BETWEEN:

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

AND

JAMES KARFILIS ....RESPONDENT.

Toronto 1965 Nov. 29

Ottawa 1966 Aug. 19

Income tax—Income Tax Act, R.S.C. 1952, c. 148, Sections 3, 4, 10(1)(j), 83(2)(3)—Proceeds from sale of "mining property"—Exemption for prospectors—Whether property acquired as a result of prospecting—Whether income exempt.

The respondent, although a layman in prospecting business, had an active interest in mining. Having met a prospector named Byles, together they formed a partnership in April 1956. Both agreed that Byles, the prospector, was to devote his full time to the venture. Karfilis agreed to keep Byles in funds and both were to divide proceeds equally.

Having heard of a copper discovery in Raglan Township (Ontario) the partners decided to stake claims in the neighbourhood area wherever possible and, when the land was under ownership to acquire the mineral rights, subject to royalty rights in favour of the owner of the land.

Partners above thus acquired a number of claims and rights. A short time later some of these were disposed of to mining interests in two transactions, from which $46,000 were realized.

In the taxpayers' view any profit so derived was exempt from tax under section 83(2) or (3) but the Minister denied the applicability of those provisions on the ground that the property had not been acquired as a result of prospecting efforts.

The Minister accordingly treated the profits as derived from a "business" within the meaning of sections 4 and 139(1)(*e*). He allowed some $12,000 for expenses, added about $35,164 to the taxpayer's declared income.

The taxpayer claimed that in any event a deduction should be allowed for additional expenses incurred by him relating to the venture.

Held, That the mere staking of claims did not constitute "prospecting".

2 That the evidence failed to establish that the properties in question had been acquired after prospecting had been carried out; neither did it establish that an employer-employee relationship existed between the respondent and Byles.

3 That as a result of that prospecting, whether by Karfilis himself as prospector, or by Byles as in the employ of or as grubstaked by Karfilis, neither section 93(2) nor (3) applied.

4 That the profit was therefore taxable.

5 That the Minister failed to allow all of the relevant expenses and the profit should therefore be reduced from $35,164 to $19,260.

6 That the Minister's appeal was allowed in part.

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APPEAL from a decision of the Tax Appeal Board.

D. J. Wright, Q.C. and *J. E. Sheppard* for appellant.

W. G. Cassels for respondent.

KEARNEY J.:—The present appeal is from a decision of the Tax Appeal Board dated May 25, 1964[1], which maintained the respondent's appeal from an assessment imposed by the Minister on July 13, 1961, whereby the sum of $34,887.50, which allegedly represented the net profit realized by the respondent in 1956 on two separate sales of mining properties located in the province of Ontario, was declared taxable in virtue of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

The aforesaid profit was accordingly added to the respondent's otherwise taxable income in respect of his taxation year 1956.

In maintaining the respondent's appeal, the Chairman of the Board, Mr. Cecil L. Snyder, Q.C., found, as alleged by the respondent, that none of the profits arising from the two aforesaid sales were subject to tax because they fell within the exemption referred to in s. 10(1)(*j*) and the relevant provisions of s. 83 of the Act which stipulate:

10(1) There shall not be included in computing the income of a taxpayer for a taxation year.

. . .

(*j*) an amount received as a result of prospecting that section 83 provides is not to be included,

83(1) In this section,

(*a*) . . .

(*b*) "mining property" means a right to prospect, explore or mine for minerals or a property the principal value of which depends upon its mineral contents, and

(*c*) "prospector" means an individual who prospects or explores for minerals or develops a property for minerals on behalf of himself, on behalf of himself and others or as an employee.

(2) An amount that would otherwise be included in computing the income of an individual for a taxation year shall not be included in computing his income for the year if it is the consideration for

(*a*) a mining property or interest therein acquired by him as a result of his efforts as a prospector either alone or with others, or

(*b*) shares of the capital stock of a corporation received by him in consideration for property described in paragraph (*a*) that he has disposed of to the corporation.

[1] 35 Tax A.B.C. 373.

(3) An amount that would otherwise be included in computing the income for a taxation year of a person who has, either under an arrangement with the prospector made before the prospecting, exploration or development work or as employer of the prospector, advanced money for, or paid part or all of, the expenses of prospecting or exploring for minerals or of developing a property for minerals, shall not be included in computing his income for the year if it is the consideration for

(*a*) an interest in a mining property acquired under the arrangement under which he made the advance or paid the expenses, or, if the prospector was his employee, acquired by him through the employee's efforts, or

(*b*) shares of the capital stock of a corporation received by him in consideration for property described in paragraph (*a*) that he has disposed of to the corporation.

The case for the appellant is set out in the statement of facts contained in the notice of appeal, commencing at paragraph 5.

5 The assessments with respect to the respondent's 1956 taxation year, Notices of which were mailed to the respondent on July 13, 1961, and July 18, 1963, are based upon the following assumptions of fact:

(*a*) the respondent entered into an agreement with Georges Byles dated the 20th day of April, 1956;

(*b*) as a result of the agreement described in paragraph 5(*a*) herein, the respondent acquired options on the minerals or mining rights of certain patented properties;

(*c*) the respondent entered into an agreement with Kenneth A. Wheeler dated the 17th day of July, 1956, and conveyed his interest in some of the options on mineral rights described above to Kenneth A. Wheeler for a cash consideration of $29,000 and 75,000 shares of Van Doo Consolidated Explorations Limited;

(*d*) by an agreement dated the 20th day of August, 1956, duly amended by an agreement dated the 9th day of October, 1956, the respondent conveyed his interest in some of the other options on mineral rights described above to Libby Investments Limited for the sum of $7,500.00;

(*e*) the minerals or mining rights of the patented properties, referred to in paragraph 5(*b*) herein, had not been reserved by the Crown in the location, sale, patent or lease of such properties;

(*f*) the patented properties referred to in paragraph 5(*b*) herein had been sold, located, leased or included in a license of occupation prior to 1956 without reservation of the minerals;

I need not set out the remaining subsections of paragraph 5 consisting of (*g*) to (*k*), inclusive, as they refer to the value of the 75,000 Vandoo shares mentioned in subsections (*c*) and (*d*) *supra,* nor to subsection (1) which concerns the various amounts expended by the respondent in acquiring the properties in question, because—for reasons which appear later—they ceased to be an issue.

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6. In purchasing and selling the options on the mineral rights of certain patented properties during the spring and summer of 1956, the respondent engaged in the business of dealing in mineral rights.

B. THE STATUTORY PROVISIONS ON WHICH THE APPELLANT RELIES AND THE REASONS WHICH HE INTENDS TO SUBMIT

7. The appellant states that the consideration which the respondent received from Kenneth A. Wheeler and Libby Investments Limited was properly included in the respondent's income for 1956 within the provisions of Sections 3, 4 and 139(1)(*e*) of the *Income Tax Act,* R.S.C. 1952, Chapter 148

8. The appellant states that the consideration which the respondent received from Kenneth A. Wheeler and Libby Investments Limited was properly included in the respondent's income for 1956 because the mining property sold to Kenneth A. Wheeler and Libby Investments Limited was not acquired in the manner contemplated by subsections 2 and 3 of Section 83 of the *Income Tax Act,* R S C. 1952, Chapter 148.

THE RESPONDENT'S REPLY

A. STATEMENT OF FACTS

1. The respondent admits the statement of facts as contained in paragraphs 1 to 5(*e*) inclusive and 5(*k*) of the appellant's notice of appeal.

2. The respondent does not admit the allegations contained in paragraph 5 (*g*) (*h*) (*i*) (*j*) and (*l*) and paragraph 6 of the appellant's notice of appeal.

3. The respondent acquired options on patented property and mining rights by staking on unpatented property in the County of Renfrew. Mineral rights only were acquired in the patented property, surface rights always being specifically excluded.

4. The respondent further alleges that the purchase price payable pursuant to the agreement with Mr. Wheeler dated the 17th of July, 1956, was reduced from $29,000 by the sum of $4,160.

5. The respondent spent additional sums totalling $20,903.94 by way of expenses incurred in the course of these transactions.

B. STATUTORY PROVISIONS AND REASONS

1. The respondent submits that any profits realized from the above transaction should be excluded from income in accordance with Section 83 s s. 2(*a*) and Section 83 s.s 3(*a*) as provided by Section 10 s.s. (1)(*j*).

2. In the alternative the respondent submits that the expenses incurred were incurred for the purpose of gaining or producing income from these transactions and should therefore be allowed as a deduction from the gross income.

3. The respondent alleges that the shares he received were never sold or liquidated and accordingly no income was ever received with respect to same and should not be included as income of the respondent in the year 1956.

4 The respondent also relies on the reasons of the Income Tax Appeal Board.

In their opening remarks, counsel for the parties declared that the facts were "fairly sufficiently described in the pleadings" and later they filed as Ex. A-1 this agreed statement of facts:—

For the purpose of the appeal it is agreed that:—

1. (*a*) The total purchase price of all the Raglan claims was $3,716.
   (*b*) The total purchase price of the Raglan claims sold Vandoo and Rowan was $2,331 67.
2. (*a*) The total legal account rendered in respect of the acquisition of the Raglan claims was $3,500 and was rendered in 1956.
   (*b*) of the said sum of $3,500, $2,500 was paid in 1956 and $1,000 in 1957.
3. (*a*) There was paid to George Byles in 1956 by monthly payment, the sum of $2,000.
   (*b*) There was paid to George Byles in 1956 under the September 7, 1956 agreement, the sum of $8,500.
4. There was paid in 1956 for day labour in respect of all the Raglan claims, the sum of $250.
5. There was paid in 1956 for transportation expenses in respect of all the Raglan claims, the sum of $700.
6. Karfilis paid to Walters in connection with his obligations under the Wheeler agreement, the sum of $3,760.
7. Karfilis paid various miscellaneous expenses in connection with all the claims, the sum of $313 94.
8. Karfilis made the following payments in March, April and May of 1957 in connection with work done on all of the Raglan claims during the year 1956:
   (*a*) Bryson the sum of $1,275;
   (*b*) Mintern the sum of $1,000; and
   (*c*) Thompson the sum of $725.

As a result, the field of factual disagreement has been greatly narrowed. There remains, however, a vital point in dispute on a mixed question of fact and law, namely, whether or not the evidence discloses that the mining properties which the respondent sold at a profit were acquired as a result of his efforts as a prospector. In resolving the question, much depends on the appraisal of the respondent's testimony having regard to the requirements of s. 83(2)(3) of the Act.

I might here observe that although the parties had, in their pleadings, described the agreements entered into by the respondent with the owners of the patented lands in issue as options, it is clear that each of their agreements was for the acquisition of a vested right to a mining property as that expression is defined in Section 83.

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No witnesses were called on behalf of the appellant and apart from the respondent's testimony on his own behalf the only other verbal evidence consisted of a short statement by Mr. Robert S. Montgomery, who was then legal adviser to the taxpayer. The balance of the evidence was made up of documentary evidence filed by counsel for the parties respectively.

I will have occasion later to refer in some detail to the respondent's testimony which has a bearing more particularly on his qualifications, his alleged prospecting efforts, his negotiations in acquiring the mining claims in issue and the factors which prompted him to do so. The following, however, is a résumé in broad outline of some facts which are not in dispute.

The respondent, who, as a side line, had made some study of geology, was interested in mining. He had met George Byles who was a full-time prospector and, at the latter's suggestion, on April 20, 1956 (Ex. R-2) they decided to form a partnership to explore for minerals and share the profits equally. The partners heard of what appeared to be a new copper discovery in Raglan Township (Ontario) and decided to investigate it. Mr. Byles staked unpatented claims which were open for prospecting near the above-mentioned find. The respondent negotiated more than twenty purchase contracts (not merely options), for good and valuable consideration, with owners of nearby patented properties.

On July 17, 1956, the respondent entered into an agreement (R-6) with one Kenneth A. Wheeler (hereinafter sometimes referred to as "the Wheeler sale") whereby the respondent conveyed his interests in 28 patented claims and one unpatented claim for $1,000 per claim, or $29,000, plus 7,500 shares of Vandoo Consolidated Explorations Limited, the then value thereof, by agreement of counsel, amounted to $9,250, making a total price in round figures of $38,000.

The respondent next arranged to sell eleven patented lots (Ex. R-8), each of which being the equivalent of two mining claims, to a subsidiary of Rowan Consolidated Mines Ltd. named Libby Investments Ltd. (hereinafter sometimes referred to as "the Libby sale"), originally for $7,500,

and certain shares of Rowan Consolidated Mines Limited (cf. Ex. R-7 dated August 20, 1956), but delivery of the said shares was later waived by the respondent (Ex. R-8 dated October 9, 1956). Thus, from the two herein above-mentioned sales (with which we are here concerned) the respondent realized about $46,000 on which the Minister allowed some $12,000 as cost of sales and assessed the respondent on a net profit of some $34,000.

Following the Wheeler and Libby purchases mentioned in Exhibits R-7 and R-8, a dispute arose between Karfilis and Byles because the respondent contended the unpatented properties described in the said exhibits belonged to him alone and did not form any part of the grubstaking and partnership agreement Exhibit R-6, while Mr. Byles contended that they did and that he was entitled to his share of the proceeds in both instances.

In order to resolve their differences, the partners, as appears by Exhibit R-9, entered into an agreement dated September 7, 1956, whereby Mr. Byles relinquished all his right, title and interest arising from the aforesaid partnership agreement of April 20, 1956, in consideration of the receipt of $8,500 and certain further undertakings by the respondent as set out therein. About two years later, to wit, on September 4, 1959, George Byles instituted, as plaintiff, an action for an accounting against the respondent, as defendant, in the Supreme Court of Ontario, alleging that following the settlement of September 7, 1956 (Ex. R-9), the respondent had received monies, stocks and bonds with respect to the mining properties referred to in Exhibit R-9 and has failed to deliver to the plaintiff his just share thereof. The said action was settled out of court.

To conclude this preliminary summary, I should add that no further sale of any of the remaining properties was effected.

Before the end of 1956, however, the drilling carried out by the owners of the original discovery disclosed that it petered out about a foot below its surface. Nothing worthwhile was ever discovered on any of the mining properties which the partners had disposed of or on the mining claims which they retained, so the partners "dropped" their claims.

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For a more ready appreciation of the testimony of the respondent, which follows, I propose here to set out the respective submissions of counsel for the parties.

Counsel for the appellant, in support of what he termed his main submission, urged that the evidence offered by the respondent was inconsistent, vague, uncorroborated and insufficient to discharge the burden of establishing that he acquired the properties in issue as a result of or through *bona fide* prospecting efforts of himself or Mr. Byles. On the contrary, it is claimed that the respondent and his partner having learned of a copper strike in the Raglan Township, rushed into the area without any previous genuine prospecting and, relying solely on the strength of the said strike, proceeded to blanket the area. This was done by Mr. Byles staking all the unpatented properties which had not already been staked and the respondent acquiring the mining rights on as many privately owned properties as he could afford to buy and which ran in a north-easterly direction and as close as possible to the said strike. The purpose and intent of the respondent in doing so was not to discover or develop a mining property but to quickly dispose of his mining rights at a profit. Furthermore and most important, that any prospecting done by the aforesaid parties having taken place after the acquisition of the properties in issue the provisions of s. 83(2)(*a*) are consequently inapplicable.

In so far as the applicability of Section 83(3) is concerned, it was submitted that in order to obtain relief thereunder it would be necessary to establish that Mr. Byles prospected on the patented properties sold and the evidence establishes that he was only engaged in staking the unpatented properties.

Alternatively, even if the Court should find that the respondent were entitled to relief by reason of Section 83(3), such relief would not extend to the one-half interest in the partnership which the respondent acquired from Mr. Byles, as this arose not from prospecting but as a result of an independent agreement between the parties, which would render it taxable under ss. 3, 4 and 139(1)(*e*) of the Act.

As not infrequently happens in cases such as this, counsel for the respondent takes issue with the main submission of

counsel for the appellant on grounds diametrically opposed to those invoked by him. The case for the respondent may be briefly stated as follows:

(1) The appellant's main contention is unfounded in fact and in law, because the testimony of the respondent affords clear and uncontradicted evidence that the various efforts which he exercised in acquiring the properties in issue were the very things which constituted prospecting in the true sense of the term.[1]

(2) The appellant's alternative submission is equally unfounded, because the so-called independent agreement, which is dated September 7, 1956, was not, as alleged by the appellant, an agreement whereby the respondent acquired Mr. Byles' original half-interest in the partnership dated April 20, 1956, but an agreement between Mr. Byles and the respondent to divide the proceeds of those properties which had been disposed of six months previously; it did not change, in the slightest degree, the interest which the two parties originally held; it was merely an accounting of the proceeds thereof and has no bearing on the instant case.

(3) Alternatively, even if the respondent is taxable on the net profits realized by him of the Wheeler and Libby sales under ss. 3, 4 and 139(1)(*e*) of the Act, as claimed by the appellant, his reassessment of approximately $35,000 is excessive and unwarranted, because it fails to make proper allowance for the expenditures made by the respondent in acquiring the aforesaid mining claims, which exceeded $25,000 instead of $12,000 allowed by the appellant.

I might here add a few particulars to those already mentioned at page 7 *supra* as to the respondent's background. As appears by his income tax return, in 1956 he was a self-

[1] The Court was referred to various dictionaries re the meaning of "prospector". These definitions are naturally very much the same. According to *The Oxford Universal Dictionary*, the word "prospect" is of American origin and "to prospect" means "to explore a region for gold or other minerals." *Webster's Third New International Dictionary* defines "prospecting" as "exploring an area for mineral deposits, to make preliminary developments" and "to explore" means "to seek for or after; strive to attain by search, to search through or into."

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employed restaurateur in Toronto, where he resided. In his examination in chief, he stated that he was 38 years old, that in 1947 he became a school-teacher and that in the same year he took out his first mining licence and visited during summer vacations several mining areas particularly in Ontario. At university he had taken a course in geology and prior to 1956 he had, on one occasion, staked a mining property in the Red Lake district.

The Byles-Karfilis agreement Exhibit R-2 *supra*, in which Mr. Byles is described as "Party of the First Part" and the respondent as "Party of the Second Part", is short and reads as follows:—

> Whereas the Party of the First Part and the Party of the Second Part are desirous of forming a partnership for the purpose of obtaining interests in mining claims and properties.
>
> Witnesseth that in consideration of the mutual premises herein, the Party of the First Part hereby agrees to devote his full working time commencing the 1st of May 1956 to the exploration of mining properties and obtaining mining rights on these properties by the staking of claims, purchasing of claims or any other manner whatsoever.
>
> All mining rights to property and any other interests obtained during the term of this agreement or subsequent thereto but directly or indirectly a result of activities pursuant to this agreement shall be the property of both parties as tenants in common, each owning an undivided one-half interest in same and any monies made from the disposal of such interests shall be split equally between each party
>
> The Party of the Second Part will provide the sum of $500 per month by the 1st of each and every month during the term of this agreement for the use of the Party of the First Part provided that the Party of the First Part is actively carrying out the terms of this agreement.
>
> This agreement shall extend to the end of the normal prospecting season.

The witness was asked:

> Q What was your intention of the activity that should be carried out under the terms of that agreement?

The question was objected to and the objection reserved. The witness answered:

> . . . . I felt I could learn a great deal from him and I also saw an opportunity of getting involved in prospecting in a very interesting way The only way Byles could do this, he said, was I could grubstake—it was his idea that we enter into a grubstake agreement whereby I would provide him with a monthly payment of $500 per month and he was to devote his full time to prospecting anywhere that he saw fit or anywhere that I thought would be interesting, we would work together on it, the agreement that we have a sharing on an equal basis 50-50 on the things that he himself would find I told him at that time that I was interested in

prospecting on my own also and that he would not—or at least I thought I had made it clear to him at that time that I was free to enter into any other grubstake agreement with anyone else that I wished and I was also free to prospect on my own and he would not share in what I had prospected, but I would share into what he had prospected because I was paying him $500 per month to do this, sir.

Q. When did you first hear of the Raglan property?

A. I don't remember the exact date but I think it was in the early spring of 1956. By this time I had become very interested in the mining business, very interested in prospecting, and I had made—I was going to say many contacts but that would be exaggerating—I had made several contacts in the mining business with mining engineers, mining geologists and prospectors. One of my acquaintances was Mr. Murray Watts who is one of the Canadian foremost geologists and explorers and he is a friend of mine. He had told me that there were some interesting developments happening in Raglan Township. He said that he thought the area would be a great prospecting area and that he had—his company had discovered what he thought at that time was a major copper find He told me where the area was. By this time it was general knowledge I guess, or most of the good prospectors knew about it, and I am not sure whether Byles knew about it at the same time or whether I had told Byles or just what happened, but our attention was focussed on Raglan Township. My first job was to get maps of the area, geological maps I went up to the Department of Mines and got a geological map of Raglan Township, Lyndock Township, and I had two other townships. We looked at the maps, we looked at the geology of the maps. We found out what was open for staking and what was not open for staking.

Asked to clarify who he meant by "we", the witness said:—

Well, I suppose initially I would say that myself. Subsequently I think I would likely have had discussions with Mr. Byles and other geologists in the area who had been working up there. And then I went up on the property and I was one of the people to see the original discovery and when I walked on the original discovery, my lord, it really looked very interesting. They had stripped the area and it was—on surface it appeared like a real big find.

HIS LORDSHIP: Had anything been done on it?

A. Yes, but at the time they had stripped the overburden on it, they took the trees down and the earth on top and exposed the strike.

Q. Where was this in relation to the claims you purchased?

A. That was in Raglan Township near a place called Heart Lake. We discussed with the geologist there which way the strike was going and I discovered that if there were going to be any other finds in the area the strike was going in an easterly, north-easterly direction, there was a fault that appeared on the map going from Raglan Township across to Lyndock Township.

And this according to Watts and according to other mining men, they said there could be something interesting somewhere along the line.

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. . . . I wanted to find out just what structure there, through the copper strike, what kind of rock bore this copper, whether there were any quartz in it So on looking at the map we found there was some area open and I instructed Byles to stake the open property, it was in the tip of Lyndock Township in there and we staked and I went up there and staked myself, I think I staked one or two claims myself in the 29 claims that we staked and that was the only property that was open for staking. Following that I went up there at least, I flew up there at least eight times that I can remember, and I drove out there practically every day and spent my weekends there and spent weeks there. I travelled the area generally myself. I went on these farmers' properties, I wanted to find out just what the area was like. It is a very hilly country. And I told them what I was looking for and I found out that they had owned their property and I told them that I was interested in prospecting their farms. They were very good about it, they brought me samples of rocks that they had found on their property and that area, my lord, is a great iron ore, great iron ore deposits was in that area,—I was not concerned in iron ore deposits, we were interested in copper—a great many rock samples bearing iron ore When I finished prospecting I decided on certain properties that I liked I based my decision on the fact that I thought this would be the best place to prospect, and the other factor was the closeness to the Raglan strike.

Q Well, now, Mr. Karfilis, when you went on these properties did you have permission to go on these properties?

A Well, not the first time I went on I don't think I did. I don't think I asked for any permission. Subsequently I think, yes, we did. If we bumped into the farmer we would ask him if we could go on the property and just if he could see a rock sample, or our first question to them was "Are there any rock exposures on your property" and if there were we would—

Q. Who is "we"?

A Well, again I am talking of myself. On many occasions I had other prospectors with me and actually just day labourers that would help me pick some of these rocks up. We had a couple of pick and shovel men.

Q Who were some of these prospectors you had?

A. Well, George Byles was one of them, he came on with me on this property. Mintern was another. I guess those are the only ones that I can think of right now. Mr. Montgomery was with me one time

Q. Why did Mr. Montgomery come up with you?

A. After I decided, when there was certain (ones) that I wanted, I would suggest to Mr. Montgomery that we option these things on an option basis from the farmers and Mr. Montgomery was there to draw up the necessary papers.

Q. I show you an agreement dated July 19, 1956, between Arthur Liedtke and R S Montgomery. Can you identify that agreement?

A. Yes, I can.

Q. What is that agreement?

A. Arthur Liedtke was one of the farmers up there who owned lot 32 in concession 7 and part of lot 35 in concession 8, and we agreed to

give Mr. Liedtke $125 for an option upon signing and then a percentage of the mine if and when it was found, I think.

Q. Is that agreement typical?

A. Yes.

Q. Of the type of agreement that you got from any farmer?

A. Yes, they were all the same.

Q The agreement says that the party of the second part is R. S. Montgomery as trustee Why were these agreements taken in the name of R. S Montgomery as trustee?

A. Well, that is to make it—to make it a little easier to process the things through. I would not be around and Mr. Montgomery was, I would be out in the bush, and I wanted him to be able do that.

Q. Who was Mr. Montgomery a trustee for?

A. He was my trustee.

Q. He was your trustee?

A. Yes.

Q. Exclusively your trustee?

A. Yes.

The witness was asked to file as Exhibit R-4 a sketch of all the properties acquired which the witness thought consisted of 150 claims but he was not sure.

Q. Have you any comment with respect to why you acquired that many claims?

A. I could not say. I just wanted to protect what I thought was the strike, take the strike area. On the claims that we staked I thought these were the—and they happened to be at the end, at the very end of the find, I thought they were the best bet for prospecting. There was a great deal of exposed rock on them.

Q. Now you finally acquired all these claims. What did you do with the claims once you had them?

A. Well, I—by this time the area became a very exciting area in the mining community. Once it became known that I had acquired these properties I had a great many people that contacted me. So I decided to sit on them for a while before I made any move. I went up—

Q. Excuse me, you say they contacted you?

A. Yes.

Q. Did you contact them?

A. No, I contacted no one

Q. O.K.

A. I decided not to deal with these claims immediately. I thought we were millionaires at the time, that the property looked very exciting. So I picked what I thought were the very best prospects and we did a considerable amount of trenching and grab sampling and essaying over the whole area actually, and Mining Corporation—I decided to have a holiday, as a matter of fact, I left

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Toronto and I went up north of Haileybury, my wife was expecting at the time, and they found where I was. The Mining Corporation of Canada phoned me, Noranda group phoned me, and a great many of the people interested in mining business tried to get some of these properties for the companies. And do you want me to go on, sir?

Q. Please.

A I finally decided to make a deal with Mr. Wheeler whom I happened to—I am not sure whether—where and how I first met him, whether I met him in a business way or whether I met him on the street. Mr. Manley was acting for him and they took me to dinner in the old club One-Two but I—

The witness described how, on July 17, he had agreed with Wheeler to sell him the 29 claims referred to in Exhibit R-6. The latter's lawyer dictated the terms of the agreement to the respondent, who wrote them by hand, whereupon the parties affixed their signatures.

What has been referred to as "the Rowan" or "the Libby" sale was briefly dealt with.

Q. Now, going on from the Wheeler transaction did you make any further transactions with respect to these claims?

A. Yes, I did I met Arthur White who was then controlling a company called Rowan Consolidated Mines. I agreed to sell them, I think it was 30 but I am not sure of the number of claims, for $7,500

Q. I produce an agreement which is dated the blank day of August 1956 between James Karfilis, Libby Investments Limited and Robert Stanley Montgomery. Can you identify that agreement?

A. Yes, sir This was the agreement that we entered into in our deal with Rowan Consolidated.

The witness then stated he did not enter into any other transactions with respect to the properties in question.

The witness described how his disagreements with Byles arose and how they were settled. See Exhibits R-9 and R-10.

Libby Investments Limited was a subsidiary of Rowan Consolidated and, as appears by Exhibit R-7, it provided for a payment of $2,500, which was acknowledged, and a further payment of $5,000 on subsequent dates and 100 shares of Rowan Consolidated Mines Limited.

By a later agreement dated October 9, 1956 (Ex. R-8), to which the respondent, the Libby Investments company and the Rowan company were parties, the respondent acknowledged receipt of $5,000 and waived any claim in respect of the Rowan shares.

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On cross-examination the witness was asked if his idea in entering the mining field was to pick up some claims and turn them over at a profit.

A. I don't think so, sir. I think if I had found a mine—I could have sold the claims, the best claims in the area for a lot more money than I did . . . . I could have made a lot more money than I did. Now, my intention was if I could find a mine, fine, but I had no intention, I did not go into this thing with the idea that we will go in there and find and sell That was not my intention.

Q. Well, did you have the money yourself to finance a mine or anything of that nature?

A No, I don't think anybody has enough money to really finance a mine Once the discovery is made the financing is not a difficult matter, you soon have the money.

Q What did you do with the proceeds of the sale to Mr. Wheeler under the agreement?

A. Well, we used part of that money to pay the expenses we were involved in. We used part of that money for work that we did on some of the property that we were going to keep ourselves

Q. Well, you spent quite substantial amounts, didn't you?

A. Yes.

Q On developing your own property?

A. That is right, sir.

Q. What work did you do?

A. Well, the first job was to bare, to take the overburden from the area that we prospected, that was the job, was to trench and get down to the rock surface.

Q Who was working with you when you were doing this?

A. Well, this went on over a period of time I had people from the area. I had farmers, I had a geologist up there, Byles was up there.

Q. You were doing some fairly intensive work and used this money that you would get from the sale of parts of the claims to finance it, is that right?

A Well, we did some work prior to this too.

Q But I am talking about subsequently?

A. Yes, that is what it was.

Q . . . you paid some couple of hundred dollars or so for day labour and you had your expenses of getting you back and forth to this property And you paid a Mr. Bryson $1,275, is that right?

A. Yes

Q And Mintern $1,000?

A Yes, sir

Q And Thompson $725 And they were all doing this work that you have just been referring to, were they?

A. That is correct

Q You are saying that they worked on these claims that you had kept and had not sold?

A. That is correct, yes.

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The witness stated that staking was carried out before he "went and negotiated the purchase".

Q. And I don't suppose you would waste any time, would you?

A. No, we would do it pretty quickly.

Q. Sure. So would you say within a week or two of the time you had picked up these options that you had done the staking?

A. Yes, I think that would be fair to say.

Q. Now, then, your agreement with Byles you said I think at the time that you entered into the agreement your idea was that he would be going out as a prospector and finding, using his own initiative, and I suppose doing geological work, and you hoped that he would hit on prospects somewhere and stake some claims?

A. Yes

Q. But you say that that was not covered by this transaction because all you did in this transaction was to go where you told him to go and stake the claims that you told him to stake, is that what your position is?

A. Well, no, I am not certain who heard about the strike . . . . I could not say, Mr. Wright, whether I heard about the strike first or whether Mr Byles heard about the strike first.

The respondent was questioned as to what, in his opinion, constituted prospecting.

Q. . . . . Now, then, from your knowledge would you agree with me that prospecting is the search for valuable mining occurrences?

A. I agree, sir.

Q. And what that involves is looking for a property, is that right?

A. That is correct, sir.

Q. And taking specimens, is that right?

A. Yes.

Q. And maybe making certain tests on the specimens and then assaying tests and things of that sort?

A. Yes.

Q. And then you also have the possibility of geochemical prospecting?

A. That is right.

Q. I think you can do that without a magnetometer, or do without electrical methods of testing resistivity and activity and by means of geochemical methods?

A. That is right

Q. So this is all related to looking for mineral deposits?

A. Yes.

Q. Now, would it be right to say that in many cases, or should I say there are probably two particular ways of acquiring mineral properties and one is first of all for a prospector to go out in an area which he may have decided he wants to go and prospect and examine the area?

A. Yes.

Q. And he combs over that area having no idea whether there is anything there or not and hits his axe on the rock and picks samples off the rocks, he decides he may have come across something that looks interesting?[1]

A Well, before the prospector decides that that is the area he is going to investigate the land this is information of something interesting.

Q And I appreciate he has some idea which takes him to this area he wants to look into?

A. Yes, sir.

Q. And he may just have a geological map and he may decide that looks interesting and—

A. Or throughout similar areas of the same character.

Q. That is one way to go about acquiring mining property, is that correct?

A. That is correct, sir.

Q And then the other way in which it can be done is where there has been a strike in some particular area and then we have what is a sort of rush, isn't it?

A That is correct, sir.

Q Into that area?

A That is correct.

Q And in that case the practice is not so much to go in but to look for claims that are open in that area, stake them as fast as you can and to look afterwards to see if you have got anything, is that right?

A. That is true, yes.

Q And I think that sort of thing is called blanket staking? And he just goes into an area and covers a whole area that is available willy-nilly regardless of what he might find there?

A. That is true.

Q. And what you do I suppose, if this is referred to as a hot area or I think you used—it has been used, I think the expression "a hot area"?

A. Yes.

Q Yes, and the problem that you may encounter if you find that some of these properties are patented properties is that instead of staking you have to purchase?

A. That is correct.

Q. The rights from the original owner?

A. Correct, sir.

Q. So that what you are primarily concerned with in a hot area is getting the best claims you can and should I say getting whatever claims you can as close as possible to the original strike, right?

---

[1] Although the witness agreed that various acts are involved in prospecting, he made no attempt to indicate whether and when any of these acts were carried out particularly on the properties sold to Wheeler and Libby—which, as appears later in the evidence, he sold within a fortnight of when he first saw them.

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A. That is a factor, sir.

Q And otherwise if you take the time to look carefully at it first you are liable to find somebody else goes in and acquires it ahead of you?

A. That is true.

Q And it might quite often be too late, once you do the prospecting. You could then find, and once you want an agreement, the owner turns around and says, "Well, I think it looks much more interesting" and he wants a high price or else somebody else has already bought it

A. That is right, sir.

Q. Now, in connection with your arrangement with Mr. Byles he was a completely—to use a little legal word and since you are a law student, we can agree that he was an independent contractor, can we?

A. Yes, sir

Q. And then you didn't control his hours of work or anything of that nature?

A. No, sir

Counsel for the appellant directed the attention of the witness to a reference in a publication entitled "PROSPECTING IN CANADA" by A. H. Lang and stated that he was going to read it to the witness and ask him if there was anything in it which he would like to comment upon or disagree with. The following extract was then read:—

Prospectors and others often rush to areas where new discoveries are reported This is understandable, but unless one "gets in on the ground floor" he will probably find that the area is fully staked for a long way around the discovery. Rushes generally result in staking bees participated in by persons who are merely speculators who hope to sell their claims promptly, as well as by prospectors who feel that they have to stake first and investigate afterwards for fear there will be no open ground left. Latecomers have to prospect on the fringes of the district or wait for claims to lapse. These are not always disadvantages, because discoveries may be made miles away from the original one, or on hurriedly-prospected claims that are abandoned. However, careful consideration should be given before joining the more popular rushes, because so many persons participate, transportation and other services may be taxed to the limit, and many of the early reports may be exaggerated.

Counsel asked:

Does that sound like a fair statement to you?

A. I think that is a fair statement, sir.

The witness added:

I will draw this to your attention there. Mr. Wright, the statement where they said "unless—" your first two lines there which—

Q Yes, "unless one gets in on the ground floor"?

A. Yes, ... In our particular case we were the first ones on the scene.

Q. You felt you were in on the ground floor?

A. Well, we were opening up the area, more so than anyone else I think.

The question was asked:

How close were these claims that you staked to the original discovery?

A. I think we had some claims less than a half a mile, ...

Q. You came in and you purchased your claims as close as you could get it?

A. Yes.

Q To the original find?

A. Yes, that is true.

Q Now, going back a little bit, this whole expedition of yours in that area resulted from your hearing of this copper discovery at Raglan, is that right?

A. Yes, sir.

Q. And as a matter of fact you ultimately abandoned the whole project yourself because you heard that the Raglan find didn't turn out to be anything after all, I think you told his lordship that, didn't you?

A. Yes, but there was other work in the area around here up to the west, on which claims were the ones on which they also did a considerable amount of drilling on the property and the area we abandoned we eventually abandoned after the results became known.

Q. But you told his lordship . . . . that the Raglan discovery proved the find was only about 12 inches deep after considerable drilling they found it was not commercial copper and we dropped our claims, is that right?

A. That is correct, sir.

Q. You referred to a gamble, you didn't base your decision on what your actual findings were but rather on what was found by the people that originally interested you in the area?

A. Well, no, sir, I made my own decision. In other words, I don't want to leave you with the impression we dropped that because Raglan became—I suppose we stopped work because economically it proved it would not be worth the gamble to drill our property because of the drillholes that surrounded our property and the best geological advice impelled me to say that if we drilled the chance of finding anything would be very small. So I dropped it on that basis.

Q. Now, you took the so-called options such as Exhibit R-3 at the time because you were worried that if you didn't take them somebody else could take them, is that right?

A. I didn't consider that. I just wanted to get what I thought we could get. I was not in competition with any one else at the time we went in there.

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Q. No, but the reason you picked them up at the time you did was because you were aware that if you didn't somebody else could get them?

A. I think that was one of the factors. I think the other factor was we looked at the area we wanted to get before we got it. We didn't just go in there and blanket the area with—claims, because we had to pay and I didn't have the money at the time. You had to pay a certain amount of money for these, the tax. So we wanted to be sure that what we did get was worth getting.

Q. . . . . I will ask you if you were asked this question and made this answer—it is on page 11:

Mr. WRIGHT (question 105—on discovery):

Why did you bother at this stage getting options? What was new that you felt that rather than just go on this laissez faire approach you needed to have them tie it up under an option?

A. Well, if I did not acquire them someone else could have come in and got them.

Q. Now, then you heard about this Raglan find and you went up and you told his lordship earlier you went up and you saw where the original find was and you examined the way they had taken off the overburden and so on and then I think you phoned Byles and you said, "Get down in Raglan it looks pretty hot". Is that right?

A. Well, I am not sure of that point, Mr. Wright. I don't know whether I called Byles, whether he knew about it or not, I am not sure.

Q No, between the two of you you found that some land was open for staking and others was patented property?

A. Yes, sir.

Q. So on the property that was open for staking you called Byles and he came in and you showed him where the property was and you staked that?

A. Yes

Q. Rather he staked, you didn't do any staking there?

A. I think I staked one or two—I think I staked at least one claim or two claims of that there.

Q. I will ask you if you were asked this question and made this answer—it is question 41 to 43, my lord, at page seven—

"You say you went up first of all yourself and saw the property where the original find was, is that right?

A. Right.

Q. Then did you go up with Byles following that?

A. Yes. After my first visit we ascertained that the area—there was some land that was open for staking and other land that we looked at was patented property.

Q. Yes?

A. So on the property that was open for staking I called Byles He came in. I showed him where the property was and we staked that—rather, he staked it; I did not do any staking there."

Q. Would your memory have been better when you were examined for discovery in October or now, Mr. Karfilis?

A Well, I have had an opportunity of going over this thing many times, Mr. Wright.

I wish to add that I came across some corroborative evidence as to his staking of one claim and I am prepared to accept his statement that he did so. It was not, however, among those staked by Mr. Byles but the one and only unpatented claim included in the group of 29 sold to Mr. Wheeler. I say that because of item *c*) on page 3 of Exhibit R-6, which reads as follows:

> *c*) 1 claim staked by JK.
> W. ½ of Lot 27 Con VII
>
> (I think "JK" signifies James Karfilis, the respondent)

The said claim may be seen on Exhibit R-4 and is located between the "East ½ of Lot 27, Concession VII" which the respondent bought from Henry Bardofsky and "Lot 26, Concession VII" acquired from Edward Keller (referred to in Exhibit R-6 as Items *d*) and *b*) respectively). I should add that although I think that the respondent staked the aforesaid patented claim nowhere in the evidence is there any suggestion that he prospected it. It is clear, I think, and counsel agreed, that staking alone does not constitute prospecting. It follows therefore that the $1,000 which the respondent received for this one claim is not subject to exemption under Section 83.

Q Now, would it be fair then to say that you really followed the same procedure in connection with the patented properties as in the properties that had to be staked, except that you could not stake them so you purchased them?

A. Yes, sir

Asked if what he did would be called "blanket staking", he answered:

No, it is not true because there was property available just below the fault that we didn't bother going to at all. In fact, there was property there surrounding the find that was available here that we did not take.

Q. When I said "blanket" you were betting you had claims on the location and following the location of the strike, is that right?

A. Yes, sir.

Q. Now, would it be fair to say that by far the larger part of the work that you did on these properties was done after they had been staked and purchased?

A In the overall picture I don't think so, Mr. Wright. I think we spent more money deciding on what we were going to take than

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what we spent afterwards. By the time we were really able to work it didn't take long to come to the conclusion that maybe this is not as good an area as we thought.

Q. You don't have any written record or anything to indicate what work was done prior to—

A. That is correct.

Q. —prior to the purchase and what work was done afterwards?

A. That is true

Q. And you agreed with me earlier that it looked like common sense to tie the property up first and do your exploratory work afterwards, didn't you?

A. Yes, I did with this qualification that we knew what area we were after and we did go on the property before we made any deal with any of the farmers. We looked at rocks.

Q. You didn't do anything, you didn't go on the property, you told Byles I think you said to just go up and stake those properties right away?

A Yes, the property that was open for staking we thought we would stake it and get it.

Q And you didn't do any prospecting at all?

A. No, that was open for staking and so we staked it. It was in the general area of the strike so—

Q. . . . . then would it be fair to say that—what brought you up into this area was this Raglan discovery?

A. Yes, that would be fair to say, sir.

Q. And that was the reason that you were in there looking for these claims?

A. That is true, yes.

Q. And it was really the thing that motivated you in acquiring the claims?

A. That is true, sir, that would be one of the factors.

Q. Well, it was the major factor?

A. It was the major factor getting me interested in the area, yes

The witness was asked if he had any reports or maps or anything of that kind showing the work that he had done in the area at any time.

A. I did have, Mr. Wright, but I don't know where they are.

Q. There is nothing available now that we can look at today?

A. No, sir.

Q. . . . . but there is no written evidence of any kind to show what work was done, is that right?

A. No, what happened to those is either Rowan Consolidated or Van Doo or somebody did take my reports and I just never got them back.

Q. Yes. And you don't even have any invoices for the transportation expenses that you had up to the property or anything like that?

A. No, sir, I do not.

Q Or any receipts from—

A. No.

Q. Any of these prospectors?

A No, sir, I do not.

Q. For payment, and actually three of the prospectors, Mintern and two others, Thompson I think was one, I have forgotten the name of the other, you didn't pay them until 1957?

A That is true, sir.

Q. Now, then, when you refer to these agreements that you obtained as options would I be right in saying that—his lordship can look at them anyway—but really what they were for is that you become the grantee of the mineral rights in connection with the property which you took these so-called options on?

A. Yes, an option to become the grantee of that property.

Q. . . . . I am talking about your agreement with the different land owners, I understand that for the type of agreement that you have, that terminology refers to it as an option but all I am getting at is it is really not an option, it gives you the exclusive and sole right to set up mining operations and to extract ore and you agree to pay so much a ton for the ore.

A But it also says under that agreement, Mr. Wright, it gives us a considerable time to decide whether or not we will make payments on those claims from the time—in other words, it gives us an opportunity to go in there and do any other further work we wanted to and then after a time we found there was nothing there, the moment we stopped payment the option ceased.

Q Well, could I have Exhibit R-3, please, just so we will be clear.

A. . . . . here is one clause, Mr. Wright:

"Provided that the optionee shall—"

Q. This is on page what?

A. Page three of the agreement. This would involve a lot of money, and on this one was $125.

"Provided that the optionee shall pay the municipal taxes commencing next January 1st on the said property during the time he desires to retain the exclusive mineral rights on said property and—"

Q. There you are right there, you had the exclusive mineral rights?

A. Yes.

> "and upon ceasing to pay the municipal taxes the optionee's interest in the said mineral rights shall cease and no further claims may be made by either party under this agreement."

So actually it gave us a year to decide whether or not there was anything in the property.[1]

---

[1] This, no doubt, refers to the 40 days of work required to be performed by the holder of a mining claim within a year of its registration and during four consecutive years thereafter to maintain the owner's title in good standing, as prescribed by the *Mining Act*, R.S.O. 1950, c. 236, s. 80.

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Q. Well, all I was getting at is that I would think under an option you would make a paymennt of $20 and there is an option to purchase the mineral rights, but that is not the way this reads, but this was a payment by you and you had the mineral rights and you simply paid a royalty when you took the ore out of the ground, that is all. I don't think there is anything unusual or anything about it, but I just want to make it clear that it is not an option as I think most people would think of it as an option.

A. May I—it was the intention, Mr. Wright, when we decided to buy this property, we wanted to get as long a time as we could to investigate this property, and upon ceasing, if we didn't pay the taxes, Mr. Montgomery, my solicitor, said that will give us a year in which to decide, and I don't know anything about it. I accepted his advice on it.

Q. You just lost the mineral rights if you didn't pay the taxes. In the meantime you had them?

A. My understanding is we dropped them at that time.

Q. That may be the terminology in the trade, that is all

A. Yes.

Q. For instance here is a receipt. Before you got those formal agreements my understanding is that you went around and took informal agreements and the different landowners signed a receipt?

A. Yes, I did, sir.

Q And I am showing you one dated June 29th, 1956, and that is one such, is it?

A Yes, that is one such.

Q. And it says:

"Received $100 for full payment on mining rights for Carl Klott's two lots".

A. Yes.

The witness stated that there were other similar agreements. One of these was that of Mr. Shutte, who decided to sign an agreement only after his lawyer had approved of it (cf. Ex. A-3), in which he was called "the vendor" and Mr. Montgomery, acting as trustee for the respondent, was called "the purchaser".

Another agreement was that of Otto Liedtke, who signed it on July 23, 1956, in which he is called "the grantor" and Robert S. Montgomery is called "the grantee" (see Ex. A-5).

I might add that Mr. Henry O. Flequel signed an amended agreement on July 6, 1956 (Ex. A-4), in which the parties reverted to the form used in the majority of cases

and where he is referred to as optionor and Robert S. Montgomery as optionee.

The witness was asked to file as Exhibit A-6 a list of all the patented properties which he acquired, i.e. over 20 transactions, containing the date of purchase, the date of registration, a description of the properties and the price which he paid. The earliest purchase by the respondent occurred on June 28, 1956, and the last one, which was the Liedtke property, on July 19, 1956. Thirteen of the transactions were registered on July 6, five on July 12 and five on July 30, 1956.

Q. Now, then, it is a fact, isn't it, Mr Karfilis, that you sold these properties, some of them off to Mr. Wheeler, before you had final agreements from the landowners in some cases? I mean you had original agreements, as I understand it, but then you found they were not too good, some of them didn't have bars of dower and so on and you got new ones and you obtained a number of new ones that you sold after you sold them to Wheeler?

A. Yes, there were some aspects of it that we had not completed right.

Q. And you sold to Wheeler within days or weeks of the time when you were first up on the property?

A. Well, not days, I think weeks would be—

Q. Two weeks maybe. It was some time in the middle of July that you sold to him?

A. Yes.

Re-examined by Mr. Cassels, the witness stated that in saying that he had acquired 150 claims from various property owners he was guessing at the figure. Mr. Wright, counsel for the appellant, said:

Is the witness saying that he made a mistake, that there were 60 claims instead of 150?

THE WITNESS:

Well, 60, sir, plus, that would make it 89, or approximately.

Q. 89?

A. I am not sure of that figure, sir.

Q. Well, it will be closer than the other?

On resumption of the hearing Mr. Cassels asked the respondent the following question:

Am I correct in my understanding then that you did not bother to tie up the land owners at all until you had done your investiga-

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tion and found what you thought was some favourable indication on these properties.

A. Yes.

Mr. Robert Stanley Montgomery, whose evidence was very brief, stated that he went up to the Raglan Township mining claims area on several occasions to assist the respondent in securing valid title to the patented properties he acquired. It was in the month of July that he went for the first time. The second occasion was when the Shutte agreement was signed at the office of Mr. James Maloney because Mr. Shutte wanted to have his own attorney examine the document which Mr. Montgomery had prepared. The document which was signed is dated at Renfrew July 6, 1956 (Ex. A-3). The witness noted that the respondent obviously knew his way around the country, which was very hilly, and he introduced him to a number of the local people with whom he was dealing, went up to assist the respondent in negotiating agreements with local landowners and particularly those who wished the documents be drawn by their own solicitors, as was the case with Mr. Shutte.

He did not remember how many agreements he negotiated but there was a very considerable number. He identified himself as the R. S. Montgomery named in the agreements as trustee and stated that he was acting as trustee for the respondent and nobody else.

As I have already observed, the respondent possessed a dual quality: He was both a qualified prospector and grubstaker—and if the circumstances so warranted, was entitled to invoke both s-ss. (2)(*a*) and (3)(*a*) respectively of s. 83.

I think the applicability of s. 83(2)(*a*), wherein the respondent claims relief on the grounds that he acquired the properties as the result of his own prospecting efforts, may be decided on the facts.

In order to succeed under s. 83(2) the onus was on the respondent to establish that the mining properties in question were acquired by him as a result of his efforts as a prospector. This, in my opinion, the respondent did not do, because he failed to establish to my satisfaction that

a) he had expended efforts as a *prospector* in relation to the mining properties in question *before he acquired them*; or

b) he acquired such properties "as a result of" any such efforts.

I have already reviewed the relevant evidence at length and, in my view, it is sufficient to say that such evidence did not establish the probability of either of these facts being true.

Now, with respect to Section 83(3)(*a*), which envisages the case where, such as in the instant one, the respondent, as a grubstaker or the person who financed the venture, claimed relief by reason of the prospecting done by a prospector under an arrangement made with him before prospecting and also by reason of the existence of an employer-employee relationship between the grubstaker and the prospector, in this case the prospector being Mr. Byles. What I have said *mutatis mutandis* in respect of the inapplicability of Section 83(2)(*a*) applies. It is thus incumbent on the respondent to establish that Mr. Byles, who was not called as a witness, carried out prospecting on the groups of patented claims in issue prior to their acquisition and that it was through these prospecting efforts that the respondent acquired the said claims.

In my opinion, the respondent has failed to put evidence before the Court of prospecting by Mr. Byles sufficient to discharge such onus and therefore failed to establish that he is entitled to invoke the aforesaid subsections. A further reason for the inapplicability of Section 83(3) is to be found in the admission by the respondent that no employer-employee relationship existed between himself and Mr. Byles.

In view of the above-mentioned holding, it is unnecessary for me to adjudicate on the appellant's alternative argument referred to on page 136 herein.

Subject to the under-mentioned adjudication in respect of the respondent's alternative submission, the appeal is maintained in part.

There remains for consideration the respondent's alternative submission, namely, that even if the profits made by the respondent were in no respect exempt in virtue of Section 83 but taxable under Section 139(1)(*e*) the re-

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spondent is entitled to deduct some additional expenses incurred in the earning of the said profits which the appellant failed to take into account when he added $35,164.17 to the respondent's otherwise taxable income for his taxation year 1956.

This aspect of the case presents no difficulty because, as appears by the under-mentioned schedule which was delivered to the Court by counsel for the appellant, subject to a small amendment which I will refer to later, counsel for the parties agreed on the amount of expenditures incurred by the respondent, assuming that he was not entitled to any benefit under Section 83:

SCHEDULE TO REFLECT PROFITS REALIZED UPON PURCHASE AND SALE OF RAGLAN CLAIMS, ASSUMING THE RESPONDENT IS TAXABLE ON THE WHOLE PROFIT REALIZED

Proceeds of sale:	
(a) To Wheeler $29,000 cash	$ 29,000.00
To Wheeler 75,000 escrowed shares of Vandoo valued at $9,250	9,250 00
(b) To Rowan $7,500 cash	7,500.00
Total cash value of proceeds of sale	$ 45,750 00
Less cost of sales:	
Total expenses including $8,500 paid to Byles	25,739.94
Profit	$ 20,010 06

Counsel for the appellant declared that owing to an oversight he did not include under the title of "Cost of sales" 5,000 Vandoo shares the agreed value of which was $750. Consequently, after deduction of the said $750 the amount of the respondent's otherwise taxable income for 1956 amounts to $19,260.06 instead of $35,164.17 as assessed by the appellant. The respondent's alternative submission is justified.

The assessment will be referred back to the Minister for reassessment accordingly. As success is divided there will be no order as to costs.