BETWEEN:

1956
Oct. 4
1958
Mar. 13

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

GRANITE BAY TIMBER COMPANY LIMITED .... RESPONDENT.

Revenue—Income Tax—Deduction claimed for capital cost allowance—"One or more transactions . . . between persons not dealing at arms length"—The Income Tax Act, 1948, c. 52, ss. 11(1)(a), 127(5)—S. of C. 1949, c. 25, s. 8(3).

In January 1947, A, B and C purchased all the outstanding shares of Granite Bay Logging Co. Ltd. and became its sole shareholders and directors. On November 5, 1947, acting on the instructions of A, B and C, a solicitor and his son incorporated the respondent company under *The Companies Act* (B.C.), subscribed for one share each and became its first directors. On November 10, 1947, A, B and C, as shareholders of the Granite Bay Logging Co. Ltd., authorized its voluntary winding up and the appointment of C as liquidator. On December 29, 1947, that company transferred its property to A, B and C pursuant to a document signed by C as liquidator purporting to be a resolution passed by the board of directors through the liquidator resolving that

the company distribute all its assets subject to liabilities to the shareholders. The next day A, B and C sold the assets received by them on the distribution to the respondent company under an agreement in writing executed by themselves as vendors and by the respondent company as purchaser. The agreement was executed on behalf of the respondent as authorized by a resolution of its board of directors, the solicitor and son, who then resigned. Their respective shares were transferred to A and B, who became directors and allotted a share to C, who also became a director. The remaining shares were allotted to a company controlled by A, B and C.

In its 1950 income tax return the respondent claimed a deduction for capital cost allowance based on the price at which it purchased the property from A, B and C. The Minister disallowed the claim in part, proceeding upon the assumption that the property was acquired by the respondent in a transaction between parties not dealing at arms length, and that s. 8(3) of S. of C., 1949, 2nd Sess., c. 25, applied. The Income Tax Appeal Board allowed the respondent's claim in part, and the Minister appealed from the Board's decision.

Held: That despite the legal power with which the solicitor and his son were clothed both as shareholders and as directors as between themselves and the respondent company to act independently as they saw fit, there could be no doubt that their control as shareholders and their acts as directors were those of their clients, and that the situation was the same in principle as it would have been had their clients been the only shareholders and directors when the agreement was made. Consequently the agreement, which was the transaction by which the property became vested in the respondent, falls squarely within the meaning of the expression in s. 8(3) of "one or more transactions prior to 1949 between parties not dealing at arms length." *Minister of National Revenue v. Sheldon's Engineering Ltd.*, [1955] S.C.R. 637, followed.

2. That it was not necessary to refer to the provisions of s. 127(5) of *The Income Tax Act* since at the time of the sale it would be impossible to maintain that the parties were dealing at arms length. It followed that s. 8(3) applied and that the price mentioned in the agreement, on which respondent based its claim for capital cost allowance, was not the correct basis for the calculation thereof and that the assessment should be restored.

The appellant contended that the right to have the property of Granite Bay Logging Co. Ltd. distributed among the shareholders had devolved upon them by operation of law upon the passing of the resolution to wind up and had not become vested in them by virtue of a "transaction" within the meaning of s. 8(3).

Held Further: That in using "transactions" in s. 8(3) Parliament selected a word of far wider meaning than "sales" or "contracts" and the definition "the action of passing or making over a thing from one person, thing or state to another" represents most nearly the meaning of the word as used therein.

2. That the expression "one or more transactions" in s. 8(3) is wide enough to embrace all types of voluntary processes or acts by which property of one person may become vested in another without regard for the reason or occasion for such processes or acts and regardless of whether the process is undertaken or the act is done for consideration in whole or in part or for no consideration at all. As used in s. 8(3)

it includes any voluntary transfer of property between existing persons falling within the class referred to as "persons not dealing at arms length."

3. That in the whole series of transactions by which the assets of Granite Bay Logging Co. Ltd. became vested in the respondent, none could be regarded as having been made by persons dealing at arms length.

APPEAL from a decision of the Income Tax Appeal Board.

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

D. T. B. Braidwood and *T. Z. Boles* for appellant.

Max M. Grossman, Q.C. for respondent.

THURLOW J. now (March 13, 1958) delivered the following judgment:

This is an appeal by the Minister of National Revenue from the judgment of the Income Tax Appeal Board dated January 13, 1956[1], by which the respondent's appeal from an assessment of its income for the year 1950 was allowed in part and the matter referred back to the Minister for reconsideration and reassessment in accordance with the reasons for judgment given by the Board. The matter in issue in the appeal relates to the basis for determining the capital cost to the respondent of certain property in respect of which it claimed a deduction for capital cost allowance pursuant to s. 11(1)(*a*) of *The Income Tax Act* (S. of C. 1948, c. 52, as amended by S. of C. 1949, 2nd Sess., c. 25, s. 4). This section provides that, in computing his income, a taxpayer may deduct such part of the capital cost of the property, if any, as is allowed by regulation. The respondent based its claim for such a deduction on the price at which it purchased the property from Samuel Heller, Paul Heller and John H. Maier in 1947. The Minister, however, in making the assessment, proceeded upon the assumption that the property in question was acquired by the respondent in a transaction between parties not dealing at arms length and disallowed a portion of the allowance claimed by the respondent. In so doing, he applied the special provision of s. 8(3) of S. of C. 1949, 2nd Sess., c. 25, which was as follows:

(3) Where property did belong to one person (hereinafter referred to as the original owner) and has *by one or more transactions prior to 1949*

[1] 14 Tax A.B.C. 273; 56 D.T.C. 53.

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between persons not dealing at arms length become vested in a taxpayer who had it at the commencement of the 1949 taxation year (or who acquired it during his 1949 taxation year from a person whose 1948 taxation year had not expired at the time of the acquisition), the capital cost of the property to the taxpayer shall, for the purpose of subparagraph (i) of paragraph (*a*) of subsection one, be deemed to be the lesser of the actual capital cost of the property to the taxpayer or the amount by which

(*a*) the capital cost of the property to the original owner exceeds

(*b*) the aggregate of

(i) the total amount of depreciation for the property that, since the commencement of 1917, has been or should have been taken into account in accordance with the practice of the Department of National Revenue, in ascertaining the income of the original owner and all intervening owners for the purpose of the *Income War Tax Act,* or in ascertaining a loss for a year when there was no income under that Act, and

(ii) any accumulated depreciation reserves that the original owner or an intervening owner had for the property at the commencement of 1917 and that were recognized by the Minister for the purpose of the *Income War Tax Act.*

Neither the notice of assessment nor the Minister's notice of appeal shows, nor does the evidence disclose, what cost the Minister used as the basis of his calculation, and the only information on this point to be found in the record is contained in the assertions by counsel for the respondent (which counsel for the Minister did not dispute) that the basis used by the Minister was the cost of the property to Granite Bay Logging Co. Ltd., a company which had been the owner of the property before Samuel Heller, Paul Heller and John H. Maier became the owners of it. It has, however, been agreed between the parties that, if the price which the respondent paid for the property is held to be the correct basis on which to compute the capital cost allowance to which the respondent is entitled, the figures used in its income tax return are to be taken as correct, and in the other event the figures used by the Minister are to be taken as correct.

The issue in the appeal is whether or not the Minister was right in disallowing, as he did, a portion of the capital cost allowance claimed by the respondent for 1950. This issue turns on whether or not the subsection above quoted is applicable in the circumstances of this particular case. By its terms, the subsection is applicable if the property has become vested in the respondent *by one or more transactions prior to 1949 between persons not dealing at arms length.* Accordingly, in view of the rule that the burden

of showing error in an assessment rests on the taxpayer, the question for determination becomes that of whether or not the Minister's assumption that the property in question became vested in the respondent by one or more transactions prior to 1949 between persons not dealing at arms length has been disproved.

The events by which the property became vested in the respondent are as follows: On or about January 2, 1947, Samuel Heller, Paul Heller and John H. Maier purchased all the outstanding shares of Granite Bay Logging Co. Ltd., a company which had been incorporated in 1934 under *The Companies Act*, Statutes of British Columbia 1929, c. 11. On completion of the purchase, the three new shareholders, none of whom had previously been connected with the company, became its directors, replacing its former directors who then retired. On November 10, 1947, by a special resolution consented to in writing by all three shareholders, it was resolved that the company be wound up voluntarily under the provisions of *The Companies Act* and that John H. Maier be appointed liquidator of the company. *The Companies Act*, R.S.B.C. 1936, c. 42, which was in force at that time, provided as follows:

> 214. The commencement:
>
> (*a*) Of a voluntary winding-up shall be the time of the passing of the special resolution to wind up; . . .
>
> 215. Where a company is being wound up:
>
> (*a*) The company shall, from the commencement of the winding-up, cease to carry on its business, except so far as may be required for the beneficial winding-up thereof: Provided that the corporate state and corporate powers of the company shall continue until it is dissolved;
>
> (*b*) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the liquidator sanctions the continuance thereof;
>
> (*c*) The property of the company shall, after satisfaction of its liabilities and the costs, charges, and expenses properly incurred in the winding-up, including the remuneration of the liquidator, be distributed among the members according to their rights and interests in the company;
>
> (*d*) Every transfer of shares, except transfers made to or with the sanction of the liquidator, shall be void.

Subsequently, on December 29, 1947, by a document signed by John H. Maier as liquidator of the company and purporting to be a resolution passed by the board of directors of the company through its liquidator, it was

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resolved that the company distribute all its assets, subject to liabilities, to the shareholders of the company, Samuel Heller, Paul Heller and John H. Maier, and that the liquidator be authorized to execute and deliver all necessary transfers, consents and other documents necessary to fully transfer all the assets of the company to the said shareholders. No instrument of transfer was put in evidence, but it was stated in evidence by Mr. Samuel Heller that this resolution was carried out.

In the meantime, the respondent company had been incorporated on November 5, 1947 under *The Companies Act*, R.S.B.C. 1936, c. 42, by a solicitor and his son, who were employed by and acting on behalf of Samuel Heller, Paul Heller and John H. Maier. The solicitor and his son were the first directors of the respondent, and each of them had by the memorandum of association subscribed for one of the 10,000 shares without nominal or par value which the respondent was authorized to issue.

On December 30, 1947, by an agreement in writing made between Samuel Heller, Paul Heller and John H. Maier as grantors and the respondent as grantee, in which it was recited that the liquidator of Granite Bay Logging Co. Ltd. had distributed the assets thereof to the grantors, subject to liabilities, the grantors sold and transferred the same assets to the respondent, subject to liabilities, and the respondent agreed to assume and pay the liabilities as and when due and to indemnify and save harmless the grantors and each of them therefrom, and also to pay to the grantors the sum of $185,170.43. A schedule to the agreement lists the assets at $429,622.12 and the liabilities at $244,451.69, and shows the $185,170.43 as the difference. The agreement was executed on behalf of the respondent, as authorized by a resolution of its board of directors, consisting of the solicitor and his son, passed on the same day. On the same day, these directors resigned and were replaced by Samuel Heller and Paul Heller, who, along with John H. Maier, became the directors of the respondent company. Following this change of directors, one share was allotted to the solicitor and one to his son, and applications to transfer them to Paul Heller and Samuel Heller, respectively, were approved. The directors also allotted one share to John H. Maier, and the remaining shares to a company controlled by them.

On the trial of the appeal, the respondent neither contended nor offered evidence to show that the agreement of December 30, 1947 by which the respondent acquired the property from Samuel Heller, Paul Heller and John H. Maier was a transaction between parties dealing at arms length. On the contrary, counsel for the respondent stated in his opening that he was not going to argue that the solicitor and his son, who incorporated the respondent company for clients, were at arms length with them. In addition, the evidence adduced in cross-examination of Mr. Samuel Heller further reinforces the position that the solicitor and his son were at all material times acting for and on the instructions of Messrs. Samuel and Paul Heller and John H. Maier. In these circumstances, despite the legal power with which the solicitor and his son were clothed both as shareholders and as directors as between themselves and the respondent company to act as independently as they saw fit, there can be no doubt that their control as shareholders was the control of their clients, that their acts as directors were the acts of their clients, and that, for the purposes of this case, the situation was precisely the same in principle as it would have been if Messrs. Samuel and Paul Heller and John H. Maier had been the only shareholders and directors of the respondent when the agreement was made. Consequently, no matter how fair or reasonable the price, this agreement, which in my opinion was the transaction by which the property became vested in the respondent, falls squarely within the meaning of the expression "one or more transactions prior to 1949 between parties not dealing at arms length."

In *Minister of National Revenue v. Sheldon's Engineering Ltd.*[1] Locke J., in delivering the unanimous judgment of the Supreme Court of Canada, after referring to the various sections of *The Income Tax Act* in which the expression "not dealing at arms length" appears, said at p. 644:

> S. 127(5) does not purport to define the meaning of the expression generally: it merely states certain circumstances in which persons are deemed not to deal with each other at arms length. I think the language of s. 127(5), though in some respects obscure, is intended to indicate that,

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in dealings between corporations, the meaning to be assigned to the expression elsewhere in the statute is not confined to that expressed in that section.

Where corporations are controlled directly or indirectly by the same person, whether that person be an individual or a corporation, they are not by virtue of that section deemed to be dealing with each other at arms length. Apart altogether from the provisions of that section, it could not, in my opinion, be fairly contended that, where depreciable assets were sold by a taxpayer to an entity wholly controlled by him or by a corporation controlled by the taxpayer to another corporation controlled by him, the taxpayer as the controlling shareholder dictating the terms of the bargain, the parties were dealing with each other at arms length and that s. 20(2) was inapplicable.

In my view, it is not necessary in this case to refer to the provisions of s. 127(5), for at the time when the property was sold to the respondent the respondent was wholly controlled by the persons who sold the property to it, and it would be impossible to maintain that these parties on the one hand and the respondent on the other were dealing at arms length. It follows from this that s. 8(3) applies and that the price mentioned in the agreement, on which the respondent based its claim for capital cost allowance, is not the correct basis for the calculation of such an allowance. It also follows, in view of the agreement already mentioned between the parties to the appeal, that the assessment should be restored.

Counsel for the respondent, however, approached the matter in another way. He asserted in argument that the Minister's computation is based on the cost of the property to Granite Bay Logging Co. Ltd. and that, in the Minister's computation, that company is regarded as the "original owner" referred to in s. 8(3). He then submitted that the property which originally belonged to Granite Bay Logging Co. Ltd. did not become vested in the respondent by "one or more transactions between persons not dealing at arms length" because the events or process by which the property of Granite Bay Logging Co., Ltd. became vested in its shareholders did not amount to a transaction within the meaning of that word in s. 8(3), and that, accordingly, there was no uninterrupted series of transactions between parties not dealing at arms length by which the property of Granite Bay Logging Co. Ltd. became vested in the respondent so as to invoke s. 8(3) and thus require that the capital cost allowance should be

based on the capital cost of the property to Granite Bay Logging Co. Ltd. More particularly, he contended that, upon the passing of the resolution to wind up Granite Bay Logging Co. Ltd., the property of that company devolved on its shareholders by operation of law, and that neither this devolution nor the resolution itself nor the action of the three shareholders in voting for it was a transaction within the meaning of s. 8(3).

The appellant's answer to this was to submit that the resolution to liquidate Granite Bay Logging Co. Ltd. was a transaction within s. 8(3) and, alternatively, that the process as a whole by which the assets of Granite Bay Logging Co. Ltd. became vested in Samuel Heller, Paul Heller, and John H. Maier, consisting of voting by them, the resolution to wind up the company, the resolution of the liquidator to transfer the assets to the shareholders, and the transfer of the assets by the company to them, constituted a transaction of the kind referred to in s. 8(3).

The word "transaction" is one of wide scope, and it is used in a variety of senses. In Webster's *New International Dictionary,* Second Edition, the following meanings are given:

trans-ac'tion . . . 1. The act or process of transacting, or an instance of such; as, averse to the *transaction* of business at this time.

2. That which is transacted or in the process of being transacted. Specif.: a A business deal; an act involving buying and selling; as, the *transactions* on the exchange. b *pl.* The records, esp. the published records, of action taken, addresses read, etc., at the meeting or meetings of a society or association; proceedings. Some societies restrict the term *transactions* to the published addresses, and *proceedings* to the published record of the business done.

3. *Philos.* An action or activity involving two parties or two things mutually affecting or reciprocally influencing one another.

4. *Roman & Civil Law.* An adjustment or compromise of a disputed claim between parties by mutual agreement.

Syn.—Proceeding, action; performance, discharge.

In the *Shorter Oxford Dictionary,* its meanings are given as follows:

Transaction. 1460. [ad. L. *transactionem,* f. *transigere;* see prec.] 1. *Roman* and *Civil Law.* The adjustment of a dispute between parties by mutual concession; compromise; hence *gen.* an arrangement, an agreement, a covenant. Now *Hist.* exc. as in 3 b. 2. The action of transacting or fact of being transacted 1655. 3. That which is or has been transacted; a piece of business; in *pl.* doings, proceedings, dealings 1647. b. *Theol.* In ref. to the Atonement, "transaction" has senses ranging from 1 to 3. (In sense 1

chiefly in deprecation.) 1861. 4. The action of passing or making over a thing from one person, thing, or state to another—1691. 5. *pl.* The record of its proceedings published by a learned society. Rarely in *sing.* 1665.

The word appears in O. 16, r. 1 of the Rules of the Supreme Court of Judicature in England respecting joinder of parties to actions and in differing contexts in a number of statutes, and it has been judicially considered from time to time in the interpretation of such rules and statutes.

In *Bendir v. Anson*[1] Lord Wright M.R. in considering its meaning in O. 16, r. 1, said at p. 330:

> The word "transaction," I think, necessarily means an act, the effect of which extends beyond the agent to other persons. For instance, to take this particular case, the building of the premises by the defendant is an act which from one point of view is limited to the builder and to the area covered by the premises; but its effects on other premises extend also to those premises in respect of which a nuisance or an interference with an easement may be created by the building. In that sense the building of the premises may be regarded as a transaction, and I find on the authorities that that view seems to have been taken. As I have already said, I do not think that the word is very happily chosen. It seems to have been used in the first instance rather with reference to cases in which there was something in the nature of a contractual relation, or some relation of that nature between parties, but it has quite clearly been extended from that more limited connotation.

In *Barron v. Littman*[2] a taxpayer had taken short term leases, intending to sublet the properties at a profit. He sublet some at a higher rent than he paid, some at a lower rent, and some he failed to sublet at all. He was entitled under the statute to deduct losses sustained "in any transaction", but it was argued that a loss resulting from failure to sublet a property was not sustained "in any transaction." Viscount Simon, in dealing with this point in the case, said at p. 108:

> In my opinion, there was in each case a transaction out of which the loss arose. The transaction consisted in taking a lease of property with a view to reletting it and either succeeding or failing to relet it. It is just as much a transaction as would be the purchasing of an article by a trader, who seeks to resell it at a profit, and who either does sell it at such a profit or sells it at a loss or does not succeed in selling it at all. On the facts of the present case there clearly is a transaction, and this was the view of every member of the Court of Appeal. If all that could be said was that an owner of property, freehold or leasehold, had tried to find a tenant for it and had failed, it would be a question whether his unsuccessful effort could be regarded as a transaction. A similar difficulty would arise if the

[1] [1936] 3 All E.R. 326. [2] [1953] A.C. 96.

taxpayer had become the owner of property by bequest or inheritance, which he failed to relet. But, in the present case, no real difficulty arises on this first point.

Lord Normand also said at p. 112:

> Neither the Special Commissioners nor Wynn-Parry J. decided whether there was a transaction within the meaning of section 27. All three members of the Court of Appeal held that there was a transaction. In my opinion, "transaction" is a comprehensive word which includes any dealings with property. The "transaction" entered into by the respondent as a dealer in property was the acquisition of leases of property, the attempt to sublet at a rent in excess of the rent payable by him, and the success or failure of this attempt. I therefore agree with the Court of Appeal on this point. I see no difficulty on the facts of this case, though there may well be difficulty on other facts.

In *Grimwade v. Federal Commissioner of Taxation*[1], a case much relied on by the respondent, the question was whether or not E. N. Grimwade, by voting at a meeting of a company, of which he had complete control, in favour of a resolution the effect of which was to reduce the value of his interest in the company and increase that of the interests of his children, had entered into a transaction constituting a disposition of property. Latham C.J., in delivering the judgment of himself and Webb J., said at p. 219:

> But did E.N. Grimwade "enter into a transaction" when he voted for the resolutions reducing capital?
>
> There may be a "transaction" with respect to the casting of a vote . . . But when a shareholder makes up his mind to vote in a particular way and casts his vote accordingly he cannot be said to be "entering into a transaction." A transaction by a person must be a transaction *with* some other person. In the circumstances mentioned there is no transaction with any person.
>
> If a preference shareholder in a company voted in favour of reducing the rate of dividend upon preference shares in order to allow the company to pay some dividends to ordinary shareholders it would be an unreal description of what took place to say that that fact showed that the preference shareholder had "entered into a transaction." The result of a contrary view would be that each of the preference shareholders or at least all who voted for the resolution, would (if the intent of improving the value of ordinary shares were found to exist) be regarded as making a gift within the meaning of the *Gift Duty Act* to each of the ordinary shareholders. Presumably a dissenting minority would not be held to be engaged in a transaction of making a gift. If so, the majority of voting shareholders would be regarded as making the whole of the gift—which would be a remarkable result. It was suggested that even to abstain from voting against a resolution beneficial to a class of shareholders amounted to entering into a transaction within par. (*f*). All these contentions interpret

[1] (1948) 78 C.L.R. 199.

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the words "enter into a transaction" as if they had the same meaning as "do an act or abstain from doing an act." Such an interpretation gives no real effect to the words "enter" and "transaction."

We are therefore of opinion that E. N. Grimwade did not enter into a transaction constituting a disposition of property within the meaning of par. (*f*) in s. 4 and that therefore there was no gift upon which duty became chargeable.

In my view, while the authorities above mentioned, as well as the other cases cited by counsel, illustrate the scope and versatility of the word "transaction", none of them affords a sure guide to its meaning in s. 8(3). I do not think that the votes of the shareholders in this case can be regarded as transactions of the kind contemplated by s. 8(3), but that is far from saying that the resolution itself which resulted from such voting and became an act of the company was not such a transaction or part of such a transaction. In my opinion, the "transactions" referred to in s. 8(3) are not limited to contracts. True, the subject matter with which s. 8 deals is that of capital "cost", which suggests that "transactions" in s. 8(3) refers to transactions in the nature of contracts of sale in which the taxpayer incurs cost in purchasing property. No doubt, in the great majority of cases the transaction will be of that kind. But in using "transactions" in s. 8(3) Parliament selected a word of far wider meaning than "sales" or "contracts" and, except in so far as its wide meaning is necessarily limited by the context in which it is used, there is, in my opinion, no valid reason why the word should not have its full scope and meaning. Of the various meanings of the word, that stated in the fourth definition given in the Oxford dictionary, viz. "the action of passing or making over a thing from one person, thing or state to another," seems to me to represent most nearly the meaning of the word in s. 8(3). While it is limited in its context to transactions by which property can become transferred from one person and vested in another and by the words *between parties,* I do not think it is limited to sales of property nor to contractual transactions between parties. In adopting this view, I do not overlook the word *dealing,* but I regard it as applicable to and descriptive of the parties rather than as qualifying the word *transactions.* In my opinion, the expression "one or more transactions" in s. 8(3) is wide enough to embrace all types of voluntary

processes or acts by which property of one person may become vested in another without regard for the reason or occasion for such processes or acts and regardless also of whether the process is undertaken or the act is done for consideration in whole or in part or for no consideration at all. It may not be wide enough to embrace a transmission or devolution upon death but, as used in s. 8(3), I think it is wide enough to include any voluntary transfer of property between existing persons falling within the class referred to as "persons not dealing at arms length."

Applying this interpretation to the facts of the present case, I have come to the conclusion that the events or process by which a right became vested in the shareholders of Granite Bay Logging Co. Ltd. to have the residue of its assets, after payment of its liabilities, distributed among the shareholders was a transaction within the meaning of the word in s. 8(3). It is clear that, immediately prior to the passing of the resolution to wind up Granite Bay Logging Co. Ltd., none of the three shareholders had any right or title to the property of that company. See *Macaura v. Northern Assurance Co., Ltd.*[1], where at p. 633 Lord Wrenbury said:

> My Lords, this appeal may be disposed of by saying that the corporator, even if he holds all the shares, is not the corporation, and that neither he nor any creditor of the company has any property, legal or equitable, in the assets of the corporation.

It is equally clear that, by virtue of s. 215 of *The Companies Act*, R.S.B.C. 1936, c. 42, upon the passing of the resolution to wind up Granite Bay Logging Co. Ltd. the shareholders did have the right to have the property of the company distributed among them after satisfaction of the liabilities and the expenses of the winding-up. The events making up the transaction by which this result was accomplished, in my opinion, consisted of the resolution to wind up, which, from the point of view of the company, was all that was necessary to confer the right and was a transaction in the wide sense of the term, and the consent of the shareholders to this right being conferred on them. Without their consent, no right of property could be vested in any of them. In this case, in my view, their intention not to dissent is to be inferred from their common purpose, coupled with the fact that they passed the

[1] [1925] A.C. 619.

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special resolution by consenting to it unanimously in writing. That they consented in fact, is shown by their subsequent receipt and acceptance of property distributed pursuant to the resolution. This, in my opinion, is enough to turn the unilateral transaction of the company into a transaction *between parties*, within the meaning of the expression in s. 8(3). In this view, the fact that, in voting for the resolution, the shareholders were simply exercising their legal rights as shareholders, rather than entering into a transaction, has no bearing on the question. They do not become parties to the transaction by virtue of their having voted for the resolution but by reason of their consent to take property rights under the transfer which it effected.

As it is clear that, at the time of the passing of such resolution, the three shareholders who, through it, became entitled to rights in the company's property had and exercised complete control over the company for a common purpose of their own, the persons between whom the transaction took place fall within the description "persons not dealing at arms length" and, in my opinion, this is so whether one invokes the aid of s. 127(5) of *The Income Tax Act* or not. I therefore hold that the events by which a right became vested in the shareholders of Granite Bay Logging Co. Ltd. to have the residue of its property, after satisfaction of its liabilities, distributed among them, constituted a "transaction between parties not dealing at arms length" within the meaning of that expression in s. 8(3).

There was, however, another step in the process by which the property of Granite Bay Logging Co. Ltd. became vested in its shareholders. The effect of the transaction referred to was to vest in the shareholders not the property of the company as a whole but the right to have the residue of it distributed to the shareholders after payment of the liabilities. It was one of the functions of the liquidator to make provision for the satisfaction of the liabilities. Instead of satisfying them from the property and distributing the balance of it to the shareholders, what the company did through its liquidator was to transfer to the shareholders the whole of the property, subject to the payment by them of the liabilities. The shareholders, on the other hand, accepted this in place

of the distribution, to which they had become entitled, of what might remain after the liabilities had been satisfied. This, in my opinion, was also a transaction between the company and its shareholders.

There remains the question whether this transaction, as well, was one between parties not dealing at arms length. In entering into it, the company was governed by the decision of the liquidator, who had certain statutory functions to perform. In carrying out these functions, he had a wide discretion conferred by the statute, but in exercising that discretion he was subject to the right of the shareholders in general meeting to direct that certain things should not be done without the sanction of such a meeting. On the other hand, the statute did not empower the shareholders, as a body, to dictate action to be taken by the liquidator, and it is clear that, as shareholders, they had no legal power to require the liquidator to administer the company and distribute its property in the way which he followed. But these considerations do not conclude the matter. The three shareholders, in determining to wind up the company, had a common purpose to get rid of certain difficulties which were being encountered in connection with the company by winding it up and, at the same time, having a new company take over its undertaking. The transaction in question was but one step in the carrying out of that common purpose, and I see no reason to conclude that the liquidator's action in resolving to distribute the property in specie, subject to liabilities, was dictated by anything but that common purpose or that he was acting otherwise than as the agent of all three. On the contrary, despite the undoubted power of the liquidator to act independently as such, in my opinion the correct inference from the circumstances is that the liquidator, in determining to distribute the property of the company as he did, was in fact acting in furtherance of the common purpose and as the agent of the three shareholders, of which he himself was one. Accordingly, I am of the opinion that this transaction, as well, was a transaction between parties not dealing at arms length.

There is thus in the whole series of transactions by which the assets of Granite Bay Logging Co. Ltd. became vested in the respondent none which can be regarded as

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having been made between persons dealing at arms length, and it follows that the respondent's submission cannot be upheld.

The appeal will be allowed and the assessment restored. The appellant is entitled to his costs.

Judgment accordingly.