BETWEEN:

NATHAN ROBINS .....APPELLANT;

AND

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

1962
Apr. 25

1963
Jan. 14

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 21(1), 139(1)(e)—Husband and wife—Agency—Money owing by husband to wife—Profit on real estate transaction by wife not attributal to husband—Observation on law of evidence in Province of Quebec—Section 21(1) applies to transfer of income producing property only and not to profit on real estate transaction—Appeal allowed.

Appellant, a resident of Quebec, in 1952 provided his wife with $6,900 to permit her participation in an attractive real estate investment. She became party to a partnership agreement which was entered into for the purchase of the property and paid her share of municipal and school taxes and real estate commission from her own funds and received her share of the proceeds of the sale of the property in 1954

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and retained it. Respondent assessed the appellant for the profit on the real estate transaction and taxed him accordingly, attributing such profit to him on the ground that his wife was only his agent in the undertaking and that the profit was taxable in his hands. The respondent also contended that s. 21(1) of the Act applied and that the tax on income derived from property which has been transferred from one spouse to another is assessable to the transferor. An appeal to the Income Tax Appeal Board was dismissed and a further appeal was taken to this Court.

The Court found that the money paid out by the appellant on behalf of his wife was money owing to her since their marriage contract entered into in 1948 by which he had obligated himself to supply furnishings up to a value of $10,000 for their house and which had been supplied by her and paid for by her from her own money.

Held: That the appeal must be allowed.

2. That the marriage contract together with certain invoices and a cancelled cheque indicating payment by the wife of furnishings which the taxpayer had undertaken to purchase under the marriage contract was documentary evidence sufficient to render probable the alleged loan from the wife to the husband and was a "commencement of proof in writing" which made it possible for the taxpayer to complete this proof by oral testimony.

3. That the wife did not act as the husband's agent or alter ego and that neither the source of the money used to effect the investment nor the advice and direction which the wife received from the appellant with respect to the property were factors which proved the appellant's position as principal in the venture.

4. That s. 21(1) of the Act does not apply in the circumstances as that section as well as sections 22 and 23 is designed to prevent avoidance of tax by transfer of income producing property to persons who are normally in close relationship with the transferor and relate to income from property only and do not refer to income from a business as in this case and s. 21(1) does not assist in determining if the profit from the real estate transaction is taxable as income of the appellant or of his wife.

APPEAL under the *Income Tax Act*.

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

Philip Vineberg, Q.C. for appellant.

John Cerini, Q.C. and *Paul Boivin, Q.C.* for respondent.

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

NOËL J. now (January 14, 1963) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1] dated November 29, 1960, dismissing the taxpayer's appeal from reassessments made upon him by

[1] 25 Tax A.B.C. 353.

the Minister increasing his declared income by an amount of $8,956.11 and $4,276.05 for the taxation years 1954 and 1955 respectively as profits resulting from the sale of his wife's interests in a real estate joint venture or partnership in which he had supplied his wife's equity.

The amounts added to the appellant's income are similar to those received by one of the other parties in the partnership, one Jacob B. Fisher which were held to be in *Jacob B. Fisher v. M.N.R.*[1] amounts received as income from a business as defined in s. 139(1)(*e*) of the *Income Tax Act*.

The appellant's appeal to the Tax Appeal Board was rejected, Mr. Fordham being of the opinion that the taxpayer was not allowed to establish by verbal evidence that the amount he supplied to his wife as her participation in the real estate partnership was owed her as a result of a verbal agreement which was alleged to have taken place shortly after their marriage whereby, although the taxpayer had in their marriage contract undertaken to supply household furniture and effects up to an amount of $10,000 and maintain such a value throughout their married life, his wife consented at the time to purchase such furniture and effects with her money as the taxpayer had no funds available at the time to do so, having just purchased a new business. It was indeed stated by both the taxpayer and his wife that the monies expended by the latter to purchase these furniture and effects were a loan which the husband had promised to repay as soon as he could.

An objection was entered by Counsel for the respondent to verbal proof of such a loan on the basis of article 1233 of the Civil Code of Quebec which requires that proof of all juridical acts must be made in writing unless they fall within one of the exceptions provided in the article. As Mr. Fordham held that the establishment of a loan did not fall within one of these exceptions, he disregarded the verbal evidence with respect to the alleged loan of funds for the purchase of furniture. On the other hand, as the taxpayer had supplied the money necessary to enable his wife to invest in her portion of the joint venture, the Minister treated the gain made from the real estate transaction as being income to the appellant rather than to his wife who was taken to be merely the taxpayer's agent or *alter ego*.

[1] 24 Tax A.B.C. 313.

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Mr. Fordham, in the above tax appeal decision, states that it was with some reluctance that he found that the reassessments forming the subject of this appeal had not been dislodged and that he should affirm them but that because of the requirement of article 1233 of the Civil Code of Quebec and its mandatory application he had no choice in the matter. He realized indeed that this would place a Quebec resident in a position different from that of a resident of Ontario for instance which has no such requirement as article 1233 C.C., and where such testimonial evidence of such facts is permissible, although the circumstances of each such resident's case may happen to be the same in any material respect. He added, and with reason, that such a situation would appear to be at variance with the fundamental rule mentioned by Viscount Haldane in *Minister of Finance v. Smith*[1]:

> Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the existence of taxation depend on the varying and divergent laws of the particular provinces.

From that decision, the appellant now appeals to this Court and he has the burden of establishing that there is error in fact or in law in the reassessments under appeal. cf. *M.N.R. v. Simpsons Limited*[2].

Before, however, reviewing the facts which gave rise to the present appeal, it may be helpful to deal at the outset with a submission made by Counsel for the respondent that as the appellant had transferred what was originally his land to his wife s. 21(1) of the *Income Tax Act* applied to the present case. This section reads as follows:

> 21. (1) Where a person has, on or after August 1, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall, during the lifetime of the transferor while he is resident in Canada and the transferee is his spouse, be deemed to be income of the transferor and not of the transferee.

It can be seen that should the above section apply, the income for a taxation year from the property transferred from husband to wife, as in this case, or from any property substituted therefor, is deemed to be the income of the husband (the transferor) and not of the wife (the transferee) and, of course, the word "deemed" in the above sec-

[1] [1927] A.C. 193 at 197. [2] [1953] Ex. C.R. 93.

tion has in many cases been held to be inflexible in its purport. cf. *Regina v. Norfolk*[1] and *Rogers v. McFarland*[2]. Indeed it does not merely create a rebuttable presumption, but an irrebuttable one, providing of course all the conditions mentioned in the section are met.

Section 21 as well as sections 22 and 23 are designed to prevent avoidance of tax by transfer of income producing property to persons who are normally in close relationship with the transferor. But what is deemed to be the income of the transferor, and this is clearly stated, is income from property only. Indeed there is no mention of income from a business such as we have here and, therefore, this section can be of no assistance in determining whether the business profit resulting from the real estate transactions is taxable as income of the appellant or of his wife. May I also add that there is no evidence, and I have gone through the transcript very thoroughly, that land belonging to the appellant was transferred to his wife. Indeed what the transcript discloses is that the husband forwarded a cheque in the amount of $6,900 to a Mr. Rozanski in trust, one of the co-partners of his wife, for her participation in the real estate partnership and this took place a few days after the partnership document was signed. What the appellant did do was to pay for his wife's equity in the joint venture and the property transferred was money and not land. This may be of some importance in dealing later in this judgment with the matter of a loan.

It follows that the only matter in issue here is therefore whether the Minister, with respect to this business profit was right in assessing the appellant instead of his wife. That question is to be answered by a consideration of all the facts and a determination as to whether the appellant's wife or himself were the real parties to the transactions which gave rise to the realized profits.

With this in mind it will now be convenient to consider the facts and exhibits produced at the hearing before the Tax Appeal Board and which by consent were produced in the present appeal.

On November 12, 1952, Messrs. James D. Raymond, Jacob B. Fisher, Moses Wigdor, Matus Rozanski and Dame Bina Sukiennik (Mrs. Robins, the taxpayer's wife) entered

[1] (1891) L.J.Q.B. 379 at 380.
[2] (1909) 19 O.L.R. 414 at 416, 418, 420.

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into a real estate partnership agreement for the purchase of subdivisions 220 to 229 inclusive and 349 to 371 inclusive of lot 366 of the Town of St-Michel which was effectively purchased by the partnership on November 14, 1952, (Exhibit R-1) for the sum of $31,229. The taxpayer supplied Mr. Rozanski in trust with a cheque dated November 17, 1952, in the amount of $6,900, which the taxpayer admitted was for his wife's participation in the partnership.

On August 3, 1953, due to an apparently founded suspicion that Messrs. Raymond and Rozanski had deceived the other partners, including Mr. Fisher and Mrs. Robins, in purchasing the property on behalf of the partnership in an amount much higher than its listing, the partnership was dissolved and the lots were partitioned between the parties, Mrs. Robins and Mr. Fisher receiving subdivisions 349 to 371 inclusive of original lot 366 on the official plan and book of records of the parish of Sault-au-Récollet, Ville St-Michel, P.Q., on a two-third/one-third basis respectively. On October 26, 1954, Mr. Fisher and Mrs. Robins sold the above lots (Exhibit A-4) to Messrs. E. Finestone, A. R. Isaacs, Elie M. Solomon and Moses Tupnik for the price of $45,705.60 of which $22,852 in cash and the balance payable in eighteen months and of which Mrs. Robins, after expenses, received two-thirds and Mr. Fisher one-third. The profit realized in this transaction totalled $13,232.16 of which $8,956.11 was received in 1954 and $4,276.05 in 1955. A cheque is attached to this Exhibit A-4 in the amount of $1,218.80 signed by Mrs. Robins, the taxpayer's wife and made out to the order of Capital Realties as payment in full for the real estate agent's commission on the sale of the land held jointly by both Mrs. Robins and Mr. Fisher.

School and municipal tax bills for the St-Michel property, Exhibit A-13, were sent to Mr. Jacob B. Fisher and Mrs. Nathan Robins and the latter signed a cheque dated November 11, 1954, for the sum of $1,213.12 for the payment of the above tax bills.

Mrs. Robins had some means, as evidenced by Exhibits A-5, A-6, A-7, and A-8 which are all written agreements dated January 30, 1948, whereby she sold a number of common and preferred shares in a company called Stuart Busby & Asgo Co., Limited, as well as a number of Dominion bonds, both of which she had inherited from a former husband and the sale price of which totalled $12,025. She also,

according to Exhibit A-11, which is a copy of her bank ledger from June 27, 1947, to April 29, 1949, had in her bank account amounts varying from $17.57 to $4,270.

The taxpayer's marriage contract with Mrs. Bina Sukiennik, wherein it is stated that the parties are separate as to property, is dated December 23, 1948, and comprises *inter alia* clauses 6-1 and 2 which read as follows:

(6) In consideration of the foregoing stipulations, and of the love and affection which the Party of the First Part (the husband) has for the Party of the Second Part (the wife), he does hereby settle upon, give and grant by way of donation "inter vivos" and irrevocably unto the Party of the Second Part (the wife) thereof accepting:

1. Articles of household furniture of a value of $10,000 which the Party of the First Part binds and obliges himself to pay to the Party of the Second Part at any time within thirty years from the date of the solemnization of the intended marriage for the purpose of furnishing their home, and he further binds and obliges himself to maintain and renew the same when necessary during the intended marriage, and the Party of the Second Part shall become absolute owner of the aforesaid effects and/or any replacements thereof as soon as and at the moment they are brought into the common domicile, subject to the joint use thereof by both parties thereto;

2. And the sum of $25,000 shall be paid to the Party of the Second Part during the intended marriage and at the option of the Party of the First Part either in cash or by "dation en paiement", of moveable or immoveable property.

It is suggested by the appellant that his wife had supplied furniture in an amount of approximately $10,000 of which documentary evidence in an amount of $5,463.58 was established. Indeed a cheque in the amount of $1,028.50 dated January 22, 1949, made to the order of Joe Brenner, was signed by Mrs. Robins. This was for the purchase of carpets which are now in the common domicile of the taxpayer and his wife. A floor lamp and shade, valued at $31.20, was bought by Mrs. Robins in 1949 as well as a long list of furnishings and furniture, on February 5, 1949, in an amount of $4,403.88. She, therefore, established by receipted invoices that she had purchased furniture in a total amount of $5,463.58, although, as we have seen, under the marriage contract, her husband, the taxpayer, was obligated to supply the funds necessary for the furnishing of the common domicile.

A letter dated June 12, 1956, addressed to the taxpayer and signed by Gregory Charlap, Advocate, was produced as

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Exhibit A-14 and Counsel for the respondent admitted that if Mr. Charlap was heard as a witness he would testify in accordance with this letter which reads as follows:

Mr. N. Robins,
1405 Maisonneuve St.,
Montreal, Que.

Dear Mr. Robins,

Referring to our telephone conversation, I hereby confirm that, in the fall of 1952, you consulted me in connection with a proposed purchase of land by your wife.

At the time you explained to me that you were indebted to your wife for monies which she laid out on your behalf out of her own personal funds in connection with the furnishing of your home and that you were prepared to repay to her the sum of, approximately, $10,000.

I advised you that you could effect such repayment by issuing your personal cheque to the order of the Vendors of the land she was buying, for her account and on her behalf, it being obvious that the payment was so being made, in view of the partnership agreement between your wife and her associates, in connection with the purchase of the land in question, which I myself drew up prior to our consultation.

Should you require any further information, kindly do not hesitate to call upon me.

Yours very truly,
Gregory Charlap.

In addition to the above documentary evidence, Mr. J. B. Fisher, Mrs. N. Robins and Mr. Robins, the taxpayer, all testified before the Tax Appeal Board.

Mr. Fisher, the taxpayer's auditor, stated that he came into the joint venture on the invitation of Mr. Robins in whom he had a great deal of faith and, as he repeatedly said, because of Mr. Robins; that the latter was associating himself with a number of people, two of whom were James Raymond and a Mr. Rozanski. The latter as well as the taxpayer and Mr. Fisher became interested in a company called Carnival Amusements which purchased a number of lots situated alongside the lots purchased by the partnership in which Mr. Fisher, Mr. Raymond, Mr. Rozanski and Mrs. Robins and others became interested. The only transaction involved in this appeal is the one in which Mrs. Robins was involved and not the Carnival Amusements Company which is mentioned here merely to clarify some parts of the evidence which otherwise would be confused. When Mr. Fisher and Mrs. Robins started suspecting that their partners Raymond and Rozanski had deceived them on the price of the lots purchased by the partnership, Fisher states that he came to Mr. Robins and began to go over a

lot of the information he had and as he said, "We reviewed our transaction with this Mr. Raymond and Mr. Rozanski when information was received to the effect that the seller of the lots to the partnership could not be identified." He added that, "I took the information to Mr. Robins and he was upset, highly upset to say the least because he felt perhaps that I was implying some reflection on his own integrity because there seemed to be such an excessive difference." He was here referring to the price paid by the partnership and that at which it was listed immediately prior thereto, which happened to be much less than what the partnership paid for the lots. With respect to the separation of Mr. Fisher and Mrs. Robins from the other partners as a result of their suspicions that the latter had deceived them, Fisher stated, "As a matter of fact, the subsequent history when Robins and I felt we wanted to separate this land in Ville St-Michel as a result of what happened, we separated our land and there were no buyers." With respect to the partition of the lots at the dissolution of the partnership, Fisher stated: "I have a third with Mr. Robins."

When there was some question of taking legal action against the other two partners, Raymond and Rozanski, Fisher states that he left the decision to Mr. Robins and added at p. 19 of the transcript:

> A. Senator Monet felt he had a case for legal action. Very shortly thereafter Mr. Robins, to whose opinion I deferred particularly since I became involved in this largely through him because curiously enough one of these two parties Raymond was a person I had known about, but he had never approached me in any manner about any possible property deal and apartment construction previously. I left the question pretty largely to Mr. Robins about taking legal action. We were quite concerned at the time not about the title of the land but about whether we would ever be able to recover what we had originally expended.

And in view of Raymond and Rozanski's alleged breach of trust, Fisher in answer to the Chairman's question at p. 21 stated:

> Q. You got rid of the others and you and Robins were left?
> A. Yes.

It would appear from the transcript that there was some confusion in the mind of the witness as to which real estate transaction was being dealt with as Fisher was indeed involved in two deals at the same time, in one he was in

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with the appellant which would be the Carnival Amusement transaction which has nothing to do with the present instance, and in the other with Mrs. Robins which, of course, is the one involved here. If one, however, reads a little further down the transcript, at p. 22, the Robins mentioned by the Chairman would appear to be Mrs. Robins. Indeed, the appellant's Counsel states in a question that such is the case and the witness does not deny it.

> Q. At the time of your agreement, Exhibit A-2, you and Mrs. Robins were left with the property, what did you then do with it?

Fisher's evidence is confirmed entirely by the taxpayer himself at p. 53 of the transcript:

> Q. Have you heard Mr. Fisher's evidence this morning?
> A. Yes.
> Q. Would you agree with what he said in so far as . . .
> A. 100%.
> Q. Are there any changes you would make, or would you say he was correct in what he said?
> A. I do not think so; what he said is correct.

Fisher's evidence is also confirmed by Mrs. Robins at p. 49 of the transcript.

On the other hand, Fisher admits that when the partnership was dissolved, he and Mrs. Robins took one-third of the property in the partnership and that subsequently the sale price of the property was divided between himself, his silent partner Mr. Yelin and Mrs. Robins. Mrs. Robins testified that when she acquired an interest in the joint venture she was the owner and that her purpose in so acquiring such an interest was to build some apartment houses. With respect to supplying the funds necessary to invest in this joint venture by her husband she added, "my husband wanted to give me back my money and this was an opportunity." Evidence with respect to this alleged previous loan by her to her husband, as mentioned above, was strongly objected to under article 1233 of the Civil Code of Quebec and this objection was taken under advisement, and later as already mentioned, sustained by the Tax Appeal Board. We will deal with this matter later on in this judgment.

At p. 50 of the transcript Mrs. Robins declares that she kept the part that came to her when the property was sold. This is confirmed by her husband, the taxpayer, who swore

that he had received nothing from this real estate transaction. She admits that the money that went into paying her share was provided by her husband, the taxpayer, who also admits this at p. 65 of the transcript:

Q. To get back to the question of the $6,900 do you say you paid the purchase price or your wife's equity in the purchase price of this property?

A. I paid for my wife.

With respect to the reasons why the taxpayer paid out this sum of $6,900 under reserve of the objection to verbal evidence based on article 1233 of the Civil Code, he stated in answer to his Counsel at p. 57 of the transcript:

Q. How much money had she spent?

A. I do not know exactly, but I think about $10,000.

Q. What had the money been spent for?

A. Carpets, furniture. At that time I could not spend that money because I had just bought out my partners.

Q. In what firm?

A. Tarkor.

Q. What arrangements did you make?

A. As soon as ever I had it I would pay it back.

Q. What is the connection between the monies you paid in this connection we are now talking about, in this particular case, and the money spent by your wife.

A. I do not understand the question.

Q. Were you lending your wife the money you advanced?

A. No I paid it back and she bought this land.

Q. To whom did the money belong then?

A. To her.

Q. You understand you were paying back what she laid out?

A. We had no written agreement, but I promised to pay her back and I did.

The appellant argued, and rightly so, that the documentary evidence shows that his wife was the partner in the partnership agreement relating to the property which gave rise to the profit and that she was the one who acquired an interest in the property; that she paid out of her own money the municipal and school taxes on the property and the real estate agent's commission on the sale of the property and finally that she received the monies from the sale of the property and retained them. This is also confirmed by her husband.

The respondent, on the other hand, submitted that it was not unreasonable for the Minister to consider the appellant as the owner of the land since he had provided money for

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its purchase. He added that it therefore follows that if the appellant were the owner, any and all profits derived from the sale of his property should accrue to him and be taxed in his hands. He admits on the other hand that the appellant has produced a partnership document in which it appears that his wife is one of the individual owners of the land and that, therefore, a conflict exists. He, however, urges that this conflict should be decided in his favour unless and until the appellant can show the existence of a juridical relationship between husband and wife which allowed the transfer of what was originally the land of the appellant to the property of his wife and that this relationship should not only be shown to exist but it must be brought in evidence, according to the rules which govern evidence under s. 1233 C.C. of the Civil Code of Quebec. Now I have already pointed out that the husband did not transfer any land that belonged to him to the property of his wife but merely supplied her with the money necessary to pay for her participation in the real estate partnership and that, therefore, the respondent's submission in this regard is unfounded.

Respondent's argument to the effect that the appellant must establish the juridical relationship between himself and his spouse, important and useful as this may be to assist the Court in deciding who was the real participant in the present transaction, is not the only and an indispensable element in this regard. Indeed, there are many other facts which must also be taken into consideration in determining the real party interested in this transaction.

I would add, however, that it must be possible to consider that this transfer of funds was legal and if such an explanation is not possible, it follows that the amount was the property of the husband, and still is, and of course this fact may have a strong bearing in the appreciation of the facts necessary to establish the real party to the transaction.

As we have seen, the appellant and his wife both attempted to establish that the payment by the taxpayer of the sum of $6,900 for his wife was a partial reimbursement of an amount loaned by the wife previously in purchasing furniture for the common domicile.

An objection to proof of such a loan entered by Counsel for the respondent based on article 1233 of the Civil Code

of Quebec was maintained by the Tax Appeal Board and the evidence of such a loan was completely disregarded.

Article 1233 of the Civil Code of the Province of Quebec reads as follows:

Art. 1233. Proof may be made by testimony:

1. Of all facts concerning commercial matters;—R.S.C., c. 213, s. 2.
2. In all matters in which the principal sum of money or value in question does not exceed fifty dollars;
3. In cases in which real property is held by permission of the proprietor without lease, as provided in the title of Lease and Hire;
4. In cases of necessary deposits, or deposits made by travellers in an inn, and in other cases of a like nature;
5. In cases of obligations arising from quasi-contracts, offences and quasi-offences, and all other cases in which the party claiming could not procure proof in writing;
6. In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced;
7. In cases in which there is a commencement of proof in writing.

In all other matters proof must be made by writing or by the oath of the adverse party.

In short, this article establishes that, except in commercial matters, written evidence is the rule and verbal evidence the exception. If proof of a juridical act, i.e. an act having juridical consequences, does not fall within one of the exceptions of the above article, then without a written document it cannot be proven.

There is no question that the laws of evidence of the Province of Quebec, and particularly article 1233 of the Civil Code, apply to the present case. Indeed, ss. 2 and 36 of the *Canada Evidence Act*, R.S.C. 1952, c. 307, read as follows:

2. This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpeona or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

As the *Canada Evidence Act* and the *Income Tax Act* do not mention any rules of evidence in connection with any proceedings taken under these Acts, there is no doubt that the laws of evidence of the province where the proceedings are taken apply.

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It might be of some assistance to point out here that there is a basic difference between the English law of evidence and both the French and the Quebec laws particularly with respect to article 1233 C.C.

In the English law there are various rules requiring written evidence in specific instances only. In Quebec, however, written evidence is the rule and testimony the exception and this requirement of written evidence appears to be more so here than in France. The practical effect between the Quebec law of evidence and the English law would appear to be that in Quebec the admissibility of verbal evidence must be justified by the party proposing it whereas in England, or in the common law provinces, the party objecting to verbal evidence would have to justify his objection. In short, verbal evidence in the common law provinces is the rule and is only exceptionally refused. Because of these differences, and as pointed out by Mr. Fordham, of the Tax Appeal Board, in his decision, the incidence of taxation may in some cases be different for a taxpayer in Quebec as compared to a taxpayer in another province and this is something which I respectfully submit, if I may venture so to say, should be corrected by Parliament, as it may well, in some instances, deprive a Quebec taxpayer of a right which is enjoyed by the taxpayer of the other provinces.

May I also add that although the greater part of article 1233 may be traced to the French Ordonnance of de Moulins, of 1566, the context and phraseology differ in many respects from the corresponding sections of the French Code, namely article 1341 C.N. and the following articles. In some instances the law in Quebec comes from the laws of England. Indeed, English rules in commercial matters were introduced to Quebec law by an ordonnance of 1785 (25 George III, c. 2, s. 10) and the rule in this respect in the English law is that verbal evidence is admitted except when there is a writing.

One difference of importance between the Quebec law under article 1233 C.C., and its corresponding French counterpart, can be found in s-s. 7 of article 1233 C.C. and article 1347 of the French Code which both state that verbal evidence can be permitted when there is a commencement of proof in writing. Indeed, under our Quebec law there is

no definition of what is a commencement of proof in writing, whereas in the French text it is expressed as being "an instrument in writing which proceeded from the party against whom the claim is made, or the party whom he represents and which renders probable the fact alleged."

There is no question that proof of a loan does not fall within any of the exceptions of article 1233 C.C. unless there is of course a commencement of proof in writing. We have seen *supra* that the French law defines a commencement of proof in writing and that the Quebec counterpart does not. If one should accept this French definition it would appear that the writing must have emanated from the party sought to be charged. He need not be the absolute author of the writing; he need not have been even signed it but he must have appropriated to himself the contents of it by express or tacit consent. The writing also should render probable the fact alleged. This is a question of fact which is left to the Court to determine according to the circumstances of each particular case.

As stated by the late Justice C. E. Dorion in a thesis entitled "De l'admissibilité de la preuve par témoins en droit civil", p. 90:

> Il n'est même pas nécessaire qu'elle (cette personne) ait pris aucune part à sa confection, si elle s'est approprié l'écrit depuis, par exemple, en l'invoquant à l'appui d'une demande. Le notaire qui dresse un acte, le commis qui écrit sous la direction de son maître, ne sont pas liés eux-mêmes par ces écrits et on ne pourrait pas les invoquer contre eux comme commencement de preuve par écrit; en réalité ils n'émanent pas d'eux. Mais les faits que le notaire constate par lui-même dans l'acte, pourront être invoqués contre lui, *de même que les énonciations des parties qui y sont intéressées.* Si l'acte était nul parce que le notaire était intéressé (S.R.Q. 3540), il ne vaudrait pas même comme acte sous seing privé, car la signature du notaire, partie contractante, est nulle (C.C. 1221); il vaudrait cependant comme commencement de preuve par écrit contre ceux qui l'ont signé, même le notaire. Il serait difficile en effet de trouver un acte qui rende plus probable les faits qu'il constate.

Under the above interpretation, the only document which would qualify as one emanating from the party against whom the claim is made in the present instance, i.e. against the appellant, is the authentic marriage contract between himself and his wife which, of course, does not establish a loan but states that the husband had undertaken to supply the funds necessary for the furnishing of the common domicile. This document alone, of course, does not render probable the verbal allegations by both husband and wife

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that a loan took place between the wife and the husband. However, there is further documentary evidence adduced in this case by the wife. She indeed produced several receipted invoices totalling $4,403.88 from a furniture supplier and a cheque in an amount of $1,028.50 for carpets which unquestionably is admissible under Quebec law as there is documentary evidence to support it and besides it could also be proven by verbal evidence as it is not a juridical act but merely a material fact which can always be proven by testimony. However, this evidence emanates from a third party to the proceedings, the appellant's wife and we may now well consider whether a writing emanating from a third party could be used in association with the marriage contract, as a commencement of proof in writing sufficient to establish by verbal evidence the loan of the wife to the appellant. The late Mr. Justice C. E. Dorion in the above mentioned thesis "De l'admissibilité de la preuve par témoins en droit civil", pp. 94 to 99, has this to say with regard to writings emanating from third parties:

> Ceci nous amène à examiner une question très débattue dans le droit français. Il s'agit de savoir si l'écrit émané d'un tiers parti peut servir de commencement de preuve par écrit. Disons d'abord qu'on ne peut trouver la solution de cette question ni dans les auteurs français modernes, ni dans les auteurs sur l'ancien droit.
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> * * *
>
> Voici le cas: A. revendique contre B. qui n'a pas de titre, un immeuble, et il invoqua une vente verbale qu'il demande à prouver par témoins en produisant une promesse de vente à lui consentie par C. qui, lui, était bien propriétaire. A. sera-t-il admis à faire la preuve par témoins?
>
> Nous pensons que oui. Si un acte de vente par C. à A. suffirait pour établir la propriété de A., pourquoi la promesse de vente ne suffirait-elle pas à en faire un commencement de preuve par écrit?
>
> Le Code Civil ne définit pas ce que c'est qu'un commencement de preuve par écrit; à première vue on est donc justifiable de croire que c'est une preuve par écrit incomplète, et le Code ne distingue pas entre la preuve qui vaut contre la partie et celle qui vaut contre les tiers.
>
> * * *
>
> Le Code Napoléon exige que le commencement de preuve par écrit ait le caractère d'un aveu, c'est-à-dire qu'il émane «de celui contre lequel la demande est formée.» Les auteurs français s'en tiennent à la lettre du Code et leur opinion ne saurait être invoquée dans notre droit qui ne contient pas cette restriction. En droit français il faudrait donc probablement décider le cas posé contrairement à l'opinion que nous soutenons, malgré l'autorité de Toullier (Toullier, t. 8, n° 69 et suiv.).

In view of the difference between the Quebec text and the French one with respect to what a commencement of proof in writing is and the absence of a definition in the Quebec

law in this regard it would appear that the French definition may not necessarily apply to our Quebec law with the result that what a commencement of proof in writing would be here is left to the appreciation of the Court on the basis of any documentary evidence which would render probable the fact or facts alleged. The late Justice C. E. Dorion's opinion in this regard, as quoted above, would, I believe be sufficient authority to sustain the above proposition.

The marriage contract between the appellant and his wife together with the invoices and cheque produced by the wife indicating that she did purchase furniture for the common domicile, although this obligation was that of the appellant would, in my opinion, be documentary evidence sufficient to render the allegation of a loan from the wife to the husband probable. This would, therefore, constitute a commencement of proof in writing which would enable the appellant to complete this proof by verbal evidence. The verbal evidence adduced to the effect that the supplying of a cheque in the amount of $6,900 by the appellant to his wife as her participation in the joint venture is the reimbursement for the previous loan made to the appellant for the purchase of the furniture in the common domicile becomes therefore admissible and establishes the juridical relationship of the appellant and his wife with respect to this amount.

The contract of prête-nom which is really a contract of agency has been suggested by the respondent as existing in the present case. No such contract has been proven here. There is no evidence that Mrs. Robins agreed to act as agent or prête-nom of her husband nor that the latter undertook to guarantee and indemnify his wife in respect of all the liabilities that she personally assumed under the Deed of Sale. Indeed, the evidence is quite the reverse.

May I also add that the partnership document which to all intents and purposes establishes that the appellant's wife is the person interested in this partnership, has not been contradicted. The only attempt by the respondent to challenge this particular document was by producing the appellant's cheque and the admission that he had paid the amount of $6,900 for his wife. We have seen that this fact alone is not sufficient to set aside this document and that the amounts so paid can be otherwise justified.

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In a judgment of the Supreme Court of Canada in *La Corporation de la paroisse St-Joseph de Coleraine v. Colonial Chrome Co. Ltd.*[1] it was held:

> . . . that the declarations and statements contained in authentic deeds as well as in deeds under private seal are considered as proved until they are challenged and contrary evidence is adduced, and it is so, not only as between the parties to the deeds, but also against third parties.

The partnership document not having been successfully challenged, becomes a very significant element which goes far to establish that the appellant's wife is the real party to the transaction.

The evidence adduced and particularly that of Jacob B. Fisher, who as we have seen in the recital of facts *supra* refers constantly to the appellant in his dealings with the partnership, has given me some trouble. Indeed, I did not have the advantage of seeing and hearing the witnesses and the fact, as mentioned above, that the appellant was interested with the same Mr. Fisher in another real estate deal conducted by a company called Carnival Amusements, around the same time, and which had purchased lots situated next to those purchased by the partnership in which Mrs. Robins was interested, has created a certain amount of confusion. Indeed if one relies on Mr. Fisher's evidence, Mr. Robins, the taxpayer, was a very close and continuous adviser to both Mr. Fisher and his wife during the transactions.

However, the fact that the appellant had counselled his wife in her venture is nothing to be surprised of and a very natural thing indeed. I might even add that this may be considered as part of the obligations of a husband towards his wife in investment matters. Any action of the husband in this regard, even when he supplies the funds necessary to his wife, should not necessarily be interpreted as establishing that she was acting as her husband's agent or *alter ego*.

In a Quebec case *Déry v. Paradis*[2] the husband acted throughout as the agent for his wife and even advanced the funds for the purchase of the property. The Appeal Court nonetheless clearly validated the wife's title to the property and Mr. Justice Wurtele observed at p. 230:

> There is nothing either in the prohibition against consorts benefiting each other during marriage, to prevent a husband who is separate as to

[1] [1933] S.C.R. 14.

[2] 10 Que. K.B. 227.

property, giving his advice and his spare time to his wife for the purpose of buying and selling immovable property on her behalf and acting as her agent in such transactions, when they are genuine and when, although they are beneficial to the wife, they abstract nothing from the property or estate of the husband. A man may give his time and services to another person gratuitously if he chooses, and there is no provision of the law which forbids or prevents him from doing so for his wife. Then a husband who is separate as to property, can validly administer the property of his wife, and this right is recognized by article 1425 of the Civil Code. In the absence of clear evidence of fraud, the fact of a husband having acted as the agent of his wife in transactions whereby real estate was acquired by her, and of having afterwards administered such property as her agent, does not attaint the transactions by which such real estate was acquired as fraudulent nor the deeds and titles under which it is held as simulated.

I therefore must conclude that the fact the appellant, under the circumstances, supplied his wife with the funds necessary to purchase her equity in the partnership and assisted her in the transaction is not sufficient to overcome the evidence from the documents produced by the appellant and his wife as well as their testimony. Indeed, a thorough examination of this documentary and verbal evidence has brought me to accept the verbal evidence of both the appellant and his wife on the basis of a commencement of proof in writing contained in both the marriage contract and the cheques and receipted invoices of the wife which establishes the loan from the wife to the husband and, therefore, that the payment by the husband of an amount of $6,900 is a reimbursement of this loan.

However, should the acceptance of such a commencement of proof in writing be not valid and that I should disregard entirely the verbal evidence adduced regarding this alleged loan, I can still see one of two things to explain the payment of this amount of $6,900. It must be inferred that it is either a loan or a donation of the husband to his wife.

A loan between husband and wife is not prohibited under any of the laws of Quebec. Indeed, it has been so decided in many cases such as *Denis v. Kent & Turcotte*[1]; *Fry v. O'Dell*[2]; *Irvine v. Lefebvre*[3]; *Allard v. Legault*[4] and *L. P. Sirois: contrat entre époux*[5]. Even in cases where, in addition to supplying the funds, the husband had offered assistance to his wife, this would not in the slightest impugn her title to the property. Such a decision was rendered in *Rhéaume v. Hurtibise*.[6]

[1] 18 Que. S.C. 436.
[2] 12 Que. S.C. 263.
[3] 4 Que. S.C. 75.
[4] [1945] Que. S.C. 287.
[5] 1 R.L.N.S. 293.
[6] 28 R.L.N.S. 465.

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Le mari ne peut faire déclarer qu'un acte de vente d'une immeuble par un tiers à sa femme négocié par lui, passé depuis 13 ans et exécuté sous sa direction, est simulé, que sa femme n'est que son prête-nom et qu'il est le véritable propriétaire des biens-fonds, en établissant qu'il avait fait cette transaction au nom de sa femme vu qu'il avait l'intention de faire commerce, et pour se protéger dans l'avenir, contre les accidents et la déconfiture.

In *Saint-Amour v. Lalonde*[1] it was held:

A husband may validly lend his wife, who is separate from him as to property, the purchase price of an immovable that is sold to her, and he, thereby, becomes her creditor for the amount. His heirs, if he dies, or his creditors, if he becomes insolvent, have no other action arising from the transaction, but a personal one to recover the money lent.

In *Côté v. Didier*[2] it was held that:

Lorsqu'une femme, dûment autorisée, achète un immeuble en son nom, quand même elle le paierait avec de l'argent fourni par son mari, cette propriété n'en est pas moins la sienne. Dans ce cas, le recours des créanciers est par une saisie-arrêt, entre les mains de la femme pour ce qu'elle doit à son mari.

Leblanc v. Gamache[3] is to the same effect.

Kladis v. Pulos[4]:

Un acte authentique de société ne peut être contredit par une preuve testimoniale dans une contestation entre un tiers, créancier du mari de l'une des associées, et les deux autres associés, pour faire déclarer que la femme associée n'est que le prête-nom de son mari.

Le mari peut représenter sa femme dans le commerce que fait cette dernière, et lui prêter son intelligence, son expérience, ses aptitudes et son temps, sans être considéré tenir le commerce lui-même ou en société avec son épouse; ses créanciers n'ont pas le droit de faire saisir, pour cette raison, les biens de la femme sous prétexte qu'elle n'est qu'un prête-nom.

In *Rhéaume v. Hurtibise (supra)*:

Simulation is practised to give legal colour to a disposition or contract prohibited by law and to evade the law or defraud third parties. Nothing of the kind occurred here. It was a real sale. The vendors intended to sell. The respondent, authorized by her husband, intended to buy and bought. Title was taken in the name of respondent with appellant's authorization. She was the real owner under a real sale, not a sham one. The hypothecs in favour of Dame Celina Cayer, appellant's mother, and J. N. Constantin were given by respondent, authorized by her husband.

A donation under the laws of Quebec can be made between husband and wife only by a marriage contract. After the marriage such donations are prohibited (s. 1265 C.C.). If the transfer of the amount of $6,900 is a donation, it might, if the appellant had so asserted, have been a partial payment of the sum of $25,000 donated by the husband

[1] 10 Que. K.B. 227.
[2] 44 Que. S.C. 39.
[3] 14 R. de J. 1.
[4] 24 R.L.N.S. 482 (confirmed by Supreme Court, (1919) 59 S.C.R. 688).

to the wife in their marriage contract which, of course, is the only legal way in Quebec by which a husband may donate to his wife after the marriage.

If such is not the case, it therefore can be but a loan from the husband to the wife which the Court can properly infer as the only other possibility would be a donation not covered by the marriage contract which, of course, is forbidden under Quebec law. There would, therefore, be a strong presumption that this would be a loan on the basis that this is the only possible legal transaction it could be under Quebec law and of course one must conclude in favour of the parties presumably entering into a valid transaction rather than an invalid one.

Before concluding may I add here that should it be a loan, or the reimbursement of a loan, it would in both cases fall within the *Jacob B. Dunkelman v. M.N.R.*[1] case where Thurlow J. decided under s. 22(1) of the *Income Tax Act* that the expression "has transferred property" must be given its natural meaning and cannot include the loan made by the appellant to the trustee.

Section 22(1) of the *Income Tax Act* is similar to s. 21(1) of the Act which I dealt with at the beginning of this judgment and this would be an additional reason in deciding that s. 21(1) of the Act cannot assist the respondent here and has no application to the present case.

On the whole and after a careful analysis of all the evidence I arrive at the conclusion that the appellant has discharged the burden cast upon him by the reassessments and that it therefore follows that the appeals must be allowed; consequently, the amounts of $8,956.11 and $4,276.05 for the taxation years 1954 and 1955 respectively should not be added to the appellant's income for the above taxation years and the assessments are referred back to the Minister to be revised accordingly.

The appellant is entitled to his costs.

Judgment accordingly.

[1] [1959] C.T.C. 375.