) de la *Loi de l'impôt sur le revenu,* ch. 148, S.R.C. 1952, le Ministre l'ajouta au revenu imposable déclaré par l'intimée pour l'année d'imposition 1956. Portée en appel devant la Commission d'appel de l'impôt la cotisation du Ministre fut annulée quant à ce montant. D'où le présent appel à cette Cour.

Jugé: L'appel est rejeté.

2. Le montant ainsi reçu, par l'intimée n'est pas imposable, par l'effet de l'article 3 seul de la Loi car il n'est relié à aucune des sources de revenu qui y sont énumérées.

3. Ce montant n'est pas non plus, imposable par le jeu combiné de l'article 3 et de l'article 6 *a*)(iv) de la Loi parce que, tenant compte du sens à donner aux termes «prestations», «pensions de retraite» et «pension», l'article 6 *a*)(iv) comprend dans le calcul du revenu d'un contribuable pour une année d'imposition tout montant alors reçu «à titre, à compte ou au lieu de paiement ou en acquittement» *de bienfaits ou avantages par la suite de la mise à la pension d'un employé.* Dans le présent cas, le montant reçu par l'intimée, qui, du reste, n'était pas un employé, ne tombe pas dans cette catégorie, se résumant à un simple transfert de fonds dont la seule relation avec le plan de pension de ses employés consiste à inclure la majeure partie des souscriptions qu'elle avait fournies et versées, irrévocablement et sans espoir de recouvrement.

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4. Il n'est pas, en troisième lieu, imposable par le jeu de l'article 139(1)(*ar*) combiné avec les articles 6 *a*)(iv) et 3 de la Loi car l'article 139(1)(*ar*) doit, dans le présent cas, être conditionné par l'article 6 *a*)(iv) et il ne peut s'agir que de montants reçus par un employé pour l'avantage duquel, seulement, le plan de pension existe. Telle interprétation du sous-paragraphe (iv) de l'article 6 *a*) est davantage renforcée par le texte des sous-paragraphes (v) et (vi) du même article 6 *a*) qui, dans chacun des cas qui sont prévus dans les trois sous-paragraphes, établit qu'il ne peut s'agir que d'un montant reçu d'un fonds ou d'un plan de pension par un employé.

5. Il est fondamental qu'un impôt ne peut être imposé que par un texte clair. Or il est impossible de conclure que l'article 139(1)(*ar*) permettrait à l'article 6 *a*)(iv) de la *Loi de l'impôt sur le revenu* d'englober comme revenu imposable un montant reçu par un employeur dans les circonstances du présent cas lorsque cet article 6 *a*)(iv) ne prévoit que les montants reçus par un employé et comme rien d'autre dans ladite Loi ne permet de considérer ce montant comme un revenu, il n'est pas imposable.

APPEL d'une décision de la Commission d'appel de l'impôt.

L'appel fut entendu par l'Honorable Juge Noël, à Québec.

Paul Boivin c.r. pour l'appelant.

L. Galipeault c.r. pour l'intimée.

Les faits et les questions de droit soulevées sont exposés dans les motivés du jugement que monsieur le Juge Noël rend maintenant (30 octobre 1962):—

Le Ministre du Revenu national excipe par le présent appel d'une décision de la Commission d'appel de l'impôt en date du 21 septembre 1960[1], maintenant l'appel de l'intimée (parfois ci-après appelée le contribuable) relativement à la cotisation pour l'année d'imposition 1956 du contribuable Eastern Abattoirs Ltd, de la cité de Montréal, province de Québec, par laquelle le Ministre avait augmenté son revenu imposable déclaré d'un montant de $63,605.15 portant ainsi ce revenu à la somme de $302,797.75.

Le dossier du présent appel, comme celui utilisé devant la Commission d'appel de l'impôt d'ailleurs fut constitué par le moyen d'une admission de faits signée par les procureurs au dossier des deux parties en cause.

Ce document révèle que toutes les actions ordinaires de l'intimée Eastern Abattoirs Ltd appartenaient en 1945 à

[1] (1960) 25 Tax A.B.C. 209.

Canadian Pacific Railway Company et qu'en cette même année, à titre de subsidiaire, l'intimée s'était prévalue du consentement de ses employés des avantages du fonds de pension de Canadian Pacific Railway Company, le tout conformément audit plan de pension produit comme pièce A-1. De 1946 à 1955 inclusivement, le contribuable versa à ce fonds de pension un montant de $76,120.47 et les employés de leur côté versèrent pendant la même période les montants requis conformément aux règlements du fonds de pension.

Le 19 avril 1955, le capital-actions alors en cours de l'intimée fut vendu à un M. Maurice Lemelin, industriel de la cité de Québec, agissant tant pour lui-même que pour des tiers et par conséquent l'intimée n'était plus, à partir de cette date, une subsidiaire de Canadian Pacific Railway Company et ne pouvait par conséquent continuer à bénéficier ou à se prévaloir tant pour elle-même que pour ses employés dudit plan de pension.

Les officiers du fonds de pension du Canadian Pacific Railway Company décidèrent alors de faire bénéficier l'intimée de la réserve alors en sa faveur au fonds de pension, soit un montant de $63,605.15 en vue de la continuation d'un fonds de pension en dehors et différent de celui de Canadian Pacific Railway Company et sans la participation de cette dernière et de consulter les employés de l'intimée sur la question de savoir s'ils préféraient la continuation d'un tel fonds de pension ou le remboursement de leurs souscriptions. A ces fins, M. Maurice Lemelin, au nom de l'intimée, requit Canadian Pacific Railway Company de transmettre à Sun Life Insurance Company of Canada ladite somme de $63,605.15, ce qui s'effectua le 19 avril 1955 dans une lettre portant cette même date et signée par M. B. Unwin, vice-président de Canadian Pacific Railway Company.

Le 3 mai 1955, par une lettre portant cette date, les officiers de Amalgamated Meat Cutters & Butchers Workmen of North America, Local n° 66, représentant les employés de l'intimée informèrent cette dernière que ses employés, au cours d'une assemblée, avaient à l'unanimité décidé de ne plus avoir de fonds de pension et désiraient recevoir le remboursement de leurs souscriptions.

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Sun Life Insurance Company of Canada avertie par l'intimée de la décision des employés lui versa le 6 juin 1955 la somme de $63,605.15.

Ce montant, si on se réfère à la lettre de M. B. Unwin, vice-président du département des finances de Canadian Pacific Railway Company représente: «The full amount heretofore contributed by Eastern Abattoirs Ltd to Canadian Pacific Railway Company and representing a contingent provision for pensions based on a percentage of its payroll for employees during a portion of the period and their eligibility under the pension rules of Canadian Pacific Railway Company.»

Le montant de $12,515.32, soit la différence entre $76,120.47 et $63,605.15, semble par conséquent avoir été dépensé dans l'intérêt des pensionnés ou avoir été retenu pour pourvoir aux contingences dudit plan de pension.

A tout événement, ce montant de $63,605.15, suivant l'intimée, fait inattendu, lui est parvenu par ricochet en passant d'abord par la Sun Life Insurance Company of Canada et serait, quant à elle, de la manne tombée du ciel. En effet, elle prétend qu'elle n'avait aucun droit à ce montant et que, d'autre part, ni le Canadian Pacific Railway Company ni la Sun Life Insurance n'avaient l'obligation de la lui verser. Elle soutient, par conséquent, que ce montant ne peut être considéré comme un revenu taxable en vertu de la Loi de l'impôt et que partant, ce montant n'est pas imposable.

D'autre part, selon l'appelant, le montant serait imposable par le jeu de l'article 3, et de l'article 6 *a*)(iv) combiné avec l'article 139(1)(*ar*) de la *Loi de l'impôt sur le revenu,* lesquels articles se lisent comme suit:

3. Le revenu d'un contribuable pour une année d'imposition, aux fins de la présente Partie, est son revenu pour l'année de toutes provenances à l'intérieur ou à l'extérieur du Canada et, sans restreindre la généralité de ce qui précède, comprend le revenu pour l'année provenant

a) d'entreprises,

b) de biens, et

c) de charges et d'emplois.

6. Sans restreindre la généralité de l'article 3 doivent être inclus dans le calcul du revenu d'un contribuable pour une année d'imposition

(*a*) les montants reçus dans l'année à titre, à compte ou au lieu de paiement ou en acquittement

. . .

(iv) de prestations de pension de retraite ou de pension,

139(1)(*ar*):

(*ar*) «prestation de pension de retraite ou de pension» comprend tout montant reçu sur un fonds ou plan de pension de retraite ou de pension ou en conformité d'un tel fonds ou plan;

En effet, il ne pourrait être imposable par l'effet de l'article 3 seul car il ne s'agit pas d'un revenu provenant de l'entreprise de l'intimée ou de ses biens ni de charges et d'emplois.

Il ne s'agit pas non plus d'un montant provenant des fruits de son entreprise ni d'un montant qui les remplacerait.

Il ne serait même pas imposable par le jeu combiné de l'article 3 et de l'article 6 *a*)(iv) puisqu'elle n'a pas reçu ce montant à titre, à compte ou au lieu de paiement ou en acquittement de prestations de pension de retraite ou de pension.

En effet, si on s'en tient à la signification des mots «pension de retraite ou pension» suivant le dictionnaire l'on voit que les mots «pension de retraite» veulent dire des montants payés par suite de la limite d'âge et «pension» tous montants payés en considération de services passés.

Les mots anglais «superannuation or pension benefits» ont le sens suivant dans «The Shorter Oxford English Dictionary»: «to superannuate; to dismis or discharge from office on account of age; esp. to cause to retire from service on a pension; to pension off;» et «pension» est défini comme suit: «an annuity or other periodical payment made esp. by a government, a company or an employer of labour in consideration of past services or of the relinquishment of rights, claims or emoluments.»

Quant au mot «prestation» pour en déterminer le sens, il faut se référer au texte anglais qui, comme nous l'avons vu, emploie le mot «benefit» lequel, d'après le dictionnaire, veut dire «avantage ou bienfait».

L'article 6 *a*)(iv) veut donc dire que doivent être inclus dans le calcul du revenu d'un contribuable pour une année d'imposition les montants reçus dans l'année à titre, à compte ou au lieu de paiement ou en acquittement de bienfaits ou avantages par suite de la mise à la pension d'un employé.

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Le montant reçu par l'intimée, qui d'ailleurs n'est pas un employé, ne tombe sûrement pas dans cette catégorie puisqu'il se résume à un simple transfert de fonds dont la seule relation avec le plan de pension de ses employés est qu'il comprend la majeure partie des souscriptions de l'intimée à ce plan, souscriptions d'ailleurs que l'intimée en vertu de la Loi fournit irrévocablement et qu'elle a versées sans espoir de les recouvrer jamais.

Ce montant de $63,605.15 serait-il imposable par le jeu de l'article 139(1)(*ar*) combiné avec 6 *a*)(iv) et 3 de la *Loi de l'impôt sur le revenu*? L'appelant le soutient en soumettant que la Loi (article 139(1)(*ar*)) dit que tout montant reçu d'un fonds de pension sans spécifier que cela soit par l'employé seulement et sans faire d'exception pour l'employeur doit être inclus dans le calcul du revenu d'un contribuable. Il ajoute que ceci est d'ailleurs conforme à un principe fondamental de la *Loi de l'impôt sur le revenu* à savoir que des dépenses admises dans une année donnée (les souscriptions de la compagnie au plan de pension déduites comme dépenses dans l'année où elles ont été dépensées) et récupérées dans une année subséquente seraient imposables dans l'année de la récupération.

Il est vrai que la *Loi de l'impôt sur le revenu* prévoit dans certains cas la taxation de certains montants déduits et plus tard récupérés mais seulement lorsqu'un texte de la Loi le prévoit clairement.

L'article 6 *a*)(iv) combiné avec l'article 139(1)(*ar*) prévoit-il la taxation de tout montant reçu et provenant d'un plan de pension ou ne prévoit-il que les montants qui sont reçus par un employé à l'occasion de sa mise à la retraite ou de la réception d'une pension.

Il me semble que donner aux articles 6 *a*)(iv) et 139(1)(*ar*) le sens que veut lui donner l'appelant serait faire violence aux textes et aller au delà de ce que le législateur a décrété.

En effet, l'article 139(1)(*ar*) doit dans le présent cas être conditionné par l'article 6 *a*)(iv) et il ne peut s'agir que de montants reçus par un employé pour l'avantage de qui seul, d'ailleurs, le plan de pension de retraite existe.

Le sens du sous-paragraphe (iv) de l'article 6 *a*) m'apparaît encore davantage conforme à l'interprétation pré-

citée si on le lit avec les sous-paragraphes (v) et (vi) du même article 6 *a*) qui se lisent comme suit:

> 6. Sans restreindre la généralité de l'article 3, doivent être inclus dans le calcul du revenu d'un contribuable pour une année d'imposition
>
> (*a*) les montants reçus dans l'année à titre, à compte ou au lieu de paiement ou en acquittement
>
> . . .
>
> (iv) de prestations de pension de retraite ou de pension,
>
> (v) d'allocations de retraite, ou
>
> (vi) de prestations consécutives au décès.

En effet, cet article 6 *a*) et les trois sous-paragraphes déclarent tout simplement que les paiements provenant d'un fonds ou d'un plan de pension de retraite ou de pension doivent être taxés lorsqu'ils sont reçus, soit quand l'employé est mis à sa retraite par suite d'une limite d'âge ou mis à sa pension tout simplement et c'est le cas prévu par (iv) ci-dessus, soit quand il résigne et c'est le cas prévu par (v) soit quand il meurt et c'est le cas prévu par (vi). Ceci établit donc clairement qu'il ne peut s'agir que d'un montant reçu d'un fonds ou d'un plan de pension par un employé.

Il est fondamental qu'un impôt ne peut être imposé que par un texte clair. Or il m'est impossible de conclure que l'article 139(1)(*ar*) permettrait à l'article 6 *a*)(iv) de la *Loi de l'impôt sur le revenu* d'englober comme revenu imposable un montant reçu par un employeur dans les circonstances ci-haut mentionnées lorsque cet article 6 *a*)(iv) ne prévoit que les montants reçus par un employé et comme rien d'autre dans ladite Loi ne permet de considérer ce montant de $63,605.15 comme un revenu, il n'est pas imposable.

Pour tous ces motifs, il y a lieu de renvoyer le présent appel, l'intimée ayant droit à tous ses honoraires taxables, et de déférer le tout au Ministre pour qu'il émette une nouvelle cotisation déduisant du revenu de l'intimée pour l'année 1956 ladite somme de $63,605.15.

Jugement en conséquence.

1962
Mar. 20, 21, 22
1963
Jan. 18

BETWEEN:

HANS-EDWIN REITH AND ORION SCHIFFAHRTS-GESELLSCHAFT REITH & CO. .....PLAINTIFFS;

AND

ALGOMA CENTRAL & HUDSON BAY RAILWAY COMPANY ... } DEFENDANT.

Admiralty—Collision on Great Lakes—Apportionment of negligence—Damages.

Plaintiffs' Ship *B* and defendant's ship *A* collided in Lake Huron and the plaintiffs sue for damages and the defendant counter-claims. The collision occurred in United States territorial waters at a point about midway between the Lake Huron lightship and the northern end of a dredged channel which extends from the northern end of the St. Clair River northwardly for approximately six miles into Lake Huron. It was convenient for an upbound ship intending to take the westerly course to keep to the western side of the channel and pass any downbound traffic starboard to starboard. Ship *A* was upbound on the western side of the channel going to Sault Ste. Marie. Ship *B* after leaving an anchorage about a mile to the north-eastward of the lightship proceeded with her engines at full speed ahead in a semi-circular north to south-westerly course toward the channel entrance. She had observed ship *A* proceeding northwardly in the western side of the channel. Ship *B* blew a single blast of her whistle to indicate she was keeping her course and speed. There was no reply. The signal was repeated four or five times in eight minutes and ship *B* kept her course with her speed increasing. When ship *A* was four or five ship lengths from ship *B* the master of ship *B* observed several puffs of steam from ship *A* which though he heard nothing, he took to be a danger signal and immediately ordered full speed astern and hard astarboard in an effort to avoid the collision which occurred about two minutes later.

Held: That ship *A* was two-thirds to blame and ship *B* one-third to blame.

2. That ship *B* was at fault in creating the risk of collision by directing her course to the portion of the channel being navigated by ship *A* without waiting until that ship had cleared the channel.

3. That ship *A* was at fault in holding her course and speed along the western side of the channel until there was imminent danger of collision, without having signalled her intention, and without having ascertained by signal or otherwise whether the course ship *B* was following would cross her own, and without having obtained the concurrence of ship *B* for a starboard to starboard passing, or having taken in due time the action required by the crossing rule to keep out of her way, and in having negligently pursued her course for a time even after hearing ship *B's* signal and thereby made the collision inevitable despite the action of ship *B* to avoid it.

ACTION by plaintiffs and counter-claim by defendant to recover damages resulting from collision of two ships.

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The action was tried before the Honourable Mr. Justice Thurlow at Ottawa.

R. C. Holden, Q.C. and *A. S. Hyndman* for plaintiffs.

F. O. Gerity, Q.C. for defendant.

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

THURLOW J. now (January 18, 1963) delivered the following judgment:

In this action the plaintiffs claim and the defendant counterclaims damages arising from a collision which occurred in Lake Huron on November 11, 1960 between the plaintiffs' ship *Beteigeuze* and the defendant's ship *Algosoo*.

The collision occurred in United States territorial waters at a point about midway between the Lake Huron light ship and the northern end of a dredged channel which extends from the northern end of the St. Clair River northwardly for approximately six miles into the lake. The channel was 800 feet wide and was marked at intervals of approximately one mile on its western side by black buoys numbered B1, B3, B5, B7, B9 and B11, B11 being the northernmost buoy, and on its eastern side by red buoys numbered R2, R4, R6, R8, R10 and R12. From B1 to B7 the course of the channel was approximately true north but between B7 and B11 it was 5° T. The light ship was located 1,500 feet to the northwestward of B11 on a bearing of 341° T. from it. The channel was dredged to a depth of 30 feet, the water on either side of the most northerly mile of it being from 25 to 30 feet deep. North of the northern end of the channel the water gradually deepens.

To the eastward of the light ship and 1,000 feet from it is a point shown on the charts at which the lines of four courses commonly used by upbound and downbound ships meet. The most easterly and the most westerly of these are upbound courses leading to eastern and western Lake Huron ports respectively and between them are two downbound courses from the same ports. An upbound ship leaving the channel from the eastern side and intending to take the easterly course would thus experience no problem with ordinary downbound traffic in getting on her course but

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from the same position one intending to take the westerly upbound course might well be delayed if there was a stream of downbound traffic in the vicinity as she would be unable to cross its path and would be obliged to wait for it to pass before getting on her course. For this reason it was generally more convenient for an upbound ship intending to take the westerly course to keep to the western side of the channel and pass any downbound traffic starboard to starboard.

On the morning of the collision the visibility was excellent, the wind was south-southwest at 25 to 30 miles per hour and the current was negligible.

The *Beteigeuze* is a single screw steel steamship of the Port of Hamburg of 4,929 tons gross and 2,778 tons net register, 442 feet in length and 58 feet 4 inches in beam. She was commanded by Captain Gustav Theodore Peterson, who was on his first voyage through the Great Lakes, and at the particular time was downbound from Saginaw, Michigan to Detroit. She was carrying a cargo of 4,445 tons and was drawing 18 feet 7 inches.

The *Algosoo* is a single screw steel steamship registered in Sault Ste. Marie. She is 346 feet long, 48 feet wide and of 3,373 tons gross and 2,152 tons net register. She was commanded by Captain Frank G. Wagg and was upbound from Toledo to Sault Ste. Marie with a load of coal. Her draught was 20 feet 2 inches. Both vessels were equipped with radio-telephones.

The *Beteigeuze* left Saginaw on November 10th and on reaching the vicinity of the northern entrance to the channel early the following morning anchored about a mile to the eastward of the Lake Huron light ship, to wait for a pilot to take her through the St. Clair River. Several hours later on being advised by radio-telephone from Sarnia to proceed in to meet the pilot she hove anchor and at 10:17 proceeded at full steam ahead to shape a semicircular course first to the northwestward and then around to the southwest toward the northern entrance of the channel. This movement according to the evidence of her master ultimately brought the ship on a course of about 210° or 215° T. with the B11 buoy slightly on the port bow. By this time the *Algosoo* had been observed proceeding northwardly in the western side of the channel some three to four miles away with another ship, the *Joe S. Morrow* also on the western

side of the channel following her about three-quarters of a mile astern, and the *Beteigeuze* thereupon blew a single blast of her whistle to indicate that she was keeping her course and speed. There was no reply and in the period of about eight minutes which followed she repeated the signal four or five times and meanwhile kept her course with her speed increasing as she worked up toward her full speed of nine knots. Though the *Algosoo* had been observed to be on the western side of the channel the master of the *Beteigeuze* expected her as the give away ship in a crossing situation to alter course to starboard and pass astern of the *Beteigeuze* and he gave no consideration to deferring his approach to the channel entrance until the *Algosoo* and the *Joe S. Morrow* had cleared it. The *Algosoo* however continued on for about two miles without changing her course or speed and, according to Captain Peterson, when she had passed B11 but was still close to it and the *Beteigeuze* was four or five ship lengths from her and moving at about seven knots he observed several puffs of steam which, though he heard nothing, he took to be a danger signal. He thereupon immediately ordered full speed astern and hard astarboard in an effort to avoid a collision. The *Beteigeuze* turned rapidly to starboard and her speed was reduced but a collision nevertheless occurred about midway between B11 and the light ship some two minutes after the orders were given, the stem of the *Beteigeuze* striking the starboard side of the *Algosoo* at an angle of about 30°. At the moment of collision the speed of the *Beteigeuze* was said to have been about three knots and her heading 298° T. Captain Peterson's evidence is supported in general by that of his chief officer, but this witness placed the position of the *Algosoo,* at the time when the puffs of steam were observed, in the channel immediately south of the entrance buoys. Though the doors on either side of the bridge of the *Beteigeuze* were open and the wind was blowing directly from the *Algosoo* to the *Beteigeuze* no signals from the *Algosoo* were heard at any time and the one series of puffs of steam was the only signal observed. Some time after the collision but on the same day a note in German was entered in the log of the *Beteigeuze* which stated that a starboard signal had been given in good time and had been repeated several times while approaching the first canal buoys, that contrary to the regulations of

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marine law commonly in use the *Algosoo* did not react to the signal but maintained her course, that "due to the incomprehensible behaviour of the ship *Algosoo* very quickly the danger of a collision arose" and that in order to prevent this danger for both ships "we gave engine full reverse and wheel hard to starboard". No record was made of the course of the *Beteigeuze* having been 210° or 215° prior to the alteration to starboard.

From the *Algosoo,* which was proceeding northwardly up the channel, the *Beteigeuze* was first observed at a distance of about six miles while she was still at anchor east of the light ship. Some time afterwards the *Beteigeuze* was seen to be under way and headed for the northern entrance of the channel but Captain Wagg who intended taking the westerly upbound course on passing the light ship wanted a starboard to starboard passing and thinking he would be able to be out of the channel before the *Beteigeuze* reached the entrance he continued on his course some 50 to 60 feet from the western side of the channel with his ship working up to her full speed of 10 miles per hour which she reached shortly after passing B5. He did not, however, signal his intention nor did he hear any of the *Beteigeuze* signals until he had reached a point some two ship lengths of his ship south of B11, when, according to his evidence, the *Beteigeuze* was to the northeastward of his ship about in line with B12 and some two ship lengths to the northeastward of it and heading somewhat north of west. At that point on hearing a single blast from the *Beteigeuze* he replied with a danger signal of five short blasts and followed it after an interval with two blasts to indicate his desire for a starboard to starboard passing. At the same time he altered his course slightly to port to pass very close to B11. Captain Wagg did not know whether the *Beteigeuze* had a lake pilot on board or not but he had overheard the radio-telephone conversation between the *Beteigeuze* and the Pilot Station at Sarnia and knew that she did not have a river pilot on board and he was in no doubt from the time when he first observed her to be under way and headed for the channel entrance that she intended to enter and proceed down the channel. Immediately after sounding his signal Captain Wagg endeavoured to contact the *Beteigeuze* by radio-telephone but was not successful. When the *Algosoo* was abreast of B11

another single blast was heard from the *Beteigeuze* and Captain Wagg thereupon repeated his danger signal, followed it at an interval with two short blasts and altered course hard aport but did not reduce his speed. The ship went very fast to port but this manoeuvre did not succeed in avoiding the collision which according to Captain Wagg's evidence occurred about 460 feet to the north-northwestward of B11. This would indicate that the *Algosoo* travelled about 1,160 feet from the time of hearing the first signal from the *Beteigeuze* until the moment of impact which at ten miles per hour would have taken somewhat less than a minute and a half. Captain Wagg also stated that at the time when he first heard the signal from the *Beteigeuze* there was not sufficient room for him to avoid a collision by turning to starboard or reversing his engines or both.

At this point I should say that I regard as credible the evidence of Captain Peterson and of his chief officer with respect to the movements of the *Beteigeuze* after she hove anchor and that for some minutes before reversing her engines and going to starboard she was headed for B11 on a southwesterly course. I also accept their evidence that a single blast of her whistle was blown on four or five separate occasions while she was on that course but I do not regard it as established that the course was 210° or 215°. This would involve a conclusion that she turned 83° to 88° to starboard in the period of about a minute and a half before the collision which Captain W. M. Bowen and Captain P. F. Batten, the assessors appointed to assist me in the case, advise me is not reasonable. On the other hand, I do not think the southwesterly course of the *Beteigeuze* was more westerly than 240°, which is the bearing of B11 from her place of anchorage, and I regard as inaccurate the evidence of Captain Wagg that the *Beteigeuze* was on a course somewhat north of west or about 280° to 290° at the time when his ship was two ship lengths from B11 as well as his evidence as to the position of the *Beteigeuze* at that time. Such a position would put the *Beteigeuze* at that moment further from the point of collision than the *Algosoo* and if it were correct having regard to the speed and directions of the ships there should have been no collision or no collision such as occurred. The *Algosoo* was I think probably somewhat nearer to B11 than two ship lengths but still somewhat south of it when Captain Wagg

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first heard a single blast signal from the *Beteigeuze* which he answered with the first of his two danger signals and it was this danger signal which was observed from the *Beteigeuze*. It was at this point that the master of the *Beteigeuze*, which was not yet directly opposite the channel entrance though probably near to or opposite the prolongation of its eastern side and had as yet made no alteration to port to steer for the entrance, ordered her engines full astern and her helm hard astarboard and that a further and somewhat longer single blast of her whistle was blown. When the *Algosoo's* danger signal was observed but four to five lengths of the *Beteigeuze* (approximately 2,000 feet) separated the ships and with combined speeds of 10 miles per hour and seven knots though the latter would be decreasing in the meantime they were not much more than a minute and a half from collision. In the plaintiffs' preliminary act the intervening period is estimated at about a minute. On the other hand the engine manoeuvre book of the *Beteigeuze* records the reversal of her engine at 10:34 and the engine room log records the collision at 10:36 but these entries were made by different persons and I take them to be merely records of minutes shown on the clock. They might indicate an interval of as much as nearly three minutes or as little as just over one minute. The second danger signal by the *Algosoo* followed soon afterwards when she had reached B11 but it was neither heard nor observed by those on the *Beteigeuze*. However, at that point no further action by the *Beteigeuze* to avoid collision was possible since her engines had already been put in reverse and her helm hard astarboard.

I turn now to the rules governing the navigation of ships in the locality. In their preliminary act and in the statement of claim the plaintiffs alleged contravention by the *Algosoo* of several of the United States Great Lakes Rules and of the equivalent provisions of the Canadian Rules of the Road for the Great Lakes as well as of several of the United States Coast Guard Pilot Rules for the Great Lakes and at the trial a copy of the United States rules was filed as Exhibit 2. From this it appears that the United States Great Lakes Rules are contained in an Act of Congress passed in 1895 and that by a subsequent amendment of the Act authority was given to the Commandant of the Coast Guard to establish such regulations to be observed by

steam vessels in passing each other, not inconsistent with the provisions of the Act as he from time to time deems necessary which regulations when adopted by the Commandant under the authority of the Act are to have the force of law. Supplementary rules apparently made under the authority of the Act and entitled "Navigation Requirements for the Great Lakes and St. Mary's River" are contained in the exhibit and appear to be the rules referred to in the plaintiffs' preliminary act and statement of claim as the United States Coast Guard Pilot Rules for the Great Lakes. The Act, it may be noted, purports to make the rules applicable in the navigation of United States vessels anywhere in the Great Lakes and of all vessels on the lakes while in the territorial waters of the United States. In offering Exhibit 2, counsel for the plaintiffs observed that the United States rules are exactly similar to the Canadian rules and at no stage was any question raised as to which set of rules should be applied in resolving the question of responsibility for the collision.

In its preliminary act and defence the defendant referred to the Canadian Rules of the Road for the Great Lakes and at the trial its counsel took the position that ss. 645 to 647 of the *Canada Shipping Act* R.S.C. 1952, c. 29, makes the Canadian Rules binding in this Court on foreign as well as Canadian ships. To my mind however there is a difficulty with this position in that while s. 647(4) provides that:

> . . . in any case arising in a Canadian court concerning matters arising within Canadian jurisdiction, foreign ships shall so far as respects the Collision Regulations and the said provisions of this Act, be treated as if they were Canadian ships.

it does not appear to me that the Canadian Rules of the Road for the Great Lakes were applicable to either the plaintiffs' or the defendant's ship. For while the rules purport to apply anywhere in the Great Lakes the rule making power conferred on the Governor-in-Council by s. 645(1) is limited to the making of "rules or regulations for the prevention of collisions at sea and on the inland waters of Canada or any part thereof" and having regard to the definition of "inland waters of Canada" contained in s. 2(4) of the Act, the portions of the Great Lakes comprised within the boundaries of the United States do not appear to fall within the areas for which the making of rules and regulations is authorized. While it probably makes no difference

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in the result I think the situation should be regarded as governed by the United States rules.

Rules 18, 20, 21, 23, 26, 27 and 28 of the United States Rules of the Road for the Great Lakes and Rule 90.10 of the United States Coast Guard Regulations are as follows:

Rule 18. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other.

Rule 20. Where, by any of the rules herein prescribed, one of two vessels shall keep out of the way, the other shall keep her course and speed.

Rule 21. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

Rule 23. In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in rule twenty-six:

One blast to mean, "I am directing my course to starboard."

Two blasts to mean, "I am directing my course to port."

But the giving or answering signals by a vessel required to keep her course shall not vary the duties and obligations of the respective vessels.

Rule 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse.

Rule 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Rule 28. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Rule 90.10. *Vessels approaching each other at right angles or obliquely.*—

(*a*) When two steam vessels are approaching each other at right angles or obliquely so as to involve risk of collision,

other than when one steam vessel is overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel; or, if necessary to do so, slacken her speed or stop or reverse. The steam vessel having the other on her own port side shall blow one distinct blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steam vessel by one distinct blast of her whistle as a signal of her intention to direct her course to starboard so as to cross the stern of the other steam vessel or otherwise keep clear.

(*b*) If from any cause whatever the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steam vessels shall be stopped, and backed if necessary, until signals for passing with safety are made and understood.

There was no rule requiring ships to keep to the starboard side of the channel in question or to pass ships approaching in it port to port.

The plaintiffs submitted that the *Algosoo* was solely to blame for the collision, that if she had been keeping an adequate lookout she would have heard or observed the early signals of the *Beteigeuze* and would have had plenty of time to go to starboard or slow down so as to avoid her, that whether she heard the signals or not it was her duty under the crossing rule to keep out of the way of the *Beteigeuze* which she failed to do, and that she kept on at full speed throughout though she could still have avoided collision by reversing and going to starboard when she first heard a signal from the *Beteigeuze*. They also submitted that the *Beteigeuze* complied with the rules in every way, that it was her duty to keep her course and speed until the last possible moment and only then to take action to avoid collision, that she held her course and speed until that moment and then went full astern and to starboard and that she was not guilty of any fault at all.

The question whether the *Algosoo* could still have complied with the crossing rule and kept out of the way had she gone to starboard or reversed or both immediately upon first hearing the single blast signal of the *Beteigeuze* is one of considerable difficulty and unfortunately the views of

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the assessors on this point are not in agreement. In Captain Batten's opinion assuming the *Beteigeuze* to have been headed for B11 on a course of 240° T. and the distance between the ships to have been four lengths of the *Beteigeuze* at the time mentioned, the *Algosoo* could still have avoided a collision by at least 60 feet by going hard astarboard. This opinion was based on the assumption that the *Beteigeuze* would also take the action which she in fact took shortly afterwards to reverse her engines and go hard astarboard. In Captain Batten's view such a turn to starboard by the *Algosoo* would have avoided the *Beteigeuze* by an even greater distance if the ships were further apart than four lengths of the *Beteigeuze* at the time mentioned and also if the course of the *Beteigeuze* was in fact more southerly than the 240° T. which I have estimated. It would, however, have been a closer passing than 60 feet if instead of reversing and going to starboard when she did, the *Beteigeuze* had kept on a course of 240° or thereabouts for any appreciable time after her signal was given and there would have been a collision if she had held the course and not made a turn to starboard. As Captain Wagg was not expecting the *Beteigeuze* to alter to starboard this may I think explain his view that at that stage there was not enough room to avoid the *Beteigeuze* by going to starboard. Captain Bowen's advice on the question was that while he could not say that a hard astarboard turn by the *Algosoo* would not have avoided collision, he was not satisfied that such a turn would have avoided it. Neither assessor considered that reversing the *Algosoo's* engines at that stage would have been wise or effective. On the whole, while I think that an alteration to starboard by the *Algosoo* would probably have avoided a collision if the *Beteigeuze* had also altered to starboard and reversed, as in fact she did, I do not think it can be assumed that the *Beteigeuze* which had just blown a signal indicating her intention to keep her course and speed would have taken such action to reverse her engines and go hard astarboard immediately had she received an answering single blast signal from the *Algosoo* instead of the danger signal which was in fact given and I find it impossible to estimate when she would have taken the action, if at all. Without such action being taken early enough, I do not think a move to starboard by the *Algosoo* would have been effective to avoid the *Beteigeuze*

and the most that can be said is that if the *Algosoo* had immediately gone hard astarboard or hard aport the *Beteigeuze* would have had an opportunity to avoid a collision by reversing her engines and going hard astarboard. Having regard to the evidence of Captain Wagg and the advice of the assessors, I do not think that stopping or reversing the engines of the *Algosoo* would have served any useful purpose at that stage. Accordingly, I am not satisfied that the *Algosoo* alone could still have avoided collision by reversing or going to starboard or both when she first heard a signal from the *Beteigeuze* and in the view I take it has not been established that the failure of the *Algosoo* to take such action at that time was the sole cause of the collision.

The evidence also leaves me unsatisfied that in the circumstances a lookout stationed outside the bridge would have heard or observed one of the earlier signals of the *Beteigeuze* and the answer to the question whether or not with such a lookout an earlier signal of the *Beteigeuze* would have been heard or observed must also remain a matter of conjecture. The master of the *Algosoo,* however, was not in any doubt as he passed B7 and B9 and approached B11 that the *Beteigeuze* was headed for the entrance of the channel and while he may have hoped or even expected that the *Beteigeuze* would wait for him to clear the channel or would give the signal for a starboard to starboard passing and even though he had received no indication that the course which the *Beteigeuze* proposed to take when entering the channel would cross his own he ought to have realized that if by chance the *Beteigeuze* intended to cross his bow the *Algosoo* as the give away ship in a crossing situation would be required by the rule to keep out of her way by slowing down or by going to starboard or both. Moreover, he ought also to have realized that if the occasion for it arose such action would be required not merely after an emergency had arisen but in time to avoid danger of a collision. He thought, however, that he could be out of the channel and away to the northward before the *Beteigeuze* reached the entrance and for the sake of the convenience that this would afford, though there were no other downbound ships in the vicinity that would cause him any inconvenience, and though he had made no arrangement with the *Beteigeuze* which would absolve him from

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the necessity if occasion should arise, as in fact it did, to keep out of her way, he took the risks involved in pursuing his course at top speed until he finally heard a signal from the *Beteigeuze* by which time the ships had reached the point where he did not think there was enough room for him to slow down or stop or go to starboard and thus keep out of the way. And even at that point instead of stopping or reversing, as his own danger signal required, or going hard astarboard or hard aport, either of which possible alternative course offered some chance of avoiding collision he continued on for an appreciable and important period of time on a virtually unchanged course which made a collision inevitable despite the action taken by the *Beteigeuze* to avoid it. The assessors concur in advising me that the course so taken by the *Algosoo* was not a good one under the circumstances and it appears to me to have been the worst of three possible choices of course for if it was too late to go to starboard it was obviously less hazardous and afforded a longer time and a greater opportunity of avoiding collision to go hard aport than to continue on with practically no attempt to get out of the way until B11 was reached.

It was argued that while Captain Wagg might have sounded a signal somewhat earlier in order to ascertain the intention of the *Beteigeuze* having heard nothing from her he had committed no fault of navigation prior to the time when he first heard a signal from the *Beteigeuze,* that is when he was some 600 to 700 feet from B11 and by that time the emergency was upon him and the law will not require the most perfect action on his part in an extremity. Assuming, as I think was obviously the case, that when the *Algosoo* reached the point mentioned it was high time for someone to take action to avoid collision in my opinion the evidence shows that the *Algosoo* was already seriously at fault in having allowed such a situation of danger to arise. As the vessels approached each other the master of the *Algosoo* did not know whether the course of the *Beteigeuze* would cross his own or not but in the absence of any kind of communication from the *Beteigeuze* indicating that she intended a starboard to starboard passing he was I think at least bound to regard the situation as one in which the crossing rule might be or become applicable and was seriously at fault in closing the distance between the ships

at high speed to the point where he had put it out of his power to keep out of the way of the *Beteigeuze*. The *Algosoo* accordingly in my opinion was negligent and cannot be absolved from blame for the collision.

I turn now to the conduct of the *Beteigeuze*. It was submitted that she was at fault in two respects, first in that she failed to wait for the *Algosoo* and the *Joe S. Morrow* to clear the channel before proceeding to the entrance and secondly in that she held her course and speed too long under the circumstances.

The first of these submissions depends on the particular circumstances in which the *Beteigeuze* was being navigated toward the channel entrance. From the time when the *Beteigeuze* left her anchorage until shortly before the collision both the *Algosoo* and the *Joe S. Morrow* were proceeding along the western side of the channel and close enough to that side to leave some 700 feet of its width free for other traffic of which there was, however, none at the time. When Captain Peterson first saw the *Algosoo* he observed that she was on the western side of the channel and in the circumstances it should I think have been readily apparent to anyone even slightly familiar with the geography of Lake Huron and its navigation that the *Algosoo* was very probably holding that side of the channel because she intended taking a westerly upbound course when passing the light ship. The inference should have been apparent shortly afterwards with respect to the *Joe S. Morrow* as well and it should have become even clearer when despite his approach both the *Algosoo* and the *Joe S. Morrow* continued to maintain their positions on the western side of the channel. It should I think also have been obvious that a crossing situation would arise only if the *Beteigeuze* insisted on having the extreme western side of the channel since otherwise with the remaining seven-eighths of it free of ships she would have ample room to enter the channel by a path which would nowhere intersect the courses of the outcoming ships. This of course would mean passing the two ships starboard to starboard, and would involve a decision to do so by the master of the *Beteigeuze* and action by him to put his decision into effect. In the particular circumstances, having regard to the fact that this was Captain Peterson's first voyage in the Great Lakes as well as to the

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fact that he had no pilot on board, I do not think his failure to head for the open portion of the channel and pass the outcoming ships starboard to starboard is open to criticism but it does seem to me and to the assessors, that if he was not prepared to adopt that course he should have deferred his approach to the channel entrance until the two ships had cleared it rather than to bring about risk of collision by seeking to bring the crossing rule into play in an effort to require them to leave the portion of the channel they were navigating and thus incurring the hazards of failure by him or them to hear or to understand or to comply with or to respond to signals involved in crossing the bows of these ships which were of unknown draft and in comparatively shallow waters and which had no means of knowing at what point or how sharply the *Beteigeuze* would alter her course, as she would have to do sooner or later, in order to enter the channel. In the circumstances the conduct of the *Beteigeuze* in directing her course toward the portion of the channel which the other ships were navigating in my opinion and in that of the assessors was unseamanlike and amounted to neglect of a precaution required by the special circumstances of the case within the meaning of Rule 28.

Apart from this fault, however, and viewing the situation as simply one of ships on crossing courses, I do not think it can be said that the *Beteigeuze* which would be required by the rule to keep her course and speed was also negligent in having held her course and speed too long for while by the time her signal was heard the point had been reached where action by the *Algosoo* alone would be ineffective to avoid collision and the time had thus arrived for the *Beteigeuze* to take action such action was in fact taken immediately after the exchange of signals. And while it cannot be affirmed that the *Beteigeuze* would have taken the same action in time to avoid collision if the *Algosoo* instead of a danger signal had given an answering single blast signal and turned to starboard, neither can it be said that the *Beteigeuze* would not have acted in time. Accordingly, and with the concurrence of the assessors, I do not think that the *Beteigeuze* was guilty of additional fault in this respect as well.

The situation as I find it is thus one in which both ships were at fault, the *Beteigeuze* in creating risk of collision by directing her course to the portion of the channel being navigated by the *Algosoo* without waiting until the *Algosoo* had cleared the channel and the *Algosoo* in holding her course and speed along the western side of the channel until there was imminent danger of collision without having signalled her intention and without having ascertained by signal or otherwise whether the course which the *Beteigeuze* was following would cross her own and without either having obtained the concurrence of the *Beteigeuze* for a starboard to starboard passing or having taken in due time the action required by the crossing rule to keep out of her way and in having negligently pursued her course for a time even after hearing the *Beteigeuze* signal and thereby made collision inevitable despite the action of the *Beteigeuze* to avoid it. In my opinion the faults of both ships caused the collision and both were accordingly to blame for it. I think however that the fault of the *Algosoo* was of a greater degree than that of the *Beteigeuze* and I apportion two-thirds of the blame to her and one-third to the *Beteigeuze*.

There will be judgment accordingly on the claim and counterclaim pronouncing the *Algosoo* two-thirds to blame and the *Beteigeuze* one-third to blame and if the parties are unable to agree on the amounts there will be a reference to the Registrar to assess the damages. The plaintiffs may tax and recover against the defendant two-thirds of their costs and the defendant may tax and recover against the plaintiffs one-third of its costs.

Judgment accordingly.

1962
Oct. 4
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Jan. 21

BETWEEN:

GLADYS M. MAINWARING ..... APPELLANT;

AND

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

Revenue—Income—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 127(1)(e)—Shares of stock purchased by wife from husband and sold at a profit—Whether profit from a business—Appeal allowed.

Appellant, a housewife, inherited a small sum of money in 1949. At that time her husband, a prominent businessman, in association with others had organized an oil and gas producing company in which he acquired a large number of shares at a price of one-half a cent per share. Appellant, who was utterly lacking in business experience, gave to her husband her cheque for $1,000.00 for which she acquired from him 33,333 of these shares at the price of one-half cent per share costing in all $166.67, and other stocks purchased for her by her husband. The shares in the oil and gas company advanced in price and most of those purchased by the appellant were sold in 1951 and 1952 realizing substantial profits for her. The Minister taxed these profits as those from a business. The appellant appealed from such assessment and at the hearing of such appeal the Minister moved that her husband's evidence in a concurrent appeal be considered in toto as an inherent part of the case under consideration.

Held: That the transaction had none of the characteristics of carrying on a business.

2. That the evidence of the husband in the concurrent case cannot be admitted.

3. That the appeal be allowed.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Dumoulin at Victoria.

C. C. Locke, Q.C. and *W. M. Carlyle* for appellant.

W. J. Wallace for respondent.

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

DUMOULIN J. now (January 21, 1963) delivered the following judgment:

Mrs. Gladys M. Mainwaring, a housewife, residing in the City of Vancouver, B.C., appeals against the assessments imposed upon her income by the respondent for taxation years 1951 and 1952.

The material aspects of this case are of the simplest.

In the course of 1949, the appellant inherited, from an aunt in England, a rather modest amount of some $2,617.89, which she deposited at a local branch (Vancouver) of the Bank of Montreal on August 27, 1949, as appears on exhibit 2.

It so happened that her husband, Mr. W. C. Mainwaring, at the time Vice-President of British Columbia Electric and a prominent businessman, had just organized, in partnership with four or five others, an oil and gas producing company, Britalta Petroleums Ltd., of which he owned 133,333 shares obtained at a price of ½ cent per unit.

If Mr. Mainwaring possessed extensive business experience, such was not the case with his wife, who had no knowledge whatever of financial transactions, and her evidence before the Court fully substantiates her assertion to this effect.

Under the circumstances it surely appears a quite natural move on appellant's part to look to her husband for proper advice concerning the intended investment. And it is not unnatural either that Mainwaring should recommend investing part of the windfall in the budding enterprise just launched by himself and a few associates.

Accordingly, exhibit 3, a $1,000 cheque, dated Nov. 14, 1949, signed by the appellant in favour of W. C. Mainwaring completed her purchase of 33,333 shares of Common Stock in Britalta Petroleums Ltd., at one half cent (½) per share, as evidenced on a receipt, exhibit 4, also of November 14, 1949, with the mention that: "The balance of the above amount is to pay for other stocks I have purchased for her", signed: W. C. Mainwaring. The outstanding surplus of the legacy was left in the bank.

Two years later to a day, November 13, 1951, the common stock of Britalta Petroleums had achieved a meteoric rise and would continue ascending to much more fruitful levels for months to come. It therefore seems a permissible assumption to think that appellant acted as most sane investors would have done, possibly on her husband's prompting and no blame attaches, in reaping from November 13, 1951, until December 15, 1962, the astounding yields accruing from her 1949 deal. Exhibit A relates the com-

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plete listing of those sales at prices ranging, per share, from a minimum of $4.10, to a maximum of $7.25. On the day of the last transaction entered on exhibit A, Dec. 15, 1952, Mrs. Mainwaring still retained a lot of 2,233 shares. The profit thus realized reached a grand total of $170,802.94.

Such was the participation of the appellant in the matter, that of buying common shares in an oil company just formed and subsequently reselling at a profit, a normal investment initially, a normal incentive as the stock sky-rocketted. This lady testified convincingly to her ignorance of the company's internal story, the many intricate dealings it underwent to obtain sufficient financing. Indeed the Court feels assured that had she been apprised of such details they would have meant nothing due to her utter unfamiliarity with the methods or terms of business technique.

This set of facts, innocuous enough, nevertheless led the respondent to reassess in the sum of $40,002.25, appellant's taxable income for 1951, and in a further amount of $131,584.14 for taxation year 1952, allegedly, as stated in paragraph 4 of the Reply to Notice of Appeal, because:

> 4. The acquisition by the Appellant of the shares of Britalta Petroleums Limited and the subsequent sale of them by the Appellant during the taxation years 1951 and 1952 at a total profit to the Appellant of $170,802.94 is income from a business within the meaning of the word as defined in *The Income Tax Act*.

To the recital above given of each and every feature of the instant transaction, I need only say that it offered none of the characteristics of carrying on a business, something the totally unexperienced appellant could not have done however earnestly she might have tried, and I might also add a reference to a recent decision: *Irrigation Industries Ltd. v. Minister of National Revenue*[1], in which Mr. Justice Martland, speaking for a majority of the Supreme Court, held as follows:

> I cannot agree that the question as to whether or not an isolated transaction in securities is to constitute an adventure in the nature of trade can be determined solely upon that basis. In my opinion, a person who puts money into a business enterprise by the purchase of the shares of a company on an isolated occasion, and not as a part of his regular business, cannot be said to have engaged in an adventure in the nature of trade merely because the purpose was speculative in that, at that time, he did not intend to hold the shares indefinitely, but intended, if

[1] [1962] S.C.R. 346 at 347.

possible, to sell them at a profit as soon as he reasonably could. I think that there must be clearer indication of trade than this . . .

At the hearing, counsel for respondent moved that Mr. Mainwaring's evidence, in case No. 165547, should be considered in toto as an inherent part of the instant one, a rather unusual suggestion properly objected to on appellant's behalf. I see no grounds whatever for not rejecting this request.

For the reasons preceding the appeal is allowed and the record of the case will be returned to the Minister for consequential reassessment.

Appellant shall recover all costs after taxation.

Judgment accordingly.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

GERTHEL L. LAMON ..... RESPONDENT.

Revenue—Income or capital—Income Tax Act, R.S.C. 1952, c. 148, s. 6(j), 139 (1)(e)—Sale of gravel—Payments "dependent on the use of land" —Profits from a business—Appeal allowed.

Respondent had owned farm land for twenty years the farming of which had been unsatisfactory. In 1957 she contracted for the removal and sale of gravel from specified portions of the land. She did not participate in any way in the removal of the gravel for which she received payment at an agreed rate per cubic yard. The Minister assessed her for income tax on the money so received after allowance for depletion in each of the years 1957 and 1958. An appeal from that assessment to the Tax Appeal Board was allowed and from that decision the Minister now appeals to this Court. The respondent contends that the payments so received related to the sale of the property and were not income and further that the payments were instalments of the sale price of agricultural land and specifically exempted under s. 6(*j*) of the *Income Tax Act*. The Minister contends that the payments were for the use of or production from land and taxable under s. 6(j) and also that the payments represented income from a business or were rent.

Held: That there was no sale of land, agricultural or otherwise, but the grant of a licence analogous to a *profit à prendre* and the payments were not exempted by s. 6(j).

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2. That the payments were "dependent upon the use of land" within the meaning of s. 6(j) of the Act.

3. That the amounts received by respondent in each year were profits from a business within the meaning of "business" as found in s. 139(1)(e) of the Act.

4. That the appeal be allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at London.

F. J. Dubrule and *M. Barkin* for appellant.

J. W. Cram for respondent.

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

CAMERON J. now (January 22, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated May 31, 1961, which allowed the respondent's appeals from re-assessments to income tax dated May 9, 1960, and made upon her for the taxation years 1957 and 1958. In her return as filed, the respondent declared no taxable income for the 1957 taxation year and a net income of $2,684.47 for the 1958 taxation year. In re-assessing her for the 1957 taxation year, the appellant added a profit from sale of gravel amounting to $6,361.82, less a depletion allowance of $938.44, and assessed a tax of $781.90 and interest. In the re-assessment for 1958, the appellant added to the respondent's declared income similar profits on gravel sales amounting to $7,911.06, less depletion of $1,100, and assessed an additional tax of $1,367.07 and interest in respect thereof. Following Notices of Objection, the Minister by Notification confirmed the said re-assessments.

The following facts are not in dispute. In August, 1937, the respondent purchased for $4,000 parts of the south half of Lots 5 and 6 in the 4th Concession of the Township of London, County of Middlesex, consisting of a residence and other buildings, and some 20 acres of land. Previously she had been associated with her husband in the operation of a bakery in London. Attempts to farm the property were unsuccessful as the soil was not satisfactory. At some unspecified date it was found that there were deposits of

gravel in commercial quantities on the property, but the respondent did nothing about the gravel until 1957.

On May 1, 1957, the respondent entered into an agreement with Riverside Construction Co. Ltd. (Exhibit 1) in which the respondent is called "the vendor" and the company "the purchaser". In the recitals, after giving a description of the property owned by the defendant, it is recited:

> AND WHEREAS the Parties have staked a certain part of the said lands, approximately 170 feet by 330 feet and the vendor has agreed to permit the Purchaser to remove all gravel from the said part of the said lands as staked, on the terms and conditions hereinafter contained.

Clauses 1, 2, 4 and 5 of the Agreement are as follows:

> 1. The Purchaser shall have the right to enter upon the said part of the said land as staked at any time after the date hereof and to remove therefrom all the gravel and stripping from the portion of the said lands, and for such purposes to be permitted to take on to the property such equipment as they may require for such purposes.
>
> 2. The Purchaser will keep a record of all the gravel and stripping removed from the premises and will pay to the Vendor at the rate of 12¢ per cubic yard, bank measurement, such amount as may be due to the Vendor on the first day of each month according to these records.
>
> 4. The Purchaser agrees to pay the full purchase price for all gravel removed from the said part of the said premises on or before the first day of August, 1957, and in the event that there is still gravel to be removed on that date, will pay to the Vendor such additional amount in cash as an estimate will determine of the balance of the gravel which has not been removed by the Purchaser as of that date and all of such gravel shall be removed from the premises on or before the 1st of October, 1957 upon which date all rights under this agreement shall cease.
>
> 5. The Vendor covenants with the Purchaser that she has good right and full power to sell the said gravel, notwithstanding any act of the Vendor or any other person whomsoever, except for such municipal restrictions concerning it for which the party of the first part makes no representations.

The Agreement further provided that the purchaser at its own expense would build access roads to the part so staked for the purpose of removing the gravel, such roads to become the property of the vendor at the expiry of the contract.

On October 22, 1957, a similar agreement (Exhibit 2) was entered into by the respondent with T. J. Branton Co. Ltd., by which that company was given similar rights to enter upon and remove gravel, fill and stripping from a portion of the said lands having an area of 920 feet by 330 feet, paying therefor 13½ cents per cubic yard, bank

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measurement. So far as this appeal is concerned, there was otherwise no material difference between the two contracts except that there was no time limit for the performance of the second contract and the evidence indicates that it was continued throughout 1958, 1959 and 1960, in each of which years substantial payments were received by the respondent. Finally in 1961, 10 acres of land which included the gravel pits were sold to Riverside Construction Co. Ltd. for $11,850.

It is admitted that pursuant to the said contracts, the respondent received monthly payments from the said two firms in payment for the gravel removed, totalling $6,361.82 in 1957, and $7,911.06 in 1958, and that the said respondent did not participate in any way in the operation of winning and removing the gravel, the entire operation being carried out by the two named companies who for such purpose brought suitable equipment on the property.

Notwithstanding the fact that the Minister is here the appellant, the onus is on the respondent to establish that there is error in fact or in law in the re-assessments (*Minister of National Revenue v. Simpson's Ltd.*[1]).

In the respondent's reply to the Notice of Appeal, it is submitted that the payments received by her were payments for the sale of the property and the contents thereof, which sales were frustrated by the provisions of a bylaw of the Township of London prohibiting the sale of less than 10 acres; and that the receipts therefrom constituted capital and not taxable income.

In the Minister's Notice of Appeal, it is submitted that such receipts in each year constituted either

(a) income from a business—namely, that of selling gravel—within ss. 3 and 4 of the *Income Tax Act;* or

(b) amounts received by the respondent which were dependent upon the use of or production from property and are therefore required to be included as income by virtue of the provisions of s. 6(j) of the Act; or

(c) rent, and were therefore part of the respondent's income as being income from property under ss. 3 and 4.

[1] [1953] Ex. C.R. 93.

I shall first consider the provisions of s. 6(*j*) which reads:

> 6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> (j) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph.

Counsel for the respondent, while submitting that the amounts received were not dependent upon use or production from property, namely land, or instalments of the sale price of land, also submitted that if they were instalments of the sale price of land, they were instalments of the sale price of *agricultural* land and therefore were exempted by the terms of s. 6(*j*).

In my opinion, there was here no "sale of land", agricultural or otherwise. The ownership of the land remained in the respondent at all relevant times and it was not until 1961 that she sold the lands where the gravel pits were located. What the respondent did was to give to the two firms the right to enter upon the lands staked and to remove therefrom the gravel, using such equipment as they might require for such purpose, coupled with the right to construct and use access roads thereto. This, I think, is not a sale of land but rather a grant of a license analogous to a *profit à prendre*. The respondent cannot, therefore, avail herself of the concluding part of s. 6(*j*).

In the *Smethurst v. Davy* case[1], to which I will refer later, Wynn-Parry J. found that the transaction involved the grant of a *profit à prendre,* and in the Court of Appeal, the Master of the Rolls specifically stated that Wynn-Parry J. came to a correct conclusion and that he agreed with the reasons for his judgment. At p. 598, Wynn-Parry J. said:

> I would have no hesitation . . . in concluding that here the transaction did not involve any sale and purchase, but a licence to work the gravel pit, that is, a *profit à prendre*.

In my opinion, the amounts received were amounts that were dependent upon use of property. It may be noted here that property as defined by s. 139(1)(*ag*) includes real property. In accordance with the terms of the contracts, the amounts to be received by the respondent were dependent

[1] 37 T.C. 593.

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upon the number of cubic yards of gravel removed from the premises. Does the right so conferred by the respondent to enter upon her property and to remove gravel therefrom constitute a "use of land"? A similar phrase was considered in *Smethurst (H.M. Inspector of Taxes) v. Davy*[1], a case decided by the Court of Appeal in 1957. The headnote reads as follows:

> The taxpayer was the occupier of land on which were certain gravel pits. She gave permission for gravel to be excavated from the pits and received payments based on the amount of gravel taken.
>
> On appeal to the Special Commissioners against assessments to Income Tax under Case VI of Schedule D in respect of these payments, the taxpayer contended that the payments were made as the purchase price on sales of gravel and not for any easement over or right to use any land within the meaning of Section 31 of the Finance Act, 1948. For the Crown it was contended that the payments were made, not in respect of a sale of the gravel, but for a right to make use of the land within the meaning of Section 31, and were accordingly brought into charge to tax by virtue of the Section. The Special Commissioners allowed the appeal.
>
> Held, that the payments in question were for a right to use land and fell within Section 31(1)(d), Finance Act, 1948.

The section of the *Finance Act*, 1948 referred to, reads as follows:

> 31. (1) As respects income tax for the year 1949-50 and all subsequent years of assessment— . . .
>
> (d) profits or gains arising from payments for any easement over or right to use any land in the United Kingdom made to the person who occupies that land, whether he occupies it for the purpose of a trade, profession or vocation or otherwise, shall, except so far as the payments are chargeable to tax under section twenty-one of the Finance Act, 1934, be taken into account in computing the profits of the trade, profession or vocation or as annual profits or gains chargeable under Case VI of Schedule D, as the case may be.

The judgment of Lord Evershed, Master of the Rolls, which upheld the judgment of Wynn-Parry J. who had reversed the finding of the Special Commissioners, was concurred in by the other Judges in the Court of Appeal. It is a lengthy judgment and I shall cite only those parts which are especially referable to the meaning of the phrase "use of land". At p. 602, the Master of the Rolls said:

> I turn first to what I have called the first point, namely, that this right is not a use of land as that phrase is used in the paragraph. It is quite true that the phrase "use of land" might with advantage have been expanded. It might, for example, have been interpreted by a definition paragraph such as is found in Section 21 of the Finance Act of 1934. But

[1] 37 T.C. 593.

in my judgment it is clear that a profit of this kind is a use of land as that phrase would be understood to anyone having knowledge of real property law, and I think that the phrase in the paragraph must be taken at least to be addressed to such a person. I think that that view follows inevitably from the speeches, particularly three of the speeches, in the House of Lords in Scott v. Russell, 30 T.C. 394; [1948] A.C. 422. In the course of his judgment Wynn-Parry, J., said:

> "That the latter activity constitutes 'using land' is established by the decision of the House of Lords in *Russell v. Scott*, [1948] A.C. 422. In the course of his speech Viscount Simon said, at page 432 (30 T.C., at p. 423): 'The digging and carrying away of sand or of gravel have been, I apprehend, one of the normal uses of suitable areas of land from the earliest times'. Lord Simonds said, at page 434 (Ibid., at pp. 424-5): 'I need go no further into the history of this catalogue than to say that with some additions it goes back for nearly one hundred and fifty years. During the whole of that time there can have been no more familiar feature of the landscape than pits of sand or gravel or clay and I cannot doubt but that during that time and before it the owners of such pits have been accustomed in greater or less degree to exploit them not only for their own use but by profitable sales.' Finally, at page 438 (30 T.C. at p. 428), Lord Oaksey said: 'Now, the digging of sand, gravel, clay or peat are and have been from time immemorial ordinary and well-known uses of land'."

Wynn-Parry, J., went on as follows:

> "The problem which the House had to consider in that case was quite different from the one before me, but the observations which I have quoted appear to me to be quite clearly intended to be statements of general application, and not uttered for the limited purpose of resolving the particular question before the House, namely, whether the activity of a farmer in permitting contractors to dig and carry off sand from his farm constituted a concern of the like nature to those enumerated in Rule 3 of No. III of Schedule A or whether his whole farm ought to be assessed under No. I. It follows that if the occupier permits another to do any of the acts referred to above, including the extraction of gravel, that other is using the land. Here, then, Fosters were using the land, paying a consideration which gave them the right to do so."

In my judgment, there is no answer, at any rate in this Court, to the argument as it was here presented by Wynn-Parry, J.

In my opinion, the problem under this section of the Act comes down in the end to one single point. Was the right here granted, the right to come on to the land and excavate and take away gravel, a *use of land* as that phrase should be understood in its context here? Following the principle stated in the *Smethurst v. Davy* case, I have come to the conclusion that the receipts here in question were dependent upon the use of land and were therefore within the ambit of s. 6(*j*).

Further support for this view is found in the dissenting judgment of Cartwright J. in *Orlando v. Minister of*

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National Revenue[1]. In the latter report, the facts are summarized in the headnote, as follows:

> In 1944, the appellant was a shareholder in a company operating a mushroom farm, on the outskirts of Toronto, of which her late husband was president and principal shareholder. Thinking that the farming operations might be forced to move by the growth of the city, she bought a farm as an alternative site for the business and worked it by hired help for several years. About once a year she sold topsoil to the mushroom farm. She refused other offers for the topsoil and was not engaged in the business of dealing in it apart from the sales to her husband's company. In 1953, she was forced to sell a portion of her farm as the Ontario Government was building a highway across her land. She sold the land to the highway contractor on condition that he move the topsoil on the purchased property onto the remainder of her farm. She then sold this topsoil to the mushroom farm in lots, the first for $18,500 and a year later a second lot for $1,500. The appellant entered these sums as capital gains, but the Minister claimed that they were income within the meaning of Sections 3 and 4, or alternatively produce of property under Section 6(j), now Section 6(1)(j) of the Act. The Income Tax Appeal Board allowed the appellant's appeal.

The decision of the Tax Appeal Board was reversed in this Court[2] and an appeal was taken to the Supreme Court of Canada and dismissed. The majority of the Court were of the opinion that in disposing of the topsoil, the appellant was engaged in an adventure in the nature of trade and that the profits therefrom were taxable income; no reference was made therein to s. 6(j). Cartwright J., however, in referring to the earlier payments of $2 per cubic yard for the topsoil, said at p. 116:

> In my opinion the payments of $2 per cubic yard of topsoil paid over the years by the Maple Leaf Mushroom Farm Ltd. to the appellant were payments for the granting to the company of a licence, analogous to a *profit à prendre,* permitting it to enter the lands of the appellant and take therefrom for its use a portion of the soil subject to payment therefor at the price agreed; from this it follows that the amounts so paid constituted taxable income of the appellant as being amounts received by her from the use of her property but not as profits from a business.

Further reference on this point may also be made to *Ross v. Minister of National Revenue*[3], and to *Waintown Gas & Oil Co. Ltd.*[4]

I am also of the opinion that the Minister is entitled to succeed on the ground that the amounts received in each year were profits from a business within the extended meaning of "business" as found in s. 139(1)(*e*). I have already stated the essential facts in the *Orlando* case. There, as here,

[1] [1962] S.C.R. 261.
[2] [1960] Ex. C.R. 391.
[3] [1950] Ex. C.R. 411.
[4] [1952] 2 S.C.R. 377.

the property was purchased as an investment, but in each year but one, from 1945 to 1953, Mrs. Orlando sold topsoil at the agreed price of $2 per cubic yard. In rendering judgment for the majority of the Court, Abbott J. stated that he agreed with the facts as found by Fournier J. in this Court and was in substantial agreement with his reasons and conclusions. In his judgment, Fournier J. said in part at p. 399:

> When the whole course of conduct of a taxpayer who had an investment in a farm indicates that in dealing with the topsoil of his property he is disposing of it in a way capable of producing profits and with that object in view and that the transactions are of the same kind and carried on in the same way as those of ordinary trading in that commodity, I am of opinion that he is engaged in an adventure or concern in the nature of a trade or in a scheme of profit making. In my view the fact that he is not advertising his goods nor selling them to the public at large is immaterial. On many occasions it has been held that a single transaction having the badges of an adventure or concern in the nature of a trade was sufficient to attract tax on the income realized therefrom.
>
> The repeated sales of the topsoil in the manner described by the respondent, in my opinion, had, with some refinement, all the characteristics of ordinary trading in the commodity in question. She did not buy the topsoil and sell it, but she acquired a farm the topsoil of which was found suitable for the producing of mushrooms and she sold it to the owners of a mushroom farm. She sold it on the property at $2 per cubic yard and the buyers undertook to take delivery on the farm at designated places, to condition it and cart it away. She incurred no expense in the operations involved and the sales went on for years.

In the instant case, the evidence establishes that the respondent from 1957 to and including 1960 sold gravel, and in doing so in the manner I have described I am satisfied that she embarked on a scheme for profit making and engaged in an adventure in the nature of trade. On this point I am unable to distinguish the facts in this case from those in the *Orlando* case.

In view of these conclusions, it is unnecessary to consider the further submission of the respondent that the amounts in question were taxable income as being rent from property.

Accordingly, and for these reasons, the Minister's appeal will be allowed, the decision of the Tax Appeal Board set aside, and the re-assessments made upon the respondent for each year affirmed.

The appellant is also entitled to be paid his costs after taxation.

Judgment accordingly.

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novembre 22
1963
janvier 23

ENTRE:

CHARLES LÉON MOQUIN .....APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL ...INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, art. 12(1)(b)—Déductions non admises dans le calcul du revenu—Spéculations personnelles de bourse—Dividendes d'affaires perçus à titre de membre de syndicat—Catégories inconciliables d'activités financières—Appel rejeté.

Durant les années 1954 et 1955 l'appelant, tout en s'adonnant à des spéculations personnelles de bourse, était aussi membre actif d'un syndicat engagé dans la négociation de titres miniers. Il réalisa, pendant cette période, comme membre du syndicat, certains profits mais ses spéculations personnelles se soldèrent par un déficit. Prétendant déduire ce déficit des profits ainsi réalisés, prétention qui fut rejetée par le Ministre, l'appelant interjeta appel devant la Commission d'appel de l'Impôt qui maintint la cotisation du Ministre. D'où le présent appel à cette Cour.

Jugé: L'appel est rejeté.

2. Les gains encaissés par l'appelant comme membre du syndicat étaient imposables; mais, de même que les conséquences heureuses de ses opérations de bourse, à titre strictement individuel, eussent échappé à l'atteinte du fisc, de même aussi les pertes essuyées ne sauraient être déduites de ses sources de revenus légalement cotisés. En d'autres termes, l'appelant tente une compensation que la loi interdit entre deux catégories inconciliables d'activités financières.

APPEL d'une décision de la Commission d'appel de l'Impôt.

L'appel fut entendu par l'Honorable Juge Dumoulin, à Montréal.

Jean-M. Poulin pour l'appelant.

R. Boudreau et *Paul Boivin, c.r.* pour l'intimé.

Les faits et questions de droit soulevés sont exposés dans les motivés du jugement que monsieur le Juge Dumoulin rend maintenant (23 janvier 1963):—

Par sa décision du 16 janvier 1962[1], la Commission d'appel de l'Impôt rejetait la contestation par l'appelant de la cotisation de ses revenus imposables pour les années 1954 et 1955. De cette décision, M. Moquin interjette appel devant cette Cour.

Les éléments du litige ne sont guère complexes.

[1] [1961-1962] 28 C.T.A.B.C. 303.

En effet la preuve reçue par la Commission de l'Impôt, et versée de consentement au dossier de cet appel, établit tout simplement que l'appelant, durant les années impliquées 1954 et 1955, s'adonnait à des spéculations en bourse à titre privé et aussi en qualité de membre actif d'une organisation financière, désignée sous l'appellation de syndicat Joseph Finestone, sans reconnaissance statutaire, mais couramment engagée néanmoins dans la négociation de titres miniers, ceux, entre autres, des compagnies Abitca et Mobybdénite.

Moquin, pendant la période critique 1954-1955, réalisa, comme l'un des associés du groupe Finestone, des profits de l'ordre de $48,832.32. Par contre, ses spéculations personnelles furent moins heureuses, à telle enseigne que son bilan pour 1955, pièce A-1, atteste une perte récapitulative de $40,919.55.

Les parties sont convenues que les bénéfices provenant de l'appartenance au syndicat Finestone sont indiscutablement de nature commerciale et imposables comme tels. La mésentente naît de ce que l'appelant prétend déduire le passif de ses spéculations personnelles, soit $40,919.55, de la somme d'impôts sur son revenu versés au fisc en raison des dividendes d'affaires perçus du groupe Finestone. Au 3e paragraphe de l'avis d'appel, nous lisons que:

> 3. Cette perte commerciale, l'appelant pouvait l'appliquer contre l'année 1955 et/ou contre l'année 1954, au sens des dispositions de la Loi de l'impôt sur le revenu, ce que l'intimé lui a refusé.

La mention, ici, de perte commerciale explique confusément la prétention basique de l'appelant, qui voudrait se continuer «proprio motu», pour ses transactions privées, son autre qualité de commerçant en tant que co-associé du syndicat Finestone. Nous y pourrions voir avec un brin d'imagination, une paraphrase, sans doute insoupçonnée, du dicton «Once a Britisher, always a Britisher», «négociant là, négociant partout». Malheureusement pour M. Moquin, il est seul à tenir ce langage auquel la loi pertinente ne fait pas écho.

Ce que veut cette loi, nous le trouvons plutôt, en résumé, à l'article 6 de la réponse de l'intimé à l'avis d'appel à l'effet que:

> 6. Les activités de bourse de l'appelant au cours des années 1954 et 1955, même si elles se sont soldées par des pertes, ce qui n'est pas

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admis, sont des activités personnelles de l'appelant, non connexes avec ses autres activités commerciales et dont les pertes ou profits, s'il y en a eu, sont attribuables à capital et non déductibles pour fins d'impôt conformément aux prescriptions de l'article 12(1)(b) de la Loi de l'impôt.

Les gains «commerciaux» encaissés par Moquin, courtier, étaient imposables, ce qui, du reste, demeure incontesté; mais, de même que les conséquences heureuses de ses opérations en bourse, à titre strictement individuel, eussent échappé à l'atteinte du fisc, de même aussi les pertes essuyées ne sauraient être déduites de ses sources de revenus légalement cotisées.

Autrement exprimé l'appelant tente une compensation que la loi interdit entre deux catégories inconciliables d'activités financières.

Autant vaudrait, par exemple, opposer en déduction d'une taxe successorale le dernier impôt sur le revenu payé par le «de cujus». Je ferai observer, enfin, que Moquin, personnellement, ne détenait de l'administration provinciale aucune licence de courtage.

Pour les motifs ci-haut relatés, l'appel est rejeté; l'intimé aura droit de recouvrer ses frais de Cour après taxation régulière.

Jugement en conséquence.

ENTRE:

1962
juin 4
décembre 3

Dame THÉRÈSE DESLAURIERS-DRAGO ..... REQUÉRANTE;

ET

SA MAJESTÉ LA REINE ..... INTIMÉE.

Couronne—Pétition de droit—Chute à un aérogare—Blessures corporelles—Responsabilité de la Couronne—Loi sur la responsabilité de la Couronne, S. du C. 1952-53, 1-2 Elizabeth II, ch. 30, arts. 3(1)(a) et (b), 4(2), 4(4) et (5)—Responsabilité indirecte—Responsabilité directe—Préposé de la Couronne—Manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle de biens—Avis de réclamation—Omission de donner avis de réclamation.

Après sa descente d'un avion d'Air-Canada, à l'aérogare de l'Ancienne-Lorette, à Québec, fin d'après-midi de décembre 1957, la pétitionnaire buta contre une marche située à quelques pieds à l'extérieur de la porte donnant accès à l'aérogare, trébucha et, en tombant, se blessa le genou droit. Attribuant l'accident au fait que la marche n'était pas alors éclairée par suite d'une panne d'électricité à l'aérogare et, à raison de ce manquement, avoir droit à une indemnité de la part de la Couronne, la pétitionnaire poursuivit en recouvrement de ses dommages. La Cour, sur les faits mis en preuve, conclua que l'accident était arrivé au cours d'une panne complète d'électricité et n'est dû à aucune négligence ou imprudence de la part de la pétitionnaire dans ses gestes qui ont précédé ou accompagné sa marche vers la porte d'accès de l'aérogare jusqu'au moment de l'accident; laissant seulement à déterminer dans les circonstances de la cause la responsabilité de la Couronne en vertu de la *Loi sur la responsabilité de la Couronne*, S. du C. 1952-53, 1-2 Elizabeth II, ch. 30, art. 3(1)(*a*) et (*b*) qui se lit comme suit:

> «3. (1) La Couronne est responsable *in tort* des dommages dont elle serait responsable, si elle était un particulier en état de majorité et capacité,
>
> *a*) à l'égard d'un *acte préjudiciable* commis par un préposé de la Couronne, ou
>
> *b*) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle de biens».

Jugé: Pour réussir contre la Couronne sous l'article 3(1)(*a*) de la *Loi sur la responsabilité de la Couronne*, la pétitionnaire doit se conformer aux exigences de l'article 4(2) de la même loi qui confirme que la responsabilité de la Couronne dans un tel cas est une responsabilité déléguée, (vicarious), indirecte en vertu du principe *respondeat superior* et non pas une responsabilité directe. Cf. *Magda v. The Queen* [1953] Ex. C.R. 22 à la p. 31; *Canadian National Railways Co. v. Lepage* [1927] S.C.R. 575 à la p. 578.

2. La pétitionnaire doit donc établir clairement qu'un ou des préposés de la Couronne ont été négligents dans l'exécution de leurs devoirs et fonctions; que les blessures subies par la pétitionnaire sont le résultat de cette négligence, et que la négligence du ou des préposés est telle

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qu'il ou ils pourraient en être tenus personnellement responsables si il ou ils avaient été poursuivis. Le fardeau de la preuve quant à ces faits appartient à la pétitionnaire et aucune présomption ne peut déplacer cette obligation statutaire, le texte qui impose la responsabilité venant d'une loi statutaire fédérale spéciale et non pas du Code civil du Québec. Ici, d'après la preuve, l'obligation relative à la sécurité de la pétitionnaire à l'endroit où elle est tombée était celle de la compagnie qui transporte les passagers. Comme aucun des employés ou proposés de la Couronne n'avait le devoir d'assurer la sécurité de la pétitionnaire de l'avion d'où elle descendait jusqu'à l'aérogare, la Couronne ne peut être recherchée en responsabilité sous l'article 3(1)(*a*) de la loi susdite.

3. L'article 3(1)(*b*) de la *Loi sur la responsabilité de la Couronne* prévoit, par contre, une responsabilité directe «à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens». Une réclamation non recevable contre la Couronne sous l'article 3(1)(*a*) pourrait l'être sous l'article 3(1)(*b*) par suite d'une responsabilité directe du maître représenté par son préposé. Cf. *The King v. Anthony—The King v. Thompson* [1946] S.C.R. 569 à la p. 572.
4. Cette dernière responsabilité, cependant, ne peut être retenue contre la Couronne que si la formalité prévue à l'article 4(4) de la loi susdite a été suivie, sauf si, dans l'opinion du tribunal comme dans les circonstances de la présente cause, le défaut, de se conformer à la formalité requise n'est pas un obstacle légal aux procédures.
5. La faute d'omission peut engendrer une responsabilité à condition que la négligence d'agir corresponde à un devoir d'agir, à savoir, dans les circonstances de la présente cause, si la Couronne par ses employés a pris le soin et les précautions qu'eut pris un propriétaire prudent et diligent. Cf. *Œuvre des terrains de jeu de Québec vs. Cameron* (1940) 69 B.R. 112; *Massé vs. Gilbert* [1942] B.R. 181. Ici, d'après la preuve, la Couronne ayant la garde, le contrôle, la possession, l'occupation de l'aérogare, édifice destiné au public, avait le devoir une fois le courant coupé de prendre les mesures d'urgence qui s'imposaient pour empêcher tout accident.

PÉTITION DE DROIT par laquelle la pétitionnaire cherche à recouvrer de la Couronne des dommages pour blessures subies à la suite d'une chute survenue à un aérogare.

La cause fut instruite devant l'Honorable Juge Noël à Québec.

Roch Lefrançois pour la pétitionnaire.

Raymond Roger pour l'intimée.

Les faits et les questions de droit sont exposés dans les motivés de la décision que rend maintenant (3 décembre 1962) monsieur le juge Noël:

Par cette pétition de droit la requérante cherche à recouvrer de la Couronne des dommages pour blessures

subies à la suite d'une chute survenue à l'aérogare de l'Ancienne-Lorette, à Québec, le 24 décembre 1957, vers les six heures trente de l'après-midi dans les circonstances suivantes.

En effet, après être descendue d'un avion d'Air-Canada, elle buta contre une marche, trébucha et tomba sur ses genoux, se blessant le genou droit; cette marche se trouve à quelques pieds à l'extérieur de la porte qui donne accès à l'aérogare, dans une allée habituellement réservée aux passagers.

Bien que, suivant monsieur Henri Gourdeau, régisseur régional de l'Aviation Civile, un employé du ministère des Transports, la compagnie d'aviation qui transporte les passagers doit s'occuper de ces derniers de l'avion au taxi, c'est le ministère des Transports fédéral qui a le contrôle de l'aéroport à l'intérieur et à l'extérieur ainsi que des pistes d'atterrissage.

La requérante a attribué son trébuchement et sa chute au fait que la marche où elle buta n'était pas éclairée par suite d'une panne d'électricité et, à raison de ce manquement, elle prétend avoir droit à une indemnité de la part de l'intimée pour ses dommages du fait que les préposés de l'intimée n'ont pas éclairé cette marche ou du moins ne l'ont pas indiquée. Elle poursuit donc l'intimée en paiement d'une indemnité de $10,327.76 avec intérêts et dépens.

Aux paragraphes 16, 17, 18 et 19 de la «Pétition de droit» la requérante allègue:

16. Cet accident est dû uniquement à la négligence des préposés du Ministère des Transports au service de Sa Majesté, qui ont omis de prendre les mesures de sécurité qui s'imposaient pour signaler un obstacle qui constituait un réel danger;

17. La requérante observait au moment de l'accident toutes les règles de la prudence, et cet accident qu'elle n'a pu éviter est dû uniquement au manque de précautions et à la négligence des préposés de sa Majesté;

18. Les préposés de sa Majesté sont complètement responsables de l'accident dont la requérante fut victime, et lui sont redevables des dommages qu'il lui a causés;

19. Sa Majesté est également responsable des dommages causés par ses préposés pendant l'exercice de leurs fonctions;

Bien que les préposés de l'aérogare admettent qu'il y eut, le jour de l'accident et à la même heure, des pannes intermittentes d'électricité, ils déclarent qu'au moment de la descente de l'avion qui transportait la requérante, la piste

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d'atterrissage était éclairée; d'autre part, il semble bien que la voie d'accès à l'aérogare que suivait la requérante, et plus particulièrement la marche où elle buta, était plus ou moins éclairée, si l'on s'en tient aux déclarations des préposés de l'aérogare, et pas du tout si l'on s'en remet à celles de la requérante.

Celle-ci déclare en effet qu'il faisait très noir quand elle est descendue de l'avion; elle déclare en effet à la page 82 des notes sténographiques:

> Q. Vous jurez qu'il n'y avait pas de lumières?
> R. Il n'y avait pas de lumière près de la marche, non.

et à la page 83:

> Q. Si je comprends bien, madame Drago, vous dites que vous étiez en pleine noirceur, sauf les chandelles qu'il y avait à l'intérieur?
> R. Oui, en dehors, c'était en pleine noirceur sur le trottoir c'était noir.

Monsieur Louis-Philippe Leroux, un employé de l'intimée à l'aérogare, admet que le soir en question il y eut une panne d'électricité et qu'après une restauration partielle du pouvoir, suffisante, déclare-t-il, mais non pas complète, elle leur permit de faire leurs opérations habituelles sur le tablier en face de l'aérogare. Il déclare à la page 46 des notes sténographiques:

> Nous avions assez de lumière, ce n'était pas à cent pour cent, mais on en avait suffisamment pour faire l'ouvrage à l'avion environ cent trente-cinq pieds (135') de l'aérogare. On ne s'occupe pas des passagers, nous avions assez de lumière . . . .

Et à la page 48, en réponse à une question de la Cour il déclare :

> Q. Quand vous dites «la restauration du pouvoir temporaire,» est-ce que ça éclairait autant, au point de vue luminosité, que le pouvoir permanent?
> R. Le pouvoir temporaire que nous avions n'était pas à cent pour cent.
> Q. Qu'est-ce que c'était? Quinze pour cent?
> R. Ca, je ne sais pas, je ne peux pas dire que c'était à soixante (60), quarante (40) ou cinquante (50) pour cent, je ne sais pas du tout, mais on en avait suffisamment pour faire notre ouvrage aux avions.

Un peu plus tard il déclare que les lumières éclairaient le devant de l'aérogare et que plus l'on s'en éloignait, plus l'éclairage était faible; d'autre part, plus on s'en approchait, plus l'éclairage augmentait.

A tout événement, étant donné l'incertitude de ce témoin sur l'intensité de l'éclairage à l'endroit de l'accident et en face d'une déclaration catégorique de la requérante à l'effet que près de cette marche il faisait noir, déclaration d'ailleurs confirmée par son époux, et rendue plus que plausible par une déclaration de monsieur Gérard Gauvin, électricien à l'emploi du ministère des Transports, à l'effet qu'après l'entrée des deux avions le soir de l'accident on avait demandé au ministère des Transports de fermer le pouvoir complètement pour faire la réparation et que ce pouvoir a été fermé pendant vingt à trente minutes, il faut bien accepter la version de la requérante ainsi que l'explication donnée par M. Gauvin. Ce dernier, en effet, à la page 63 des notes sténographiques, déclare en réponse à une question du procureur de l'intimée:

Q. Est-ce qu'à un moment donné, après votre arrivée sur les lieux de l'aéroport, dans la soirée, il y a eu un défaut complet d'électricité?

R. Oui, la compagnie Québec Power a été obligée de demander au département du Transport s'il pouvait fermer le pouvoir complètement pour faire la réparation.

Q. A quelle heure ça?

R. Probablement après l'entrée des deux avions; on a demandé au département des Transports s'ils avaient des avions en circuit et ils ont dit: non, pas pour le moment, si vous avez une réparation à faire, hâtez vous pour les autres envolées.

Q. Ca duré combien de temps ça?

R. Ca peut avoir duré la totalité peut-être vingt (20) à trente (30) minutes.

La requérante ajoute qu'au moment de l'accident, il faisait également noir à l'intérieur de la salle d'attente de l'aérogare et qu'il y avait des chandelles d'allumées sur les tables. L'on doit donc conclure que l'accident est survenu pendant cette période de vingt à trente minutes où le pouvoir électrique fut fermé complètement.

On n'avait posté personne près de cette marche pour l'éclairer ou, du moins, pour en indiquer le danger. Disons ici que cette marche fut supprimée peu de temps après pour permettre, disent les employés de l'intimée, aux chaises roulantes de circuler plus facilement.

La requérante déclare que dans l'espace de dix minutes son genou droit enfla et elle n'était plus capable de le bouger. On l'aida à monter dans une auto et elle se rendit ainsi chez son père qui demeure à Québec. A la maison, on essaya de l'installer sur une chaise longue et on lui

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appliqua des compresses mais son genou continua quand même de lui faire mal, d'élancer et de grossir. Un médecin fut appelé qui lui ordonna le lit et l'hôpital pour le lendemain. Elle se rendit à l'hôpital St-François d'Assise, y demeura quinze jours et fut sous les soins d'un Dr Morissette qui ordonna une ponction et qui plaça ensuite son genou dans le plâtre qu'elle garda pendant quinze jours. Après l'enlèvement du plâtre, elle se rendit à l'hôpital où elle reçut une dizaine de traitements électriques. Elle ne put retourner à New-York avec son mari au mois de janvier à cause des traitements qu'elle devait subir et demeura chez son père, à Québec, jusqu'au début de février 1958.

A son retour à New-York elle déclare ne pas avoir été capable de reprendre son travail à la maison, ne pouvoir s'agenouiller pour laver son plancher ni rester debout longtemps et, ajoute-t-elle, lorsqu'elle se couchait le soir, le seul moyen de reposer sa jambe c'était de se coucher sur l'estomac pour que la partie plus haute, située au-dessus du genou, puisse reposer directement sur le matelas.

Elle a dû, par conséquent, pour faire son travail se faire aider à la maison par ses belles-sœurs, des voisines et des bonnes pendant une période de six mois. Elle ajoute que depuis elle a eu deux attaques d'arthrite au genou droit, l'une il y a deux ans et l'autre il y a six mois, qui l'ont empêchée de marcher pendant deux jours.

Le Dr Jean-Louis Larochelle, chirurgien-orthopédiste, après avoir examiné la requérante neuf mois après l'accident, soit le 21 octobre 1958, déclare que l'examen radiologique était négatif. A ce moment il y avait cependant, déclare-t-il, un peu d'épaississement de la synovide, c'est-à-dire, l'enveloppe extérieure du genou et un peu de sensibilité sur la face latérale interne du genou vis-à-vis l'interligne articulaire. Ce médecin, en raison d'un examen tant objectif que subjectif, lui accorde une incapacité partielle permanente de 3 pour cent.

Le rapport du Dr Gaston Morissette, qui a traité la requérante au début, a été tout simplement déposé au dossier comme Exhibit 2 sans que ce médecin ne vienne témoigner. Il diagnostiqua une hémathrose post-traumatique du genou droit. Son rapport indique qu'en raison des séquelles subjectives notées et d'après les constatations cliniques et radiologiques qu'il a faites, il fixe, en tenant

compte de l'évolution future, le taux d'incapacité partielle permanente de la requérante à 3.5 pour cent.

Les dépenses de médecin au montant de $154, d'hospitalisation au montant de $74.16, et les déboursés au montant de $99.57 pour remèdes, déplacements, téléphones et autres, donnant un total de $327.73, alléguées respectivement aux paragraphes 8, 9 et 10 de la pétition de droit furent admis par le procureur de l'intimée à l'enquête.

Elle réclame au paragraphe 11 de sa pétition la somme de $500 pour incapacité totale temporaire pendant un mois et «immobilisation dans ses activités pendant deux autres mois.»

La requérante, au paragraphe 13, réclame une indemnité de $7,500 basée, dit-elle, sur une incapacité permanente de 20 pour cent. Or, ses médecins lui donnent, comme nous l'avons vu, 3 et 3.5 pour cent. Si on retient le 3 pour cent que fixe le Dr Larochelle et qu'on l'applique proportionnellement aux $7,500, somme qui représente d'après elle 20 pour cent d'incapacité permanente, l'on obtient un montant de $1,125 qui me semble sensiblement plus que raisonnable dans les circonstances.

La requérante, au paragraphe 14 de sa pétition de droit, réclame un montant de $2,000 pour douleurs physiques et morales.

Si j'étais d'avis que la pétitionnaire a droit à ce qu'elle demande dans sa pétition, je lui accorderais une somme de $327.73 pour ses dépenses et déboursés, et une somme de $1,725 à titre de compensation tant pour son incapacité totale temporaire pendant trois mois que pour son incapacité partielle permanente et ses douleurs et souffrances.

D'autre part, l'intimée allègue qu'elle n'est nullement responsable des dommages que la requérante aurait subis, que la panne partielle d'électricité survenue quelques minutes avant la chute de la requérante était due à des circonstances fortuites sur lesquelles elle n'avait aucun contrôle; que l'accident est uniquement dû à la faute et la négligence de la requérante, notamment parce qu'elle aurait accéléré le pas et se serait précipitée dans sa marche au moment où elle allait entrer dans l'aérogare alors que le chemin qui conduisait à l'aérogare, de même que les abords de cet édifice étaient partiellement plongés dans l'obscurité et, par conséquent, elle n'aurait pas pris les

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précautions additionnelles qui s'imposaient dans ces circonstances, et, enfin, qu'elle aurait dû, au moment d'entrer dans l'édifice de l'aérogare, redoubler de prudence «vu la possibilité qu'elle ait eue à gravir des marches ou à franchir le seuil de la porte qui donne dans la salle d'attente de l'aéroport.»

Disons immédiatement que la preuve ne permet aucunement d'attacher la moindre négligence ou imprudence aux gestes de la requérante qui ont précédé ou même accompagné sa marche vers la porte d'accès de l'aérogare jusqu'au moment où elle buta dans la noirceur contre la marche et tomba sur ses deux genoux.

Il semble donc que les seules questions que l'on doive résoudre ici sont d'abord la responsabilité de l'intimée en vertu de la *Loi sur la responsabilité de la Couronne en matière d'actes préjudiciables et de sauvetage civil,* 1-2 Elisabeth II, c. 30, articles 3(1)a) et b) qui, depuis le 15 novembre 1954, s'applique aux réclamations contre la Couronne; les articles pertinents de cette Loi se lisent comme suit:

> 3. (1) La Couronne est responsable *in tort* des dommages dont elle serait responsable, si elle était un particulier en état de majorité et capacité,
>
> *a*) à l'égard d'un *acte préjudiciable* commis par un préposé de la Couronne, ou
>
> *b*) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle de biens.

et «acte préjudiciable» est défini dans ce statut relativement à toute matière surgissant dans la province de Québec comme signifiant délit ou quasi-délit.

La responsabilité de la Couronne en vertu de la Loi précitée en est une dite statutaire et la requérante pour réussir contre l'intimée, sous le paragraphe a) de l'article 3(1), doit se conformer aux exigences de l'article 4(2) de la même Loi qui se lit comme suit:

> (2) Il ne peut être ouvert de procédures contre la Couronne, en vertu de l'alinéa *a*) du paragraphe (1) de l'article 3, relativement à quelque acte ou omission d'un préposé de la Couronne, à moins que l'acte ou omission, indépendamment des dispositions de la présente loi, n'eût entraîné une cause d'action *in tort* contre le préposé en question ou son représentant personnel.

Il appert donc que lorsqu'une réclamation est faite contre la Couronne pour dommages résultant de la négligence de

ses préposés dans l'exécution de leurs fonctions, le réclamant doit établir d'une façon concluante que le préposé lui-même pourrait être tenu responsable des dommages subis et réclamés s'il était poursuivi.

Dans la présente action, sous l'article 3(1)a), la requérante doit donc établir clairement qu'un ou des préposés de l'intimée ont été négligents dans l'exécution de leurs devoirs et fonctions; que les blessures subies par la requérante sont le résultat de cette négligence, et que la négligence du ou des préposés est telle qu'il ou ils pourraient en être tenus personnellement responsables si il ou ils avaient été poursuivis.

Le fardeau de la preuve quant à ces faits appartient à la requérante et aucune présomption ne peut déplacer cette obligation statutaire. En effet, le texte qui impose la responsabilité vient d'une loi statutaire fédérale spéciale, celle que nous avons citée précédemment, et non pas du Code civil du Québec.

De plus, cet article 4(2) de la Loi confirme que la responsabilité de la Couronne dans un tel cas est une responsabilité déléguée, (vicarious), indirecte en vertu du principe *respondeat superior* et non pas une responsabilité directe. En effet, pour être déclaré responsable, comme nous l'avons dit plus haut, il doit être démontré qu'un ou plusieurs des préposés de la Couronne auraient pu être tenus responsables si la réclamation avait été dirigée contre eux. Dans une décision du président de cette Cour traitant de l'article 19(c) de la *Loi de la Cour de l'Échiquier*, qui établissait à ce moment les conditions de la responsabilité de la Couronne et dont les principes contenus dans cette décision ont été par la suite réaffirmés dans les nouveaux articles 3(1)a) et 4(2) il fut déclaré dans *Magda* v. *The Queen*[1]:

> To engage the responsibility of the Crown to a suppliant under section 19(*c*) it must be shown that an officer or servant of the Crown, while acting within the scope of his duties or employment, was guilty of such negligence as to make himself personally liable to the suppliant, for the Crown's liability under section 19(*c*), if the term liability is a precise one to apply to the Crown, is only a vicarious one. Consequently, the suppliant must allege facts from which negligence on the part of an officer or servant of the Crown may be found, that is to say, facts showing that the officer or servant of the Crown owed a legal duty, whether imposed by statute or arising otherwise, to the suppliant to take care to avoid injury to him,

[1] [1953] Ex. C.R. 22, 31.

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that there was a breach of such duty while the officer or servant was acting within the scope of his duties or employment and that injury to the suppliant resulted therefrom: *vide Lochgelly and Coal Co.* v. *McMullan; Hay or Bourhill* v. *Young; The King* v. *Anthony.*

En effet, le principe qu'un acte de négligence ne peut être considéré comme une faute engendrant une responsabilité que s'il correspond à un devoir légal d'agir a été reconnu par nos tribunaux en plusieurs circonstances, entre autres dans *Canadian National Railways Co.* v. *Lepage*[1] Rinfret J.:

> It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

Quels étaient donc les devoirs des préposés de la Couronne, soit les employés du ministère des Transports, à l'égard de la requérante dans les circonstances de cette cause?

Monsieur Louis-Philippe Leroux, un employé de l'intimée, travaille à l'aérogare de l'Ancienne-Lorette et s'occupe de voir à placer le débarcadère pour y faire descendre les passagers des avions ainsi que le générateur mobile qui remplace le générateur de l'avion et qui éclaire à la fois la cabine de l'avion et les marches du débarcadère. Lorsque ce débarcadère est bien placé, il ouvre la porte et les passagers qui en sortent se dirigent ensuite vers l'aérogare en passant par un chemin qui conduit à la marche où la requérante est tombée. Il déclare qu'il était en devoir le soir de la chute de la requérante mais qu'il n'a pas vu l'accident.

Il semble, d'après le témoignage de ce monsieur, qu'une fois qu'il a vu à assurer la descente des passagers de l'avion par le moyen du débarcadère, il ne s'est pas préoccupé de voir à ce que les passagers puissent se rendre en toute sécurité à l'aérogare car son rôle quant aux passagers se termine lorsqu'il a placé le débarcadère et permis aux passagers de l'utiliser. Ensuite comme il le dit à la page 50 des notes sténographiques:

> R. Je devais faire mes fonctions habituelles à l'avion, regarder comment les hommes déchargent les bagages des compartiments, et ensuite, je suis, comme je fais d'habitude, parti avec la sacoche de la compagnie, et de là à nos bureaux.

[1] [1927] S.C.R. 575, 578.

Monsieur Lionel Maheux, un autre employé du ministère des Transports à l'aérogare, déclare que ses fonctions consistent à faire l'enregistrement des avions, la cueillette de l'argent et des taux d'atterrissage et comme il le dit «advenant toute condition atmosphérique, de changement de la condition des pistes, répondre au téléphone; advenant une panne électrique, appeler l'électricien, et voir à préparer les torches . . .».

Ce témoin déclare qu'après cinq heures de l'après-midi, c'est le ministère des Transports, par ses préposés, qui a le contrôle et la charge de voir à l'opération de l'aérogare.

Le soir de l'accident, ce monsieur s'est occupé de faire préparer les torches à l'huile de charbon au cas où le pouvoir manquerait complètement et qu'un avion descendrait; il s'est enquis pour voir si c'était le Quebec Power ou le ministère des Transports qui était responsable de la panne d'électricité. Au moment de l'accident il était dans la cave de l'aérogare en train de vérifier s'il s'agissait bien de l'équipement de l'aérogare qui faisait défaut et en remontant de cette cave on lui apprit qu'une dame s'était blessée en tombant dans la porte d'entrée. Ce monsieur a son bureau à côté de la porte d'entrée où la requérante est tombée. Il déclare que «en ce qui concerne les passagers des 'airlines', on ne s'en occupe pas du tout, on ne s'en est jamais occupé, on ne s'occupe pas de ça.» «Il n'est pas attitré pour les passagers» déclare-t-il, et que personne d'autre n'est attitré «aux passagers par le ministère des Transports.»

Monsieur Henri Gourdeau, régisseur régional de l'Aviation civile, confirme les témoignages de ces deux messieurs et déclare qu'en effet la Couronne n'a pas de fonctionnaires qui s'occupent de l'entrée et de la sortie des passagers de l'aérogare parce que, dit-il, c'est la compagnie qui transporte les passagers qui s'occupe de ces derniers de l'avion au taxi.

La preuve révèle donc que les préposés de la Couronne n'avaient aucunement comme fonction ou devoir de prendre soin de la requérante de l'avion à l'aérogare ni n'avaient-ils l'obligation légale d'avertir la requérante du danger que comportait ladite marche ou de voir à ce qu'elle soit éclairée. L'exécution du mandat qui leur avait été confié n'avait aucune relation avec la sécurité de la requérante à

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l'endroit où elle est tombée et il n'est pas possible de leur imputer une faute par suite d'une omission alors que ni la Loi ni les termes de leur emploi ne les obligeaient à agir. Je n'ai aucun doute sur le résultat de toute action intentée contre Leroux ou Maheux leur réclamant personnellement des dommages à cause de cette omission. L'obligation relative à la sécurité de la requérante à l'endroit où elle est tombée était, en effet, celle de la compagnie qui transporte les passagers. Or, comme nous l'avons vu, un acte de négligence ne peut être considéré comme une faute engendrant une responsabilité que s'il correspond à un devoir d'agir, et comme aucun des employés ou préposés de la Couronne n'avait le devoir d'assurer la sécurité de la requérante de l'avion d'où elle descendait jusqu'à l'aérogare, l'intimée ne peut être recherchée en responsabilité sous l'article 3(1)a) de la *Loi de la responsabilité de la Couronne.*

Ceci ne dispose pas, cependant, de la réclamation de l'intimée. En effet, sa responsabilité en vertu du statut pourrait exister en vertu de l'article 3(1)b) de la *Loi de la responsabilité de la Couronne en matières d'actes préjudiciables et de sauvetage civil,* que nous avons vu plus haut, mais que je reproduis cependant ci-après:

> 3. (1) La couronne est responsable *in tort* des dommages dont elle serait responsable, si elle était un particulier en état de majorité et capacité,
>
> *a*) . . .
>
> *b*) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens.

Nous avons vu que la responsabilité de la Couronne en vertu de l'article 3(1)a) du statut en est une indirecte, déléguée, (vicarious), basée sur le principe de *respondeat superior.* Cette responsabilité, d'ailleurs, existe aussi dans la province de Québec en vertu de l'article 1054 du Code civil.

Les décisions sous le paragraphe b) de l'article 3(1) sont peu nombreuses et n'informent guère sur la portée de cet article touchant à la responsabilité. Il semble bien, cependant, que si le paragraphe a) de l'article 3(1) prévoit, comme nous l'avons vu, une responsabilité indirecte, le paragraphe b) prévoit une responsabilité directe «à l'égard d'un manquement (et en anglais on emploie le terme

'breach of duty') au devoir afférent à la propriété, l'occupation, la possession ou le contrôle des biens.»

Cette distinction entre la responsabilité directe et indirecte, prévue par les sous-sections a) et b) de l'article 3(1), a été bien définie par la Cour Suprême dans *The King* v. *Anthony—The King* v. *Thompson*[1], Rand J.:

> This raises the distinction between duties and between duty and liability. There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of *respondeat superior;* the former does not.

Il me semble bien, par conséquent, qu'une réclamation qui ne pourrait être reçue contre la Couronne sous le paragraphe 3(1)a) pourrait l'être sous le paragraphe 3(1)b) par suite d'une responsabilité directe du maître représenté par son préposé.

Cette responsabilité, cependant, ne peut être retenue contre la Couronne si on se réfère à l'article 4(4) du statut précité:

> . . . que si dans un délai de sept jours après que la réclamation a pris naissance, un avis écrit de la réclamation et du préjudice dont on se plaint
>
> *a*) a été signifié à un fonctionnaire compétent du département ou de l'organisme administrant les biens ou à l'employé du département ou de l'organisme ayant le contrôle ou la charge des biens, et
>
> *b*) copie de l'avis a été envoyée par courrier recommandé au sous-procureur général du Canada.

Or, il n'y a rien dans le dossier qui me permet de croire que cette procédure a été suivie.

L'article (5) de la même Loi, cependant, vient au secours de la requérante et déclare que:

> (5) . . . l'omission de donner l'avis, ou l'insuffisance de celui-ci, n'est pas un obstacle légal aux procédures si le tribunal ou le juge devant qui elles sont intentées estime que la Couronne, dans sa défense, n'a subi aucun préjudice en raison de l'absence ou de l'insuffisance de l'avis et que le fait d'empêcher les procédures constituerait une injustice, bien qu'une excuse raisonnable de l'absence ou de l'insuffisance de l'avis ne soit pas établie.

Il semble bien que dans la présente cause l'intimée n'ait subi aucun préjudice par suite de ce manquement. En effet,

[1] [1946] S.C.R. 569 à la page 572.

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la preuve révèle que quelques instants après l'accident le gérant de l'aérogare, ou du moins un des préposés en charge, en ait été immédiatement averti de sorte que, si une enquête était nécessaire, elle aurait pu se faire immédiatement. Je suis aussi d'avis que dans le présent cas le fait d'empêcher les procédures dans les circonstances constituerait une injustice à l'égard de la requérante. J'en viens donc à la conclusion que le défaut de se conformer à cette formalité importante de la Loi ne doit pas empêcher la requérante d'obtenir une compensation de l'intimée si par ailleurs elle y a droit.

Pour permettre à l'intimée de se prévaloir de l'article 3(1)b) du statut, il aurait fallu qu'elle allègue, au moins d'une façon générale, les faits qui pourraient y donner ouverture, soit le ou les manquements au devoir afférent à la propriété, l'occupation, la possession ou le contrôle de biens. Or, nous avons bien vu que la requérante a ramassé aux paragraphes 16, 17, 18 et 19 de la pétition les griefs qu'elle reproche à l'intimée et sur lesquels elle base sa réclamation et bien que dans ces paragraphes l'on s'applique à décrire la négligence par omission des préposés de l'intimée, ce n'est qu'à l'allégué 19 que l'on mentionne que ses dommages auraient été causés pendant l'exercice de leurs fonctions. Il semblerait, par conséquent, que les paragraphes 16, 17 et 18 de la pétition comporteraient une base de réclamation différente de 19 ou du moins la rédaction de ces allégués semblerait l'indiquer.

A tout événement, s'il y a un doute sur la suffisance de ces allégués quant à l'article 3(1)b) du statut, cette omission pourrait être comblée par le juge ou le tribunal en vertu des règles 115 et 117 de cette Cour si d'autre part la preuve contient les éléments nécessaires à l'application de l'article.

Or, il appert de la preuve que les faits qui pourraient donner ouverture à l'application de l'article 3(1)b) ont été, non seulement soulevés, mais prouvés et établis à l'enquête. En effet, si l'on se réfère au témoignage de mònsieur Lionel Maheux, un des préposés de l'intimée à l'aérogare, l'on voit qu'il déclare à la page 69 des notes sténographiques que:

> R. Après cinq heures, les bureaux sont fermés, on prend la charge de l'aéroport, autrement dit.
>
> Q. Vous avez la charge, votre département des Transports a la charge de l'aéroport à ce moment-là?

R. C'est-à-dire, on représente les autorités, après cinq heures.
Q. Quelles autorités?
R. Notre gérant, le gérant de l'aéroport.
Q. Le gérant, c'est un employé du département des Transports?
R. Oui monsieur.
Q. Alors, c'est le département des Transports qui a le contrôle et la charge de voir à l'opération de l'aéroport?
R. Oui monsieur.

Enfin, monsieur Henri Gourdeau, régisseur régional de l'Aviation civile, employé du département des Transports, admet lui aussi que c'est l'intimée, soit le département des Transports, qui a le contrôle de l'aérogare.

L'on peut donc au moins dire que la question de possession, de contrôle, d'occupation de l'aérogare de l'Ancienne-Lorette, où l'accident est survenu, bien qu'elle ne soit pas clairement plaidée est, cependant, en litige dans cette cause.

L'intimée ayant ce contrôle de l'aérogare, lequel comprend également ses voies d'accès, et plus particulièrement celle conduisant à la marche où la requérante trébucha et tomba, aurait-elle commis un acte préjudiciable envers la requérante par l'entremise de ses employés, qui engagerait sa responsabilité directe? Aurait-elle, en effet, manqué à son devoir comme occupante de l'immeuble de l'aérogare en charge de ses services, en ne donnant aucun avertissement aux passagers descendant de l'avion, et plus particulièrement à la requérante, du danger que pouvait comporter la marche où cette dernière est tombée ou en ne l'illuminant pas pour permettre aux passagers de l'utiliser sans danger.

Remarquons que l'intimée ne serait responsable que si elle n'a pas pris les soins raisonnables pour prévenir l'accident.

Dans une cause de *l'Œuvre des terrains de jeux de Québec* v. *Cameron*[1], le juge Rivard disait:

> Le plus sûr critère de la faute, dans des conditions données, c'est le défaut de cette prudence et de cette attention moyenne qui marquent la conduite d'un bon père de famille; en d'autres termes, c'est l'absence des soins ordinaires qu'un homme diligent devrait fournir dans les mêmes conditions.

Et dans *Massé* v. *Gilbert*[2], le juge Létourneau déclare:

> De sorte que tout ce que la Cour doit se demander c'est si l'intimé Gilbert, en cette occasion, et eu égard à la situation des lieux, a bien pris

[1] (1940) 69 B.R. 112. [2] [1942] B.R. 181.

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le soin et les précautions qu'eût pris un propriétaire prudent et diligent; si oui, l'on peut dire qu'un propriétaire prudent et diligent n'eût rien fait de plus, rien fait de mieux pour éviter ce qui est arrivé, l'intimé doit être exonéré en appel comme il l'a été en première instance.

Examinons maintenant la conduite de l'intimée et voyons si celle-ci par ses employés a pris le soin et les précautions qu'eût pris un propriétaire prudent et diligent.

Disons tout d'abord que l'aérogare et l'allée où se trouve la marche en question est pour l'utilité du public voyageur et les autorités de l'aérogare ont, par conséquent, certains devoirs envers les usagers.

Dans les circonstances exceptionnelles de la présente cause, telles qu'elles existaient au moment de l'accident, par suite de la fermeture du courant pendant vingt à trente minutes après l'arrivée de l'avion d'où la requérante est descendue et l'obscurité qui régnait à l'endroit où se trouve la marche, l'intimée, il me semble, devait prendre immédiatement les mesures nécessaires pour ou bien avertir les passagers qui circulaient dans l'allée du danger que pouvait comporter cette marche ou bien l'éclairer par des moyens de fortune de façon à prévenir tout accident.

Que fait le préposé Lionel Maheux, en charge de l'aérogare en l'absence du gérant? Il s'assure que l'avion puisse descendre en sécurité en préparant au besoin des lumières d'urgence, s'intéresse à l'électricité de l'aérogare, mais bien que placé tout à côté de la porte par où passent les passagers, et sachant qu'il y avait une panne intermittente d'électricité, ne prend aucun moyen pour assurer le passage sans encombre des piétons ou passagers à un endroit comme la marche qui, comme nous l'avons vu, non éclairée, constitue un danger. Sa faute est aggravée, il me semble, par le fait qu'immédiatement après la descente des deux avions, le courant a été enlevé complètement de l'aérogare, tel que le révèle le témoin Gauvin. Il serait en effet étonnant qu'on ait enlevé le courant sans l'assentiment de cet employé. Dans l'occurrence, et vu la situation d'urgence provoquée d'abord par la panne d'électricité et ensuite son enlèvement, cet employé n'a-t-il pas commis une faute d'omission qui engage la responsabilité directe de l'intimée. En effet, il aurait pu, il aurait dû, il me semble, placer un employé près de la marche avec une torche électrique qui aurait pu indiquer cette marche aux passagers et prévenir l'accident qui est arrivé.

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Il est certain que la faute d'omission peut engendrer une responsabilité à condition, comme nous l'avons dit plus haut, que la négligence d'agir corresponde à un devoir d'agir. L'intimée ayant la garde, le contrôle, la possession, l'occupation de l'aérogare, édifice destiné au public, avait le devoir une fois le courant coupé de prendre les mesures d'urgence qui s'imposaient pour empêcher tout accident.

Il sera donc permis à la requérante de faire tout amendement à sa pétition de droit de façon à lui permettre d'asseoir sa réclamation sur un manquement de l'intimée à un devoir afférent à la propriété, l'occupation, la possession ou le contrôle de l'aérogare, si besoin en est.

Par conséquent, la Cour maintient la pétition de droit de la requérante et déclare que dame Thérèse Deslauriers-Drago a droit de recouvrer de la Couronne la somme de $2,052.73, le tout avec dépens.

Jugement en conséquence.

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Sept. 24

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Jan. 25

BETWEEN:

BRAMPTON BRICK LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Land transactions apart from main business—Whether profit therefrom is income—Transaction not "an operation of business in carrying out a scheme of profit making"—Appeal allowed.

Appellant, in the business of manufacturing bricks for fifty years, in 1949 sought to expand production. It tried to acquire an additional 50 acres of suitable clay land from a nearby farmer but had to purchase the entire farm of 150 acres. Later it gave a mortgage for a substantial part of the price. A condition of the mortgage was that partial releases would be granted by the mortgagee in respect of portions of the land that might later be sold. The appellant used some of the land for the extraction of clay and began a dairy operation on another part of the land. In 1956, 8 acres were expropriated for a roadway and the appellant in 1958 sold for a service station a corner of the property which had become attractive for that purpose as a result of the expropriation. Later a corporation exercised an option to purchase 5 acres of the land, the remainder of the property being retained. Two other transactions in land were the purchase and retention of a nearby farm

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because its owner complained of rubble from the brickyard being dumped on it, and the purchase of another nearby farm in 1956 which was sold two years later at a profit which appellant conceded was taxable.

The Minister assessed the profit on the sale of the service station site for income tax and on appeal to this Court contended that the appellant's business had expanded to include dairy farming and dealing in land or, alternatively, that the transaction in question was a venture in the nature of trade. Appellant contended the profit was a capital gain.

Held: That in the absence of documentary proof of the objects of the incorporation of appellant it is to be inferred from the fact that the appellant prior to the purchase of the land had been engaged for many years in an operation consisting only of brickmaking that dealing in real estate was not one of the objects for which appellant was incorporated.

2. That the evidence preponderates in favor of the view that the purchase of the 150 acres was not made in the course of or for the purpose of expanding the appellant's business to include dealing in land and the sale of the service station site was not one made in the course of a business which included dealing in land.

3. That nothing in the conduct of the appellant in seeking a purchaser for the service station site or the manner in which the transaction was effected serves to characterize it as a trading transaction or "an operation of business in carrying out a scheme of profit making" and thus a venture in the nature of trade rather than the realization of an investment.

4. That the appeal be allowed.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

W. D. Goodman for appellant.

F. J. Cross for respondent.

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

THURLOW J. now (January 25, 1963) delivered the following judgment:

This is an appeal from a re-assessment of income tax for the year 1958. The matter in issue is the liability of the appellant for income tax in respect of an amount of $34,467.43 which the Minister included in the computation of the appellant's income for the year as profit realized by the appellant from the sale of certain land in circumstances to be described. The Minister's case is that the amount was profit from a business as defined in s. 139 (1)(*e*) of the

Income Tax Act, R.S.C. 1952, c. 148 and therefore subject to tax as income under ss. 3 and 4 of the Act. The appellant's contention on the other hand is that the sale of the land was a mere realization of a capital asset and that the amount in question was not subject to tax as income under the Act.

The appeal came to trial before Fournier J. in June, 1960 when evidence was given by one witness called by the appellant and argument of counsel for both parties was heard but judgment had not been rendered when Fournier J. later died. Subsequently the parties agreed that the case be determined on the transcript of evidence given before Fournier J. and the matter then came on for oral argument before me.

The main facts may be briefly stated. The appellant carries on a brick manufacturing operation in the Township of Chinguacousy in Peel County some ten miles north of Brampton, Ontario and has been so engaged for more than 50 years. In or about the year 1949 at a time when the plant of the appellant company was in a run-down condition and its treasury depleted the shares of the company were acquired by four new owners who thereupon became its directors and assumed control of its affairs. These directors planned to make the operations more successful by expanding the appellant's production but it soon became apparent that the clay available for brick-making on the 17 acres of land then owned by the company, whereon its plant was situated, would be insufficient to maintain production on the increased scale and that it would be necessary to acquire an additional source of clay near at hand. With this in mind, the appellant sought to acquire 50 acres of land, on which clay was available, from what was known as the Calvert farm which adjoined the northern side of the appellant's property. The owner however was unwilling to sell a part of his land for such a purpose and insisted on selling the whole, which consisted of 150 acres, or none of it. In April, 1953 the appellant agreed to purchase the 150 acres and subsequently on March 1st, 1954 completed the purchase for a price of $150,000, $50,000 of which was paid on or before completion and the balance secured by a mortgage for $100,000 at 6 per cent interest repayable at the rate of $5,000 each half year for five years when the balance would be due

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but with a right for the appellant to extend the term for a further two and a half years. In the mortgage as well as in the purchase agreement there was provision that the appellant should be entitled to obtain partial releases of the mortgage in respect of any portions of the land that might be sold provided the sale was approved by the mortgagee and the price obtained on such sale was paid on account of the mortgage.

The 150 acres of land so acquired fronted on the eastern side of a paved road known as provincial highway No. 10 and also fronted on the southern side of what at the time of the purchase was a narrow gravelled road intersecting highway No. 10. The land contained enough clay to supply the appellant's operation for many years but there were portions of the property which were unlikely ever to be used for that purpose. In particular there was a municipal by-law which prohibited extraction of clay within 400 feet of the roads. When the property was purchased there were on it several cottages and a farm house which were occupied by tenants, and a large barn and sawmill, and some time after the purchase the appellant acquired a herd of cattle and began carrying on a dairy farm operation on the portion of the premises not immediately required for the extraction of clay.

In 1956 a portion of the property consisting of about eight and a half acres was expropriated by the municipal authorities for the purpose of developing the road bordering the northern side of the property into a highway for traffic by-passing the City of Brampton and as a result the corner of the property formed by the intersection of the roads became a valuable site for a service station. The appellant which still owed a considerable sum on the mortgage of the property thereupon endeavoured to sell the corner consisting of a lot 200 feet square to McColl-Frontenac Oil Company Limited for $60,000 and ultimately in September 1956 succeeded in doing so at $55,000, the transaction being completed in July, 1957. This occurred in the appellant's fiscal period which ended January 31st, 1958 and as appears from the Notice of Appeal and the Minister's reply it was this transaction which resulted in the alleged profit which is in issue in the appeal. In the meantime in 1954 the appellant had given to Peel Block Co. Ltd., a corporation organized and con-

trolled by close relatives of the individuals who controlled the appellant, an option to purchase five acres of the land at $2,000 per acre and in the 1958 taxation year the option was exercised and the transaction completed. Apart from the expropriated portion, the lot sold to McColl-Frontenac Oil Company Limited and the lot transferred to Peel Block Co. Ltd., the appellant still owned the whole of the property at the time of the hearing of the appeal, in 1960. At that time a portion of it was being used as a source of clay for the brickmaking operation, a portion of it was being used for the dairy farm operation, and the remaining dwellings (two had been situated on the corner lot sold to McColl-Frontenac Oil Company Limited) apparently were still yielding rentals. No effort had been made to sell any portion of the land other than that sold to the McColl-Frontenac Oil Company Limited.

Two other land transactions in which the appellant engaged should also be mentioned. Some time after the purchase of the Calvert property, the appellant purchased a property known as the Fleury farm which was located near the brick plant. The reason given for the purchase of this property was that its owners were complaining of rubble from the plant having been dumped on it and the appellant purchased the land to settle the controversy. It was still held by the appellant at the time of the trial of the appeal.

The other transaction was the purchase by the appellant in 1956 of what was known as the Zultak farm consisting of 101 acres in or near Brampton and the sale of it at a profit in 1958. The land had been bought at a "cut" price and had not been put to any use while held by the appellant and the appellant had no plans to use it in its operations. The purchase was apparently a speculation in real estate and counsel for the appellant stated that the profit realized on the sale was income subject to tax. The profit would, of course, be subject to tax only if it arose from a business within the meaning of s. 139 (1)(*e*) of the Act and the statement of counsel suggests either that the business of the appellant at that time included dealing in land or that the purchase and sale of the Zultak farm were transactions in the course of a venture in the nature of trade.

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The Minister's case for including the profit realized on the sale to McColl-Frontenac Oil Company Limited in the computation of the appellant's income as put forward in the argument was based on an assumption that at the time of the purchase of the 150 acres the business of the appellant which had formerly been merely that of brickmaking was expanded to include dairy farming and dealing in land and that the sale in question was a sale made in the course of that business. In the alternative it was submitted that the sale of the lot to McColl-Frontenac Oil Company Limited was itself an adventure in the nature of trade. In support of these contentions it was submitted that it had not been established that the objects for which the appellant was incorporated did not include dealing in land, that since the appellant could not expect to use all of the property for the purpose of extracting clay the sale of portions of the property must have been contemplated from the time of the purchase and that as early as 1954 the appellant had granted an option to Peel Block Co. Ltd. to purchase five acres of the property at $2,000 per acre which was twice the average cost per acre of the land to the appellant, that in 1956 the appellant had acquired the Zultak farm which was later sold for a profit without having been turned to any use in the meantime and that the proper inference from the facts was that in purchasing the property the appellant did so for the purpose of turning it to account for profit in any practical way that might arise including sale of it in whole or in part. Finally, it was submitted that whether or not the purchase of the land was made for the purposes of the brickmaking operation, the appellant had no intention of retaining the corner later sold to McColl-Frontenac Oil Company Limited for the purposes of that operation and that in endeavouring to sell the corner to the McColl-Frontenac Oil Company Limited, the appellant had acted in the same way as any land dealer would proceed, that it was not a case of the appellant receiving an offer that was too good to resist but one in which the appellant made the approach to the respective purchaser, obtained the permit for the gasoline outlet and actively promoted the sale from all of which it should be inferred that the sale was one made in the course of a venture in the nature of trade rather than a mere

realization of a capital asset not required for the purposes of the appellant's business operations.

In my judgment the Minister's contentions cannot succeed. No doubt the burden was on the appellant to establish that the Minister's assumptions were not true in fact but this onus may be met by a preponderance of evidence and as I view the case it has been discharged. While the admission that the profit from the appellant's transactions in connection with the Zultak farm was income suggests that the appellant had corporate power to trade in land, in the absence of documentary proof of the objects of the incorporation, which the respondent as well as the appellant might have offered if he regarded it as advisable to do so, I would infer from the fact that the appellant prior to the purchase had been engaged for many years in an operation consisting only of brickmaking that dealing in real estate was not one of the objects for which the apellant was incorporated. The salient facts with respect to the alleged business of dealing in land on which the appellant is said to have embarked when purchasing the 150 acre property are thus that dealing in land was not one of the objects for which the appellant was incorporated nor had its business previously included dealing in land, that in a period of more than three years following the purchase there was but one arm's length sale, that it was a sale of less than two acres of the land and that the chance of making that sale arose because of the widening and development of the cross-road into an important highway, an event which occurred some three years after the appellant had contracted for the purchase of the property. In the circumstances I do not regard the sale to the Peel Block Co. Ltd. or the expropriation or the prices secured in either transaction as affording any support for the Minister's contention and while the subsequent transactions of the appellant in purchasing and selling the Zultak farm do not help its position to my mind they are not of sufficient weight to affect the view I take of the nature of the purchase and sale here in question. Moreover I see no inherent improbability in and I regard as credible the explanation given at the trial that the appellant requiring further land

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from which to take clay for its brickmaking operation sought to acquire 50 acres of the Calvert farm and purchased the 150 acres simply because the owner would not sell the required portion alone. In the circumstances the owner might well have felt that the value of the remainder would be adversely affected by the proximity of the appellant's brickmaking operation and while I do not doubt that before acquiring the 150 acres the directors of the appellant considered what might be done with the portion that would not be required for the extraction of clay and how it might be turned to advantage whether by using it or disposing of it, on the evidence, I can discover no good reason for thinking that there were prospects at that time of selling such portions to advantage or that prospects of selling them at a profit even constituted a motive for making the purchase. Nor would I infer from the inclusion in the mortgage of provision for partial releases anything more than a purpose to protect the right of the appellant to dispose of portions of the property not required for its business and thus reduce its mortgage obligation if an opportunity should arise to sell at a reasonable price a portion of the land not required for the brick making operation. On the whole therefore I am of the opinion that the evidence preponderates in favor of the view that the purchase of the property was not made in the course of or for the purpose of expanding the appellant's business to include dealing in land and that the sale to McColl-Frontenac Oil Company Limited was not one made in the course of a business which included dealing in land. Nor do I think that anything in the conduct of the appellant in seeking a purchaser for the corner lot, which, following the purchase, had become useful as a site for a service station, or in the manner in which the transaction was effected would in the circumstances serve to characterize it as a trading transaction or "an operation of business in carrying out a scheme of profit making" (*Vide Californian Copper Syndicate (Limited and Reduced) v. Harris*[1]) and thus a venture in the nature of trade rather than a mere realization of an investment.

[1] (1904) 5 T.C. 159.

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I am accordingly of the opinion that the profit realized on the sale of the corner to McColl-Frontenac Oil Company Limited cannot properly be regarded as profit either from the appellant's business in the ordinary sense of the expression or from a venture in the nature of trade.

The appeal therefore succeeds and it will be allowed with costs and the re-assessment varied accordingly.

Judgment accordingly.

BETWEEN:

PHILIP REGINALD MORRIS .....APPELLANT;

AND

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

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Jan. 23, 24, 25, 28

Jan. 28

Revenue—Income tax—Income Tax Act 1948—Income Tax Act R.S.C. 1952, c. 148, ss. 3 and 4—Statute of Limitations R.S.O. 1960, c. 214—Income from property—Income of taxpayer—Appeal dismissed.

In May 1924 property in Hamilton was conveyed to the appellant and his father and mother as joint tenants and not as tenants-in-common. Following the death of the mother, the father on May 1, 1945, conveyed the property to the appellant who has been the sole registered owner since that date. The Minister assessed the appellant for the whole net income from the property for the years 1950-1956 inclusive. Appellant contended

(1) That pursuant to a trust agreement dated April 15, 1944 (but not registered) between his father and the appellant's wife and signed also by the appellant, he had only a one-third interest in the property, the other two-thirds being owned equally by his two sisters. On July 2, 1945 the appellant as sole owner executed a mortgage in favour of his two sisters for $3,000, which mortgage was discharged on December 2, 1946 by payment of $2,300. Since that date the appellant has paid no part of the profits from the property to either sister or otherwise acknowledged that they have any interest in the property.

(2) That under the Statute of Limitations of the Province of Ontario by adverse possession either the appellant's father, his mother or his wife has become the sole owner of the property and the appellant is not taxable in respect of any of the profits therefrom.

An appeal to the Tax Appeal Board was dismissed and from that decision an appeal was taken to this Court. By virtue of an agreement entered into by the appellant and the Minister, it is not necessary to consider the question as to the quantum of the net annual profits from the

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property, the issue in the appeal being "Was the appellant entitled to the whole of such profits, or part thereof or none at all?"

Held: That at all relevant times the appellant was the owner of the property and directly or indirectly received all the net profits therefrom.

2. Since the two sisters of the appellant are not parties to these proceedings, their rights, if any, in the property should not be finally determined; but the only reasonable inference to be drawn from the established facts is that the appellant in his personal capacity did receive directly or indirectly and retain for his personal use and benefit all the net profits from the property in the relevant years and that from December 2, 1946, when the mortgage to the sisters was discharged, the appellant considered that the two sisters had no further interest in the property.

3. That neither the appellant's father, mother or wife ever acquired ownership of the property by adverse possession as against the appellant; that in such transactions as may have been carried out by the appellant's wife in collecting rents, paying expenses and debts, she acted merely as agent for the appellant.

4. That after discharging such obligations the balance was payable to and paid to the appellant in his capacity as owner.

5. That in any event the appellant failed to meet the onus cast upon him to establish that the assessments were erroneous.

6. That the appeal must be dismissed.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Hamilton.

The appellant in person.

C. W. Robinson, Q.C. and *F. J. Dubrule* for respondent.

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

CAMERON J. now (January 28, 1963) delivered the following judgment:

By its decision dated March 24, 1961[1], the Tax Appeal Board upheld with a variation (later to be referred to) the re-assessments made upon the appellant for the taxation years 1950 to 1956, inclusive, and from that decision an appeal is now taken to this Court.

The following facts are not in dispute. The appellant was formerly a member of the bar of Ontario, but was disbarred in 1933 and is now a prospector. He is a son of the late William Morris of Hamilton who died in 1949

[1] 26 Tax A.B.C. 198.

and of the late Esther Georgina Morris who died in 1941. The appellant's wife is Jean Cairns Morris, a practising solicitor in Hamilton, and both are now over seventy-five years of age.

By deed dated May, 1924 (Exhibits 2 and "C"), Business Realty Limited conveyed to William Morris, Esther Georgina Morris and the appellant as *joint tenants and not as tenants in common* parts of Lots 23 and 24 on N. Hughson's survey in the City of Hamilton, known also as street numbers 22 to 26 John Street North, Hamilton. On that property, there was and is situated a large brick building, the ground floor being used or rented as shops and offices and the upper floors being divided into a substantial number of living apartments. It is located within one block of the main shopping and business street in the city. For the sake of brevity, I shall hereafter refer to it as "the property".

The consideration for the above conveyance was $40,000 which was paid by the assumption of a registered mortgage to the Tuckett Estate for $25,000, and the balance of $15,000 was paid by William Morris. The grantees in that deed on March 8, 1926, gave a mortgage to the Toronto General Trusts Corporation for $25,000 (Exhibit 3), it being provided that $500 on principal as well as interest should be re-payable every six months and the balance on March 1, 1931. The Tuckett mortgage was then discharged.

By indenture dated April 14, 1944 (Exhibit 4), the Toronto General Trusts Corporation assigned the mortgage to the wife of the appellant—Jean Cairns Morris (in trust), the amount owing thereon being $18,183 for principal and $358.50 for interest, plus interest on the principal from March 1, 1944, at 6¼ per cent.; that assignment was registered on June 11, 1945, as No. 98026 N.S.

By deed dated May 1, 1945 (Exhibit F) William Morris conveyed the property to the appellant for the expressed consideration of natural love and affection and $2. In the recitals thereof it is stated that the grantee and grantor with Esther Georgina Morris, the former wife of the grantor, were joint tenants and not as tenants in common of the property and that Esther Georgina Morris had died on March 30, 1941. That deed was registered on July 10, 1945 as No. 98349 N.S. That deed was prepared in the office

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of Morris and Morris (the appellant's wife being then the sole partner in that firm) and in the affidavit made under the *Land Transfer Tax Act,* she swore that she was solicitor for the grantee.

As shown by the Registrar's Abstract of Title (Exhibit "A"), the appellant since that date has been the registered owner of the property. It is also shown by the evidence that at least since that date the appellant has been assessed as sole owner of the property and as such owner has on one or more occasions appealed the amount at which the property was assessed and applied for allowances due to vacancies. *Prima facie,* therefore, it would appear that on the facts which I have mentioned, the appellant as such owner is bound to include as part of his taxable income all the profits arising in each year from the rents of the property under ss. 3 and 4 of the *Income Tax Act* 1948 and the *Income Tax Act.*

It may be noted here that Jean Cairns Morris (in trust) executed a discharge (Exhibit "B") of the mortgage to the Toronto General Trusts Corporation which had been assigned to her, on June 11, 1945, and registered on June 29, 1945; and also that four mortgages later to be referred to in detail and given by the appellant as sole owner of the property (with his wife joining to bar dower) have all been discharged, so that the property now stands in the Registry Office in the name of the appellant as sole owner, subject to this, that Exhibit 7, a discharge of a mortgage for $14,000 given by the appellant to the Canada Permanent Mortgage Corporation and dated February 29, 1956, has not been registered by the appellant.

I turn now to a consideration of the issues in this appeal and the manner in which they have come to this Court. The appellant first filed income tax returns for the years 1950 to 1956 on October 14, 1958, doubtless because he was pressed to do so by the tax officials. In each of those returns he included as income only one-third of the net income from the rentals of the property as taxable in his hands; and on that basis, the returns, after allowing for exemptions and deductions, showed no taxable income. The first assessments based on these returns and dated October 28, 1958 show no tax payable for any of these years.

Subsequently, and following a lengthy investigation, the Minister in April, 1960 issued re-assessments for each year, and, on the assumption that the appellant was entitled to the whole of the net profits from the rentals of the property, the total taxes so assessed for the seven years aggregated $4,962.77, including some penalties for late filing and interest. Following objections by the appellant, the Minister by his Notifications dated January 3, 1961, agreed to amend the re-assessments by allowing further deductions in respect of the capital cost of certain parts of the property, the details of which are set out in the reply of the Minister to the appellant's Notice of Appeal to this Court. At the hearing before the Tax Appeal Board, an agreement was entered into by which a further annual deduction of $500 for expenses was allowed to the appellant. By its decision the Tax Appeal Board allowed the appeal in part only; referred the matter back to the Minister for re-assessment based on the adjustments necessary by reason of the allowances made in the Minister's Notifications and the further amount of $500 for expenses in each year as agreed by the parties, and in all other respects affirmed the said re-assessments. It is from that decision that the appellant now appeals to this Court.

At the commencement of the trial, the first question that arose was the effect of the agreement of March 15, 1961, now filed in this Court. It reads as follows:

Hamilton, Ontario,
15th March 1961

BETWEEN:

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With regard to the income tax assessment appeals relevant to the years 1950, 1951, 1952, 1953, 1954, 1955 and 1956 we hereby agree to the expenses shown in the relevant forms T 7 W for all the above-mentioned years being increased each by the sum of $500, and with the result that the net rental income in each year be reduced as shown on the T 7 W by $500, or the sum of $3,500 in all.

It is understood and agreed that after providing for this adjustment the figures in the various assessments shall be deemed as correct and may form the basis for re-assessment accordingly.

These figures to be so arrived at are to be binding on us, irrespective of the determination of the legal questions involved.

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All subject of course to the further adjustments contained in the Notifications by the Minister dated Jan. 3rd, 1961.

Witnessed
(sgd.)
P. McCann,
Deputy Registrar.

(sgd.) F. J. Dubrule, Solicitor for
Minister of National Revenue.

Philip R. Morris.
J. C. Morris.

While it is true that the hearing of an appeal in this Court from a decision of the Tax Appeal Board is a trial *de novo,* I came to the conclusion and so ruled that this agreement in the circumstances disclosed was a final and complete settlement as to the total net profits from the property for each year binding upon the parties thereto and that the only matter remaining to be determined by the Tax Appeal Board was a matter of law, namely, was the appellant entitled to the whole of such profits or part thereof, or none at all? It was on that basis that the matter proceeded before the Board. No doubt it was a compromise settlement which both parties were content to accept rather than embark on a lengthy and involved investigation as to receipts and expenditures.

Because of the ruling so made, I need not consider further the question as to the quantum of the net annual profits from the property.

The onus is on the appellant to establish that there is error in fact or in law in the re-assessments as so modified (*Minister of National Revenue v. Johnston*[1]).

The appellant was not represented by counsel at the hearing, but conducted his own case and evidence was presented on his behalf by his wife, his son Alan Morris, his daughter Mrs. Alma Tefft, a practising solicitor, J. L. Coburn, local manager of the Canada Permanent Mortgage Corporation in Hamilton, and by the appellant himself. No witnesses were called on behalf of the respondent.

Many grounds of appeal are raised in the appellant's Notice of Appeal. Some of these grounds are untenable, such as the submission that the respondent had no right to make the re-assessments now in appeal. His main submissions are that for the years in question he was not the

[1] [1948] S.C.R. 486.

owner of the property, was not entitled to receive any profits from the rental of the property and, in fact, did not receive any; or that at most he was entitled to only one-third thereof, these amounts being so small annually as to result in no taxable income. For the Minister, it is submitted that the re-assessments were based on the assumption that the whole of the annual profits from the property were income in his hands and that the evidence shows that he was the owner and did receive the annual profits.

In order to understand the nature of the case put forward by the appellant, it is desirable at once to set out the terms of an indenture dated April 15, 1944 (Exhibit 1) between two parties, namely, William Morris of the First Part and Jean Cairns Morris (in trust) called the trustee of the Second Part. While the appellant is not named as a party to the agreement between his father and his wife, he did in fact sign it. It reads as follows:

THIS INDENTURE MADE IN TRIPLICATE THIS 15th DAY OF APRIL A.D. 1944.

B E T W E E N

William Morris of the City of Hamilton, in the County of Wentworth, Gentleman, hereinafter called the Party

OF THE FIRST PART

—and—

Jean Cairns Morris of the said City of Hamilton, Barrister-at-Law, hereinafter called the TRUSTEE

OF THE SECOND PART

WHEREAS the said William Morris, Esther G. Morris and Philip R. Morris made and executed a mortgage on the property known as 22, 24 and 26 John Street North, in the said City of Hamilton, to The Toronto General Trusts Corporation to secure $25,000 and interest, which mortgage is dated March 8th, 1926 and was registered March 28th, 1926 at 11.04 A.M. in the Registry Office for the Registry Division of the City of Hamilton as number 284532.

AND WHEREAS the said mortgage is now overdue and the party of the First Part desires to be relieved from the obligations of the covenant in the said mortgage.

AND WHEREAS the Toronto General Trusts Corporation has agreed to assign the said mortgage to the party of the Second Part as Trustee and the party of the Second Part has agreed to relieve the party of the First Part from the covenant in the said mortgage.

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the abandonment of any claim to interest upon the principal of the said mortgage, the party of the Second Part hereby declares that no claim shall be made to interest under the said mortgage and the covenant in the said mortgage contained shall stand barred and of no effect

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so far as the party of the First Part or his estate is concerned and the party of the Second Part covenants promises and agrees with the Party of the First Part that in the event of a sale of the said mortgage, the transfer or assignment thereof shall contain a provision that the purchaser or assignee shall have no recourse or rights or remedies on the said covenant or otherwise against the party of the First Part, William Morris.

AND the parties hereto agree that so long as the said mortgage is held by the TRUSTEE there shall be no interest payable or claimed upon the said mortgage but whatever principal can be paid thereon every three months after due provision for repairs, taxes, water rates and insurance and improvements to the property 22, 24 and 26 John St. N. Hamilton shall be paid to Isla Victoria Ford, Edna Marion Hulbig and Philip Reginald Morris in equal shares. PROVIDED that in the event of one of the said last mentioned three persons or any or all of them directing that the said payments shall be paid otherwise, the said payments shall, after deduction of fees be so made. PROVIDED FURTHER that in the event of the decease of the Trustee without appointment of a new Trustee, the said three persons or the survivor or survivors of them shall have power, if deemed necessary to appoint a new Trustee.

THE PARTY OF THE SECOND PART and WILLIAM MORRIS shall have the right, until the property is sold to occupy the premises they are at present occupying rent free, respectively, and until his decease or until sale of the said property Philip R. Morris shall manage it and shall render a statement to the TRUSTEE every three months remitting at the same time the balance payable to the Trustee. After his decease or should Philip R. Morris desire to retire from the management of the said property, it shall be managed by the TRUSTEE.

In the event of a sale or mortgage of property the proceeds shall be equally divided between the said Isla Victoria Ford, Edna Marion Hulbig and Philip Reginald Morris or such other persons as they shall individually in writing (filed with the TRUSTEE) direct or appoint.

IN WITNESS WHEREOF THE PARTIES HERETO HAVE HEREUNTO SET THEIR HANDS AND SEALS THE DAY AND YEAR FIRST ABOVE WRITTEN

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF
(sgd.) Alan Morris
(sgd.)
William Morris
J. C. Morris
Philip Morris

That indenture denoted on the cover as a "trust agreement" was never registered. It was prepared in the office of Morris and Morris, the only member of that legal firm at the time being the appellant's wife. It is to be noted that it is dated the day following the date on which the Toronto General Trusts Corporation mortgage was assigned to the appellant's wife in trust as above stated. The recitals in the trust agreement indicate that William Morris desired to be released from his covenants in the mortgage

and that the party of the Second Part had agreed to do so. I find it difficult to understand why this was done in view of the evidence that William Morris himself paid to the Toronto General Trusts Corporation the full amount they demanded at the time they executed the assignment to the appellant's wife. Mrs. Ford and Mrs. Hulbig, named in the trust agreement, are sisters of the appellant.

On the evidence of the appellant's wife, I find that William Morris made the arrangements with the Toronto General Trusts Corporation to have the mortgage assigned to her, and, as I have said, he supplied all the funds to pay off the Corporation. Undoubtedly, he then wished to keep the mortgage alive.

In construing the trust agreement, I must keep in mind the fact that Mrs. Ford and Mrs. Hulbig, the appellant's sisters, both of whom are still alive and who by the agreement were entitled to some benefits, are not before me in this case. Nothing that is said here, therefore, may be construed as determining their rights either as to an accounting by the trustee or the appellant, or as to any interest they may have in the property when sold or otherwise.

In my view the trust agreement, in so far as it relates to the present issue and to the events that have occurred, provided as follows:

(a) The appellant was appointed manager of the property until his retirement from that office with the duties incidental to that office of collecting the rents and after paying for repairs, taxes, water rates, insurance and improvements to the property to remit the balance payable to his wife, the trustee of the mortgage, so long as she held that mortgage.

(b) That the trustee of the mortgage, so long as she held the mortgage, was not entitled to any interest thereon, but that any payments she received as above from the manager were to be applied on the principal of the mortgage and after deduction of fees were to be divided equally between the appellant, Mrs. Ford and Mrs. Hulbig or as they might direct. If the appellant died or retired from the management of the property, the trustee was to become manager of the property.

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The first submission of the appellant is that whatever interest he may have had in the property as one of the grantees in the joint tenancy created by the conveyance in 1924 from Business Realty Limited (Exhibit C) was purely nominal and that his rights therein were lost by the adverse possession of his mother and father for a period in excess of ten years, any title he may have had being therefore extinguished by the *Statute of Limitations* R.S.O. 1960, c. 214. and its predecessors.

It is in evidence that following the grant by Business Realty Limited the appellant at the request of his father acted as manager of the property, collecting the rents and providing for necessary out-goings until about 1931 when his father, being dissatisfied with the returns, decided to collect the rents himself. Accordingly, he moved from Toronto and from about 1931, with his wife occupied two apartments in the property. There is no evidence that either the father or mother ever asserted any claim to having become owner of the property by possession at any time during their lives. The only evidence is that the father did collect the rents and paid the necessary out-goings for a considerable time. On the contrary, it would appear from the recitals in the deed of William Morris to the appellant, dated May 1, 1945, that the father then considered that following the death of his wife in 1941, he and his son, the appellant, were the owners as joint tenants of the property. That deed was prepared in the office of Morris and Morris, presumably by the appellant's wife. There is no satisfactory evidence that the appellant's mother did anything by way of collecting rents or otherwise which would indicate that she with her husband acquired any interest in the property adverse to that of the appellant. She merely resided with her husband in the property.

The evidence does not warrant a finding that William Morris became the sole owner of the property and that the title of the appellant was lost by adverse possession. Even if that had been the case, it would not be of any assistance to the appellant in view of the fact that by the deed (Exhibit "F") of May 1, 1945, his father conveyed all his interest therein to the appellant. As will be seen later, the appellant considered himself to be thereafter the owner in fee simple of the property when executing

four mortgages thereon. I therefore reject the appellant's submission on this point.

The next submission of the appellant is that by adverse possession for over ten years, Jean Cairns Morris, his wife, personally has acquired sole ownership of the property. While she frankly disavowed any right to any personal interest in the property (except for a possible claim to monies which she may personally have paid on the mortgages or any expenses, but of which she had no record and did not attempt to prove) and alleged that whatever possession she may have had was at all times referable to the trust and for the benefit of the *cestuis que trustent* therein, the appellant maintained this point to the end, realizing, no doubt, that if it could be established, the property would then be owned by his wife and not only would he avoid any income tax in respect of the profits, but any rights his sisters might have had under the trust might be extinguished.

The facts are that the appellant's wife had possession of her office and other space in the building at least since the execution of the trust agreement and as provided therein she paid no rent. It is also shown that commencing in May, 1948 she collected rents, secured tenants and paid necessary out-goings for the property until at least 1956—the last year with which I am here concerned. During that time she paid nothing to Mrs. Ford or Mrs. Hulbig, but she did pay the net revenue to her husband personally. While she says at all times her "possession" was referable to the trust agreement, she neither accounted to Mrs. Hulbig or Mrs. Ford for the income received by her, nor paid them anything. I reject as entirely unsupported by the evidence the effort of the appellant to establish that his wife personally acquired a possessory title—a title she does not assert, but disavows. In any event, such possession as she may have had began only in 1948 and could not have ripened into a possessory title until 1958, two years later than the years with which I am concerned.

I must find, also, that she could not have acquired a possessory title as against the owner (the appellant) in her capacity as trustee since she acknowledged his right to the rents and profits every three months by the payments which I have mentioned and will refer to later.

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Reference may be made, also, to the case of *Andre v. Valade*[1], a decision of the Court of Appeal of Ontario. There the husband, a mortgagor, and his wife, a mortgagee of property, were living together in harmony as man and wife—as they were and are in the present case—and it was held that in those circumstances the Statute of Limitations did not run against the mortgagee—wife. Further reference may be made to *Gordon v. Ottawa*[2], a decision of McRuer, C.J.H.C. See also Lewin on Trusts, 15th Ed., p. 809.

I am fully satisfied that from his whole course of conduct the appellant himself considered that he was at all relevant times the sole owner of the property and that his effort to establish a possessory title in favour of his wife and/or parents was but an after-thought, made with the purpose of avoiding income tax on profits which he received and for which he has accounted to no one.

In March, 1945 the appellant consulted Mr. J. L. Coburn, the Hamilton manager of the Canada Permanent Mortgage Corporation in regard to a loan of $15,000. He advised Mr. Coburn that he needed the money for the purpose of settling a family estate in which he and his sisters were interested, and that the sisters now wished to be paid their shares which he had agreed to do. A loan of only $10,000 was recommended and the appellant told Mr. Coburn that he had bonds and securities which he was arranging to sell or had sold, out of which he would pay the balance above $10,000 due to his sisters. I accept unreservedly the evidence of Mr. Coburn, supported as it is by his report to head office dated March 16, 1945 (Exhibit "C"). I also accept Mr. Coburn's evidence that nothing was said at that time as to any rights the sisters had in any trust referable to this property and regard as untrue the appellant's statement that he did so.

On July 1, 1945 the appellant, with his wife joining to bar dower, executed a mortgage to the Canada Permanent Mortgage Corporation for $10,000, registered on June 29, 1945 as No. 98027 N.S. (Exhibit 5). That mortgage, as well as all the other mortgages to which I shall refer, was made in pursuance of the *Short Forms of Mortgages Act*, and contained a recital that the mortgagor was seized in

[1] [1944] O.R. 257.

[2] [1953] 4 D.L.R. 542.

fee simple of the lands described and a covenant that he was the owner in fee simple to the said lands and had the right to convey the said lands to the mortgagee. The proceeds of that mortgage were paid to the appellant, but nothing was then paid to his sisters. Instead, as shown by Exhibit "D", the appellant executed a mortgage to his sisters for $3,000 on July 2, 1945, and registered on July 10, 1945 as No. 98350 N.S. That mortgage was discharged as shown by Exhibit "E" dated December 12, 1946, and registered on December 17, 1946 as No. 116849 N.S. The appellant says that he paid his sisters at that time $2,300 only, and that since then he has paid them nothing further or accounted to them in any way for the profits from the property.

Immediately thereafter the appellant gave a further mortgage to the Canada Permanent Mortgage Corporation for $13,500 (Exhibit 6) dated and registered December 18, 1946, and the former mortgage for $10,000 was discharged. The difference between the amount due under the former mortgage and the new loan of $13,500 was paid to the appellant who says that it was used on improvements to the property arranged by him as were the proceeds of the first mortgage.

The appellant again gave a mortgage to the Canada Permanent Mortgage Corporation for $14,000 (Exhibit 7) on March 1, 1951, registered March 15, 1951 as No. 184060 N.S. Again the proceeds of that loan, less the amount due under the former mortgage, were paid to the appellant and used by him for improvements to the property. A discharge of the mortgage for $13,500 was registered on March 30, 1951.

The last mortgage to the Canada Permanent Mortgage Corporation was discharged as fully paid on February 29, 1956 (Exhibit 7) but the discharge has not been registered. The only explanation for the failure to register it is the statement of the appellant that he thought he might ask for an assignment in lieu of the discharge. Subject to the registration of that discharge there has been no encumbrance on the property since 1956.

While, as I have said, I am not now directly concerned with the quantum of the net annual profits derived from the property over the seven years in question, I think it

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right to note that from March, 1951 to February 29, 1956, there was paid not only the interest on the Canada Permanent mortgage, but also $14,000 as principal. While it is alleged by the appellant's wife that she made the payments out of her general office account into which all the rents were paid and from which the disbursements for taxes etc. were paid, and it is possible that some of the payments may have been made from her own funds, I must also find that there is no proof that such mortgage payments were made other than from income of the property, no record having been kept by the appellant's wife as to any amount that may have been paid by her personally. In fact, her failure to keep any record of such payments from her own funds strongly suggests that she was liable to account to no one but her husband.

Now as I have said, the appellant's wife from May, 1948 to 1956 did collect rents and pay the necessary out-goings. In addition, it is shown that during that period she paid to her husband by cheque each three months $150 on account of the principal of an alleged second mortgage for $16,000, as well as interest at 4 per cent. per annum, less a rental of $25 per month, for the use of an apartment in the building occupied for considerable periods by her husband and herself. The sums so paid in that period aggregated $6,550 on account of principal as well as interest, and the payment made in May, 1956 indicates that the principal of the so-called second mortgage had been reduced to $9,450. Between the date of the execution of the deed to the appellant and 1948, the appellant as manager of the property collected the rents and paid the out-goings. He says that in 1948 he retired as manager and thereafter did only necessary work entrusted to him by his wife.

Both the appellant and his wife were repeatedly asked to explain the details of the so-called second mortgage, but neither was able to say expressly that there ever had been such a mortgage or who was mortgagee or who was mortgagor or why it was given. Certainly, it was not registered and no such document was produced. I have grave doubts that it ever existed. The only possible inference that I have been able to draw from the facts is that the appellant and his wife thought it advisable for purposes of the appellant to keep alive in theory the

Toronto General Trusts' mortgage which had been discharged in 1946; and that as the principal amount thereof when assigned to the appellant's wife was approximately $18,300 (of which $2,300 had been paid to the appellant's sisters), the balance of $16,000 was to be represented in some way by the so-called second mortgage of $16,000. Now, as all the payments made by the appellant's wife were made to the appellant personally and thereafter retained by him and as his wife as trustee made no payments of any kind to Mrs. Hulbig and Mrs. Ford, it is also reasonable to infer that both the appellant and his wife considered that the sisters had accepted the mortgage for $3,000 in payment of all their rights under the trust agreement and in the property and that later on they were content to accept $2,300 in settlement of their rights. That this is the reasonable inference from the evidence is further shown by the fact that since this mortgage was discharged, neither sister (one of whom had a lawyer as husband and the other a son who is a lawyer) has made any claim to any interest under the trust agreement or in the property to either the appellant or his wife. I do not find that they have no rights, but for the purpose of this case I do find that that is the only reasonable inference to be derived from the limited evidence before me. If the trust agreement was still entirely in effect and if the sisters were entitled to two-thirds of the principal of the $18,300 Toronto General Trusts Corporation mortgage (less the $2,300 paid on account), it would have been the duty of the appellant's wife as trustee to pay their share regularly as it came into her hands instead of paying it all to her husband. Mrs. Morris stated frankly, "I don't know that it was not his money", and that she did not know what he did with the money. Such payments have been renewed and the balance of principal on the so-called mortgage is now $5,000.

I do not attribute bad faith to the appellant's wife. She is now seventy-six years of age and admitted to some loss of memory and confusion as to the facts. I think, moreover, that she was possibly subject to pressure on the part of her more astute husband.

But I am quite unable to accept the evidence of the appellant when it is in conflict with either documentary evidence or with other oral evidence. His explanation of the

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manner in which he has dealt with these receipts is quite incredible. That he did receive them in his personal capacity is not open to question. He has been collecting them since 1948 and has not paid one cent to his sisters or accounted to them in any way. At the conclusion of his evidence, he did say that he held them in trust under the trust agreement and that he still had them "on hand" although declined to state where or in what form they now are. He said, also, that his sisters were entitled to a share therein, but he had not paid it over as he did not want them to dissipate the money—namely, money which he now says belonged to them, each being presumably a woman of mature years. Finally, he said that his wife at some unspecified time had demanded that he return the money to her, but he had refused to do so. His wife, however, made no mention of such demand. Now he says that he is willing to turn over the shares to the sisters *if they demand it.*

Frankly, I do not believe his last-minute conversion to the theory that he held the money in trust and made for the first time fifteen years after he first began to receive the payments and under pressure of a demand for income tax thereon.

On the evidence which I have accepted in this case and drawing the inferences therefrom which I have set out above, I have come to the conclusion that

(a) at all relevant times the appellant was the owner of the property; and

(b) that the appellant's two sisters ceased to have any interest in the trust or in the property upon executing a discharge of the $3,000 mortgage, or at least until the property has been sold, an event which has not occurred; and

(c) that in collecting the rents of the property and paying the expenses of operation and the principal and interest on the Canada Permanent mortgages, the appellant's wife acted only as the agent of the owner, the appellant; and

(d) that after providing for payment of interest and principal of the said Canada Permanent mortgages out of income from the property (of which the principal amount would be taxable income of the appel-

lant), the balance was payable to and was paid to the appellant in his capacity as owner.

In any event, the appellant has completely failed to meet the onus cast upon him to establish that the assumptions on which the re-assessments were made upon him—namely, that he was entitled as owner to all the rents and profits—was erroneous.

For these reasons, the appeal from the decision of the Tax Appeal Board fails. Its decision affirming the re-assessments made upon the appellant for each year, subject to the allowances made in the Minister's Notifications and to those made by the agreement of the parties on March 15, 1961, will be affirmed and the matter remitted to the Minister to re-assess the appellant in accordance with these findings.

The respondent is also entitled to be paid his costs after taxation.

Judgment accordingly.

ENTRE:

LE MINISTRE DU REVENU NATIONAL ..... APPELANT;

1962

novembre 23

1963

janvier 29

ET

WILFRID PELLETIER ..... INTIMÉ.

Revenu—Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, arts. 5(b) (V, VI, VII), 11 (9)—Revenu provenant d'une charge ou d'un emploi—Fonctionnaire provincial résidant ou domicilié en dehors de la province de Québec—Frais de voyage—Frais de séjour—Allocation forfaitaire annuelle pour dépenses de voyage—Appel accueilli.

Déjà directeur d'orchestre à New York l'intimé, à l'automne de 1942, devenait directeur du Conservatoire de musique et d'art dramatique de la province de Québec dont le siège était situé à Montréal. En plus d'un traitement annuel, une allocation forfaitaire annuelle de $2,000 pour dépenses de voyage lui était attribuée par le Gouvernement de la province, ainsi que le statut de fonctionnaire permanent à compter de mai 1954. Tout en lui concédant, pour les années d'imposition 1955, 1956 et 1957, la totalité des dépenses encourues depuis New York en ce qui regardait ses activités artistiques personnelles en différents centres du Québec ainsi que pour ses déplacements dans la province en tant que directeur du Conservatoire, l'appelant, cependant, refusa à l'intimé, en tant que fonctionnaire, la détaxe du coût des voyages New

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York—Montréal, et celle des notes de résidence à Montréal, siège du Conservatoire. Portées en appel les cotisations du Ministre furent infirmées pour partie par la Commission d'appel de l'impôt. D'où le présent appel par le Ministre.

Jugé: L'appel est accueilli.

2. L'intimé, pour exercer sa fonction et gagner son traitement de fonctionnaire, est obligatoirement tenu de se trouver à Montréal, et l'intention de maintenir une résidence ou un domicile à New York ne peut entrer en ligne de compte. Le Ministre est donc justifiable de refuser à l'intimé, en tant que fonctionnaire provincial, la soustraction du prix de transport entre New York et Montréal et les dépenses de séjour dans cette ville.

APPEL d'une décision de la Commission d'Appel de l'Impôt.

L'appel fut entendu par l'Honorable Juge Dumoulin à Montréal.

Paul Boivin, c.r. pour l'appelant.

Jean-M. Poulin pour l'intimé.

Les faits et questions de droit soulevés sont exposés dans les motivés du jugement que monsieur le Juge Dumoulin rend maintenant (29 janvier 1963):

Le Ministère du Revenu national interjette appel de la décision de la Commission de l'impôt[1], datée le 20 février 1962, qui accueillait partie des objections du Docteur Wilfrid Pelletier à l'encontre des cotisations de son revenu pour les années d'imposition 1955, 1956 et 1957.

Les éléments du litige se résument à ce qui va suivre.

Musicien de réputation internationale, le Docteur Wilfrid Pelletier, depuis plusieurs années déjà, dirigeait l'orchestre du Metropolitan Opera à New-York quand, à l'automne de 1942, il accepta, par surcroît, de présider aux destinées du Conservatoire de musique de la province de Québec, dont le siège était alors au numéro 1700, rue Saint-Denis, en la cité de Montréal.

L'arrêté ministériel qui décrétait définitivement la nomination de M. Pelletier est du 5 novembre 1942; en voici le texte:

IL EST ORDONNE, sur la proposition de l'honorable Secrétaire de la Province, que l'arrêté ministériel numéro 2844, du 22 octobre 1942, relatif à la nomination de monsieur Wilfrid Pelletier comme directeur du Conservatoire de musique et d'art dramatique de la province de Québec, soit modifié en fixant le traitement de monsieur Pelletier à $3,000 par année,

[1] (1962) 29 Tax A.B.C. 7.

et qu'il lui soit attribué une allocation spéciale annuelle de $2,000, sans égard aux dépenses réelles et sans obligation de rendre compte de cette dernière somme.

Quelques années après, le 13 mai 1954, ce premier arrêté ministériel fut modifié à l'effet que:

CONCERNANT le traitement de M. Wilfrid Pelletier comme directeur du Conservatoire de musique et d'art dramatique de la province de Québec

QUE le traitement de M. Wilfrid Pelletier, a/s du Conservatoire de musique, 1700 rue St-Denis, Montréal, à titre de directeur du Conservatoire de musique et d'art dramatique de la province de Québec, soit porté à $5,500 par année, avec en plus $2,000 de dépenses de voyages, qu'il soit assigné à la classe «G», permanent, à compter du 1er mai 1954, et ce, suivant la liste d'éligibilité numéro 1051-54 de la Commission du Service Civil de la province de Québec.

Pour les années d'imposition 1955, 1956 et 1957, l'intimé déduisit de son revenu réel, à titre de frais de déplacement et d'indemnité de séjour, des montants de $5,103.61, $7,040.98 et $8,053.99, comme on le voit à la pièce A-4-A versée de consentement, lors de l'audition de l'appel, pour remplacer la pièce A-4. L'appel, du reste, s'instruisit d'après le dossier de première instance.

Dans la computation de son revenu, l'intimé, toutefois, avait omis d'inclure l'allocation forfaitaire de $2,000 que lui attribuait le Gouvernement de la province. Cet oubli est à l'origine de la complication à résoudre.

Disons de suite que l'article 5 de la loi de l'impôt sur le revenu interdisait pareille omission au contribuable, en édictant que:

5. Le revenu provenant, pour une année d'imposition, d'une charge ou d'un emploi est le traitement, salaire et autre rémunération, y compris les gratifications, que le contribuable a touchées dans l'année, plus

(*b*) tous les montants qu'il a reçus dans l'année, à titre d'allocation pour frais personnels ou de subsistance ou à titre d'allocation pour toutes autres fins . . .

Et je préciserai surtout que la qualité de fonctionnaire provincial de l'intimé est irréfutablement établie par la teneur des arrêtés ministériels qui en font un employé «permanent» de la province et le rendent éligible à la pension de retraite.

La décision de la Commission de l'impôt joignait au texte précité l'article 11(9) de la loi qui accorde, dans les conditions précisées, un dégrèvement pour frais de voyage et autres, à un fonctionnaire ou employé.

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Dumoulin J.

Le procureur de l'intimé a soutenu, à tort, que ce dernier n'était ni employé ni fonctionnaire du Gouvernement de Québec, et que, si la Cour en venait à une conclusion différente, son client aurait quand même «le droit de réclamer toutes les dépenses mentionnées au paragraphe 12 parce qu'il était ordinairement tenu d'exercer les fonctions de son emploi à différents endroits; parce qu'aussi il était tenu, aux termes de son contrat d'emploi, d'acquitter les frais de voyages que lui occasionnait l'accomplissement des fonctions de son emploi; parce qu'il ne touchait pas une allocation pour frais de voyage non comprise en raison des sous-alinéas V, VI, VII de l'alinéa *b*) de l'article 5 dans le calcul de son revenu et n'a pas réclamé de déductions pour l'année aux termes des paragraphes 5, 6 et 7 de l'article 11 de la Loi de l'impôt;» (voir réponse à l'avis d'appel, article 14).

Je ferai remarquer dès maintenant, que les conditions d'engagement intervenues entre le Secrétariat de la Province et le Docteur Pelletier ne sauraient influer sur les prescriptions de la loi fédérale de l'Impôt dans le domaine de sa juridiction. Mais il n'est peut-être pas indispensable d'insister sur ce point, puisque, à mon sens, la solution du litige doit s'inspirer de critères différents.

La prétention du ministère paraît, en effet, beaucoup plus objective. Elle se résume à ceci que la preuve corrobore. L'intimé a exercé alternativement son art de directeur d'orchestre en double qualité de fonctionnaire provincial et de musicien professionnel à titre libre, dirigeant un certain nombre de concerts pour son compte personnel en différents centres du Québec.

En ce qui regarde ces dernières activités artistiques, l'appelant consent au D[r] Pelletier la déduction totale des dépenses encourues depuis New-York, comme le permet l'article 12(1)(*a*) de la loi, pour les frais engagés «en vue de produire ou de gagner un revenu». Puis encore une pareille autorisation pour tous déplacements dans le Québec en tant que directeur du Conservatoire de musique. Par contre, le ministère ne consent pas au directeur du Conservatoire de musique la détaxe du coût des voyages New-York-Montréal, ni davantage celle des notes de résidence dans la métropole où se trouve le bureau officiel du Conservatoire provincial de musique.

En bref, la prétention du ministère à cet égard est que le Dr Pelletier, pour exercer sa fonction et gagner son traitement de haut-fonctionnaire, est obligatoirement tenu de se trouver à Montréal, et que s'il entend maintenir une résidence ou un domicile à New-York, cela ne peut entrer en ligne de compte.

La Cour croit que cette interprétation est conforme à la loi.

L'entente forfaitaire conclue entre l'artiste et la province de Québec d'une somme de $2,000 pour frais de voyage revient à dire que s'il dépensait davantage durant l'année, il n'avait aucun recours en remboursement du surplus.

S'il m'était loisible de faire allusion à des considérations d'équité en une matière de droit aussi stricte que la législation fiscale, je pourrais alors souligner le fait que l'intimé opposerait en réduction de son impôt sur le revenu une somme supérieure à celle que lui accorde son propre patron.

Or, pour l'année 1955, l'appelant concède à l'intimé une déduction de $2,783.89, pour 1956 de $3,878.26 et pour 1957 de $4,295.46, soit ici, deux fois plus et au delà que l'indemnité prévue dans les arrêtés ministériels précités.

Enfin, comme l'indiquait le savant membre de la Commission de l'impôt: «Il se peut que l'appelant ait droit à la totalité des déductions qu'il réclame (pourvu qu'elles découlent des activités «privées» du Dr Pelletier), mais c'est à lui qu'il appartenait de le prouver. Ses avocats et ses comptables avaient en main toutes les pièces justificatives nécessaires à l'établissement de son revenu et des dépenses encourues pour le gagner . . . Ils ne l'ont pas fait».

Dans ces conditions, la Cour estime que l'appelant est justifiable de refuser à l'intimé, en tant que fonctionnaire provincial, la soustraction du prix de transport entre New-York et Montréal et les dépenses de séjour dans cette ville, s'élevant à $2,319.92 pour 1955, à $3,162.72 pour 1956 et à $3,758.53 pour 1957, selon la récapitulation à la pièce A-4-A.

Par ces motifs, l'appel est accueilli, et l'appelant pourra recouvrer de l'intimé les frais de Cour après taxation régulière.

Jugement en conséquence.

1961
Jan. 31
Feb. 1, 2
1963
Feb. 27

BETWEEN:

RONALD K. FRASER .....APPELLANT;

AND

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

Revenue—Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(e)—Capital gain or income—Income from a "business"—Land purchased and sold to a company for shares which were sold at a profit—Profit is income from a business—Dominant intention to develop properties not sole intention at any time—Abandonment of primary intention—Adoption of secondary intention—Alteration of nature of undertaking from a capital investment to venture in nature of trade—Appeal allowed in part.

Appellant and one Grisenthwaite, both having extensive knowledge of real estate developments in their area formed Grisenthwaite Investments Ltd. which corporation acquired a number of subsidiaries, some engaged in buying and selling real estate, some in construction work and others in owning and renting properties. In 1952 they jointly acquired two contiguous tracts of raw land with a total area of about 123 acres as a site for a shopping centre to include a Dominion Store and an adjoining apartment project. In 1953 two corporations were formed, Aldershot Investments Ltd. and Aldershot Realty Ltd. to the former of which appellant and Grisenthwaite sold the portion of land intended as a shopping centre, in return for shares and to the latter of which the portion of the land intended as an apartment site, also in return for shares. Later in 1953 Aldershot Investments Ltd. commenced the construction of a large supermarket building but nothing was done with the land acquired by Aldershot Realty Ltd. In April, 1954, Dominion Stores Ltd. purchased all the shares in Aldershot Investments Ltd. from appellant and Grisenthwaite. The building was almost completed and differences had arisen between appellant and Dominion Stores Ltd. In April, 1954, appellant and Grisenthwaite sold all their shares in Aldershot Realty Ltd. to another party. The Minister in assessing appellant for income tax for the year 1954 added to his income the profits from the sale of these shares. On appeal from such assessment appellant contends that it was the intention to develop the two properties and hold them as rental investments, the one as a shopping centre and the other as an apartment project, and that in any case the sale of his shares in the two corporations was not part of any business or venture in the nature of trade. No plans for financing the proposed projects were ever completed.

Held: That while it was probably the dominant intention of the appellant and Grisenthwaite to develop the properties and retain them it was not their sole intention at any time, and they also had in mind the intention to sell at least part of the property if they were unsuccessful in developing it as planned.

2. That the intention to build and operate a shopping centre was not brought to an end by any circumstances beyond the control of appellant and Grisenthwaite.

3. That the abandonment of the primary intention in favour of a secondary intention altered the nature of the undertaking from that of a capital investment to that of a venture in the nature of trade.

4. That the whole scheme was of a speculative nature in which the promoters envisaged the possibility that if they could not complete their plans to build and retain as investments a shopping centre and apartments a profitable sale would be made as soon as it could be arranged.

5. That the character of the profit was not altered because of the fact that the property was first transferred to a corporation and the shares therein sold by appellant rather than his interest in the property itself.

6. That the profits realized by the appellant from the sale of shares in Aldershot Investments Ltd. in 1954 were profits from a business or at least from an adventure or concern in the nature of trade; the profit realized from the sale of shares in Aldershot Realty Ltd. was not realized until the following year.

7. That the appeal be dismissed as far as the profits on Aldershot Investments Ltd. are concerned and be referred back to the Minister to re-assess the appellant by excluding the profits on the sale of Aldershot Realty Ltd. shares.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

H. H. Stikeman, Q.C. and *P. N. Thorsteinsson* for appellant.

M. Bruce, Q.C. and *J. D. C. Boland* for respondent.

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

CAMERON J. now (February 27, 1963) delivered the following judgment:

This is an appeal from a re-assessment to income tax dated May 14, 1958 and made upon the appellant for the year 1954. In his return for that year, the appellant computed his net income at $17,099.96, but the Minister in his re-assessments added thereto the following items:

Profit from Business Venture of R. K. Fraser and Wm. H. Grisenthwaite re:

(a) Sale of Aldershot Investments Ltd. shares to Dominion Stores Ltd. $140,198.38

(b) Sale of Aldershot Realty Ltd. shares to Bayshore Realty Ltd. 23,498.88

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and assessed the appellant to tax of $105,565.05 plus interest.

It is not disputed that the appellant on the sale of the shares referred to realized a profit as so computed. In his Notice of Appeal, the appellant, after setting out certain facts on which he relied, alleged that the gain so realized was "a capital gain to the appellant, not taxable under any of the provisions of the *Income Tax Act*. The said sales were not part of any business or concern in the nature of trade engaged in by the appellant." In the Minister's reply thereto, it is submitted that the purchase by the appellant of the two parcels of land, the sale thereof to Aldershot Investments Ltd. and to Aldershot Realty Ltd. in consideration for shares and the subsequent sale of such shares at a profit is income from a business within the meaning of "business" as defined in the Act, the Minister relying on ss. 3, 4 and 139(*e*) of the Act.

The onus is on the appellant and he must establish the existence of facts or law showing error in relation to the tax imposed upon him (*Johnston v. Minister of National Revenue*[1]).

It becomes necessary at once to set out the circumstances of the acquisition and disposal of the shares and the facts which I shall now state are not disputed.

The appellant, who for many years was district mortgage supervisor for the London Life Assurance Company in the Hamilton and Niagara district, had acquired an intimate knowledge of land values, real estate operations and real estate development in that area. He was well acquainted with W. H. Grisenthwaite who since 1937 had been active in several corporations doing business in that area, particularly in the field of real estate and in the development thereof, and in construction. In 1950 they formed a new company, Grisenthwaite Investments Ltd., in which Grisenthwaite held 51 per cent. of the shares and the appellant the balance. That company had a number of wholly-owned subsidiaries, some of which were engaged in the buying and selling of real estate, others in construction work and others in owning and renting properties.

[1] [1948] S.C.R. 486.

Early in 1952, the appellant and Grisenthwaite were approached by officials of Dominion Stores Ltd.—with which company they had previously done business—who asked for their assistance in locating a suitable site for a large Dominion store in the vicinity of Hamilton. They found that two adjacent properties in the vicinity of Aldershot with a long frontage on Highway No. 2 were for sale, and they took steps in May, 1952 to purchase them. The property was raw land lying between Highway No. 2 and the Hamilton Harbour, containing about 123 acres in all. Part of it was low-lying and boggy and quite incapable of development. There were also two large gulleys running down to the water. In their opinion, the land adjacent to Highway No. 2 could be developed into a regional shopping centre and the balance into a garden apartment house project.

Their solicitor, Mr. E. D. Hickey of Hamilton, on their instructions acquired title to the property in trust, being parts of Lots 7 and 8 in the Broken Front Concession in the Township of East Flamboro, County of Wentworth. In July, his offer to purchase 10 acres from Scheer for $25,000 was accepted and title passed to him in trust on October 31, 1952, $12,000 being paid in cash and the balance being secured by a mortgage to the vendor. On June 6, 1952, his offers to purchase the balance of the property from the three Townsend interests were accepted and title thereto passed to him in trust on January 2, 1963. The total consideration for the Townsend purchases was $180,000, of which $77,000 was secured by mortgages to the vendors, the balance being paid in cash.

The total cost of all the lands was $205,000, of which $115,000 was paid in cash. Of the latter amount, $30,000 was advanced by Grisenthwaite and $25,000 by the appellant who had borrowed $10,500 from his father. The remaining $60,000 was advanced by G. W. Foster, a vice-president of Dominion Stores Ltd. It was intended that Foster should have a 50 per cent. interest in the project and the appellant and Grisenthwaite 25 per cent. each. Mr. Hickey's declarations of trust (Exhibits 22, 23 and 24) show that their respective interests were as stated. However, at some unspecified date in 1953, Mr. Foster dropped out of the

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project due, it is said, to a conflict of interest, but allowed his advance to remain as an unsecured loan. At the beginning, one Donolo of Montreal was also to have been associated with them, but he dropped out at the end of 1952 due to illness.

Mr. Hickey also took steps to secure the incorporation of two private companies under the *Ontario Companies Act* as instructed by the appellant and Grisenthwaite. On March 15, 1953, Aldershot Investments Ltd. was incorporated (Exhibit A), its authorized capital consisting of 3,500 5 per cent. non-cumulative redeemable preference shares of a par value of $100 each, and 40,000 common shares without nominal or par value. On June 1, 1953, that company accepted Mr. Hickey's offer to sell to it 36.17 acres, the consideration being the issue to him or to his nominees of 720 fully paid preference shares. The property was conveyed to the company which issued 360 preference shares to the appellant and a like number to Grisenthwaite, both of whom also acquired 20,000 common shares by purchase, paying approximately $3,800 each therefor. No other shares were issued at any relevant date.

In the spring of 1953, Aldershot Investments Ltd. applied to the Township of Flamboro for a building permit to erect "Dominion Stores Mammoth Market Building" and after some dispute and threatened legal proceedings due to a pending zoning by-law, the permit was issued on June 5, 1953 (Exhibit 31). The evidence indicates that construction of that building was commenced in September, 1953 by Barclay Construction Co. Ltd. (a company wholly-owned by the appellant and Grisenthwaite or by one of their companies), although the formal construction contract (Exhibit 32) was not signed until January 15, 1954. It is of some significance to note that the address of the owners in that contract (Aldershot Investments Ltd.) is given as 605 Rogers Road, Toronto, which is, in fact, the address of Dominion Stores Ltd.

On April 9, 1954, when the store was about 80 per cent. completed, an agreement was entered into by Dominion Stores Ltd. with the appellant and Grisenthwaite in the form of an offer and acceptance (Exhibit 35) by which the former agreed to purchase all the shares of the appellant

and Grisenthwaite in Aldershot Investments Ltd. for $360,000, payable in cash as therein provided. It was a term of the said offer that the outstanding liabilities under contracts of Aldershot Investments Ltd. should aggregate not more than $350,000 approximately (as stated on p. 4 thereof), that amount including about $297,000 due to the general contractor, Barclay Co. Ltd. (which up to that date had been paid nothing), the balance being made up of the cost of sewers, septic tanks, water mains, road and engineering services. The agreement was carried out and the purchase price divided equally between the appellant and Grisenthwaite. It is the profit on that transaction that appears as Item (a) in the re-assessment.

Mr. Hickey also secured the incorporation of Aldershot Realty Ltd. on behalf of the appellant and Grisenthwaite. It was incorporated on November 18, 1953, its authorized capital consisting of 20,000 5 per cent. non-cumulative redeemable preferred shares of a par value of $10 each, and 40,000 common shares without nominal or par value. On March 1, 1954, the balance of the property was conveyed to it by Mr. Hickey, the consideration being the issue of 10,800 preference shares and the assumption of two registered mortgages aggregating $25,000, 5,400 of such preference shares being issued to the appellant and a like number to Grisenthwaite. The company also issued 20,000 common shares to both the appellant and Grisenthwaite, each paying about $5,000 therefor. No other shares were ever issued by this company at any relevant date.

On April 29, 1954, J. F. Easterbrook, in trust on behalf of Jacob Cooke, offered to purchase from the appellant and Grisenthwaite all their shares in Aldershot Realty Ltd. for $165,000 (Exhibit 13) and that offer was accepted on May 1, 1954. The appellant and Grisenthwaite thereby agreed that the company on closing and out of the purchase price would pay off the existing mortgages of $25,000. The sum of $10,000 was paid as a deposit on the acceptance of the offer and the balance of $155,000 on closing the transaction on January 4, 1955, the date for closing being fixed at the request of the purchaser. On closing, the purchase price was divided equally between the appellant and Grisenthwaite. It is the profit on that transaction which is shown as Item (b) in the re-assessment (*supra*).

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It may be noted here that upon the completion of the sale of the shares in Aldershot Investments Ltd. to Dominion Stores Ltd., the loans by Foster and the appellant's father, as well as the mortgages on that property, were paid off; and that when the appellant and Grisenthwaite sold their shares in Aldershot Realty Ltd. to Cooke, the mortgages on that property aggregating $25,000 were paid off.

The main submission on behalf of the appellant is that the original intention of the appellant and Grisenthwaite—an intention which he says continued up to the time of the sale of the shares to Dominion Stores and to Cooke—was to acquire the lands, to develop one portion thereof into a shopping centre and the other into a garden court apartment project, and in each case to retain the ownership of the shares in the two companies that were formed and to derive revenue therefrom by leasing the stores and apartments. In other words, it is said that they were investing their money and not planning to make a profit by sale of the lands or shares.

While Grisenthwaite was not called as a witness, I think that the evidence of the appellant, supported as it is by other oral and documentary evidence, is sufficient to establish that when they acquired the property they did have the intention to try and develop the property for the purposes stated, namely, for rental. That such is the case is shown by the instructions to Mr. Hickey to acquire the lands and to incorporate the two companies (Exhibit 17); and also by the fact that some $5,000 was paid to Town Planning Consultants Ltd. for advice and for the preparation of plans. Other minor expenses were incurred for engineering services, for projected roads and other services. In addition, modest efforts were made to interest prospective commercial tenants for the shopping centre, and while a number appeared to be interested, no lease agreements were ever completed. The promoters also endeavoured over a period of some months to secure the passage of a suitable township bylaw which would permit the construction of the shopping centre and apartments.

Now while I am satisfied that the appellant and Grisenthwaite had that intention and that it was probably their dominant intention, I am far from being satisfied that it

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was their sole intention at any time. As I have said earlier, the appellant and Grisenthwaite were both experienced operators in the real estate field and fully aware of the demand for lands for commercial and other uses. Both they and their companies had bought and sold lands in substantial quantities. While their company, Grisenthwaite Investments Ltd., constructed a number of buildings which it then leased, it also constructed buildings for International Business Machines and for Singer Sewing Machine Co. and then sold them to those companies. The appellant and Grisenthwaite personally in December, 1952, bought some 32 acres of land near St. Catherines for $97,800 and in the same month sold 4.4 acres to Dominion Stores Ltd. for $50,000 cash; in the following June they sold the balance for preference stock shares having a face value of $163,450. At the same time, they personally bought and sold another 80 acres of land in Hamilton.

There seems no doubt whatever that the appellant and Grisenthwaite had in mind the intention to sell at least part of the property if they were unsuccessful in developing it as planned. Forming part of Exhibit 29 is a letter from Grisenthwaite Investments Ltd. (per the appellant as secretary) to Dominion Stores Ltd., dated August 14, 1952. It reads in part as follows:

> In reply to your letter of August 12th, as you no doubt realize there are quite a few problems in planning a property as large as Oaklands Park with such a broad potential. However, we are making progress and, as a matter of fact, we should appreciate being able to discuss with you our preliminary planning so that we may benefit from your experience and end up with a plan mutually satisfactory.
>
> At the moment, we are inclined to favour a rental agreement on a basis similar to the store in Westdale having in mind of course the probable higher cost of the store as well as the land. However, if we cannot reach an agreement on this type of deal, then we certainly would consider an outright sale.

Oaklands Park therein referred to was the name used at that time for the property in question. A further letter to Dominion Stores Ltd. (Exhibit 29) dated October 3, 1952, stated in part:

> (*d*) As mentioned above, if mortgage arrangements can be made on a similar basis to Westdale, we would certainly like to build the building on our own account and lease it to you for not less than 25 years and we should like you to consider a 30 year lease.

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(e) The question of financing a project such as this subdivision is one on which we have been putting considerable thought. We have mentioned before we believe the possibility of receiving payment in advance for the area which will be devoted to your store, but in view of the fact that we are very much interested in a lease arrangement and also the fact that there may be some inter-company deals before this subdivision is placed on the market, we have in mind requesting that you give us say, 2 years rent in advance to assist us in the development of the commercial area and in the construction of your store. Naturally, this would involve some discussion between our lawyers and your lawyers and some form of special agreement but I would like to have some indication from you if you would consider something of this kind.
(The underlining is mine)

It is clear, also, that no plans were ever completed for financing the proposed projects. Neither Aldershot Investments Ltd. nor Aldershot Realty Ltd. had any assets except the land, which was subject to large mortgages, and the small amount of cash received for the sale of the common shares. A few mortgage companies were approached, but no definite arrangements were ever made. The Dominion Stores building alone cost in excess of $300,000 and no part of that amount was paid until the shares in Aldershot Investments Ltd. were acquired by Dominion Stores. The proposed shopping centre could have cost at least one million dollars, but as no plans were ever prepared for construction of apartment houses and as the number of such apartments is not known, their cost cannot be accurately estimated, although doubtless it would have been substantial.

I turn now to the evidence relating to the circumstances which led up to the sale of the shares in Aldershot Investments Ltd. to Dominion Stores in April, 1954, the terms of which I have already stated. In the late fall of 1953, the appellant and Grisenthwaite and the two companies which they had formed owed on mortgages on the property about $90,000, and $60,000 was owed to Foster and $10,500 to the appellant's father. In addition, Aldershot Investments Ltd. had liabilities under construction and engineering contracts of about $350,000. Nothing definite had been done in the way of providing further capital for the payment of these obligations or for further developments.

The negotiations with Dominion Stores Ltd. which had been continuing for many months had never been finally settled by a formal agreement, although the store was near-

ing completion. No reason is given as to why this matter was not finally settled, although the appellant says there was an understanding of some sort and that the terms of a proposed lease based on a return of 9½ per cent. of the total cost of the building and land had been discussed. There is a strong inference that the appellant and Grisenthwaite were keeping the matter open so that they could either lease or sell as they thought best. In the late autumn of 1953, the appellant and Grisenthwaite heard that Loblaws, a large chain grocery store and a competitor of Dominion Stores Ltd., might be interested in renting part of the shopping centre. Because of their close business contacts with Dominion Stores, the appellant says that in fairness to it, he and Grisenthwaite decided to advise Dominion Stores that it might have a competitor in the immediate area. Dominion Stores took violent objection to any such scheme. Finally, the appellant and Grisenthwaite suggested that as the problem could not be resolved by mutual consent, "that the only way we could see that they could do it would be for them to take over the development of the shopping centre, in other words, take over Aldershot Investments Ltd." by a purchase of the shares. In the result, Dominion Stores Ltd. made the offer earlier referred to and it was at once accepted.

In these circumstances, I am quite unable to find that the intention to build and operate a shopping centre was brought to an end by any circumstances beyond the control of the appellant and Grisenthwaite. To keep the goodwill of Dominion Stores Ltd., with whom they had other contracts, the appellant and Grisenthwaite were prepared to abandon their original plan and to sell their shares—a purely voluntary act on their part. Understandably, it was advantageous for them to do so, for by this means they were able at once to make a very substantial profit, pay off their liabilities for mortgages and loans, as well as having the liabilities for building and engineering contracts taken over by Dominion Stores Ltd. Their own company, Barclay Construction Co. Ltd., would also receive payment in full for its building contract. It may be noted here that Dominion Stores Ltd. has not developed a shopping centre on the land, its own store being the only building now erected thereon.

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Finally, it is said that the other project—the development of a garden court apartment house area—was frustrated by a number of circumstances and had to be abandoned. As I have said earlier, no plans for such a building project were ever prepared and no financial arrangements made for its completion. It is said that difficulties were encountered with the township authorities in regard to zoning the property for such purposes, that the proposed location of a sewage disposal system was not satisfactory, that large parts of the area would have had to be set aside for a conservation area, that the supply of water was uncertain and that a number of school boards in the area would require parts of the land for school purposes if the apartments were proceeded with. For these reasons, it is said that the Easterbrook offer to purchase the shares in Aldershot Realty Company on behalf of Cooke, and also made in April, 1954, were at once accepted.

It is now settled law that even if the primary intention of the promoters of a scheme for buying land and developing it is for the construction of buildings to be leased by the promoters (i.e., an intention to create a revenue producing investment), there may in certain circumstances be also an alternative intention to sell at a profit if the promoters are unable to carry out their primary aim. If, in fact, the alternative intention is carried out, the profits arising on the sale may be of a revenue character as profits from a business or an adventure or concern in the nature of trade. Reference may be made to the judgment of the Supreme Court of Canada in *Regal Heights Ltd. v. Minister of National Revenue*[1], affirming the judgment of Dumoulin J. in this Court, as reported in [2]; and to *Bayridge Estates Ltd. v. Minister of National Revenue*[3].

While it is true that in this case Aldershot Investments Ltd. proceeded with the construction of a substantial building and amenities—and on that point the facts here differ from those in the *Regal Heights* and *Bayridge Estates* cases—I am unable to conclude that that fact compels me to conclude that the only intention of its promoters was that of constructing and operating a shopping centre. The construction of a store built to the specifications of Domin-

[1] [1960] S.C.R. 902. [2] [1960] Ex. C.R. 194.
[3] [1959] Ex. C.R. 248.

ion Stores Ltd. is, in the circumstances disclosed, equally consistent with an alternative intention to sell to that company if a lease suitable to the promoters could not be arranged. There is no evidence that any lease was prepared and it is to be doubted if astute businessmen—such as the appellant and Grisenthwaite were—would embark upon the construction of a special type of building to cost $360,000, unless they had an assurance from Dominion Stores Ltd. that it would either lease or purchase the property. As I have noted earlier, the correspondence clearly indicates that there were discussions with Dominion Stores as to a sale, and a clear statement that an outright sale would be considered if agreement on a lease could not be reached. Then, as I have said above, nothing of a substantial nature had been done to secure other tenants or to ensure that capital would be available to complete the full project, pay off the short term mortgages given to the vendors of the property, or pay off the other advances. It may be noted, also, that in the mortgages given to Scheer and to the Townsends, provision was made for partial discharges of the mortgages upon payment of an agreed amount per acre. This provision, it is true, may have been necessary because no decision had been reached as to the manner in which the property would be divided between the two companies to be formed; but it is also admitted that by that provision, sales of the property in blocks would be facilitated.

In my view, the whole scheme was of a speculative nature in which the promoters envisaged the possibility that if they could not complete their plans to build and retain as investments a shopping centre and apartments, a profitable sale would be made as soon as it could be arranged. That it was a valuable property is shown by the prices paid for the shares.

Counsel for the appellant stressed the fact that the profits made by the appellant were not made by the sale of the land but by the sale of shares received on the transfer of the land to the two companies. That profit, it is said, is a capital profit. I cannot agree with that submission. In my view, the appellant and Grisenthwaite, instead of selling the land as they might have done, adopted another method, namely, to cause two companies to be incorporated, sell the land for shares in these companies, and then sell the shares

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so received. That was the particular alternative method they chose to adopt in their real estate transactions.

In *Associated London Properties, Ltd. v. Henriksen, (H.M. Inspector of Taxes)*[1], the headnote reads as follows:

The Appellant Company managed, developed and dealt in real property, and the principal part of its profits was derived from rents. The results of its dealings in property had always been brought into the computation of its profits for Income Tax purposes, and it was conceded that this was correct.

In January, 1935, a private development company was formed with a capital of £100 in £1 ordinary shares subscribed equally by the Appellant Company and an individual, H. The two parties each advanced £32,000 to enable the development company to purchase a site from the Appellant Company, and jointly guaranteed a bank loan to the development company to enable it to erect a building on the site; they also jointly guaranteed the builders. It was also agreed between the parties that, when the building had been erected, either of the parties might acquire the shares of the other in the development company at a price satisfactory to both of them. In May, 1935, H accordingly offered the Appellant Company £25,500 for its 50 shares, together with repayment of its £32,000 advance and release from the two guarantees. The offer was accepted and the Appellant Company thereby made a profit of £25,450. In the Appellant Company's accounts this sum of £25,450 was included as part of the profits from "sales in connection with land". It was also included in the general profits out of which the Appellant Company paid dividends to its shareholders, and in a statement of its profits set out in a prospectus issued by it in 1938.

On appeal to the General Commissioners against an additional assessment to Income Tax made upon the Appellant Company under Case I of Schedule D in respect of the profit of £25,450, the Company contended that the sum in question arose not from the sale of the land but from the sale of its shares in the development company and was a capital profit. The General Commissioners held that the profit was made in the ordinary course of the Appellant Company's trade, and was therefore liable to Income Tax.

Held, that there was ample evidence to support the finding of the Commissioners.

Lord Greene, M.R., in giving judgment in the Court of Appeal affirming the judgment of Macnaghten, J., who had affirmed the finding of the General Commissioners, said at p. 53:

The Supplemental Case contains this finding: "Pursuant to the Order of the King's Bench Division herein dated 26th October, 1942 we, the Commissioners who heard the appeal, have duly reconsidered our finding in paragraph 8 of the Case Stated herein. After again considering all the facts and having regard to the inclusion of the profit in the accounts and the prospectus, we find that the profit was made in the ordinary course of the Company's trade and therefore liable to tax." In my opinion, that finding is one for which there was ample evidence. When that is said, it seems to

[1] [1942-45] 26 T.C. 46.

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me all argument is at an end. In fact the Commissioners are finding, if I may expand the clear meaning of what they say, that, it being the business of the Appellants to deal in real estate, this was the particular method of dealing in real estate which they happened to adopt, and, therefore, must be treated as a method of exploiting its real estate assets just as though they had made a direct sale to a purchaser out and out. There is nothing in law which prevents the Commissioners from finding as a fact that a profit made in these circumstances is to be treated as a profit made in the ordinary course of the Appellants' business.

In my opinion, this is a pure question of fact. The finding of the Commissioners is binding upon this Court, and they have made no error in law. There was ample evidence to support their finding; therefore, the result is that the appeal must be dismissed with costs.

Reference may also be made to *Deceased Estate v. Commissioner of Taxes*[1], a decision in the High Court of Rhodesia.

For these reasons, I have come to the conclusion that the profits realized by the appellant on the sale of the shares in Aldershot Investments Ltd. were profits from a business, or at least from an adventure or concern in the nature of trade.

The profits realized from the sale of the shares in Aldershot Realty Ltd. were realized in 1954 and consequently the appeal in regard to Item (a) of the re-assessment (*supra*) will be dismissed.

Other considerations, however, apply to the profits realized in the sale of the shares in Aldershot Realty Ltd. It is the fact that the agreement to sell these shares was dated April 29, 1954, but it is not now in dispute that the sale was closed and the profits received in the following year, namely, on January 4, 1955, a taxation year with which I am not now concerned. At the opening of the case, counsel for the appellant asked leave to amend his Notice of Appeal by stating that the shares were sold on January 4, 1955, and were not in any event income for 1954. I refused to allow the amendment, but on further consideration, I think that that decision was wrong and that I should have allowed it. The amendment then asked for will now be allowed, *nunc pro tunc*. In any event, the evidence clearly establishes that the profit on this transaction was made in the year 1955 and consequently it should not and cannot now be found to be taxable income of the appellant for 1954. As to that part

[1] 16 S.A.T.C. 305.

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of the appeal, therefore, I have reached the conclusion that the appeal should be allowed.

Accordingly, the matter will be referred back to the Minister to re-assess the appellant by excluding from the re-assessment Item (b) referred to above.

While under ordinary circumstances the appellant, who has been partially successful in his appeal, would be entitled to costs, I propose to make no order as to costs so that each party will bear his own. I do so because of the delay on the part of the appellant in amending his pleadings. The facts were within his knowledge and had his original Notice of Appeal clearly set out all the facts, I have no doubt that Item (b) of the re-assessment would have been dropped from the re-assessment.

Judgment accordingly.

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BETWEEN:

DOBIECO LIMITED .....APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a)(b)(e), 14(2) and 27(1)(2)—Deductions—Stock underwriter—Inventory reserve—Onus of proof—Determination of fair market value of inventory—Market price adjusted to alleged fair market value—Loss on sale of interest in oil syndicate—Business loss incurred in a subsequent year—Whether loss deductible in taxation year—Income Tax Regulations s. 1800—Appeal dismissed.

Appellant, an affiliate of the Toronto Stock Exchange, carried on the business of an underwriter of speculative shares of natural resource companies and, in addition, sometimes purchased interests in oil and mining syndicates. This appeal is from an assessment for income tax for the taxation year ending March 31, 1956 and concerns two unrelated issues: (1) In determining the value of its closing inventory of securities for the taxation year 1956, appellant calculated the book value of each stock held by taking the lower of cost or the closing bid price on the stock exchange. In the year under consideration appellant had engaged in underwriting the securities of ninety-six companies by negotiating agreements with those companies and purchasing outright from the treasury stock of such companies. The

responsibility of disposing of such shares then became that of appellant. It was obliged to dispose of such shares on the floor of the Toronto Stock Exchange. Appellant's business was therefore, that of a trader in securities and the securities held by it were its stock in trade, and at the end of its 1956 taxation year it had on hand several blocks of shares in mining or oil companies. The total book value of the shares held amounted to some $3.8 million from which appellant deducted $400,000 as a "Provision for market decline". This was disallowed on the ground that it was a reserve prohibited by s. 12(1)(e) of the Act. The appellant contended that since fair market price was not necessarily conclusive of fair market value, it was necessary to adjust the book value of its inventory downward to arrive at the lower cost or fair market value and submitted detailed figures to show the method of valuation used and the amounts, estimated to make up the deduction of $400,000. Several errors in the unit valuations were disclosed. The second issue in the appeal concerned an attempt by appellant to deduct as part of its 1957 business loss which was deductible in 1956 by virtue of s. 27(1)(*e*) of the Act, a loss assigned to its participation in a syndicate known as the "Jerd Syndicate", which had been formed by certain persons who agreed to make joint contributions under a plan to acquire an interest in certain oil leases and to drill for oil, the cost to appellant for its interest being $80,000. After unsuccessful attempts to find oil appellant refused to contribute further funds to the syndicate, and although the other members of the syndicate could have terminated appellant's interest therein, they continued to treat the appellant as a member indebted to the syndicate for the amount of the additional contribution. In 1958 appellant sold its interest in the syndicate for $1.00. This appellant treated as a loss incurred in 1957 and deducted such from its 1956 income. This was disallowed.

Held: That the appeal be dismissed.

2. That the determination of the fair market value of an inventory is a question of fact and appellant had not discharged the onus of proving that the respondent's assessment based on the book value of the securities inventory is incorrect.

3. That market price is the best evidence of fair market value, the price at which shares sell on the market might be regarded as *prima facie* evidence of their fair market value although not necessarily conclusive if rebutted by satisfactory evidence to the contrary and the only evidence offered was that of an interested expert whose figures used to arrive at the amount of the deduction contained several errors.

4. That the market action of the principal securities held by appellant, for several months before and after March 31, 1956, was such that the shares could have been disposed of without undue disturbance of the market and it was not correct to adopt a value which allowed for the depressing effect on the market if the inventory were disposed of all at once instead of in the normal course.

5. That it was incorrect to deduct in the valuation of the shares on hand, the amount of brokerage commission and transfer tax that would have to be paid thereon when sold.

6. That the loss in respect of the "Jerd Syndicate" was properly deductible from income but it was not sustained in appellant's 1957 taxation year, the evidence being clear that appellant's participation in the

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syndicate did not terminate in 1957 when it refused to make the additional contribution but in 1958 when it sold its interest.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Cattanach at Toronto.

H. H. Stikeman, Q.C. and *P. N. Thorsteinsson* for appellant.

G. D. Watson, Q.C. and *M. A. Mogan* for respondent.

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

CATTANACH J. now (February 22, 1963) delivered the following judgment:

This is an appeal from the appellant's income tax assessment for the taxation year ending March 31, 1956 (hereinafter referred to as the 1956 taxation year) whereby a tax in the sum of $1,103,618.83 was levied in respect of income for the said taxation year.

In this appeal there are two issues, which are unrelated and, therefore, each will be considered separately. One of the issues involves the question whether or not the appellant is entitled to deduct an amount of $400,000 from its closing inventory at the end of its 1956 taxation year and the other issue is whether or not the appellant incurred a loss in the amount of $80,567.38 in connection with an interest which the appellant had acquired in a petroleum syndicate (hereinafter referred to as the Jerd Syndicate) in its taxation year ending March 31, 1957 (hereinafter referred to as the 1957 taxation year) which alleged loss the appellant carried back against its income for its 1956 taxation year.

The appellant is a corporation incorporated pursuant to the laws of the Province of Ontario by letters patent dated December 24, 1954 for the following objects:

> (*a*) *TO* underwrite, subscribe for, purchase, invest in or otherwise acquire and hold, either as principal or agent and absolutely as owner or by way of collateral security or otherwise, and to sell, exchange, pledge, transfer, assign or otherwise dispose of or deal in the bonds or debentures, stocks, shares or other securities of any government or municipal or school corporation or of any chartered bank or of any incorporated company or corporation;

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(*b*) *TO* assist in the promotion, organization, development or management of any corporation or company and to raise and assist in raising money for and to aid by way of bonus, loan, promise, endorsement, guarantee of bonds, debentures or other securities or otherwise any company or corporation and to offer for public subscription any shares, stocks, bonds, debentures or other securities of any other company or corporation, and to act as agent, attorney, employee or manager of any other company or corporation or of any shareholder thereof;

(*c*) *TO* prospect for, acquire, own, lease, explore, develop, work, improve, maintain and manage mines and mineral lands and deposits, including oil and gas lands and deposits, and to sell or otherwise dispose of the same or any part thereof or interest therein;

(*d*) *TO* procure for any company or corporation and to convey and assign or cause to be conveyed and assigned thereto any properties, real or personal, rights, privileges, powers, contracts, concessions and franchises which such company or corporation may be authorized or empowered to make or acquire;

(*e*) *TO* make loans and advances on and to underwrite and guarantee all kinds of stocks, shares, bonds, debentures and securities; and

(*f*) *TO* act as agents for the purpose of collecting and converting into money the securities and properties of any person, firm or corporation;

In furtherance of the foregoing objects the appellant devoted itself primarily to carrying on business as an underwriter particularly of speculative shares of natural resource companies in Canada and, in frequent instances, the appellant purchased interests in and contributed funds to syndicates formed to prospect for, explore and develop petroleum and mineral resources in accordance with paragraph (*c*) of its objects with the additional expectation that any consequent underwriting business would be acquired by the appellant.

During the appellant's fiscal year ending March 31, 1956 which is also the appellant's 1956 taxation year, it engaged in underwriting the securities of 96 companies which are listed in Exhibit 2. The appellant conducted this phase of its business by negotiating agreements with companies, usually those which were recently incorporated, to underwrite shares in capital stock. These shares were purchased outright from treasury stock of such companies and the responsibility of disposing of the shares then became that of the appellant. It was customary for the appellant to take down an initial block of shares from the treasury of the company with which the appellant negotiated in a substan-

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tial number, usually 200,000 shares and the appellant would take options for still further shares, the options to be exercised within a stated period, not to exceed in all more than 18 months. The shares under option were normally 800,000 in number, the foregoing amounts and procedure being prescribed by regulations of the Toronto Stock Exchange of which the appellant was an affiliate and was bound thereby.

The relationship of an affiliate of the Toronto Stock Exchange also made it obligatory that any shares posted for trading on that Exchange could only be disposed of by the appellant on the floor of the Exchange during a session thereof at the prevailing bid price for a board lot as quoted on the Exchange. The obligation of the appellant to dispose of shares held by it on the floor of the Toronto Stock Exchange was subject to seven exceptions enumerated in By-law No. 456 of the Exchange and which was filed in evidence as Exhibit 7. Of the seven exceptions so made only two are applicable in the issues here raised, the first being an isolated wholesale transaction approved as such by the Exchange and the second being a transaction made on another stock exchange.

Therefore, the appellant's business in this respect, is that of a trader in securities and having regard to the nature of the appellant's business, there is no question that the securities held by it, were to be regarded as its stock in trade. At the end of its 1956 taxation year the appellant had on hand some 48 blocks of shares in mining or oil companies, in varying numbers which it had acquired under underwriting agreements as above outlined, as well as a lesser number of shares held in independent trading accounts, which the appellant had not disposed of during that period.

Accordingly it became necessary to value the shares so held for income tax purposes, as at the end of its 1956 taxation year, which the appellant did by calculating the book value thereof by taking either the lower of cost to the appellant, which would be the price paid by it for the shares when the appellant took the shares down from the treasuries of companies pursuant to underwriting agreements, or the price paid by the appellant for shares held in trading accounts, or published market quotations for board lots on the last trading day on the Exchange for the 1956

taxation year multiplied by the number of shares held by the appellant.

The foregoing calculation resulted in an amount of $3,866,923.01 for the shares so held and from this amount the appellant then deducted the sum of $400,000 on the basis that the actual market value of the shares so held as inventory was an amount of $400,000 less than the book value computed as above described.

By notice of reassessment dated October 30, 1957 the Minister disallowed as a deduction in the computation of the value of the appellant's inventory on hand at the end of its 1956 taxation year the amount of $400,000 that the appellant had deducted and thereby increased the taxable income for that year as reported by the appellant by a like amount.

By letter dated April 28, 1958, filed in evidence as Exhibit E, the solicitors for the appellant advised the Minister that they had been instructed to appeal against the disallowance of the $400,000, provision for market decline as noted in the Notice of Reassessment on the ground that the item of $400,000 was an adjustment of the value of large blocks of speculative shares held as inventory at the end of the taxation year and represented an adjustment to the lower of cost or market value in this inventory.

By notification dated July 7, 1960 under section 58 of the *Income Tax Act*, 1952, R.S.C. c. 148 the Minister advised the appellant that the assessment, with respect to the disallowance of the deduction of the $400,000 in question, had been confirmed, in the following terms:

> that the amount of $400,000 claimed as a deduction from income in respect of a provision for market decline has been properly disallowed in accordance with the provisions of paragraph (*e*) of subsection (1) of section 12 of the Act; that the taxpayer's inventory of securities has been valued in accordance with the provisions of subsection (2) of section 14 of the Act and section 1800 of the Income Tax Regulations.

It is from this part of the assessment that an appeal is brought to this Court and constitutes the first issue before mentioned.

In the computation of business profits it has long been recognized that the value of trading stock is an important element and that the right method of ascertaining profit is

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to take into account the value of the stock in trade at the beginning and at the end of the accounting period. While for income tax purposes profits are normally those realized in the course of the taxation year, nevertheless, the ordinary principles of commercial accounting have provided an exception where traders still hold goods in inventory at the end of the year. The trader is permitted, in compiling his inventory, to enter those goods at cost or market value, whichever is the lower.

The accounting practice so described has been included in the *Income Tax Act*, section 14(2) of which is as follows:

> 14.(2) For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

The effect of section 14(2) is to permit, what is called in common parlance, a "hidden reserve" which, but for section 14(2), would otherwise be precluded by the provisions of section 12(1)(*e*) of the *Income Tax Act* reading as follows:

> 12.(1) . . .
>
> (*e*) an amount transferred or credited to a reserve, contingent account or sinking fund except as expressly permitted by this Part,

Since the value of the closing inventory is deducted from the value of the sum of the opening inventory and goods purchased during the accounting period to obtain the cost of the goods sold and the result is, in turn, deducted from the value of the sales to arrive at the profits, it follows that it is a distinct advantage to the taxpayer, in order to reduce the amount of profit which would be subject to tax, to enter the closing inventory at as low a figure as is possible.

Section 14(2) provides two bases for determining the value of an inventory:

> (1) the lower of its cost to the taxpayer or its fair market value, or
>
> (2) in such other manner as permitted by regulation.

Section 1800 of the Income Tax Regulations reads as follows:

> 1800. For the purpose of computing the income of a taxpayer from a business

(*a*) all the property described in all the inventories of the business may be valued at the cost to him; or

(*b*) all the property described in all the inventories of the business may be valued at the fair market value.

Therefore, the taxpayer has the following choices, (1) he may consider each item in the inventory and value it at the lower of cost or fair market value, as provided by section 14(2) of the *Income Tax Act*, or (2) he may value all inventories at cost, or (3) he may value all inventories at market, the latter two choices being provided for in section 1800 of the Income Tax Regulations.

The appellant, in arriving at the inventory value of shares held by it at the close of its 1956 taxation year, adopted the process of ascribing to each item of inventory either the lower of cost to the appellant or the market price, the market price being the last published bid for a board lot for shares listed on the Toronto Stock Exchange. It is significant to note that the marekt price was the figure adopted whenever such price was lower than cost. The appellant thereby arrived at the amount of $3,886,923.01 from which amount it then deducted $400,000 which deduction is in dispute.

In the auditor's report dated May 7, 1956, attached to the financial statements of the appellant for the year ending March 31, 1956 the amount of $400,000 was dealt with in the following terms:

> Results for the year
> The operations of underwriting and miscellaneous trading resulted in a profit of $4,168,124.91, from which has been deducted a provision for market decline or losses of $400,000 and general expenses of $6,918.80.

The balance sheet in the financial statements as at March 31, 1956 contained a reference to the same item on the asset side as follows:

Marketable securities, valued at the lower of cost or market price	$3,886,923.01
Less provision for market decline	400,000.00
	$3,486,923.01

Counsel for the Minister submitted that the use of the term "provision for market decline" indicated that the appellant was setting up a reserve against a possible future contingency which would be prohibited by the provisions of the *Income Tax Act*.

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The president of the appellant company, H. E. Knight, and K. E. Greenwood, the auditor of the appellant, who was responsible for the preparation of the financial statements and the selection of the language used therein, both deny it was their intention to set up a reserve in the amount of $400,000, but state that the purpose of the deduction was to attempt to evaluate the inventory at its "fair market value."

While the words used were inept, I accept the contention that an evaluation of the inventory was attempted and in so concluding I am influenced by the use of the word "price" in the language "Marketable securities, valued at the lower of cost or market price", since the word "price" has a distinct meaning different from the word "value" and, therefore, the provision for market decline constitutes an attempt to arrive at the "value".

Counsel for the appellant submitted that the published market quotations for board lots are not conclusive of the fair market value and in determining the value of the shares held in inventory the appellant is entitled to look to other factors. In my view such submission is correct and well founded on authorities.

What the appellant did was to apply the opinion of Mr. Knight, its president, as the better criterion and the best measure of value.

I understand the words "fair market value" to mean what the securities would realize if sold by the taxpayer in the normal method used by the taxpayer in the ordinary course of his business in a market not exposed to any undue stresses and composed of willing buyers and sellers.

Even though any particular assets may be difficult to value, nevertheless, the best possible valuation must be made.

While valuation may well be an art rather than an exact science, nevertheless, I cannot imagine anything that is more clearly a question of fact than what is the value of stock in trade at a particular time.

How, then, did Mr. Knight arrive at a figure of $400,000 as being the proper amount to deduct from the book value

of the appellant's inventory as at March 31, 1956 to determine the fair market value at that date.

The auditor of the appellant, Mr. K. E. Greenwood prepared a working sheet in the course of his audit, which was filed in evidence as Exhibit A, upon which was listed the names of the 48 companies in which the appellant held undisposed of shares, the number of shares held in each company, the market price, the book values, and a heading entitled "Reserve". Mr. Greenwood then consulted with Mr. Knight who settled the amount to be inserted under the column headed "Reserve" with respect to eight specific companies which represented the appellant's largest monetary holdings. In short, the deduction of $400,000 was attributed to the holdings in these eight specific companies and the determination of the amount attributed to each of the eight companies was the responsibility and decision of Mr. Knight.

I reproduce in tabular form information respecting the eight companies which formed the basis of the deduction of $400,000.

Company	No. of Shares Held	Unit Price at Lower of Cost or Market Price	Book Value	Basis of Valuation Used Market Price or Cost	Deduction	Approximate Percentage of Deduction	Correct Market Price	Difference
1. Consolidated Red Poplar Minerals Ltd.	721,243	.50	$360,621.50	market price	$50,000	14%	.53	$21,637.29
2. Eastern Mining & Smelting Corp. Ltd.	73,466	5.67	416,741.50	"	40,000	9¾%	5.95	20,570.48
3. Lake Cinch Mines Ltd.	128,400	2.50	321,000.00	"	40,000	12½%	2.80	38,520.00
4. Merrill Island Mining Corp. Ltd.	195,400	2.75	537,350.00	cost	75,000	14%		
5. New Delhi Mines Ltd.	253,300		240,091.60					
Trading acct.	755,600		717,820.00					
	1,008,900	.95	957,911.60	market price	150,000	15%	1.00	60,534.00
6. Silver Hill Mines Ltd.	250,000	.20	50,000.00	cost	40,000	80%		
7. Soil Builders Ltd.			7,500.00	"	7,500	100%		
8. Yale Lead and Zinc Mines Ltd.	400,000	.45	180,000.00	"	20,000	11%		
					Total			Total
					422,500			$141,261.77

The first column lists the companies by name. The second column sets out the number of shares held in each company by the appellant as at March 31, 1956. The third column lists the unit price per share used by Mr. Greenwood, the appellant's auditor. In the fourth column are listed the book values of the blocks of shares held in the eight enumerated companies which the auditor arrived at by multiplying the number of shares held by the unit price. The fifth column sets out the basis of valuation used in each instance, that is whether the unit price set out in the third column was cost to the appellant per share or the published bid price per share for a board lot on the last trading day on the Toronto Stock Exchange. The auditor used as unit price whichever was the lower.

Then in the sixth column are listed the amounts Mr. Knight deducted from each of the blocks of shares in the eight companies which were the basis of the deduction of $400,000. The figures listed in this column total $422,500 which figure was rounded out to arrive at the ultimate deduction of $400,000.

In the seventh column I have computed the approximate percentage of each individual deduction.

In the cross-examination of Mr. Greenwood it was established that where market price was used as the basis of valuation in four instances, namely; Consolidated Red Poplar Minerals, Ltd., Eastern Mining & Smelting Corp., Ltd., Lake Cinch Mines Ltd., and New Delhi Mines Ltd., it was not the correct one, but in each instance was lower than the actual published bid quotation on the pertinent day.

In the eighth column I have listed what was established to have been the correct market price and in the ninth column I have listed the difference which results from the difference between the market price used and the market price established as having been the correct one.

In the four instances where the basis of valuation used was market price, namely; Consolidated Red Poplar Mines, Ltd., Eastern Mining & Smelting Corp., Ltd.; Lake Cinch Mines, Ltd., and New Delhi Mines, Ltd., the error as to the correct market price as quoted on the Exchange has the

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effect of increasing the deductions applied to the respective companies by the respective amounts set out in the concluding column in the foregoing tabulation.

I am convinced that Mr. Knight, in forming his opinion as to the amount of deduction to be made to arrive at what he considered to be the "fair market value", was not aware of the error from which it follows that his estimate should have been $141,261.77, (being the total of the amounts listed in the last column of the tabulation), less than $400,000.

The book values listed in the fourth column with respect to Eastern Mining & Smelting Corp., Ltd. and New Delhi Mines Ltd., being the figures used by the auditor in the computation of the value of the inventory are not the correct product of the number of shares, in the second column, multiplied by the unit price set out in the third column. In both instances the product used is less than the correct product which would again result in a lesser inventory valuation.

It was established in cross-examination that within three months from March 31, 1956 the appellant's position with respect to the shares of Eastern Mining & Smelting Corp., Ltd. had been liquidated at prices between $5.95 and $7.00 per share and the appellant was in a short position of $6,000. It was also established that the appellant's entire position with respect to Merrill Island Mining Corp., Ltd. was liquidated at prices in excess of $3.40 per share prior to the end of April, 1956, that is within one month from the valuation date.

Events subsequent have demonstrated that Mr. Knight's opinion respecting these two items of inventory was grossly in error. These facts have shown that the deductions of $40,000 and $75,000 attributed to Eastern Mining & Smelting Corp., Ltd. and Merrill Island Mining Corp., Ltd. and totalling $115,000 were without justification, there being no reduction in market value. Accordingly a deduction of $115,000 was wholly unwarranted.

The four companies in which the basis of valuation was cost to the appellant were Merrill Island Mining Corp., Ltd., Silver Hill Mines, Ltd., Soil Builders, Ltd. and Yale

Lead and Zinc Mines Ltd. Since these four companies were entered at cost, which was lower than market price, the advantage permitted by section 14(2) of the *Income Tax Act* inured to the appellant.

The shares of Silver Hill Mines Ltd. were not listed for trading on the Toronto Stock Exchange. The shares were bought by the appellant at a cost of 20 cents per share on February 29, 1956, that is the last day of the month preceding the inventory valuation for the period ending March 30, 1956. Mr. Knight's recollection was that this stock was listed on the British Columbia Stock Exchange and that the bid price was 10 cents. Mr. Greenwood's recollection was that the stock was not listed, but he did not verify the market price from such sources as over the counter prices from brokers who were not members of a recognized stock exchange and he unequivocally accepted Mr. Knight's opinion that $40,000 was the proper deduction from a cost of $50,000. Accordingly the value of this item was written down by 80% within the comparatively short period of one month.

The evidence as to the nature of the appellant's expenditure of $7,500 in Soil Builders, Ltd. was particularly scant. The object of the company was to market a type of soil enrichment into which the appellant paid $7,500 about two years prior to March 31, 1956. The appellant did not receive any shares in the capital stock of the company and, therefore, I can only conclude that the funds were advanced in the nature of a loan. There was no evidence that the appellant attempted to, or could recover any portion of this expenditure.

Yale Lead and Zinc Mines Ltd. had advanced beyond the speculative stage and was in production having paid a dividend to shareholders in May 1955 and 1956. In my view, therefore, the value of the shares was susceptible of a more accurate estimate based upon, the assets owned, prospects and like criteria.

The original working document which was used by Mr. Greenwood in consulting with Mr. Knight and which was used by Mr. Knight in formulating his opinion as to the appropriate allowance to be made for the adjustment of

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inventory valuation, was Exhibit A. For the purposes of this trial Mr. Greenwood prepared a document entitled "Calculation of requirements for reduction to true market value" which was introduced as Exhibit 5. Exhibit 5 was prepared at a time considerably subsequent to the preparation of Exhibit A and when the matter of the disallowance of the deduction of $400,000 by the Minister became an issue. Exhibit 5 was substantially a reproduction of the material contained in Exhibit A, but with significant additions. In addition to the eight companies before mentioned, which were the only companies for which valuation adjustments were made to arrive at the figure of $400,000, there are seven further companies in Exhibit 5 as to which valuation adjustments were made in the amount of $75,000.

There were two further additions in Exhibit 5 which were not in Exhibit A being a column listing the brokerage commission which the appellant would be obligated to pay on the sale of the shares held in inventory and a further column listing the amount of tax which would be payable on the sale of the shares which would also be obligatory upon the appellant to pay.

The amounts listed in Exhibit 5 under the columns headed "Commission on Sale" and "Tax on Sale at Book Values" total $79,070.24, which was rounded to $75,000.

Because a further amount of $75,000 was inserted in Exhibit 5 as a valuation adjustment and an equal amount of $75,000 was deducted as commission and tax on sales, it is not surprising that the total valuation adjustment in Exhibit 5 is identical to that in Exhibit A.

Since Exhibit 5 was prepared some considerable time after Exhibit A and when the issue of the deduction of $400,000 arose, it has the attributes of an attempted subsequent justification of a previous conclusion.

I, therefore, conclude that Mr. Knight and Mr. Greenwood did not take into account commission and tax on sales when Mr. Knight made his original estimate and in my opinion the factors of commission and tax on sales, while obligatory upon the appellant to pay at some future time, are not the proper subject matter for deduction for income tax purposes until the sales of the securities actually occur.

Mr. Knight, whose experience as an underwriter of highly speculative securities was extensive, was the only expert witness called and he was not a disinterested expert.

Mr. Greenwood relied exclusively on Mr. Knight's judgment as to the proper deductions to be made to arrive at "fair market value". Mr. J. B. Howson, a chartered accountant, confirmed that it was accounting practice for an auditor in ascertaining fair market value to consult and accept the estimate of the president of a company as the best source of information on the subject.

Mr. A. J. Trebilcock, a past-president of the Toronto Stock Exchange testified that under Exchange regulations it was possible for a member of the Exchange to dispose of a wholesale lot of shares to the minimum value of $25,000 at less than the market price if permission of the board was first obtained. The permitted discounts below market price on the Exchange range from 25 percent to 10 percent dependent upon the Exchange trading price of the shares. The stock exchange regulations deal in generalities, but in any event wholesale sales were not contemplated in valuating the appellant's inventory, the criterion being Mr. Knight's opinion. Mr. Knight did not suggest that the shares held in the appellant's inventory were not saleable, but rather that the shares were not saleable at a price Mr. Knight thought they should fetch.

Exhibit F was introduced in evidence and was a résumé of the opening, high, low and last prices on the Toronto Stock Exchange for the shares of Consolidated Red Poplar Minerals Ltd., Eastern Mining & Smelting Corp., Ltd., Lake Cinch Mines Ltd., Merrill Island Mining Corp., Ltd., New Delhi Mines Ltd. and Yale Lead and Zinc Mines Ltd. for the months of January, February, March, April, May and June of 1956, that is three months before and three months after March 31, 1956. Exhibit F also showed the volume of shares in each of the companies traded on the Exchange in each of the six months in question. The volume of shares traded was considerable with respect to each company mentioned above in each month which would, therefore, indicate an active market.

It is, therefore, reasonable to suppose that the appellant could have disposed of the shares held in the normal course

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of its business and that the market was capable of absorbing the shares without undue disturbance.

Mignault J. in delivery of the unanimous judgment of the Supreme Court in *Untermyer Estate v. Attorney General for British Columbia*[1], said:

> I would not deduct anything from the market value of these shares on the assumption that the whole of them would be placed on the market at one and the same time, for I do not think that any prudent stockholder would pursue a like course. To make such a deduction in a case like the one at bar, would be to render the "sacrifice value" or "dumping value" of the shares the measure of valuation.

Accordingly it would not be proper, in the present case, to make any deduction on the assumption that the appellant's shares would all be placed on the market at once, thereby depressing the market value since such course would not be either normal or prudent in the appellant's business.

The expression "fair market value" has been defined in different ways, depending generally on the subject matter which the person seeking to define it had in mind. In my opinion the discussion of the meaning of the expression in *Untermyer Estate v. Attorney General for British Columbia (supra)* at p. 91 is a useful guide to the meaning of the expression in section 14(2):

> We were favoured by counsel with several suggested definitions of the words "fair market value". The dominant word here is evidently "value", in determining which the price that can be secured on the market—if there be a market for the property (and there is a market for shares listed on the stock exchange)—is the best guide. It may, perhaps, be open to question whether the expression "fair" adds anything to the meaning of the words "market value," except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market. The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. Many factors undoubtedly influence the market price of shares in financial or commercial companies, not the least potent of which is what may be called the investment value created by the fact—or the prospect as it then exists—of large returns by way of dividends, and the likelihood of their continuance or increase, or again by the feeling of security induced by the financial strength or the prudent management of a company. The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

[1] [1929] S.C.R. 84 at 91.

In the quoted passage Mignault J. treats the market prices not as the fair market value, but as the best evidence of fair market value. The price at which the shares were selling on the stock market might be regarded as *prima facie* evidence of the fair market value, although not necessarily conclusive if rebutted by satisfactory evidence to the contrary.

In the present case the only evidence to the contrary is the opinion of Mr. Knight who was an interested expert. In the eight companies the holdings in which formed the basis of Mr. Knight's opinion, it has been shown that in two of the eight instances Eastern Mining & Smelting Corp., Ltd. and Merrill Island Mining Corp., Ltd., his opinion was grossly in error, the appellant subsequently disposing of the shares of these two companies at prices far in excess of the market price as at March 31, 1956 a short time thereafter. In addition, the market prices used in the valuation of the inventory were shown to be in all instances less than the actual market prices at the relevant date.

While the shares were all of a highly speculative character and the market prices volatile, nevertheless, the prices have been shown to have been reasonably consistent for three months before and three months after March 31, 1956 and during such time the market was quite active.

In *Minister of National Revenue v. Simpsons Ltd.*[1], the President held that an assessment carries with it a presumption of validity until the taxpayer establishes that the assessment is incorrect either in fact or in law, and the onus of proving that it is incorrect is on the taxpayer. Therefore, in this case the onus is on the appellant to establish the invalidity of the assessment.

An assessor in the Department of National Revenue testified that during his experience in the Department over a period of 15 years the consistent practice has been to apply the market price of shares listed on an exchange as the value thereof.

In my opinion, therefore, in the language of Rand J. in *Johnston v. Minister of National Revenue*[2] the appellant

[1] [1953] Ex. C.R. 93. [2] [1948] S.C.R. 486.

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has not discharged the onus which was its "to demolish the basic fact on which the taxation rested."

The appeal against the disallowance of $400,000 as a deduction is, therefore, dismissed.

The second issue raised in the appeal involves the question as to whether the appellant incurred a loss in its 1957 taxation year in the amount of $80,567.38 in connection with an interest in the Jerd Petroleum Syndicate, which alleged loss was carried back against its income for its 1956 taxation year.

By notice of reassessment dated October 30, 1957 the Minister reduced the amount of loss for the 1957 taxation year carried back against 1956 income by the amount of $80,567.38 with respect to the Jerd Syndicate. On December 5, 1957 the appellant filed a Notice of Objection with respect to this reduction of the 1957 loss carried back against 1956 income and by notification dated July 7, 1960 the Minister advised the appellant that the assessment had been confirmed in the following terms:

> and hereby confirms the said assessment in other respects as having been made in accordance with the provisions of the Act and in particular on the ground that the amount of $80,567.34 claimed as a deduction from income in the 1957 taxation year in respect of Jerd Petroleum Limited interests has not been shown to have been a loss sustained by the taxpayer in the 1957 taxation year has been correctly determined for the purpose of paragraph (*e*) of subsection (1) of section 27 of the Act.

Section 27(1)(*e*) reads as follows:

> 27 (1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted from the income for the year such of the following amounts as are applicable;
>
> . . .
>
> (*e*) business losses sustained in the 5 taxation years immediately preceding and the taxation year immediately following the taxation year.

The appellant was incorporated on December 23, 1954 for the objects previously set forth, paragraph (*c*) of which is repeated here and reads as follows:

> *TO* prospect for, acquire, own, lease, explore, develop, work, improve, maintain and manage mines and mineral lands and deposits, including oil and gas lands and deposits, and to sell or otherwise dispose of the same or any part thereof or interest therein;

Prior to the incorporation of the appellant a partnership known as Draper Dobie and Company carried on business

in two branches, an underwriting and trading branch and a commission branch. On its incorporation the appellant took over the underwriting and trading business formerly carried on by the partnership.

Among the assets so acquired from the partnership by the appellant was an interest in the Jerd Petroleum Syndicate. In March, 1955 the partnership had contributed $50,000 to the Syndicate. In June, 1956 and March, 1956, the appellant made two further contributions of $7,900 and $22,668.34 respectively. The total of $80,568.34 is the amount presently in issue.

The partners in Draper Dobie and Company included Mr. H. W. Knight, Mr. Knight's father and Mr. Geo. W. Gooderman. Mr. H. W. Knight and Mr. Geo. W. Gooderman are shareholders and officers of the appellant holding the offices of President and Vice President respectively.

Before the appellant was incorporated, Mr. Robert Bryce, a mining engineer and promoter and manager of mining and oil exploration and development companies was interested in a prospective oil producing area in Alberta adjacent to the British Columbia border. He first obtained a reservation which he later converted into lease holdings. It was a condition of the leases so obtained that Mr. Bryce should expend $200,000 in exploration. The area was comprised of 40,000 acres in all, but a 25% interest in the area had been acquired by another party. The expenditure of $200,000 by Mr. Bryce would entitle him to a 75% interest. In short, on the expenditure of $200,000 Mr. Bryce would own the leasehold in 30,000 acres and the other party owned 10,000 acres. The area of 40,000 acres was unsurveyed. The 10,000 acres owned by the other party comprised a corner of each section, the balance being owned by Mr. Bryce. Because of the fact that the area was unsurveyed it followed that the limits of the respective holdings of Mr. Bryce and the other party could not be clearly defined.

In order to raise the amount of $200,000 which was to be expended as a condition of the lease Mr. Bryce formed a syndicate. Mr. H. W. Knight, Mr. Knight's father and Mr. Gooderman personally participated in this syndicate. The amount of $200,000 was raised through the syndicate so formed and was expended in the drilling of an oil well on

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the property. The amount of $200,000 was exhausted in drilling without oil being discovered and a company was formed under the name of Jerd Petroleum Company, Limited which then became the owner of the leasehold interest in the 30,000 acres. The members of the syndicate became shareholders in Jerd Petroleum Company, Limited in proportion of their participation in the syndicate and the syndicate was dissolved.

However, oil had not been discovered and in order to finance further drilling, Mr. Bryce, who was the prime motivator throughout and still continues as such, formed a second syndicate. This second syndicate is the one described herein as the Jerd Syndicate.

Draper Dobie and Company was a member of this syndicate and as indicated above made an expenditure of $50,000 as its proportionate share. It was this interest which was acquired by the appellant from the partnership.

The members of the Jerd Syndicate were Mr. Bryce, 10%, Mr. Wayne 10%, Amerex Oil, 20%, Decalta Oil 30% and the appellant 30%. There were subsequent changes in proportion and membership which are not material in this matter, but throughout the material time the interest of the appellant remained a constant 30%. Jerd Petroleum Company, Limited owned a half interest in this second venture and contributed half of the funds expended and the Jerd Syndicate owned the remaining half interest and was obligated to contribute one half of the funds to be raised. Jerd Petroleum Company, Limited was not a member of the Jerd Syndicate.

The Syndicate agreement was not reduced to writing. The custom in the trade was to conduct such arrangements orally and if necessity should arise to commit the arrangement to writing at a later time. It was understood, however, that each member of this syndicate was required to put up an amount of money in proportion to his membership interest each time an assessment was called and if the member did not meet the assessment then that member's interest was lost and the remaining members were to be offered the opportunity to take up the defaulted interest.

The purpose of the appellant in entering into the Jerd Syndicate was two-fold, first, if oil were discovered the

appellant would participate in the benefits thereof and second, if success attended the venture, there was a tacit understanding, though an unwritten one, that the appellant would be given the first refusal to underwrite the shares in a company which might be formed to acquire and operate the oil or gas field. The appellant had exercised care to ensure that it was the only member of the syndicate which also carried on the business of underwriting. Furthermore, the appellant had participated in syndicates of this nature formed by Mr. Bryce on previous occasions to its commercial and financial advantage.

The Jerd Syndicate, in conjunction with Jerd Petroleum Company, Limited, sank the well to a depth of 4,779 feet. At that depth harder rock was encountered than had been anticipated. A heavier drill would be required to penetrate deeper, but because of the cost involved, drilling was stopped on March 9, 1956 and has not since been resumed.

At the time drilling ceased the syndicate's funds actually on hand were exhausted, but the annual lease rental of $30,000 being $1 an acre continued, a payment in that amount falling due on July 4th of each year. Jerd Petroleum Company, Limited was responsible for $15,000 of the annual rental and the Jerd Syndicate was also responsible for an equal amount. The appellant's proportionate share of this liability was $4,500 for July 4, 1957. The appellant did not pay this amount into the syndicate.

Mr. Bryce, in his capacity as head of the Jerd Syndicate, called on Mr. Knight in March, 1957 for the purpose of obtaining the appellant's payment of $4,500. Mr. Knight, as president of the appellant, informed Mr. Bryce that the appellant did not intend to contribute any further. The appellant's interest in the Jerd Syndicate was not terminated upon this default as was possible under the terms of the verbal syndicate agreement previously outlined, but on the contrary the appellant was continued to be looked upon as a member of the syndicate by the other syndicate members. The syndicate treated the appellant as a member which was indebted to the syndicate in the amount of $4,500.

A further leasehold rental was falling due on July 4, 1958. Accordingly in March, 1958 Mr. Bryce again approached

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Mr. Knight for the appellant's contribution. Mr. Knight reiterated the appellant's previous decision to participate no further in the Jerd Syndicate and offered to sell the appellant's interest therein to Mr. Bryce for $1 and Mr. Bryce's assumption of the appellant's outstanding obligation to the Jerd syndicate of $4,500 as well as a further obligation of $4,500 becoming due on July 4, 1958. Mr. Bryce consulted the other members of the Jerd Syndicate who agreed to Mr. Bryce purchasing the appellant's interest.

On June 5, 1958 the appellant executed an agreement for sale of its interest in the Jerd Syndicate for the consideration of $1 in cash and the assumption of appellant's outstanding obligation of $4,500 and a future obligation of $4,500 due on July 4, 1958. The consideration so paid was $4,501, but this has no bearing on the amount of the appellant's alleged loss of $80,567.38 because if the obligation of $4,500 had been paid then the loss of $80,567.38 claimed by the appellant would have been increased by an amount of $4,500 and when the monetary consideration received was deducted from that greater figure, the amount of the loss would remain constant at $80,567.38.

To resolve the question in issue it is necessary to consider three matters (i) did the amount of $80,567.38 constitute a loss, (ii) if the first matter is answered affirmatively, then was the loss deductible for income tax purposes and (iii) if the first two propositions are answered affirmatively, then consideration must be given as to when the loss occurred in point of time.

The appellant, in entering into the Jerd Syndicate, was pursuing the objects for which it was incorporated. The primary expectation of the appellant was the prospect of profits from the sale of any oil or gas discovered added to which was the incidental possibility that any underwriting business which might arise would be acquired by the appellant which was also within the objects set out in the appellant's letters patent. Further the appellant had conducted its business in this identical manner on previous occasions.

There is no doubt whatsoever that the appellant did expend $80,567.38 as its share in the Jerd Syndicate. The

venture and rights acquired by the appellant therein were not of a capital nature, but were part of the appellant's normal business. It, therefore, follows that if a profit had been realized it would have been properly taxable and it conversely follows that a loss incurred would be properly deductible.

Therefore, the first two propositions must be answered affirmatively, (i) there was a loss of $80,567.38 and (ii) the loss was properly deductible (unless otherwise precluded by the provisions of the *Income Tax Act*).

It, therefore, remains to determine when the loss occurred.

While it was possible that the appellant's interest in the syndicate might have been forfeited in March, 1957 by reason of the appellant's failure to pay its assessment of $4,500 in accordance with the verbal syndicate agreement, nevertheless, the appellant's participation was not ended at that time. The syndicate did not act upon the default, but continued to treat the appellant as a member indebted to the syndicate in the amount of the default. The appellant, on its part, also considered itself a member otherwise it would not have been able to sell its interest to Mr. Bryce as it did on June 5, 1958, some fourteen months later. In my opinion the loss was not in the fiscal year ending March 31, 1957, but in the 1958 taxation year.

The Minister was, therefore, right in disallowing the deduction of $80,567.38 and the appeal against this disallowance must also be dismissed.

It follows that the appeal herein must be dismissed with costs.

Judgment accordingly.

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Feb. 14
Feb. 22

BETWEEN:

JAMES J. HALLEY, Executor of the Estate of William F. Halley ..... APPELLANT;

AND

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

Revenue—Estate Tax—Estate Tax Act S. of C. 1958, c. 29, s. 7(1)(d)—"Any gift"—"Absolute to any organization in Canada that . . . was a charitable organization"—Whether gift was "absolute"—Appeal dismissed.

The testator directed that the residue of his estate be held by his executor and trustee upon trust to pay the annual income therefrom to his sister for her life and upon her death, after paying two pecuniary legacies, "to give all the rest and residue of (his) estate to the Roman Catholic Episcopal Corporation, St. John's". He further directed that "it shall be lawful for my executor and trustee upon the written request of my said sister at any time or times to raise any sum or sums out of the rest and residue of my estate . . . and to pay such sum or sums to my said sister for her absolute use and benefit in addition to the income hereinbefore given to her".

The Minister held that in making the assessment appealed from the gift to the Corporation was not "absolute" within the meaning of that term in s. 7(1)(*d*) of the Act, and consequently not deductible from the aggregate net value of the property passing on the death of the testator. The appellant contended that the word "absolute" meant that there must be no possibility of reversion.

Held: That as there is more than one sense in which the word "absolute" is commonly used its meaning must be resolved by reference to the context in which it is found.

2. That it is more natural to interpret the word "absolute" in s. 7(1)(*d*) of the Act from the point of view of the recipient than from the point of view of the deceased and as referring to the irrevocable and undefeatable vesting of the subject matter of the gift in the recipient rather than to the unlimited extent of the interest given to the recipient.

3. That the word "absolute" in s. 7(1)(*d*) of the Act should be interpreted as meaning vested and indefeasible.

4. That the Corporation did not become indefeasibly entitled on the death of the deceased to the residue given to it by the will and the gift cannot be established to have been "absolute" within the meaning of s. 7(1)(*d*) of the Act.

5. That the interpretation of the word "absolute" in its application to cases not falling within the scope of the retroactive amendment to s. 7(1)(*d*) made by S. of C. 1960, c. 29, s. 4 is not affected by the amendment.

6. That the change of the expression from "absolute" to "absolute and indefeasible" does not indicate that the expression formerly used meant anything less than vested and indefeasible.

7. That the appeal be dismissed.

APPEAL under the *Estate Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

K. E. Eaton for appellant.

G. W. Ainslie and *D. H. Bowman* for respondent.

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

THURLOW J. now (February 22, 1963) delivered the following judgment:

This is an appeal from an assessment of estate tax in respect of property passing on the death of William F. Halley late of St. John's, Newfoundland, who died on January 17, 1959. The appeal, which is the first to come before this Court under the *Estate Tax Act*, S. of C. 1958, c. 29, raises a question on the interpretation of s. 7(1)(*d*) of the statute as originally enacted and involves as well a subsidiary point as to the effect on the interpretation of that section of a retroactive amendment made by s. 4 of S. of C. 1960, c. 29. The issue is whether the value of a portion of the residue of the estate of the deceased is deductible under s. 7(1)(*d*) of the Act in computing the aggregate taxable value of the property passing on his death.

By s. 2(2) of the Act, the aggregate taxable value of the property passing upon the death of a person is declared to be the aggregate net value of that property computed in accordance with Division B minus the deductions permitted by Division C. Division C is s. 7 and by ss. (1) as originally enacted, it provided that:

> 7.(1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be deducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:
>
> . . .
>
> (*d*) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute, to

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(i) any organization in Canada that, at the time of the making of the gift, was a charitable organization operated exclusively as such and not for the benefit, gain or profit of any proprietor, member or shareholder thereof, or

(ii) Her Majesty in right of Canada or a province, a Canadian municipality or a municipal or other public body in Canada performing a function of government,

minus such part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under this Part) as is either by direction of or arrangement made or entered into by the deceased whether by his will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprised in such gift or payable by the donee as a condition of the making of such gift;

The appeal turns upon the interpretation of the word "absolute" in this provision. By paragraphs 6 and 7 of his will the deceased gave the residue of his estate to his executor and trustee upon trust to convert it and to invest the proceeds and to pay the income therefrom to the testator's sister, Kathleen, for her life and upon her death to pay therefrom two pecuniary legacies and "to give all the rest and residue of (his) estate to the Roman Catholic Episcopal Corporation, St. John's." In paragraph 8, however, he provided:

(8) I hereby declare that notwithstanding anything hereinbefore declared, it shall be lawful for my executor and trustee upon the written request of my said sister Kathleen at any time or times to raise any sum or sums out of the rest and residue of my estate given to my executor and trustee in clause 6 hereof and to pay such sum or sums to my said sister Kathleen for her absolute use and benefit in addition to the income hereinbefore given to her.

It is agreed that the deceased's sister, Kathleen, survived him and that the Roman Catholic Episcopal Corporation, St. John's, was at all times material to the appeal an organization of the kind referred to in subparagraph (i) of s. 7(1)(*d*). It is also agreed that in computing the aggregate taxable value of the property passing on the death of the deceased, the Minister made no deduction from the aggregate net value of such property under s. 7(1)(*d*) of the Act in respect of the gift made in paragraph 7 of the will to the Roman Catholic Episcopal Corporation, St. John's, and that in making the assessment he assumed

that such gift was not "absolute" within the meaning of that term in s. 7(1)(*d*) of the Act.

The Minister's case for treating the gift as not falling within the meaning of s. 7(1)(*d*) is that the word "absolute" is used in the enactment to denote certainty that the gift will come into possession and that as so used the word means both vested and indefeasible. The appellant's submission on the other hand is that as used in the statute the word "absolute" is a term of art and simply means that the gift must be made in such terms that there is no possibility of the property reverting to the donor or testator or his heirs. Applying this meaning counsel for the appellant submitted that the gift was absolute since having regard to the terms of the will and the events which have occurred there is no possibility of intestacy of that portion of the residue of the estate of the deceased given to the Roman Catholic Episcopal Corporation, St. John's, and he went on to submit that the defeasibility of a vested gift does not deprive it of its absolute character. Both parties took the position that a right to the residue so given to the Roman Catholic Episcopal Corporation, St. John's, became vested in that body on the death of the deceased but that such right was subject to its being divested in whole or in part by the exercise of the power set out in paragraph 8 of the will.

In my opinion the word "absolute" even when used in a technical sense in connection with the vesting of property may signify at least two different legal concepts. In one sense it may be used to denote the lack of limitation of the extent or duration of an interest in personal property while in another it may mean the freedom of the interest from dependence on other things or persons. The word is used in the sense of absence of limitation by Lord Cottenham, L.C. in *Lassence v. Tierney*[1] and by Lord Davey in *Hancock v. Watson*[2] where in each case the contest was one between persons claiming under the donee and persons claiming as next of kin of the donor. Thus in the former case Lord Cottenham, L.C. said at p. 561:

> If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects, the

[1] (1849) 1 Mac. & G. 551; 41 E.R. 1379.
[2] [1902] A.C. 14.

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absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it.

And in *Hancock v. Watson* Lord Davey said at p. 22:

The appellants' second point is that the two-fifths allotted to Susan Drake on failure of the gift over goes to the next of kin of the testator, and not to Susan's representatives as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be. Of course, as Lord Cottenham pointed out in *Lassence v. Tierney,* if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event.

And at p. 23:

In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only.

Examples of the usage of "absolute" in the sense of freedom from condition or dependence on other things or persons may be found in *Adamson v. Attorney-General*[1] and in *Browne v. Moody*[2]. In the *Adamson* case Lord Buckmaster said at p. 267:

The title, which had formerly been contingent and liable to be divested, became absolute.

And in *Browne v. Moody* Lord MacMillan used the word thus at p. 649:

The contingency of predecease "leaving issue," in other words, is a resolutive, though not a suspensive condition; it does not prevent vesting a morte but it prevents that vesting from being absolute, and renders it subject to divestiture in the event of this specified contingency happening.

The distinction between these two senses is pointed out in *re Williams, Williams v. Williams*[3] where Lindley, L.J. said at p. 21:

This case goes far to shew that the widow of the testator in this case took his property absolutely, and not for life only; and I am of

[1] [1933] A.C. 257.
[2] [1936] A.C. 635.
[3] [1897] 2 Ch. 12.

opinion that she did so take. I have, moreover, no doubt that she took it absolutely in the sense of taking it free from the control of her co-trustee. But further, I think that James V.C. was right when he said, in *Irvine v. Sullivan* (1869) L.R. 8 Eq. 673, that "absolutely" may refer to extent of interest, but it may mean a great deal more, and that its natural grammatical meaning is unfettered and unlimited, i.e., unlimited in point of estate, and unfettered in respect of any consideration or trust.

In the Law Journal report of the case[1], the word "condition" appears in place of the word "consideration" in the last line of the passage quoted. See also the comments of Herring C.J. in *re Tompson*; *Rhoden v. Wicking*[2].

There being more than one sense in which the word is commonly used the problem which the present case presents is to determine in what sense the word was used in s. 7(1)(*d*) of the *Estate Tax Act* and this, it appears to me, must be resolved by reference to the context in which it is found. At the outset it may be observed that the context is not that of a deed or will but that of a taxing statute. In general the Act exacts a tax on the passing of property on death and is so worded as to include in the computation of the value of such property for the purposes of the statute both property alienated by the deceased during his lifetime by certain types of transactions and certain notional types of property as well in which the deceased never had any proprietary right, the whole without reference to the person or persons who become beneficially entitled thereto. But while the value of all such property is initially brought into the computation, the tax is imposed only in respect of the amount by which such value exceeds certain specified amounts which by s. 7 are permitted to be deducted, most of which amounts are also prescribed without reference to the person or persons who become entitled to any portion of the property. Only in respect of the amounts referred to in s. 7(1)(*d*) and s. 7(1)(*h*) does the identity of the recipient become material. Under the latter paragraph the value of property vesting in the Crown by escheat or as *bona vacantia* on the death of the deceased may be deducted from the aggregate. Under the former, with which this case is concerned, the value of property given to a charitable organization or to the Crown or to a public body performing a function of government may also be deducted. The inten-

[1] 66 L.J. Ch. 485, 488.
[2] [1947] V.L.R. 60, 67.

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tion of this provision is apparently to permit the deduction of the value of what is given to the particular recipients and with this in mind it seems to me that it is more natural to interpret the word "absolute" in the paragraph from the point of view of the recipient than from the point of view of the deceased and as referring to the irrevocable and undefeatable vesting of the subject matter of the gift in the recipient rather than to the unlimited extent of the interest given to the recipient. This interpretation is, I think, also supported by the concluding portion of the paragraph which reduces the deduction allowable in respect of such a gift by the amount of any tax levies which may be imposed on it or which may become payable by the donee on accepting it and to this extent limits the allowable deduction to the net value of the gift accruing to the donee. Moreover while I can see no reason why Parliament should have intended to draw a distinction between a gift of an unlimited interest and an indefeasible gift for a lesser interest and to permit deduction of the value in the one case but not in the other it is not difficult to understand that in authorizing the deduction of the value of a gift to such a body Parliament would be concerned to ensure that the deduction should not be permitted when because of the provisions attaching to the gift, the body referred to in s. 7(1)(*d*) might never receive it. The word used is an apt one to make such a distinction and secure this object. I am accordingly of the opinion that the word "absolute" in s. 7(1)(*d*) should be interpreted as meaning vested and indefeasible.

Applying this interpretation to the facts of the present case, it is I think plain that the Roman Catholic Episcopal Corporation, St. John's, did not become indefeasibly entitled on the death of the deceased to the residue given to it by paragraph 7 of the will and that because of this the gift cannot be established to have been "absolute" within the meaning of s. 7(1)(*d*).

Nor in my opinion is this result affected by the retroactive amendment to s. 7(1)(*d*) made by S. of C. 1960, c. 29, s. 4 which came into force on July 7, 1960. By ss. (2) of s. 4 of that Act, s. 7 was amended by adding after ss. (1) a subsection numbered (1*a*) which as made applicable by

ss. (3) in the case of a person who died after 1958 and before July 7, 1960, reads as follows:

> 7 (1*a*) For the purposes of paragraph (*d*) of subsection (1) where any gift was made by the deceased during his lifetime or by his will,
>
> (*a*) subject to a power in favour of any person to appoint the donee or donees thereof, or
>
> (*b*) subject to a power in favour of any person to appropriate the whole or any part thereof for his own use or benefit,
>
> to the extent that the power described in paragraph (*a*) was exercised not later than one year after the coming into force of this subsection in favour of a donee described in paragraph (*d*) of subsection (1), the gift so made by the deceased shall not, by reason only of having been made as described in paragraph (*a*), be considered not to have been absolute and indefeasible and shall be deemed to have been made by the deceased to that donee, and to the extent of any estate or interest of a donee described in paragraph (*d*) of subsection (1) in the property comprised therein that became absolute and indefeasible by virtue of the renunciation of the power described in paragraph (*b*) not later than one year after the coming into force of this subsection, the gift so made by the deceased shall be deemed to have been absolute and indefeasible.

By ss. (1) of s. 4 of the same amending Act the portion of s. 7(1)(*d*) preceding subparagraph (ii) thereof was repealed and replaced by wording which differs in some respects not material for the present purpose, from the former wording of subparagraph (i), but which repeated the preceding portion of the paragraph in terms exactly the same as they had previously been worded save for the addition after the word "absolute" of the words "and indefeasible". This amendment was, however, made applicable only in the case of persons dying after the coming into force of the section on July 7, 1960.

In cases to which its wording applies the added subsection 7(1*a*) appears to me to have the effect of expanding the deductions permitted by s. 7(1)(*d*) so as to include not only gifts made during the lifetime of the testator or by his will, but also gifts perfected by appropriate action taken after the death of the deceased within the time limited by the subsection. It was not suggested that s. 7(1*a*) applies in the present situation or that the gift in question has become deductible under its terms but it was submitted that the use made by Parliament in the amending Act of 1960 of the expression "absolute and indefeasible" indicated

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that the expression "absolute" in the statute as originally enacted was intended to refer to gifts which were absolute but defeasible as well as gifts which were absolute and indefeasible. Without expressing any view as to what, if any, effect the change of expression may have in a case to which the amendment applies, I am of the opinion that the amendment has no effect on the interpretation of the wording of the Act as originally enacted in its application to gifts not falling within the scope of the amendment and that the amendment has no effect at all on the application to the present situation of the wording of the Act as originally enacted. Nor do I think that the change of the expression used by Parliament from "absolute" to "absolute and indefeasible" indicates that the expression formerly used meant anything less than vested and indefeasible.

The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.

1962

Sept. 11

1963

Feb. 5

BETWEEN:

WESTERN WOOD PRODUCTS LIMITED ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 11(1)(e), 12(1)(a), 137(1) and 139(c)(i)—Debt owing by subsidiary company to affiliated company transferred to taxpayer pursuant to a guarantee arrangement—Reserve for debts—Appeal dismissed.

Appellant controlled the majority shares of Direct Lumber Co. Ltd. and Sylvan Lumber Co. Ltd. The operations of the latter were financed partly by Direct Lumber Co. Ltd. it being understood that any loss sustained by Direct to be borne by the appellant. An entry was made in appellant's books crediting Direct with $26,133.39 and reflecting it as an amount due from Sylvan, in respect of which a reserve for bad debts was claimed by appellant in the amount of $23,000.00. Appellant testified that it from time to time had advanced money to sawmill operators and/or planer operators and/or distributors for the purpose of increasing its purchases and/or sales and/or net

income. It contended that therefore it was entitled to deduct any loss arising therefrom. The Minister contended that the indebtedness in question arose from dealings between Sylvan and Direct which did not involve the appellant and that the transfer of the debt from Direct to the appellant would unduly or artificially reduce the appellant's income within the meaning of s. 137(1) and that appellant was not entitled to the reduction claimed.

Held: That in the absence of documentary evidence, the appellant could not be regarded as a creditor of Sylvan Lumber Co. Ltd. whose indebtedness to Direct Lumber Co. Ltd. arose from transactions which did not involve the appellant.

2. That the appellant therefore is excluded from the scope of the permissive exception in s. 11(1)(*e*) of the Act.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Edmonton.

J. A. Matheson for appellant.

W. G. Morrow, Q.C. and *R. L. Radley* for respondent.

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

DUMOULIN J. now (February 5, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1], dated November 14, 1960, in respect of appellant's income tax assessment for 1957, disallowing the latter's claim to a deduction of $23,000, allegedly representing a reserve for bad debts.

The exact nature of Western Wood Products' activities was not precisely revealed, but its Memorandum of Association of April 30, 1946, Province of Alberta (exhibit 9), mentions, amongst its many objects, the following:

a) To carry on the business of the manufacture and sale of wood veneer and plywood in all its branches and phases.

b) To carry on the business of wood distillation and the sale of the products and by-products thereof in all phases.

c) . . .

d) To carry on the business of logging and lumbering and the sale of lumber by wholesale or retail in all its branches.

[1] (1960) 25 Tax A.B.C. 317

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Further powers worthy of notice are conferred by items (*f*) and (*n*):

> *f*) To enter into partnership or into any arrangement for sharing of profits, union of interests, co-operation, joint adventure, reciprocal concessions, or otherwise with any person or Company, wheresoever incorporated, carrying on or engaged in . . . any business or transaction which the Company is authorized to carry on or engage in . . .
>
> *n*) To invest and deal with the moneys of the Company not immediately required in such manner as may from time to time be determined.

Western Wood Products Ltd. has its registered office in the City of Edmonton.

The appellant submits this interpretation of the matter in paragraph (1) of its Notice of Appeal:

> 1) From time to time over a period of ten years the Appellant company has made advances of money to various lumber operators for the purpose of increasing its purchases and/or sales and/or net income. The advances were to sawmill operators and/or planer operators and/or distributors. The principal distributor to which advances of money were made was Direct Lumber Company Ltd. as a result of which the Appellant company received substantial commissions. The Appellant company owns over ninety-nine per cent of the issued shares of Sylvan Lumber Company Limited. The Appellant company made advances of money to Direct Lumber Company Ltd. which in turn made advances of money to Sylvan Company Ltd. with the understanding that the Appellant would absorb any losses incurred by Direct Lumber Company Ltd. resulting from its dealings with Sylvan Lumber Company Ltd. Sylvan Lumber Co. Ltd. sustained substantial losses and was unable to repay Direct Lumber Co. Ltd. and in 1957 pursuant to the previous understanding Direct Lumber Co. Ltd. charged to Western Wood Products Ltd. $23,000.00 of the amount owing to it by Sylvan Lumber Company Ltd. As the amount was uncollectable from Sylvan Lumber Company Ltd. a Reserve for Bad Debts in the sum of $23,000.00 was set up in the records of Western Wood Products Limited and the same amount was deducted from Income.

As seen above, this reserve was refused by the Department.

The respondent's disallowance of this reserve fund is motivated quite plainly in paragraphs (1) and (5), respectively, found on pages 12 and 14 of the written argument filed of record in the case; I quote:

> (1) There is no privity of contract in the absence of assignments or guarantees and, hence, no debtor-creditor relationship as between Western Wood and Sylvan Lumber.

(5) The indebtedness of $26,133.39 (cf. ex. B) arose from dealings between Sylvan Lumber Company Limited and Direct Lumber Ltd. which did not involve the appellant and, accordingly, the appellant would not be entitled to deduct all or any portion thereof.

Respondent's submissions of law pertaining to the above arguments are derived from sections 11(1)(*e*), 12(1)(*a*) and 137(1) of the *Income Tax Act*, R.S.C. 1952, c. 148.

At this very point, it is appropriate to note that, notwithstanding the separate legal entity of each of the three firms herein concerned, Western Wood Products acted, so to say, as the fountain-head of the trilogy, owning 99 per cent of Sylvan Lumber's issued shares, and controlling 68 per cent, or slightly more, of Direct Lumber's voting stock. On the left page of exhibit J, appellant's income tax return sheet for 1956, Direct Lumber Co. Ltd. is qualified with the caption "interlocking shareholders", and Sylvan Lumber Co. is styled "subsidiary company".

We are told, with even a flourish of doggerel verse, at pages 1 and 2 of the appellant's brief that:

> The operations of W (standing for Western Wood Products) over the years was ("were" would appear better suited to the current grammatical prejudice) moderately profitable. The operations of D (for Direct Lumber Ltd.) over the years was (ditto) moderately profitable. But to paraphrase a favorite song of a famous Canadian:
>
> Tho we worked all night, and we worked all day,
> We couldn't make the Sylvan Lumber pay.

A jocose confession of a melancholy result.

At page 2 of its argument, the appellant raises this question: "But, which Company,—D or W was the actual creditor?" of Sylvan Lumber, and suggests a solution which might be somewhat over-simplified, saying that:

> From the standpoint of the Respondent there was no material difference. The loss arising from the bad debt would be deductible from the income of either D or W depending on which was the actual creditor in whatever year would suit their purpose and at the same time comply with the Income Tax Act, and the net amount collectable by the Respondent ultimately, would for all practical purposes be the same approximate amount.

Some inkling at least about the relative degree of approximation between the "moderately profitable operations" of Western Wood Products and Direct Lumber Co., for taxation year 1957, would have been welcomed, and possibly

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explained why Western Wood and not Direct Lumber was arbitrarily chosen as Sylvan Lumber's creditor. Moreover, in matters of strict law, the Court can attach but slight concern to "practical purposes", subjectively volunteered by a taxpayer, as compared with its duty to comply with the "legal purposes" prescribed by statute.

In keeping with this norm, three main issues are now singled out for examination, namely: the acceptable plausibility of "the understanding" supposedly assumed by the appellant to secure Direct Lumber against any losses at the hands of Sylvan Lumber; the admissibility, pursuant to the proof adduced, of money advanced by Western Wood to Direct Lumber, or of transactions between Western, Direct and Sylvan; and, lastly, the degree of credence attaching to that roundabout shifting of debts from Sylvan, via Direct Lumber, unto the appellant.

One witness only testified, Mr. Richard Carl D. Ogilvie, who had qualified as chartered accountant in December, 1957, and examined the appellant's books of accounts during 1958, replacing in that task the firm of John B. White.

On this triple score what does the evidence reveal concerning:

a) An undertaking of guarantee between the appellant and Direct Lumber?

Counsel for the respondent, Mr. W. G. Morrow, Q.C., on cross-examination puts these questions to Mr. Ogilvie (cf. transcript pp. 51 and 62):

Q. Now, in this cheque (should be: check) that you refer to and in your research for preparation for today have you ever seen any documents such as a letter or a document of assignment or anything of that kind passing between one company and another with respect to the $26,133.00 or with respect to the $23,000.00?

A. No, I have seen no documents.

Q. And you have not observed any document for example of Western dated December 31st, 1957, or subsequent to that, saying "we have assumed this matter" or "we have allowed this transaction to take place and you can now look to us" or vice versa, none of that?

A. Nothing.

Next on page 62:

Q. Mr. Ogilvie, we have already had you say that insofar as your research is concerned you could find no sign of a guarantee or

any such written undertaking or assumption of an obligation by Western Wood Products to take over the obligations of Sylvan to Direct, we have already got that?

A. That is correct.

Since this lone witness has seen nothing nor found anything to materialize the would-be plea of warranty we are then left with a totally uncorroborated declaration.

b) Advances of money to Direct Lumber or transactions between appellant and the two affiliate companies.

Pursuing his cross-examination, Mr. Morrow, Q.C. asks:

Q. Is it a fair statement, Mr. Ogilvie, that on your examination of all of the records of the three companies that there is no inclusion in the income of Western Wood Products, the Appellant, of these items of debt that show as owing from Sylvan to Direct?

A. I would answer that by saying this. That in my opinion it was included in the caculation of income.

* * *

Q. . . . Now, concern yourself to what you saw on the books, sir. I am suggesting it does not show anywhere?

A. As being included in the income?

Q. Yes?

A. I would say "No".

At page 41:

Q. Now to go back to my question. Except for what you can discern from Exhibits A and B, which presumably took place on December 31st, 1957, in all of your research and preparation and examination of what books you did before you came here can you find anywhere that that $23,000 or any part of it or even a fraction of it shows on Western's books?

A. This is prior to December 1957 that you are speaking of?

Q. Yes?

A. No, I can't.

On page 46, we find that:

Q. (by Mr. Morrow) Did you ever at any time in any of your research see where it (Sylvan) had invoiced in any way or appeared to have done any work for the Western Wood Company?

A. No. I have examined no records in that regard.

Ogilvie agrees that in his review of whatever records were shown to him he could find no traces of arrangements between Direct Lumber or Sylvan Lumber and the appellant (cf. Transcript p. 47). On the preceding page 46, the witness was reported as stating that he could find no evi-

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dence of Sylvan Lumber performing any work for Western Wood, nor any entries to such effect in the books of the two companies.

And again on page 57, we read the following questions and replies thereto between the same parties:

Q. And certainly as far as that balance sheet is concerned once again we find nothing indicating an indebtedness from the Sylvan Company to Western?

A. Correct.

* * *

Q. . . . Have you any knowledge yourself of why any advances or payments were made by Direct Lumber to Sylvan?

A. No, I don't know why they were made from Direct Lumber to Sylvan Lumber.

Surely, no material of any convincing worth was adduced in respect of this second point, nothing from which the appellant could possibly derive any assistance for his contention of a bona fide indebtedness, created between Sylvan Lumber and Direct Lumber, guaranteed by Western Wood. Appellant's theory must stand or fall according to the evidence given by his accountant and only witness, who, on cross-examination, has, so far, negatived this basis of his client's plea.

Coming now to the third item:

c) The credibility of the debt transfer from Sylvan to Western Wood, some mention should be made of the pertinent exhibits filed.

One sheet of paper supposedly holds good for five exhibits, viz: A, B, G, H and I. This document, a copy of the appellant's ledger or book of accounts, bears the date of December 31st, 1957, according to information orally imparted, since only the last figure of the year appears.

I do not hesitate to say that, but for explanation obtained at the trial, this more or less glorified scrap of paper might have remained meaningless due to its practically illegible scribbling. Apparently (cf. exhibit B) it debits Sylvan Lumber in the sum of $26,133.39 and credits Direct Lumber Limited with $26,133.39. Correspondingly, exhibit A on the left hand column has these entries:

Dr. P. & L. (meaning probably Proprietorship and Liabilities)	$ 23,000
Cr. Res. Bad Debts Re Sylvan	$ 23,000

I might add that exhibit C Western Wood Products balance sheet for the six months ending June 30, 1956 under the mention "Advances to Affiliated Companies" debits Direct Lumber Company in the sum of $33,246.16.

The appellant's income tax return for 1957, exhibit I, is no more explicit than exhibits A and B. It lists a first and initial reserve for Bad Debts amounting to $22,992, subsequently carried over to the round sum of $23,000. This too unconventional method of bookkeeping led respondent's counsel to probe Mr. Ogilvie on its dubious merits. (cf. Transcript pp. 50-51).

Q. So that another piece of paper still in Western's accounts shows a reserve for, what do you call it, a deposit to cover bad debts of $23,000.00?

A. Yes.

Q. And it says "re: Sylvan"?

A. That is correct.

Q. And I assume that you have noticed or that there is such a thing, there is a similar type of voucher in Direct's books and in turn in Sylvan's books working this thing back or forwards as the case may be?

A. I have not seen these. However in the audit report of our 1958 examination we did report that the accounts had been checked, the inter-company accounts had been checked from the books of one to the other.

Q. Now, in this cheque (check) that you refer to and in your research for preparation for today have you ever seen any documents such as a letter or a document of assignment or anything of that kind passing between one company and another with respect to the $26,133.00, or with respect to the $23,000.00?

A. No, I have seen no documents.

Q. And you have not observed any document for example of Western dated December 31st, 1957 or subsequent to that saying "we have assumed this matter" or "we have allowed this transaction to take place and you can now look to us", or vice versa, none of that?

A. Nothing.

Q. Nothing of that kind. And aside from these two exhibits A and B you have no other knowledge of how the $23,000.00 got into their books?

A. No.

A few remaining quotations, taken from pages 59 and 62, will suffice to complete this overlong sifting of the evidence.

Mr. Morrow to Ogilvie:

Q. Now would you agree with me that certainly up until one minute before Exhibits A and B took place we have Sylvan as building up an indebtedness and perhaps the other companies building up a profit?

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A. This appears to be so.

Q. Mr. Ogilvie, we have already had you say that insofar as your research is concerned you could find no sign of a guarantee or any such written undertaking or assumption of an obligation by Western Wood Products to take over the obligations of Sylvan to Direct, we have already got that?

A. That is correct.

Q. Now starting from that point I am asking you that to transfer over this $23,000.00 liability to Western Wood Products and thereby reduce Western Wood Products profit for the year is that not in effect an artificial attempt to reduce Western Wood Products income?

A. I would answer by saying this, that if we assume the guarantee was there it is not.

Q. Yes, but you have already said that you had no knowledge of a guarantee?

A. That is correct.

Q. Well then let us say assuming there is no guarantee?

A. Assuming there is no guarantee it could be looked upon in that way, yes.

This protracted analysis of the case's factual components scarcely leaves any room for doubt. The unescapable result cannot be any other but that: a) Western Wood Products utterly failed to prove it had undertaken to hold Direct Lumber Ltd. secure against eventual losses in the latter's dealings with the now defunct Sylvan Lumber Co.; b) also failed to establish any debtor-creditor relations between itself and Direct Lumber, resulting from a warranty of Sylvan's debts, and c), did not resort to its so-called book-keeping entries, viz. exhibits A and B to a bare minimum of reliable information. It does appear that the alleged transfers of debts, guessed at more than shown on exhibits A and B, dated Dec. 31, 1957, are nothing better than flimsy traces of an otherwise easily discernible attempt to "unduly or artificially reduce the income" of appellant, in defiance of sec. 137(1). A manipulation of this kind was of course facilitated by the interwoven relationship of the three legal entities concerned, which were not dealing at arm's length (cf. sec. 139(*c*)(i)).

The paramount motives, however, for waiving aside the appellant's averments are, as stated in respondent's brief, that in the absence of assignments or guarantees Western Wood Products was not a creditor of Sylvan Lumber whose indebtedness to Direct Lumber arose from transactions foreign to Western Wood Products. Therefore, the appellant

is excluded from the scope of sec. 11(1) and the permissive exception of its s-s. (*e*)(i) thus worded:

> (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*e*) Reserve for doubtful debts.—a reasonable amount as a reserve for
>
> (i) doubtful debts that have been included in computing the income of the taxpayer for that year or a previous year.

For the reasons above, the appeal is dismissed with all taxable costs allowed to the respondent.

Judgment accordingly.

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COURONNE—*Pétition de droit—Chute à une aérogare—Blessures corporelles—Responsabilité de la Couronne—Loi sur la responsabilité de la Couronne, S. du C. 1952–53, 1–2 Elisabeth II, ch. 30, arts. 3(1)(a) et (b), 4(2), 4(4) et (5)—Responsabilité indirecte—Responsabilité directe—Préposé de la Couronne—Manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle de biens—Avis de réclamation—Omission de donner avis de réclamation.* Après sa descente d'un avion d'Air-Canada, à l'aérogare de l'Ancienne-Lorette, à Québec, fin d'après-midi de décembre 1957, la pétitionnaire buta contre une marche située à quelques pieds à l'extérieur de la porte donnant accès à l'aérogare, trébucha et, en tombant, se blessa le genou droit. Attribuant l'accident au fait que la marche n'était pas alors éclairée par suite d'une panne d'électricité à l'aérogare et, à raison de ce manquement, avoir droit à une indemnité de la part de la Couronne, la pétitionnaire poursuivit en recouvrement de ses dommages. La Cour, sur les faits mis en preuve, conclua que l'accident était arrivé au cours d'une panne complète d'électricité et n'est dû à aucune négligence ou imprudence de la part de la pétitionnaire dans ses gestes qui ont précédé ou accompagné sa marche vers la porte d'accès de l'aérogare jusqu'au moment de l'accident; laissant seulement à déterminer dans les circonstances de la cause la responsabilité de la Couronne en vertu de la *Loi sur la responsabilité de la Couronne*, S. du C. 1952–53, 1–2 Elisabeth II, ch. 30, art. 3(1)(*a*) et (*b*) qui se lit comme suit: «3. (1) La Couronne est responsable *in tort* des dommages dont elle serait responsable, si elle était un particulier en état de majorité

REVENUE—*Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Capital gain or income—Company investing funds from sale of investment certificates—Mortgage discounts or bonuses—Volume of business and organization set-up—Operations those of a business—Appellant's sole incentive to make a profit—Appeal dismissed.* Appellant operated its business by selling investment certificates to the public and re-investing the money so obtained in mortgages, stocks and bonds, paying to the certificate buyers interest at four per cent compounded once annually. The company had assets of over ten million dollars and also a large organization with various departments to carry on its operations. It did not purchase existing mortgages but advanced money to mortgagors usually at a 15 per cent discount. It held the mortgages until they were paid off at or before maturity. Most of the mortgages acquired were for small loans and were of a type unacceptable to insurance and trust companies. The respondent assessed the appellant for income tax on the discounts or bonuses realized from a large number of the mortgages in the years 1955 to 1958. From this assessment the company appeals contending that such discounts or bonuses are capital gains and not taxable. *Held*: That the mortgage discounts or bonuses realized by appellant are income and therefore taxable as such. 2. That the operations of the appellant were those of a business in a scheme of profit-making or an adventure in the nature of trade. 3. That the large number of mortgages, the amount of money involved and the organization set up to handle the transactions indicate that the appellant's mortgage operations were not merely incidental to but were an essential feature of the general business of the appellant. 4. That the evidence showed that the appellant's whole incentive in acquiring the type of mortgages in question was to obtain discounts or bonuses and that there was profit to be made in them without undue risk, and it cannot be said that the discounts or bonuses constituted the increment which provided for the additional risk. ASSOCIATED INVESTORS OF CANADA LTD. v. MINISTER OF NATIONAL REVENUE..... 6

2.—*Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a)—"Outlay or expense incurred for the purpose of gaining or producing income from a business of the taxpayer"—Amount of fine imposed by Board of Governors of Toronto Stock Exchange not deductible from income—Appeal allowed.* Respondent was fined $2,000 by the Board of Governors of the Toronto Stock Exchange and a claim that such sum was deductible in computing income of the year such fine was imposed

gas rights—Whether profits from a business—Valuation of inventory of unsold rights—Appeals allowed. Appellant, a consulting geologist with long experience in western oil and gas fields, had acquired over a period of twenty years various rights to oil and gas lands on twelve occasions, sometimes in association with others, and had disposed of such rights without himself developing any of the properties. The appellant was assessed for income tax purposes on the profits realized from these sales and an appeal from that assessment was denied by the Tax Appeal Board from which decision appellant appeals to this Court. He contends that the proceeds received represented the realization of an investment from which he had hoped to obtain a royalty income. The respondent contends that the transactions represented ventures in the nature of trade the profits of which were taxable. *Held*: That the profit of the appellant from his oil and gas transactions was a profit from a business within the meaning of the Act. 2. That appellant was entitled to evaluate his inventories of unsold rights at the estimated fair market value thereof, pursuant to s. 14(2) of the Act and s. 1800 of the Regulations and since it was a trial *de novo* the appellant was not prevented from establishing at this late date before the Court a "market" basis in the valuation of his inventory. 3. That the day on which the original assessment was issued must be excluded in calculating the four year period that the re-assessment in question was accordingly valid. JOSEPH S. IRWIN v. MINISTER OF NATIONAL REVENUE 51

6.—*Income tax—Income Tax Act 1948, S. of C. 1948, c. 52, s. 15(1)—Income Tax Act, R.S.C. 1952, c. 148, s. 15(1)—Partnership Act, R.S.O. 1950, c. 270, s. 2—Partnerships Registration Act, R.S.O. 1950, c. 271—Excise Tax Act, R.S.C. 1952, c. 100—Validity of father and son partnership—Did partnership in fact exist in the conduct of the business—Appeal allowed.* Respondent is a builder who for many years built for sale houses on tracts of land subdivided by him. In 1950 he entered into a partnership agreement with his minor son, then at school, and for the next three fiscal periods of the business ending in 1951, 1952 and 1953 reported the profits as divisible half and half between himself and his son. The Income Tax Appeal Board allowed an appeal by respondent from his assessment for income tax and on appeal from that decision to this Court the Minister contends that the partnership agreement that was executed was not in fact recognized as governing the operations of the business but that it was conducted in fact as sole proprietorship. The issue before the Court is did a partnership in fact exist. The Court found that the partnership was "a mere simulate agreement and not a reality" and there never was in fact any intention on the

part of the father to treat his son as a partner because: the father exercised complete dominion over all the partnership assets and used the assets to his own advantage treating them as his own property; the father registered a declaration under *The Partnerships Registration Act* (*Ontario*) stating that the partnership was in fact a sole proprietorship carried on by him; the father dealt with the banker of the partnership stating to the banker that the business was in fact a sole proprietorship; the son, at least in the initial period of the alleged partnership was in fact paid wages from which unemployment insurance was deducted; conflicting reports as to the ownership of the business for some of the years; the admission by both the respondent and the son that the largest single property of the business, then under construction, was an asset and undertaking of respondent alone and not subject to the partnership agreement. *Held*: That the mere existence of a partnership agreement is not conclusive. 2. That the onus is on the taxpayer to demonstrate that the partnership agreement that was executed actually governed and controlled the operation of the business. 3. That the evidence showed beyond doubt that the partnership agreement was a mere simulate agreement and not a reality and that there never was any intention of the respondent to treat his son as a partner in fact. 4. That while there was a partnership agreement it was never considered by the respondent as binding on him and did not in fact govern the actions of the parties to it in the conduct of the business. 5. That by virtue of s. 3 of the *Partnerships Registration Act* the respondent is estopped from denying a declaration made thereunder to the effect that he alone carried on the business. MINISTER OF NATIONAL REVENUE v. SAMUEL L. SHIELDS 91

7.—*Sales tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30, 32, 57, 58 and Schedule III—Customs Tariff, R.S.C. 1952, c. 60, Item 710 of Schedule A—"Usual coverings" used to cover exempt foodstuffs—Whether metal or wire bread-handling and delivery trays are "usual coverings"—Appeal from decision of Tariff Board allowed.* The *Excise Tax Act* exempts from sales tax certain items of foodstuffs including bread and also "usual coverings to be used exclusively for covering goods not subject to the consumption or sales tax and materials to be used exclusively in the manufacture of such coverings". The Department of National Revenue ruled that metal bread carriers or trays imported into Canada from the manufacturers in California, U.S.A. were subject to sales tax as not being within the exception of "usual coverings" as set out in Schedule III of the Act, and that wire delivery trays for bread supplied principally by a Montreal manufacturer were also subject to sales tax for

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been paid by mistake of law or fact since Dominion was the manufacturer of the balance of the footwear. The Crown refused an application by suppliant for a refund of tax paid contending that suppliant was the manufacturer, within the meaning of manufacturer in the *Excise Tax Act*. Suppliant brings its Petition of Right to recover the sales tax which it claims had been paid in error. *Held*: That the Petition be dismissed. 2. That suppliant was the manufacturer of all the footwear made for it by Dominion within the extended meaning of "manufacturer" in s. 2(*a*)(ii) of the *Excise Tax Act*. 3. That the sales tax paid by suppliant was paid in accordance with the terms of the Act. 4. That suppliant owned, held or used a proprietary sales or other right to the footwear manufactured on its behalf by Dominion. 5. That the suppliant held a sales right to the goods manufactured, as Dominion could not sell the goods to others but was required by the contract to sell and deliver them to suppliant only, and suppliant was bound by the contract to buy such goods. 6. That suppliant also used another right to the goods, its trade mark, which was used by its direction on all the footwear manufactured for it by Dominion. TURNBULL ELEVATOR CO. OF CANADA LTD. (FORMERLY GUTTA PERCHA & RUBBER LTD.) v. HER MAJESTY THE QUEEN... 221

15.—*Impôt sur le revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, arts. 3, 6 a)(iv), 139(1)(ar)—Employeur et employé—Fonds de pension—Plan de pension de retraite—Prestations de pension de retraite—Appel rejeté.* De 1946 à 1955 inclusivement l'intimée, alors une filiale de la compagnie de chemin de fer Pacifique-Canadien, et ses employés qui y avaient préalablement consenti, versaient chacun, de leur côté, au fonds de pension de cette compagnie ferroviaire la part requise d'eux par les règlements du fonds. Par suite de la vente de son capital-actions en avril 1955 à des tiers, l'intimée cessait d'être une filiale du Pacifique-Canadien et ne pouvait plus se prévaloir tant pour elle-même que pour ses employés dudit plan de pension. La compagnie ferroviaire désireuse de faire bénéficier l'intimée de la réserve en sa faveur au fonds de pension, lui proposa d'en continuer uñ autre, en dehors et différent du premier et sans la participation du Pacifique-Canadien, après consultation avec ses employés qui auraient à choisir entre la continuation d'un tel plan de pension ou le remboursement de leurs souscriptions. Ces derniers ayant opté pour la seconde alternative, le montant ainsi versé par l'intimée au fonds lui fut remboursé moins certaines retenues pour fins de contingence dudit plan de pension. Soutenant que ce montant était imposable par le jeu de l'art. 3, et de l'art. 6 *a*)(iv) combiné avec l'art. 139(1)(*ar*) de la *Loi de l'impôt sur le revenu*, ch. 148, S.R.C.

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1952, le Ministre l'ajouta au revenu imposable déclaré par l'intimée pour l'année d'imposition 1956. Portée en appel devant la Commission d'appel de l'impôt, la cotisation du Ministre fut annulée quant à ce montant. D'où le présent appel à cette Cour. *Jugé*: L'appel est rejeté. 2. Le montant ainsi reçu, par l'intimée n'est pas imposable, par l'effet de l'article 3 seul de la Loi car il n'est relié à aucune des sources de revenu qui y sont énumérées. 3. Ce montant n'est pas non plus, imposable par le jeu combiné de l'article 3 et de l'article 6 *a*)(iv) de la Loi parce que, tenant compte du sens à donner aux termes «prestations», «pensions de retraite» et «pension», l'article 6 *a*)(iv) comprend dans le calcul du revenu d'un contribuable pour une année d'imposition tout montant alors reçu «à titre, à compte ou au lieu de paiement ou en acquittement» *de bienfaits ou avantages par la suite de la mise à la pension d'un employé*. Dans le présent cas, le montant reçu par l'intimée, qui, du reste, n'était pas un employé, ne tombe pas dans cette catégorie, se résumant à un simple transfert de fonds dont la seule relation avec le plan de pension de ses employés consiste à inclure la majeure partie des souscriptions qu'elle avait fournies et versées, irrévocablement et sans espoir de recouvrement. 4. Il n'est pas, en troisième lieu, imposable par le jeu de l'article 139(1)(*ar*) combiné avec les articles 6 *a*)(iv) et 3 de la Loi car l'article 139(1)(*ar*) doit, dans le présent cas, être conditionné par l'article 6 *a*)(iv) et il ne peut s'agir que de montants reçus par un employé pour l'avantage duquel, seulement, le plan de pension existe. Telle interprétation du sous-paragraphe (iv) de l'article 6 *a*) est davantage renforcée par le texte des sous-paragraphes (v) et (vi) du même article 6 *a*) qui, dans chacun des cas qui sont prévus dans les trois sous-paragraphes, établit qu'il ne peut s'agir que d'un montant reçu d'un fonds ou d'un plan de pension par un employé. 5. Il est fondamental qu'un impôt ne peut être imposé que par un texte clair. Or il est impossible de conclure que l'article 139(1)(*ar*) permettrait à l'article 6 *a*)(iv) de la *Loi de l'impôt sur le revenu* d'englober comme revenu imposable un montant reçu par un employeur dans les circonstances du présent cas lorsque cet article 6 *a*)(iv) ne prévoit que les montants reçus par un employé et comme rien d'autre dans ladite Loi ne permet de considérer ce montant comme un revenu, il n'est pas imposable. MINISTRE DU REVENU NATIONAL v. EASTERN ABATTOIRS LTD. 251

16.—*Income—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 127(1)(e)—Shares of stock purchased by wife from husband and sold at a profit—Whether profit from a business—Appeal allowed.* Appellant, a housewife, inherited a small sum of money in 1949. At that time her husband, a prominent businessman, in association with

deduction of $400,000. Several errors in the unit valuations were disclosed. The second issue in the appeal concerned an attempt by appellant to deduct as part of its 1957 business loss which was deductible in 1956 by virtue of s. 27(1)(*e*) of the Act, a loss assigned to its participation in a syndicate known as the "Jerd Syndicate", which had been formed by certain persons who agreed to make joint contributions under a plan to acquire an interest in certain oil leases and to drill for oil, the cost to appellant for its interest being $80,000. After unsuccessful attempts to find oil appellant refused to contribute further funds to the syndicate, and although the other members of the syndicate could have terminated appellant's interest therein, they continued to treat the appellant as a member indebted to the syndicate for the amount of the additional contribution. In 1958 appellant sold its interest in the syndicate for $1.00. This appellant treated as a loss incurred in 1957 and deducted such from its 1956 income. This was disallowed. *Held*: That the appeal be dismissed. 2. That the determination of the fair market value of an inventory is a question of fact and appellant had not discharged the onus of proving that the respondent's assessment based on the book value of the securities inventory is incorrect. 3. That market price is the best evidence of fair market value, the price at which shares sell on the market might be regarded as *prima facie* evidence of their fair market value although not necessarily conclusive if rebutted by satisfactory evidence to the contrary and the only evidence offered was that of an interested expert whose figures used to arrive at the amount of the deduction contained several errors. 4. That the market action of the principal securities held by appellant, for several months before and after March 31, 1956, was such that the shares could have been disposed of without undue disturbance of the market and it was not correct to adopt a value which allowed for the depressing effect on the market if the inventory were disposed of all at once instead of in the normal course. 5. That it was incorrect to deduct in the valuation of the shares on hand, the amount of brokerage commission and transfer tax that would have to be paid thereon when sold. 6. That the loss in respect of the "Jerd Syndicate" was properly deductible from income but it was not sustained in appellant's 1957 taxation year, the evidence being clear that appellant's participation in the syndicate did not terminate in 1957 when it refused to make the additional contribution but in 1958 when it sold its interest. DOBIECO LTD. v. MINISTER OF NATIONAL REVENUE.. 348

24.—*Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(e)—Capital gain or income—Income from a "business"—Land purchased and sold to a company for shares which were sold at a profit—Profit is income*

from a business—Dominant intention to develop properties not sole intention at any time—Abandonment of primary intention—Adoption of secondary intention—Alteration of nature of undertaking from a capital investment to venture in nature of trade—Appeal allowed in part. Appellant and one Grisenthwaite, both having extensive knowledge of real estate developments in their area formed Grisenthwaite Investments Ltd. which corporation acquired a number of subsidiaries, some engaged in buying and selling real estate, some in construction work and others in owning and renting properties. In 1952 they jointly acquired two contiguous tracts of raw land with a total area of about 123 acres as a site for a shopping centre to include a Dominion Store and an adjoining apartment project. In 1953 two corporations were formed, Aldershot Investments Ltd. and Aldershot Realty Ltd. to the former of which appellant and Grisenthwaite sold the portion of land intended as a shopping centre, in return for shares and to the latter of which the portion of the land intended as an apartment site, also in return for shares. Later in 1953 Aldershot Investments Ltd. commenced the construction of a large supermarket building but nothing was done with the land acquired by Aldershot Realty Ltd. In April, 1954, Dominion Stores Ltd. purchased all the shares in Aldershot Investments Ltd. from appellant and Grisenthwaite. The building was almost completed and differences had arisen between appellant and Dominion Stores Ltd. In April, 1954, appellant and Grisenthwaite sold all their shares in Aldershot Realty Ltd. to another party. The Minister in assessing appellant for income tax for the year 1954 added to his income the profits from the sale of these shares. On appeal from such assessment appellant contends that it was the intention to develop the two properties and hold them as rental investments, the one as a shopping centre and the other as an apartment project, and that in any case the sale of his shares in the two corporations was not part of any business or venture in the nature of trade. No plans for financing the proposed projects were ever completed. *Held*: That while it was probably the dominant intention of the appellant and Grisenthwaite to develop the properties and retain them it was not their sole intention at any time, and they also had in mind the intention to sell at least part of the property if they were unsuccessful in developing it as planned. 2. That the intention to build and operate a shopping centre was not brought to an end by any circumstances beyond the control of appellant and Grisenthwaite. 3. That the abandonment of the primary intention in favour of a secondary intention altered the nature of the undertaking from that of a capital investment to that of a venture in the nature of trade. 4. That the whole scheme was of a speculative nature in which the promoters envisaged the possibility