BETWEEN:

PERCY VERNON SMITH .....APPELLANT;

1963
May 27, 28
Nov. 14

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 46(4), and 139(1)(e)—Income or capital gain—Business or adventure in nature of trade—Sales of land over period of many years—Investment or speculation.

In 1930 and 1931, the appellant, while living in Listowel, Ontario, and teaching school, purchased, in several separate transactions, a total of about 6,000 ft. of frontage on Lake Huron in Huron Township, County of Bruce and 105 lots in the town plot of Alma, the purpose of his initial purchase being to establish a summer home. In 1931, he began selling parcels of this property, allegedly to raise capital with which to purchase other more desirable property. In 1935, the appellant moved to Waterdown, Ontario and a year later he moved to Grimsby, Ontario, where, in 1947, he retired from teaching because of ill health. In that year, he purchased a real estate agency in Grimsby which he and his son operated until 1952, when he sold it and retired to his summer home on Lake Huron. The appellant purchased additional real property in the vicinity of his summer home in 1953, 1954, 1956, 1957 and 1959.

From 1931 on, the appellant had one and usually several signs displayed on or near his property advertising lots for sale. In 1953 or 1954 he advertised lots for sale on one weekend in two newspapers. He succeeded in selling lots in the years 1931 to 1934 inclusive, 1944, 1945, 1947 to 1951 inclusive and 1954 to 1958 inclusive. During the period from 1930 to 1958, he sold 172 lots and between 1959 to 1962 he sold 47 more. His principal source of income from 1952 to 1958 was the proceeds from the sale of lots.

Held: That the appellant's whole course of conduct from 1930 to 1960, including the nearly continuous sales of lots taken from property in excess of what he needed as a summer home or retirement property, the erection of "for sale" signs, the newspaper advertising, the evidence that he was the man everyone in the vicinity turned to when they wanted to buy, sell or even exchange lots and the fact that his main source of income between 1952 and 1958 was derived from the sale of lots, indicate that the appellant was carrying on a business in a scheme of profit making rather than carrying out a policy of investment and that the lots were his stock in trade.

2. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

C. H. Mahoney for appellant.

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F. J. Dubrule and *M. Barkin* for respondent.

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

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

This is an appeal from a decision of the Tax Appeal Board[1], dated March 3, 1961 dismissing appellant's appeals from reassessments dated September 30, 1959, and made upon him for the years 1954 to 1958 inclusive.

In reassessing the appellant, however, the Minister took into consideration that expenses had been incurred of $1,982.50 for 1954; $1,013.00 for 1955; $986.86 for 1956; $1,236.93 for 1957 and $778.80 for 1958 and the sole question in the appeal is whether certain profits made by the appellant in the sale of a number of lots situated on Lake Huron, Township of Huron, in the County of Bruce, are taxable profits or whether, as the appellant contends, they are capital appreciations as it was agreed that the following amounts added by the Minister's assessments to the appellant's revenue for the following years had been properly computed:

Year	
1954	$ 4,351.43
1955	$ 8,194.99
1956	$ 10,356.50
1957	$ 11,473.37
1958	$ 10,475.16

At the hearing, counsel for the respondent admitted that the appeal for the year 1954 should be admitted, the reassessment of September 30, 1959, being made beyond the four-year limit of s. 46(4) of the *Income Tax Act*, as the original assessment for the year 1954 was made in May 1955.

We will therefore deal here only with the reassessments for the years 1955 to 1958 inclusive.

[1] 26 Tax A.B.C. 146.

The appellant stated that from the year 1921 to 1935 he taught school in the town of Listowel, Ontario, and was principal of the high school for ten years out of the thirteen that he was there. In addition to his teaching and administrative duties, he had taken on a lot of extra-curricular duties in connection with the community.

In the year 1935 he went to the town of Waterdown, Ontario, situated not too far from the city of Hamilton, where he was the principal of the local school for one year. He then became principal of the school of Grimsby, Ontario, situated in the Niagara Peninsula and remained there from the year 1936 to 1947. In the latter year, he retired from teaching because of illness but was not eligible for a pension although he had taught school for twenty-seven years, as at that time the pension plan did not allow a pension for ill-health and he therefore had to find some means of subsistence. He explained that at that time he was suffering from a nervous disorder, inflammation of the nerve ganglia, and his doctor had told him to change his occupation.

He therefore in the spring of 1947 purchased a real estate agency in the town of Grimsby which he operated with his son for a period of five years. This real estate agency consisted in listing farms and homes for sale and in selling insurance and buying and selling property for others. The only property he purchased for himself during that period was a small building in which he kept his office on the ground floor with an apartment which he rented on the second floor.

While in Grimsby, he was mayor of the town from 1950 to 1951, deputy governor and district governor of the Lions Club and one year attended 125 meetings outside of town.

In 1952 he sold this agency business as he and his son were not satisfied with it and retired to a summer home situated on Lake Huron, Ontario, which he had purchased in 1930.

Since 1952, when he retired, the appellant states that he has been living on some revenue from investments derived from his office building until he sold it in 1956 for

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$17,000 and also from the sale of land in the township of Huron, Ontario, the subject matter of the present appeals from which he however admits deriving his principal source of revenue during this period.

He added that he required a great deal of the profits from the sale of land to live on as he had an expensive set-up as far as his and his wife's medical outlays were concerned; both, indeed, had to go to a warmer climate in the winter time, his wife suffering from heart and other internal troubles.

The appellant first bought land on Lake Huron, in the township of Huron, in 1930, at a time when he was living and teaching in the town of Listowel. In the summer of that year he had been invited to visit with his wife's cousin at her summer cottage on the ocean at a place called Wildwood, on the New Jersey coast. After a dip in the ocean, he got lumps all over his legs, arms and body and the doctor told him that being allergic to iodine poisoning he would have to leave the district. He and his wife, therefore, returned home immediately and a Miss Clayton, of Listowel, who had a summer home on Lake Huron at a place called Point Clarke, near the Point Clarke lighthouse, suggested that the appellant and his wife should rent her cottage and complete their vacation there, which they did. A Mr. Coulson, from Detroit, who was living in the cottage next door came to the appellant and told him that he had been out to see a farmer about some property on the lakeshore and wanted to buy a piece of land from him to build a summer cottage. This farmer, however, would not sell him an individual piece of land unless he took the whole frontage and he had more or less made a deal with the farmer to purchase this frontage. He told the appellant that he would buy a portion of it if the appellant would take the whole frontage and the latter and his wife thought that it would be nice if they would not go any other place to have a cottage there as it was close to the town where they lived at that time.

The deed was therefore made out to the appellant, then the latter made one out to Mr. Coulson for the portion he wanted and kept the remainder for himself.

In the years 1930 and 1931 the appellant made eight purchases in this area, as evidenced by Ex. 2, which is hereafter reproduced:

ORIGINAL LAND ACQUISITION OF APPELLANT

VENDOR AND YEAR	PROPERTY	CONSIDERATION
1. Smeltzer 1930	Part of Lot 11 Concession A Township of Huron 600 ft. × 132 ft.	$450.00 and legal expenses
2. James Henderson 1930	Lot 12 Concession A 44 ft. × 132 ft.	$200 00 and legal
3. Wm. Henderson 1931	Part of Lot 13 Concession A 330 ft. × 132 ft. 20 rods	$125.00 and legal
4. Henry Nesbitt 1931	Part of Lot 13 270 ft. more or less	($175 00) $275 00
5. Courtenay Estate 1932 Deed (1931)	Part of Lots 14 & 15 10 acres	$1,600 00
6. Palmer Estate 1931	Part of Lots 16 & 17 Concession 1 45 acres more or less	$1,200.00
7. Town Plot of Alma, December 8, 1931	93 lots, 35 acres more or less South of Pine River and North of Pine River	($666.00) ($740.00)
8. Town Plot of Alma 1931	6 acres 12 Lots	$144.00

The lots in the town plot of Alma were purchased from the Department of Lands and Forests of Ontario. This town plot of Alma was the frontage of lots 18, 19, 20, 21 and 22 and had been originally surveyed as a town. However, this did not materialize and it remained dormant for one hundred years before the appellant bought it. The appellant here bought ninety-three lots fronting on Lake Huron above Raglan Street as well as on both sides of Victoria and Albert Streets in the year 1931 at a price of $740. This was supposed to be a cash deal but the appellant did not have the money and asked for time to pay, which was granted, and the patent was granted on March 19, 1939, upon completion of payment of the purchase price. Another patent deed was issued in the year 1941 for twelve lots in the town plot of Alma which, however, were purchased also in the years 1930-1931.

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The appellant states that he purchased all that land in the years 1930 and 1931 for the following reasons.

The first property, part of lot 11, was purchased for the purpose of providing a location for a summer home. As for lots 12, 13 and 14 from the Henderson brothers and Sam Nesbitt, the appellant contends they were purchased as an investment, adding that he and his wife had had trouble with other types of investment and they thought this would be a safe investment for their money.

He states that lots 15 and 16 were purchased to provide for a summer home when he would retire. This, according to the appellant, was a beautiful piece of property. It was nicer than lots 11, 12 and 13 as the rear parts of these lots were a little swampy. There was an old orchard on lots 15 and 16 and it was like a park and the appellant states that he and his wife thought that this would be a wonderful thing to buy for a summer home in his retirement years adding that it was bought for aesthetic value. As for lots 16 and 17 bought from Mrs. Palmer, the appellant states that she came to him and asked if he would purchase everything she owned there. As the frontage was very nice and she had a wonderful wooded lot there and as the appellant put it "I didn't know too much about what I was doing, I was very inexperienced, but it looked as if it had a valuable bush so I bought it."

The appellant then purchased the township property of Alma in the following circumstances. On a trip to Toronto to see a Mr. Rock who was the surveyor at the Department of Lands and Forests about some squatters who had established themselves on the road allowance close to his land, he was told by a Mr. Draper, secretary of the Department of Lands and Forests, that the Department had some property in the township of Alma that it wanted to get rid of and he came up and showed the property to the appellant. The appellant states that as the property south of the river looked very good to tie in with the Palmer property with nice trees on it and good soil he was interested. He was not interested in the property north of the river which was not so good. He could not, however, have the southern part without also purchasing the northern part and having tendered for both, the purchase was awarded to him. Although the appellant had purchased these properties in

1930 and 1931, other transactions were made at a later date as appears from Ex. 5 which is hereafter reproduced:

ADDITIONAL DEEDS TO APPELLANT

GRANTOR AND YEAR	PROPERTY	CONSIDERATION
1. Sam Nesbitt 1954	5 acres in North ½ of Westerly Part of Lot 13 "immediately East of Nesbitt farm."	$2,000.00 Deed #17144 (1954)
2. MacKay to Minister 1953	Part of Lots 14 & 15	$1,600 00 Sold and repurchased
3. Herb Emerton 1956	Mill Site Reserve Alma Town Site	$300.00 Deed #17821 (1956)
4. Ross Miller (1957)	Part of Lot 16 Concession A (1957)	$400.00 Sold and repurchased Deed #18017
5. Margaret May (1959)	North ½ Lot 21 East side Lake Street	$1,250.00 Refund of Cost original Lot (1955)

With reference to the deeds mentioned on Ex. 5, the appellant had this to say about them individually. With respect to his purchase of part of lot 13 from Sam Nesbitt, in 1954, the frontage of this lot was at the time occupied by cottages one of which belonged to a Mr. Marr. Someone came along and appeared to be building a cottage behind Marr's who was located on the extreme north section of lot 13. The latter went to see the owner of this land who was a friend of his and he bought the land from him and the latter moved away. His neighbours Mr. Burda and Mr. Preston thought the same thing might happen to them, that someone might come along and occupy the land behind them and with children who would bother them by going over their lots to get to the lake. A Miss Melvin, who was the appellant's first public school teacher, had bought a lot from him and she was worried about the situation also. They all wondered what they could do about this situation and the appellant suggested that they do the same thing as Mr. Marr had done and they all asked the appellant if he would go to see Mr. Nesbitt and make a deal with him. It was then arranged that the appellant would buy the whole thing from Nesbitt. He therefore took the deed from Mr. Nesbitt and

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transferred a portion to Mr. Burda and Mr. Preston at what he considered was the actual cost and sold the frontage lot to Mr. Zurbrig at a small profit. The appellant states here that he was merely trying to help these people whom he knew well for some time and insure that he would have congenial people around him.

The appellant bought part of lots 14 and 15, listed as No. 2 on Ex. 5, for $1,600 in the year 1953 in the following circumstances. A Mr. Lewis who had purchased a lot formerly the property of the appellant came to the latter and told him that he had changed his mind about building a cottage and that if he wanted the lot he would sell it to him. At that time a Dr. Wood from Detroit had purchased a piece of land on lot 14 adjacent to the appellant's cottage and as he wanted additional frontage he asked the appellant if he would get the property from Mr. Lewis and include it in his deed to him which he did at cost price. This, according to the appellant, was done to assist one of his neighbours. With respect to No. 3, purchased in 1956 from Herb Emerton and situated on Mill Site reserve of the Alma town site, the appellant contends that he acquired this land following some difficulties he had with a Mr. Emerton, the owner of this property as a result of some gravel which was taken therefrom on the mistaken assumption that it was in the river bed. Rather than quarrel with the owner who was going to make trouble for him, and under threat of litigation, the appellant purchased the land.

With respect to the Ross Miller deed in 1957, the appellant states that Miller had purchased this particular lot 16 and his brother had bought a lot from the appellant on 17 and wanted to buy a lot beside it. So the appellant purchased the lot in front of lot 17 for $400 and sold the other lot for $400. There was no profit here and no actual acquisition of land.

As for No. 5, a purchase of one half of lot 21 East side of Lake Street from Margaret May in 1959, the appellant states that Mr. May, whom he knew in Grimsby, and his sister came to him and said they would like to buy some property in the township of Alma and he sold them two lots alongside each other. Mr. May made a deposit of $200 on his lot and his sister paid for her lot outright. The price was $1,200. A year or so later Mr. May wrote the appellant and told him he could not go ahead with the purchase and

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he would like him to cancel it so the appellant returned his money; as for Miss May she also could not keep the property and the appellant took it back also and gave her $50 for her costs.

The appellant had three cottages as appears from Ex. 6. He built his first one in 1931 on lot 11, his second a year later, in 1932, on lot 14 which he kept for twenty years, and his third one in 1952 right beside the second one on lot 14 and moved the second cottage to the east side of Victoria Street on the town plot of Alma and sold it.

The appellant at p. 42 of the transcript explains how he managed to pay for his land acquisition of property:

> A. Yes. When I purchased the property from Mr. Smeltzer I had enough money to complete the cottage and to buy the land from William Henderson and Henry Nesbitt. Those deals were made rather quickly . . . But when it came to lots 14 and 15 where I was paying $1,600 for the property, I didn't have enough money and we didn't seem to be able to get anybody to lend money to us so I decided I would have to liquidate some of these properties that I had bought along the shore and get money to pay for this, and likewise to pay for the Palmer property and the other one, so we did sell some of those lots along there. We found people who were very anxious to purchase them and we let them have them almost by liquidating at the cost price. It took a long time to clear the deed and I think eventually I paid the Department of Highways for lots 14 and 15 and by the time it was cleared I had enough money to pay for the Courtney property. But Mr. Palmer took back a mortgage of around somewhere around $880, and that was paid over a period of years. She gave me the deed of the mortgage registered against it and about 1939 I was able to pay off that mortgage and it was clear. Then other lots, properties, were liquidated to assist in paying for the townsite lots so eventually in a period of 10 years I had raised enough money to pay for the property.

Exhibit B admitted by the appellant establishes that the latter sold 172 lots from the year 1930 to the year 1958 inclusive to which must be added 47 sales from 1959 to 1962, thus forming a grand total of 219.

Exhibit A indicates that in the year 1955 the appellant sold fifteen properties and made a profit thereon of $9,207.99 after deduction of a capital gain of $910.13 on the Wood property. In the year 1956 he sold fourteen properties at a profit of $11,343.36; in 1957 he sold twenty-eight at a profit of $12,710.30 and in 1958 he sold twenty at a profit of $11,253.96.

The appellant claims that the ten and twelve sales made respectively in 1931 and 1932 were made by him "with the

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view of getting the return of my capital on what I considered more desirable property that I wanted to keep for my retirement". The sales made, one in 1933 and one in 1934, were effected according to the appellant as "there was always somebody who would think I should give them a piece of this property and there would be a sale or two made to my friends or business acquaintances" . . . adding "I would like his Lordship and the Court to understand that I never made any attempt to sell property seriously but I had a lot of people come to buy it". The sales of eight lots each for the years 1944 to 1945, the appellant cannot recall. In 1947, one sale took place, in 1948 two sales, in 1949 two sales, in 1950 four sales and in 1951 two sales. This was when the appellant was operating a sales agency in Grimsby. In the year 1954 the appellant's sales started to mount, until the year 1958, as follows: in 1954, thirteen sales; 1955 fifteen sales; 1956 fourteen sales; 1957 twenty-eight sales and 1958 twenty sales. The above sales were of lots situated mostly in the town plot of Alma, north of the river, and some on the Palmer property.

There was no office expenses in the expenses allowed by the Minister and which appear in Ex. C. As a matter of fact the appellant never had an office as he stated at p. 58 of the transcript: "People would come and want to buy a piece of land and if they did not understand it I would show them where it was and we would make up sort of a contract until the deed was issued. Then they would give me a cheque and I would give them a receipt and go and give them a deed for it." The appellant never put a subdivision plan on his properties. He explains this by saying that when he went back to the cottage property in 1952 he and his wife had taken serious account of their assets and not having a pension, he felt that he would have to try to liquidate his property and to recover, as he puts it at p. 48 of the transcript, "the capital and the capital gain from it". He adds that when he purchased the property south of Pine River, he had no access for twenty years to the property north of Pine River and he did not think there was any value to this property except for reforestation which he attempted in 1940 by planting 5,000 pines on it but this was not too successful. Access was given him to the property north of Pine River in the year 1953 only as a result of an agreement with a Mr. Bell to extend a country road through his prop-

erty to Victoria Street and then people became interested in purchasing the appellant's lots. The appellant also states that he had great plans for the Palmer property when he purchased it because there were certain aspects that he thought were very interesting, such as selling the bush lot to recover something worthwhile and to run something like an agricultural project on the back end of the lot. He also thought that he could set up a golf driving range on this property as there was a beautiful fifteen acre field in there. He and his son felt it would be nice for a boys camp; however with the exception of a small sale of wood, none of these plans materialized. A Mr. Stevenson who had a summer home at Lake Huron and who was one of the appellant's school board members together with the latter agreed to lay plans to establish a turkey farm on the property and before they got it working Mr. Stevenson died and the plans here fell through also. This would have occurred sometime in the nineteen forties.

Although there was some interest on the part of possible purchasers for small pieces of the property, the appellant maintains that he never received an offer to purchase for a large block of lands in his holdings except on one occasion and this did not materialize. As for the timber on the property, the trees being too small, the only deal possible was to sell some birch, cut them into bolts and sell them to the bobbin factory at Walkertown, which the appellant did in 1962, but it was not a very profitable transaction. The appellant did very little for roadways on his property. The only road construction he took part in was one marked "Farmers road to lakefront" east and west on Ex. 1 and the roads in the town plot of Alma which he tried to extend onto the streets when he decided to liquidate the town plot of Alma. "The little road that comes up from lot 17 and crosses the town plot was turned there to go into Victoria Street and then the farmer's road was turned at St. Arnaud Street and went back for about 300 ft. and then turned back onto the farmer's bush road so that is all that was done there."

As to how the appellant established a price for his lots, he stated that for the Smeltzer, Henderson and Nesbitt properties he did not price the lots much beyond the cost and the cost of surveying and the legal work on it. He did charge a little more for the Courtney property. As for the Palmer property he set a price of $400 for a 132 × 132 lot

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north of the river; this was true of most of the town site lots which were set at about $400 to $500 although some of them were sold for much less than that.

He contends that when he started to liquidate his property the lots were sold cheaply, adding at p. 59 of the transcript: "I wasn't really in the business of selling lots so I was just more or less trying to find locations for them. But north of the river I set a price of $1,000 on a frontage lot and those that were longer from north of Cathcart Street were $1,200. The second row of lots were $500 and the third or fourth now were $200."

He maintains that he never listed his property for sale, never had an agreement with any real estate agent whereby he would pay him a price for it, nor has he ever paid any commission on sales. The only newspaper advertising he had was in 1953 or 1954 which was carried for one week-end and only one or two people came as a response to those adds and they were never repeated.

He admitted, however, that he started putting up signs on his property in 1930 when he bought the Courtney property and as he states at p. 61 of the transcript "and knew I didn't have enough money to pay for it." These signs read as follows: "Lots for sale, apply to P. V. Smith." If he needed to sell a lot between 1930 and 1952, he would put up an occasional sign on the property. In 1952, and particularly after the road went in on Larkin Beach in the north part of the town plot of Alma, he put a sign there indicating that the lots were for sale and the location of his cottage; he also put a sign up on the south side of the river and probably a sign on the Palmer property and he had a sign at his gate saying "Lots for sale" or just "Lots", and he put a sign down at the booth near the lighthouse which referred to frontage lots and cottages for sale. The reference to the cottages for sale were not those built by the appellant. The latter comprised, as we have seen, one which was rented for a year or two and then sold to the man who had been renting it and of course when he built his permanent home he moved the second cottage he had built and sold it. It referred indeed to prefab cottages which had been the subject of an arrangement with the Wrights Lumber Company of Waterloo. The principal of this company came to the appellant and said he knew the latter had been selling some lots

(this was in 1953) and wondered if he would help to advertise his prefab cottages. The appellant told him that he was not able to sell cottages for him on a commission basis because he had no licence so he left brochures of his prefab cottages and when anyone wanted to buy a cottage, the appellant would show them this literature and tell them where to get in touch with the manager. This, according to the appellant, did not however work too well and there was no financial arrangement, commission or benefit for him in the event he sold any cottages.

He states that he did nothing to develop the property by way of water services or sewers.

According to the appellant, there were many contributing factors for the increase in value of his property in which he personally had no part whatsoever, one of which was the improvement of the beach due to the fact that the water level came up and left more sand on the beach and made it more attractive. Another factor was when the beach association brought in the hydro line and garbage collection and arrangements were made for roads and telephone booths and beach patrol during the winter months while the cottagers were away. Highway 86 was then completed in the early fifties from Kitchener to Amberley which is close to the beach and this brought in people from Guelph, Kitchener, Waterloo and intermediary towns. Highway 21 from Port Huron, a lead in from Detroit and Birmingham and the southern points, was improved. Good water in abundance by means of artesian wells was supplied and this by making it a good place to locate a cottage attracted people and interest in his properties.

The appellant, as we have seen, submits that the sales of his properties in 1955, 1956, 1957 and 1958 were the sales of capital assets purchased with a view of realizing a long term investment profit by means of a resale at a profit of whatever parts he did not need for his own use, whereas the submission on the part of the Minister is that they were income within the meaning of ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148 including, of course, the definition of "business" in s. 139(1)(*e*) as including "an adventure or concern in the nature of trade."

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It may be of some use here to repeat what Lord Justice Clerk had to say in *Californian Copper Syndicate Limited v. Harris*[1]:

> It is quite a well settled principle in dealing with questions of assessment of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of schedule D of the *Income Tax Act* of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or a change of investment but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and therefore seeking to make profits. There are many companies which in their very inception are powered for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for income tax.

And then the Lord Justice Clerk laid down the test to be applied as follows:

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

The determination of the present issue depends also on its facts and surrounding circumstances for as put by Thorson P. in *Spencer v. M.N.R.*[2]:

> For it is no more possible to lay down a single criterion for deciding that the transactions were investments than it would be for deciding that they were adventures in the nature of trade. The true nature of the transactions must be determined.

In the present instance there is one fact which strikes me and that is the large amount of property bought by the appellant in 1930 and 1931 which was way beyond what he needed as a summer home or as a place where he and his wife could eventually retire to, although admittedly, nothing would prevent him from buying more than needed and this excess could well be the proper subject matter of a long term investment.

Indeed, if we go over these purchases of the appellant in the years 1930-1931 and examine Ex. 1 we find that he had acquired at that time, without however having entirely paid for it and making allowances for the Bower property

[1] (1904) 5 T.C. 159 at 165. [2] [1961] C.T.C. 119 at 121.

approximately 6,000 ft. of frontage on Lake Huron and 105 lots in the town plot of Alma. This, of course, was way beyond what the appellant needed for his own use and he admitted at p. 93 of the transcript that at this time his intention was to sell whatever lots he did not need himself:

Q. . . . When you bought this property in 1930—and I am talking about when you, in your terminology, when you had an enforceable right to buy the property, Mr. Smith—what did you intend to do with it?

A. Just as a safe investment. At the time I bought it I had no definite plans in regard to it at all.

Q. When you did buy it at that time it was not producing revenue in the condition it was?

A. That is true.

Q. And unless you did something it would produce nothing to you?

A. It might later on if somebody wanted to buy it. I felt I bought it at the lowest possible price and that the value might increase.

Q. Then it could only produce something to you when you sold the lots?

A. That is right, on the first purchases. I bought it as a safe investment.

Now, effectively, this is what the appellant did. Indeed, he started to sell parcels of this property in 1931 practically from the time of his purchases and although he states that these sales were made for the purpose of obtaining capital to purchase more desirable property he wanted to keep for his retirement and for which he needed funds, this lack of funds in itself would indicate, it seems, that he was much more in the situation of a trader than an investor. These nearly continuous sales of land by the appellant from their date of acquisition in 1930-1931 to 1960 coupled with the fact that during the period under review his greatest source of revenue was from the sale of these lots are, in my opinion, more consistent with the idea of an operation of a business in a scheme of profit making than with that of a policy of investment.

The fact also that virtually from the beginning of his purchases in 1931 he had a sign offering lots for sale and that since that time there were other signs erected by him and as we approach the period under review, there were more frequent signs as well as advertising one week-end in two newspapers, all tend to indicate that this was a venture of speculation in land; that the appellant may not, as suggested by counsel for the appellant, have organized these sales in the best possible way by not going at it in a business like manner by subdividing and advertising extensively at

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large, does not necessarily indicate, in my opinion, that he was not carrying out such a speculation. Indeed, his experience in the real estate field for several years where he surely must have acquired some skill may well have shown him that as far as his properties in the Lake Huron township were concerned, and in view of his limited finances, the best profitable manner to deal with them at the relevant times was the very way he did deal with them, without spending uselessly on extensive advertising, or going to the trouble and expense of subdividing, bearing in mind at all times his admitted intention to sell as much as possible to old friends, acquaintances and congenial people with whom he wished to surround himself and fully alert as he was to the fact that better highways being constructed, the beach improving, these summer locations for properties were rising in value.

May I also add that appellant's assertion that he did not make an attempt to sell property seriously is not too convincing when confronted with the 219 sales made by him over the period extending from 1931 to 1960. The above number of transactions, as well as the additional deeds to the appellant, as evidenced by Ex. 5 in the years 1953, 1954, 1956, 1957 and 1958, although the latter were not all profitable to him, all indicate in my opinion that the appellant here in addition to being quite active in real estate dealings was the man to whom everyone in the vicinity turned to when they wanted to purchase, sell or even exchange lots. This, of course, is also more consistent with a business than with an investment.

Now appellant's attempt to establish that in some of his purchases he had in mind the intention of setting up some income producing establishment, such as reforestation, a turkey farm, the sale of timber or wood, the establishment of a Boy Scouts' camp or of a golf range, was not too successful. An attempt was made to reforest one section of his property but the evidence does not show how serious this endeavour was and it turned out to be unsuccessful. As for the turkey farm, the appellant's alleged partner died and this was abandoned; the wood sold from some of the lots in one instance only, and that was in 1962, amounted to only $200. As for the other intended plans, they were never implemented.

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The best test in matters such as this is the objective one. Indeed, it is not what the appellant could or might have done, it is what he in fact did do as disclosed by the whole course of his conduct from 1930 to 1960 and this reveals such a long and sustained history of sales of parcels of land taken from property in excess of what he needed as a retirement property for himself and his wife, that it could be said that these lots were really his stock in trade in the business he was carrying on.

All this has driven me to the conclusion that at the time of acquisition of the land the appellant did have the intention of turning it to account by profitable resale as soon as he could which, in effect, he did from practically the year of purchase to 1960.

I do indeed regard the present situation as one in which I must infer that the appellant purchased the property he did not need for himself and his wife as a summer home or a retirement home, as a prolonged speculation looking to resale, and that as far as this property was concerned, it was always his intention to turn it to account whenever possible or desirable which, as we have just seen, he effectively did.

The cumulative effect of the foregoing has convinced me that the appellant was engaged in an adventure or concern in the nature of trade and that the profit realized by him in the sale of property he did not need constitutes a gain made in the operation of a business in the carrying out of a scheme for profit making.

It therefore follows that on the facts and circumstances of this case, I must and do find that the profits realized by the appellant in 1955, 1956, 1957 and 1958 from the sales of land were not enhancements of the value of investments made by him. The true nature of these transactions were not investments. These profits were made by the appellant in the operation of a speculative business scheme for profit making within the meaning of the expression used in the *Californian Copper Syndicate case (supra)*. They resulted from speculative transactions that were adventures in the nature of trade. They are, therefore, because of the definition of "business" in s. 139(1)(*e*) income from a business within the meaning of ss. 3 and 4.

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With the exception of the year 1954, the appeal for which should be allowed as admitted by counsel for the Minister it follows that the Minister was therefore right in assessing the appellant as he did for the taxation years 1955 to 1958 inclusive with the result that the appeal herein for these years is dismissed.

The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.