1957
June 13, 14
Oct. 9

TOBY BARNETT ..... APPELLANT;

AND

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

Revenue—Income Tax—Capital Gain—Adventure in the nature of trade—Land purchased by furrier to be turned over at cost to company to be formed—Company not formed—Whether profit realized by forced sale taxable—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant and her brother, partners in a retail furrier business, respectively appealed from a re-assessment of their 1953 taxable incomes when the Minister added thereto gains made by them on a real estate transaction. The facts in each case were identical and the two appeals were heard together. The appellants entered into a parol agreement with New York interests to establish near Toronto a specialized fur-shopping centre. No arrangements were made as to how the expenses were to be shared but the appellants were authorized to select and purchase a suitable site to be transferred at cost to a company to be formed. The site they selected was approved by the New York interests. The land was subject to an offer to purchase executed in favour of the nominee of one S, a building contractor, who permitted the substitution of the appellants in his nominee's stead. Since the latter had nothing in writing to bind the New York interests they obtained, for their own protection, a written offer from S to re-purchase the land at the price they paid for it together with his cheque for $10,000 as a deposit. The understanding was that, if the proposed scheme went through, both would be returned to him. The appellants bought the land for $199,300, paying $58,500 down and giving back a mortgage for the balance payable in three years. They financed the down payment by a bank loan. The New York interests were notified and agreed to come to Toronto to form the company and arrange the financing, and on this assurance appellants returned S's offer and cheque. The New York interests then refused to go on and the appellants, to get rid of the heavy liability they had assumed, sought an immediate buyer. S made the first offer, $328,000. It was accepted and the appellants divided the gain made on the sale between them. The Minister added the profit realized to their declared taxable income, and they appealed from his decision.

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Held: That the gain made by the appellants was an entirely fortuitous one and not the result of an operation of business when carrying out a scheme for profit-making but resulted from circumstances over which the appellants had no control, namely, the failure of the New York parties to implement their oral undertaking, and the enhancement of the value of the land.

2. That there was here no adventure or concern in the nature of trade and the profit realized was not from a business, but an accretion to capital, not subject to tax.

APPEAL under the *Income Tax Act.*

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

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

E. D. Hickey and *T. Z. Boles* for respondent.

CAMERON J.:—This is an appeal from a re-assessment dated March 8, 1955, made upon the appellant in respect of her income for the year 1953. In that re-assessment the respondent had added to the declared income of the appellant the sum of $63,353.77, described as "gain re Scarboro property", as well as one for $1,494.25 described as "gain re King Street East". Following the appellant's Notice of Objections, the respondent by his Notification reduced the re-assessment by the sum of $1,494.25 relating to the King Street East property in Hamilton, but confirmed the said re-assessment in all other respects. The present appeal relates, therefore, to the item of $63,353.77 added by the respondent in respect to the "gain re Scarboro property".

For a number of years the appellant has been a partner in a trading firm at Hamilton, Ontario, known as Harte Manufacturing Furriers. Prior to 1947 she had a one-third interest therein with her brother Robert Organ and one Symon Wise. In that year Wise withdrew from the partnership and thereafter the business was conducted by the appellant and Robert Organ, each having an equal interest therein. The business is that of buying furs, manufacturing fur coats therefrom, and selling them at retail; it also operates a fur storage. The business has been very successful and for some years prior to 1953 the partners considered it advisable to move from 55 John Street, Hamilton (where it had been located since 1937) to a better area and into better and larger quarters. They purchased successively

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Cameron J.

a number of buildings in Hamilton with the intention of moving the business; but due to inability to get full possession, or inability to make the required structural changes, or the unsuitability of the location, each of these properties was sold. It appears that for the years 1951, 1952 and 1953, the appellant's share of the profits so realized on these sales was added to her declared income, but on objection being taken to such assessments, the amounts so added were dropped from the assessments.

Counsel for all parties consenting, it was agreed that this appeal and that of the appellant's brother, Robert Organ, should be heard together and that all the evidence should be applicable to both appeals, the facts in each case being identical.

In order to purchase furs and observe the styles, the appellant made frequent trips to New York City; her brother went less frequently. Both were acquainted with the witness Abraham Avigdor, a manufacturer of fur garments in New York City. His specialty was that of "China Mink" garments. His business in 1951 and 1952 was seriously affected by the embargo placed on the importation of goods from China into the United States. Some of his competitors had opened branches in Canada where no such embargo was in effect and he discussed with the appellant the possibility of following their example. Mrs. Barnett was of the opinion, however, that a much larger venture, such as she and her brother had considered for some time, would be much more successful. Her opinion was that there should be established near one of the larger cities of Canada a fur-centre in which all branches of the fur-making industry, including its many specialties, would be represented, as well as dyeing, cleaning and storage plants. It would be in the nature of a specialized shopping centre with ample room for various buildings and parking spaces. There was no such area in Canada although it appears that in New York City most of the industry is located in one district. The scheme appealed to Avigdor but it was realized that the venture was a large one and that other capital would have to be brought in. Accordingly, Avigdor introduced Mrs. Barnett to three or four leading New York manufacturers, including one Pestin. All agreed to join in the proposed plan and to

contribute to the expenses involved. Nothing, however, was put in writing and no decision was made as to the amounts to be contributed by the individual members. It was decided, however, that the appellant on her return to Canada should select and acquire a suitable site near Toronto and that such site when purchased should be turned over to the new company to be formed, at cost.

In the summer of 1952 the appellant made inquiries as to a suitable location near Toronto, but for some time nothing of a suitable nature was found. Her husband, Percy Barnett, who was then an employee of Harte Manufacturing Furriers and also engaged in the real estate busines, contacted a school friend, one Harry P. Botnick (a lawyer in Toronto who had contacts with parties buying and selling real estate) and asked to be advised if the latter heard of a property suitable for such a fur-centre. Some time later Botnick advised them of a parcel of land which might be suitable and that, if it were, they could "pick up the offer". The property was on Kennedy Road in Scarboro close to Toronto and comprised about 160 acres in all. It seemed suitable for light industry and in every way satisfactory for the establishment of a fur-centre. Before completing the purchase, it was arranged that the property should be inspected by Pestin, one of the New York manufacturers who were interested in the proposed plan. He came to Toronto and, after inspection, approved of the site.

The purchase was closed out on or about October 22, 1952, at the office of Mr. Schreiber, the Hamilton solicitor for the appellant and her brother. Those present were the appellant, Organ, Mr. Barnett (the appellant's husband), Mr. Schreiber, Samuel L. Shields (a contractor of Toronto), and Mr. Botnick, the latter apparently acting as solicitor for Shields. It was then disclosed for the first time that the "offer" which Botnick had originally advised the appellant might be taken up, was actually two agreements of sale and purchase in which the vendors were respectively J. C. Rutherford and H. B. Rutherford and the purchaser was D. Gilbert; the properties were adjacent to each other. Copies of these agreements are filed as Exhibit 1. It was explained that the real purchaser in these agreements was Samuel L. Shields and that at his

1957

BARNETT
v.
MINISTER OF
NATIONAL
REVENUE

Cameron J.

request, at the time the agreements were negotiated, the purchases were taken in the name of D. Gilbert as his nominee only. These agreements were dated July 2, 1952, and were accepted by the purchaser on July 15 and July 11, 1952, respectively. It was a condition of each that the other offer should also be accepted or the offers would be void. The total purchase price was $199,300, of which amount $58,500 (inclusive of the deposits of $1,000 each) was to be paid on closing and the balance secured by a first mortgage bearing interest at 5 per cent., the principal to be due on October 1, 1955. The conveyances to the appellant and Organ were direct from the Rutherfords (Exhibit 10) and were registered on October 24. In effect, the appellant and Organ were substituted for Shields, the latter withdrawing from the transaction, making no profit in the matter but being content to receive only the deposits he had made.

Organ, who was a careful business man, was greatly concerned about the liability he was undertaking, particularly so as there was nothing in writing with the New York manufacturers who had agreed to take part in the proposed scheme. Prior to closing, therefore, he had intimated to Botnick that he would like to have an escape from his liability if the scheme fell through. Botnick thought that such an arrangement could be made with his client. Accordingly, when the parties met in Hamilton there was produced an "Offer to Purchase" (Exhibit 2) by the terms of which Shields agreed to purchase the entire property from the appellant and Organ at the same price they had paid, namely, $199,300, such sale to be completed by May 19, 1952 (an obvious error for 1953). In the offer so submitted, the down-payment was $1,000, but at the insistence of Organ it was increased to $10,000 and Shields' cheque for that amount, made out in Schreiber's favour, was delivered. There was a verbal understanding the cheque would be held by Schreiber and it never actually came into the hands of the appellant or Organ. There was also a verbal arrangement that at such time as the appellant and Organ were satisfied that the proposed plan would go through, they would so notify Shields, the cheque would be returned to him and his "Offer to Purchase" would then be void and at an end.

This agreement, which was also signed by the appellant and Organ, may be referred to as the "Protective Offer".

Shortly after the purchase was completed, the appellant was again in New York and advised the parties interested that the property had been acquired. All were still interested in the scheme and it was arranged verbally that they would come to Canada in January 1953, incorporate a company to carry out the plan, and agree on the method of financing. Being thus assured that the plan would be proceeded with, the appellant on her return to Canada wrote Shields (Exhibit 6), avising him that she had just returned from New York and that "Robert (i.e., her brother Organ) and I are happy to say that we have decided to go ahead with the deal". Shields acknowledged that letter of September 2 (Exhibit 6) and added, "It is now in order for you to return our cheque for the $10,000 and cancel our offer".

When the interested parties from New York failed to appear in Hamilton in January as arranged, the appellant and her brother were greatly concerned, and in February she went to New York to ascertain the reason for the delay. To her regret she found that due to adverse business conditions in the fur industry, all the parties except one were unwilling to proceed with the plan and that the one still interested would not proceed without the others. It was then obvious that the proposed plan would have to be dropped.

It should be stated here that in October 1952, when the appellant and Organ purchased the Scarboro property, they secured a loan from the Royal Bank of Canada at Hamilton for $65,000, of which amount $58,000 was used to make the down-payment, the balance being used for the general purposes of Harte Manufacturing furriers. That loan was secured by a note payable in one year with collateral security also being provided. Mr. Amy, the manager of that bank, was advised by the appellant of the general scheme of the plan for the proposed fur-centre, that certain New York manufacturers were interested in the plan and that in the main the loan was being arranged for the purpose of making the down-payment on the proposed site. The loan was well secured and while, therefore, Mr. Amy was not greatly concerned whether

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Cameron J.

the plan went through or not, he did ask the appellant "What are you going to do if these people don't come through?", to which she replied, "Well I don't think there is any doubt about that because they are extremely anxious".

It was obvious to the appellant and her brother that without the assistance of the New York interests they would themselves be unable to proceed with the plan for a fur centre. Both the appellant and Organ were greatly concerned about their position and the large amounts for which they were liable, both to the bank and the Rutherfords. They had no desire to hold the property as a speculation, although Mr. Amy, the bank manager, advised them not to get "panicky" as the industrial expansion in the area was "very strong". The appellant's husband also advised them to "hold on" in view of advancing prices. Both the appellant and Organ, however—and they alone were under liability in the matter—decided that if possible the property should be sold in order to clear up their liabilities. Word was sent to Mr. Botnick, who had first put them in touch with the property, that they would consider an offer to purchase. On April 20, 1953, Mr. Shields, from whom they had taken over the original purchase or agreement in October 1952, came to their place of business in Hamilton with an offer to purchase (Exhibit 9). After some discussion the offer was accepted and signed by all parties. The purchase price was $328,500, some $128,000 in excess of that paid by the appellant and Organ in the previous October. The terms of purchase were as follows: $1,000 deposit; $190,000 by certified cheque at closing on May 19, 1953; and the balance by assuming the mortgages held by the Rutherfords. The purchase and sale were closed out in the manner provided for by the agreement. It is of interest to note that Shields did not know that the scheme for the proposed fur centre had fallen through until after his purchase was made; otherwise, he said, his offer would have been substantially less. He did know,

however, that prices in the area were increasing rapidly and that while in the previous year he had been advised that he could not proceed with a subdivision for some time, the way was now clear for that purpose. It is also of interest to note that in November of the same year Shields re-sold the property *en bloc* at a gain of $100,000.

The net profit on the sale to Shields, less carrying charges and costs, was divided equally between the appellant and Organ and, as I have said, that is the amount added to their declared incomes and now in dispute.

Both parties rely on the following sections of the *Income Tax Act*, (R.S.C. 1952, c. 148).

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 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*) "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 respondent it is submitted that the purchase and sale of the Scarboro property was an adventure in the nature of trade and that the profit therefrom was profit from a business within the extended meaning of that term as defined in s. 139(1)(*e*). For the appellant—on whom the onus lies—it is submitted that the gain so made did not constitute taxable income but was rather a "capital gain"; that there was here no adventure in the nature of trade; that the sole purpose in acquiring the property was that of securing a suitable site for the proposed fur centre which was to be turned over to the new company, to be formed, at cost; that owing to the change in circumstances

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Cameron J.

over which neither the appellant nor her brother had any control, namely, the failure of the New York interests to implement their verbal undertakings, the appellant had no alternative but to sell the property; that the first offer made was accepted and that such gain as was made was purely fortuitous; and that the whole transaction was an isolated one and separate and distinct from that of the appellant's business of manufacturing fur garments.

Before considering the nature of the profit made in this transaction, I should like to refer to one or two submissions put forward—but not stressed too seriously—by counsel for the respondent. They relate to the credibility of the appellant, her brother and certain of her witnesses. It was suggested that the evidence relating to the alleged plan for the establishment of a fur centre is to be viewed with a great deal of scepticism; that no person with any knowledge of business matters would have embarked upon a scheme of this magnitude without definite assurances in written form as to the nature of the company to be formed, the amount of the capital to be advanced by each of the participants and complete details as to the building plans and method of financing the project. It will be remembered that the appellant and Organ took no such precautions but were prepared to proceed on the faith of the oral commitments made by the New York group, probably because of the established position these men held in the fur industry and the repeated assurances that were given. It is suggested, therefore, that the unbusinesslike methods were so extraordinary that I should not accept the evidence as to the proposed plan as credible.

From the evidence as a whole, however, I am quite satisfied that there was such a plan as that described by the appellant and her brother. This evidence is substantially supported by that of the witness Avigdor (who has no interest in this litigation) and also by that of the appellant's brother. Shields also was made aware of the proposed plan when the sale to the appellant and her

brother was completed in Schreiber's office. It was the then uncertainty of Organ as to the completion of the plan that led to the preparation of the "Protective Offer" by Shields. Moreover, Amy, the only witness called by the respondent, was aware of the plan prior to and at the time he arranged for the bank loan. I have reached the conclusion, therefore, notwithstanding that the appellant and her brother may have lacked the usual business acumen in embarking on the plan, that there was such a plan as that described. Further, I am of the opinion that the property so acquired was purchased with the intention of turning it over *en bloc* at cost to the company which those interested had agreed to establish. There is ample evidence which supports this conclusion and nothing of a substantial nature to lead to any other view. Support for this view is found in the evidence relating to the "Protective Offer" by the terms of which Shields was given the right to repurchase the entire property at cost for a period of six months, with the collateral verbal agreement that he would be released from his agreement as and when the appellant and her brother were satisfied that the proposed plan would be carried to completion.

Counsel for the respondent referred to the evidence of the witness Amy who stated that Mrs. Barnett, at the time the bank loan was arranged, said "that it would be repaid for sure within the year". In Amy's view "the application was made on the basis that it was for the purpose of land and repayment within a year one way or the other, either from a sale of all or a part of the land or from the proceeds of the company (by which I think he referred to Harte Manufacturing Furriers) whose profits per year were sufficient under normal conditions to repay that kind of loan". Then in re-examination, when asked whether any explanation was given him as to what might have happened with any excess land that was not used, he said, "Yes, I think it was inferred that they would have no problem in disposing of the excess either in whole

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Cameron J.

or in part". It is submitted by counsel for the Minister that this evidence indicates that even if there was a plan to establish a fur centre, such a plan involved turning over only a small portion of the acreage to the new company to be formed and the sale by the appellant and her brother of the balance as soon as a convenient opportunity presented itself. Whatever inference may be drawn from this evidence—and the witness quite naturally was not too clear as to some of the details of the conversation four years prior to the trial—I accept the direct evidence of the appellant and her witnesses that the whole of the acreage acquired was to be turned over to the company to be formed, at cost. This view, I think, is supported by the evidence relating to the "Protective Offer" entered into with Shields, which, coupled with the oral evidence relating thereto, establishes that the appellant and her brother were willing and ready to turn the whole of the property back to Shields at cost in the event of the fur centre scheme falling through. Counsel for the Minister quite properly conceded that Shields' actions throughout were in good faith and his evidence was quite unshaken. In my view, the binding agreement with Shields indicates clearly that the appellant and her brother had no intention of making a profit on the purchase in the event of the fur centre scheme being carried to completion; and also that it was their intention to transfer the whole of the property to the new company at cost without retaining portions of the acreage to be sold by them later. Having secured the protective offer there was no element of speculation, for if the scheme fell through, Shields was bound to re-purchase at cost unless, of course, he was released from his contract—an event which happened when it was thought that the scheme would be carried to completion.

Another submission made by counsel for the Minister was that the amount of the land purchased was so greatly in excess of the amount reasonably required for the purpose of a fur centre, that it must have been the intention of the

appellant and her brother to retain portions for later re-sale at a profit. The execution of the "Protective Offer" with Shields precludes any such inference and the evidence of the appellant and her witnesses shows that such was not the case. Counsel for the appellant admitted that the land purchased was somewhat in excess of what would normally be required for a fur centre. The evidence is clear, however, that to get the site required, it was necesary to purchase the whole of the property. Accepting as I do the evidence led on behalf of the appellant that the entire acreage was to be transferred to the new company, it follows that if and when the plan was fully implemented, any surplus of land not then required would fall to be disposed of by the new company in whatever manner might then be decided upon.

On the facts as I have found them, it is clear that the appellant and her brother had no intention of holding the property as an investment. It is clear, also, that they intended to sell it to the company to be formed or, alternatively, to Shields—but without profit. Being assured that the fur centre scheme would be successfully carried through, they relieved Shields from his contract and shortly after found that the scheme envisaged had fallen through. In the result they accepted the first offer made, that offer, because of increasing land values, being greatly in excess of the cost. While they owned the property, they had done nothing to improve it in any way.

The question for consideration, therefore, is whether in the light of the circumstances as a whole and the findings which I have made, the transaction in question is "an adventure in the nature of trade" and the profit therefrom is income from a business under s. 4 (*supra*).

In the recent case of *Minister of National Revenue v. Taylor* (1), the learned President of this Court considered the effect of the introduction of the phrase "adventure or

(1) 56 D.T.C. 1125; [1956] C.T.C. 189.

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Cameron J.

concern in the nature of trade" in the definition of "business" now found in s. 139(1)(*e*) of the Act. After reviewing all the relevant United Kingdom and Canadian cases, he said at page 1136:

> The cases establish that the inclusion of the term "adventure or concern in the nature of trade" in the definition of "trade" in the United Kingdom Act substantially enlarged the ambit of the kind of transactions the profits from which were subject to income tax. In my opinion, the inclusion of the term in the definition of "business" in the Canadian Act, quite apart from any judicial decisions, has had a similar effect in Canada. I am also of the view that it is not possible to determine the limits of the ambit of the term or lay down any single criterion for deciding whether a particular transaction was an adventure of trade, for the answer in each case must depend on the facts and surrounding circumstances of the case. But while that is so it is possible to state with certainty some propositions of a negative nature.

Then, after stating a number of propositions (both of a negative and positive nature) of assistance in determining whether a given transaction is or is not an "adventure or concern in the nature of trade", he referred specifically to the intention of the taxpayer when entering into the transaction. He said at page 1137:

> And a transaction may be an adventure in the nature of trade although the person entering upon it did so without any intention to sell its subject matter at a profit. The intention to sell the purchased property at a profit is not of itself a test of whether the profit is subject to tax, for the intention to make a profit may be just as much the purpose of an investment transaction as of a trading one. Such intention may well be an important factor in determining that a transaction was an adventure in the nature of trade but its presence is not an essential prerequisite to such a determination and its absence does not negative the idea of an adventure in the nature of trade. The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity. And the taxpayer's declaration that he entered upon the transaction without any intention of making a profit on the sale of the purchased property should be scrutinized with care. It is what he did that must be considered and his declaration that he did not intend to make a profit may be overborne by other considerations of a business or trading nature motivating the transaction.

Findings which I have set out above were arrived at after a most careful scrutiny of the evidence of the appellant and her brother and after fully considering what they actually did, as well as all the surrounding circumstances. It now becomes necessary to consider whether the transaction was "in the nature of trade". If the purchase had been made with the intention of subdividing the property and marketing it at a profit in the same way as would have been done by a speculator or dealer in real estate, there seems no doubt that the resulting gain would have been taxable as income from an adventure in the nature of trade notwithstanding that it was an isolated case. In such a case the transaction would have borne the badges of trade (*see Edwards v. Bairstow et al.* (1)).

In *Taylor's* case, reference was made by the learned President to the first definition of "trade" in the United Kingdom cases, contained in the speech of Lord Davey in *Grainger and Son v. Gough* (2), where he said:

> Trade in the largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased.

Now, in the very special circumstances of this case, I can find none of the usual badges of trade. It is true that a purchase was made followed by a later sale at a profit; but these facts by themselves are insufficient to establish that what was done was "in the nature of trade". The property was acquired solely for the purpose of turning it over to the company to be formed, with a "loophole" by means of which the purchasers could escape without loss or profit by sale to Shields if the original scheme fell through. There was no intention of deriving any profit from the purchase; the established intention was that no profit would be made either on the sale to the company or, alternatively, to Shields.

(1) [1955] 3 All E.R. 48—House of Lords.
(2) (1896) 3 T.C. 462 at 474.

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Cameron J.

In *Taylor's* case the learned President referred to the well-known statement of the test to be applied, as stated by the Lord Justice Clerk in *Californian Copper Syndicate Ltd. v. Harris* (1):

> 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 realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

And in *Cooper v. Stubbs* (2), Warrington L.J. in the Court of Appeal said:

> The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1(*b*) of Sc. D.

In the instant case there was no scheme for profitmaking and the original transaction was not entered into with a view to producing, in the result, income or revenue for the purchaser. As I view the transaction in question, the appellant and her brother, as the main promoters of the scheme to establish a fur centre, purchased the land with no intention of speculation or without any hope or expectation of profit to be derived therefrom. To some extent they were acting on behalf of the interested members of the syndicate to whose company when formed the property would be turned over in its entirety at cost. Their ownership was intended to be of a purely temporary nature and was to continue only until such time as the company would be incorporated. That purpose was frustrated through no fault on their part and as a result they found themselves the owners of property for which they had no use. Their agreement with Shields under the "Protective Offer" had been terminated and consequently could not be enforced. In the meantime, the value of the property had increased substantially and upon re-sale a profit was made.

(1) (1904) 5 T.C. 159 at 166. (2) [1925] 2 K.B. 753 at 769.

In my opinion, the profit so made was merely an enhancement of value by realizing a security for which the appellant and her brother no longer had any use. The gain was entirely fortuitous and not the result of an operation of business when carrying out a scheme for profit-making. It resulted entirely from two circumstances over which neither the appellant nor her brother had any control, namely, the failure of the New York parties to implement their oral agreement to come into the scheme, and the enhancement of the value of the land.

I have reached the conclusion, therefore, that there was here no adventure or concern in the nature of trade and that the profit realized on the transaction was not profit from a business but was rather an accretion to capital, not subject to tax.

Counsel for the respondent also suggested that it might be found that the whole transaction was in some way for the benefit of the appellant's husband and he referred to the evidence that on previous occasions the appellant and Organ had financed some of his real estate transactions and that he played a part in the negotiation for the purchase and the later sale of the Scarboro property. I find nothing in the evidence to warrant any such conclusion. As a member of the family his advice was sought but not always followed. The down-payments on the purchase price were paid by monies borrowed by Harte Manufacturing Furriers from the Royal Bank, and when the sale to Shields was made in 1953, the proceeds were deposited to the credit of that firm and on the following day divided equally between the appellant and her brother, who alone at that time had any financial interest in the business.

For these reasons the appeal will be allowed, the assessment set aside and the matter will be referred back to the Minister to re-assess the appellant in accordance with my findings.

1957

BARNETT v. MINISTER OF NATIONAL REVENUE

Cameron J.

The appellant is entitled to her costs after taxation. Inasmuch, however, as the same counsel appeared for both the appellant and her brother at the trial and as the witness's evidence related to both appeals, I direct that the taxing officer in taxing the costs of the trial shall allow to this appellant only one-half of such taxed costs.

Judgment accordingly.