1968

*Mar. 28
June 3

DORILA TROTTIER ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Alimony—Agreed monthly payments to estranged wife secured by mortgage—Whether deductible as alimony—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(l).

The appellant was the owner of a hotel which he operated for a number of years with the help of his wife. They separated in 1958. It was agreed that the wife was entitled to half the value of the hotel, estimated at $90,000. Four documents were executed to implement the agreement reached. These documents included a separation agreement under which the wife agreed to accept a second mortgage for $45,000 on the hotel property in full settlement of all claims for an allowance from her husband and her dower rights. In 1961, the appellant sought to deduct, as alimony under the provisions of s. 11(1)(*l*) of the *Income Tax Act*, R.S.C. 1952, c. 148, the monthly payments thereafter made by him to his wife under the agreement. The Minister disallowed the deduction and his contention, which had been reversed by the Income Tax Appeal Board, was upheld by the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The monthly payments did not fall within the terms of s. 11(1)(*l*) of the *Income Tax Act*. Reading the four documents together, it appeared that the agreement between the parties was not that the husband should pay his wife a periodic allowance for maintenance and that his agreement to do so should be collaterally secured by a second mortgage; it was rather a release by her of all her claims for an allowance and the giving by her of an irrevocable power of attorney to bar her dower in her husband's lands in exchange for a single consideration: the giving of the mortgage for $45,000. The obligation to make the payments under the mortgage was not dependent on the wife continuing to live. She was free to assign it at any time. The separation agreement terminated all claims arising

*PRESENT: Cartwright C.J. and Fauteux, Martland, Hall and Pigeon JJ.

from the status of the parties as husband and wife. The payments made thereafter were in satisfaction of obligations arising not as between husband and wife but as between mortgagor and mortgagee.

Revenu—Impôt sur le revenu—Pension alimentaire—Paiements mensuels à l'épouse séparée garantis par hypothèque—Sont-ils déductibles comme étant une pension alimentaire—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(l).

L'appelant était le propriétaire d'un hôtel qu'il exploitait depuis plusieurs années avec l'aide de son épouse. Ils se sont séparés en 1958. Il a été convenu que l'épouse avait droit à la moitié de la valeur de l'hôtel, qui fut évalué à $90,000. Quatre documents ont été exécutés pour donner suite à l'entente. Ces documents comprenaient une convention de séparation en vertu de laquelle l'épouse s'engageait à accepter une seconde hypothèque de $45,000 sur l'hôtel, en règlement complet de toute réclamation pour une allocation qu'elle pourrait avoir contre son mari ainsi que de ses droits douaires. En 1961, l'appelant a tenté de déduire les paiements mensuels qu'il a faits par la suite à son épouse en vertu de la convention, comme étant une pension alimentaire selon les dispositions de l'art. 11(1)(*l*) de la *Loi de l'impôt sur le revenu,* S.R.C. 1952, c. 148. Le Ministre a refusé la déduction et sa prétention, qui a été rejetée par la Commission d'appel, a été confirmée par la Cour de l'Échiquier. Le contribuable en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Les paiements mensuels ne tombent pas sous les termes de l'art. 11(1)(*l*) de la *Loi de l'impôt sur le revenu.* Si l'on considère les quatre documents ensemble, il appert que la convention entre les parties n'était pas que le mari devait payer à son épouse une allocation périodique pour son entretien et que son engagement à le faire devait être garanti collatéralement par une seconde hypothèque; c'était plutôt une quittance qu'elle donnait de toutes ses réclamations pour une allocation et la remise qu'elle faisait d'un mandat irrévocable ayant pour effet d'exclure son douaire des biens de son mari en échange d'une seule et unique considération: la remise d'une hypothèque de $45,000. Que l'épouse continue de vivre ou non n'enlevait rien à l'obligation de faire les paiements en vertu de l'hypothèque. Elle était libre d'en faire la cession en tout temps. La convention de séparation mettait fin à toutes les réclamations résultant du statut matrimonial des parties. Les paiements faits par la suite avaient pour effet de satisfaire les obligations nées non pas entre un mari et son épouse mais entre un débiteur et son créancier.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed.

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[1] [1967] 2 Ex. C.R. 268, [1967] C.T.C. 28, 67 D.T.C. 5029.

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Andrew Brewin, Q.C., for the appellant.

M. A. Mogan, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a judgment[1] of Cattanach J. allowing an appeal from a decision of the Income Tax Appeal Board and upholding the contention of the Minister that the appellant was not entitled to deduct from his income for his 1961 taxation year the sum of $3,150 paid by him to his wife in nine monthly instalments.

The question to be determined is whether the payments made by the appellant fell within the terms of clause (*l*) of s. 11(1) of the *Income Tax Act* which reads as follows:

> (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year: .....
>
> (*l*) an amount paid by the taxpayer in the year, pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement, as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage, if he was living apart from, and was separated pursuant to a divorce, judicial separation or written separation agreement from, his spouse or former spouse to whom he was required to make the payment at the time the payment was made and throughout the remainder of the year.

It is common ground that, during the relevant period, the appellant was living apart from and was separated from his wife pursuant to a written separation agreement and that during the taxation year in question he made nine payments of $350 each to her. The dispute is as to whether these amounts were paid "pursuant to...a written agreement as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof", these being the words of s. 11(1)(*l*) relied on by the appellant.

It is necessary to state the facts in some detail. The appellant and his wife were married in 1929 and lived together as man and wife until they separated some time in 1957 or 1958. From 1944 to 1947 the appellant was, with his brother, the joint owner of a hotel in Chelmsford, Ontario, known as the Algoma Hotel. In 1947 the appellant purchased his brother's interest and became and remains the sole owner of the hotel. The appellant and his wife lived

[1] [1967] 2 Ex. C.R. 268, [1967] C.T.C. 28, 67 D.T.C. 5029.

together at the hotel until the time of their separation. The wife kept the books of the business, looked after the kitchen and dining room and the rental of the bedrooms. The appellant looked after the beverage rooms. The appellant kept the beverage room receipts; the wife kept the other hotel receipts and applied them either on expenses or improvements or for her own use and maintenance. At the time of the separation the hotel was valued at $90,000 to $100,000. The wife taught school at various times during her married life and contributed an undetermined amount of her earnings toward the upkeep and improvement of the hotel.

In 1958 the parties agreed to separate. The wife retained Mr. J. L. McMahon as her solicitor. On August 7, 1958, the appellant and his wife went to Mr. McMahon's office. The appellant was not independently represented. Four documents were drawn by Mr. McMahon and signed either then or later by the appellant and his wife. These documents were attached as schedules to a joint statement of facts on behalf of the parties, which was filed at the hearing in the Exchequer Court.

The first document is headed "Memorandum of Agreement between Dorila Trottier and Yvonne Trottier". It was signed and sealed by both parties in the presence of Mr. McMahon on August 7, 1958. So far as relevant it reads:

> It is agreed that the parties will sign a Separation Agreement when the first payment of ($12,000.00) Twelve Thousand Dollars, on a mortgage to Yvonne Trottier is made. The Separation Agreement shall include the mortgage given by Dorila Trottier to Yvonne Trottier for Forty-Five Thousand ($45,000.00) Dollars, dated the 7th day of August, 1958, in full settlement. Yvonne Trottier will sign a permanent Bar of Dower.

The second document is a Charge under the *Land Titles Act* on the hotel property made by the appellant to his wife. It provides for payment of $45,000 with interest at 5 per cent per annum. The wording of the payment clause is as follows:

> PROVIDED THIS CHARGE TO BE VOID on payment of the said sum of——FORTY-FIVE THOUSAND——($45,000.00)—00/00 dollars in lawful money of Canada, with interest at FIVE (5%) per cent. per annum as follows:
>
> THE sum of Twelve Thousand Dollars ($12,000.00) shall be paid when the proceeds of a first mortgage loan to Canada Permanent Mortgage Corporation dated July 29th, 1958, are available, or within one month from the date of execution of the Charge, which ever is the sooner. The balance of Thirty-Three Thousand ($33,000.00) Dollars shall be paid in

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equal consecutive monthly instalments of Three Hundred and Fifty ($350.00) Dollars, including interest, commencing on the 1st day of October, 1958, and on the 1st day of each and every month thereafter until all arrears of principal and interest monies hereby secured are fully paid and satisfied. The interest at the rate of Five per cent (5%) per annum shall be calculated half yearly, not in advance, on the unpaid balance of principal outstanding. Not withstanding, anything written above the interest shall not be calculated at any time on a principal sum greater than Twenty-One Thousand ($21,000.00) Dollars. Such monthly instalments when received by the mortgagee shall be applied firstly on account of interest and interest in arrears, if any, and secondly upon the unpaid balance of the Principal. The interest payable shall be calculated from the 1st day of September, 1958.

The Charge contains the following clause:

PROVIDED the Mortgagors, when not in default, shall have the privilege of paying the whole or any part of the mortgage money hereby secured without notice or bonus at any time.

It also contains an acceleration clause providing that on default of payment of any instalment the balance of the principal shall at the option of the mortgagee become due and payable.

The third document is a direction, signed by the appellant, directing the Canada Permanent Mortgage Corporation to pay $12,165 to Yvonne Trottier out of the first mortgage on the hotel property made to that company.

The fourth document is headed "Separation Agreement". It is dated August 7, 1958, and executed under seal by the appellant and his wife. It was signed in the month of October 1958 when the wife received the payment of $12,000 provided for in the Charge.

Paragraph 7 provides for payments of $50 a month by the husband to the wife for the maintenance of their daughter "for a period of two years or until such time as her education is completed". No issue is raised as to this paragraph.

The only other provision in the agreement dealing with payment is para. 2, which reads as follows:

The wife accepts in full settlement a second mortgage upon the property known as Lot number (2) TWO, in the Fourth concession in the Township of Balfour, for the sum of Forty-Five Thousand ($45,000.00) Dollars in full settlement of all claims for an allowance for herself from her husband. This is provided the convenants in the mortgage are observed.

The main contention of the appellant is that the separation agreement and the mortgage must be read together and, so read, constitute an agreement imposing upon the appel-

lant an obligation to make payments of an allowance on a periodic basis for the maintenance of his wife, within the terms of s. 11(1)(*l*).

I agree that these documents which were prepared contemporaneously and relate to the same transaction should be read together; but, so reading them, it appears that the agreement between the parties was not that the husband should pay his wife a periodic allowance for maintenance and that his agreement to do so should be collaterally secured by a second mortgage; it was rather a release by her of all her claims for an allowance and the giving by her (in para. 4 of the agreement) of an irrevocable power of attorney to bar her dower in her husband's lands in exchange for a single consideration, the giving of the mortgage for $45,000. The obligation to make the payments under the mortgage was not dependent on the wife continuing to live. She was free to assign it at any time.

The giving of the mortgage was analogous to the payment of a lump sum by which once and for all the husband was released from liability to support his wife. The mortgage was given because the husband was not in a position to pay the lump sum in cash. While the facts differ from those in *Minister of National Revenue v. Armstrong*[2], the case at bar appears to me to fall within the principle on which that case was decided.

Paragraph 2 of the separation agreement has already been quoted. Paragraph 1 reads as follows:

> 1. The husband and wife will henceforth live separate from each other, and neither of them will take proceedings of any kind against the other for restitution of conjugal rights, or molest or annoy or in any way interefere with the other or make any demands whatsoever upon the other arising from their status as husband and wife.

The agreement, in consideration of the giving of the mortgage, terminates all claims arising from the status of the parties as husband and wife. The payments made thereafter were in satisfaction of obligations arising not as between husband and wife but as between mortgagor and mortgagee.

It may be observed in passing that part of each monthly payment was made up of interest on the capital sum which the appellant had undertaken to pay.

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2 [1956] S.C.R. 446, [1956] C.T.C. 93, 56 D.T.C. 1044.

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On a consideration of the documents, read together and without giving effect to any extrinsic evidence, it is my opinion that the appeal fails and it becomes unnecessary to consider the alternative argument of counsel for the respondent that the payments agreed to be made by the appellant were not for maintenance but in satisfaction of the wife's claim that she was entitled to a fair share in the hotel property. That this was so was deposed to by the wife and it was submitted by counsel for the respondent that, even if her evidence would have the effect of varying the wording of the documents, it was admissible on the principle stated as follows in Phipson on Evidence, 10th ed., at p. 724, para. 1789:

> Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to *contradict or vary* the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness or fraud of the parties; nor, in proceedings between a party and a stranger will the former be estopped, since there would be no mutuality.

However, as mentioned above, I do not find it necessary to deal with this branch of the argument.

While I have stated my reasons in my own words, I wish to express my substantial agreement with the reasons of Cattanach J.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Hawkins & Gratton, Sudbury.

Solicitor for the respondent: D. S. Maxwell, Ottawa.