BETWEEN:

PHILIP REGINALD MORRIS .....APPELLANT;

1963

Jan. 23, 24, 25, 28

AND

Jan. 28

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

Revenue—Income tax—Income Tax Act 1948—Income Tax Act R.S.C. 1952, c. 148, ss. 3 and 4—Statute of Limitations R.S.O. 1960, c. 214—Income from property—Income of taxpayer—Appeal dismissed.

In May 1924 property in Hamilton was conveyed to the appellant and his father and mother as joint tenants and not as tenants-in-common. Following the death of the mother, the father on May 1, 1945, conveyed the property to the appellant who has been the sole registered owner since that date. The Minister assessed the appellant for the whole net income from the property for the years 1950-1956 inclusive. Appellant contended

(1) That pursuant to a trust agreement dated April 15, 1944 (but not registered) between his father and the appellant's wife and signed also by the appellant, he had only a one-third interest in the property, the other two-thirds being owned equally by his two sisters. On July 2, 1945 the appellant as sole owner executed a mortgage in favour of his two sisters for $3,000, which mortgage was discharged on December 2, 1946 by payment of $2,300. Since that date the appellant has paid no part of the profits from the property to either sister or otherwise acknowledged that they have any interest in the property.

(2) That under the Statute of Limitations of the Province of Ontario by adverse possession either the appellant's father, his mother or his wife has become the sole owner of the property and the appellant is not taxable in respect of any of the profits therefrom.

An appeal to the Tax Appeal Board was dismissed and from that decision an appeal was taken to this Court. By virtue of an agreement entered into by the appellant and the Minister, it is not necessary to consider the question as to the quantum of the net annual profits from the

1963

PHILIP REGINALD MORRIS v. MINISTER OF NATIONAL REVENUE

property, the issue in the appeal being "Was the appellant entitled to the whole of such profits, or part thereof or none at all?"

Held: That at all relevant times the appellant was the owner of the property and directly or indirectly received all the net profits therefrom.

2. Since the two sisters of the appellant are not parties to these proceedings, their rights, if any, in the property should not be finally determined; but the only reasonable inference to be drawn from the established facts is that the appellant in his personal capacity did receive directly or indirectly and retain for his personal use and benefit all the net profits from the property in the relevant years and that from December 2, 1946, when the mortgage to the sisters was discharged, the appellant considered that the two sisters had no further interest in the property.

3. That neither the appellant's father, mother or wife ever acquired ownership of the property by adverse possession as against the appellant; that in such transactions as may have been carried out by the appellant's wife in collecting rents, paying expenses and debts, she acted merely as agent for the appellant.

4. That after discharging such obligations the balance was payable to and paid to the appellant in his capacity as owner.

5. That in any event the appellant failed to meet the onus cast upon him to establish that the assessments were erroneous.

6. That the appeal must be dismissed.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Hamilton.

The appellant in person.

C. W. Robinson, Q.C. and *F. J. Dubrule* for respondent.

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

CAMERON J. now (January 28, 1963) delivered the following judgment:

By its decision dated March 24, 1961[1], the Tax Appeal Board upheld with a variation (later to be referred to) the re-assessments made upon the appellant for the taxation years 1950 to 1956, inclusive, and from that decision an appeal is now taken to this Court.

The following facts are not in dispute. The appellant was formerly a member of the bar of Ontario, but was disbarred in 1933 and is now a prospector. He is a son of the late William Morris of Hamilton who died in 1949

[1] 26 Tax A.B.C. 198.

and of the late Esther Georgina Morris who died in 1941. The appellant's wife is Jean Cairns Morris, a practising solicitor in Hamilton, and both are now over seventy-five years of age.

By deed dated May, 1924 (Exhibits 2 and "C"), Business Realty Limited conveyed to William Morris, Esther Georgina Morris and the appellant as *joint tenants and not as tenants in common* parts of Lots 23 and 24 on N. Hughson's survey in the City of Hamilton, known also as street numbers 22 to 26 John Street North, Hamilton. On that property, there was and is situated a large brick building, the ground floor being used or rented as shops and offices and the upper floors being divided into a substantial number of living apartments. It is located within one block of the main shopping and business street in the city. For the sake of brevity, I shall hereafter refer to it as "the property".

The consideration for the above conveyance was $40,000 which was paid by the assumption of a registered mortgage to the Tuckett Estate for $25,000, and the balance of $15,000 was paid by William Morris. The grantees in that deed on March 8, 1926, gave a mortgage to the Toronto General Trusts Corporation for $25,000 (Exhibit 3), it being provided that $500 on principal as well as interest should be re-payable every six months and the balance on March 1, 1931. The Tuckett mortgage was then discharged.

By indenture dated April 14, 1944 (Exhibit 4), the Toronto General Trusts Corporation assigned the mortgage to the wife of the appellant—Jean Cairns Morris (in trust), the amount owing thereon being $18,183 for principal and $358.50 for interest, plus interest on the principal from March 1, 1944, at 6¼ per cent.; that assignment was registered on June 11, 1945, as No. 98026 N.S.

By deed dated May 1, 1945 (Exhibit F) William Morris conveyed the property to the appellant for the expressed consideration of natural love and affection and $2. In the recitals thereof it is stated that the grantee and grantor with Esther Georgina Morris, the former wife of the grantor, were joint tenants and not as tenants in common of the property and that Esther Georgina Morris had died on March 30, 1941. That deed was registered on July 10, 1945 as No. 98349 N.S. That deed was prepared in the office

1963

PHILIP REGINALD MORRIS v. MINISTER OF NATIONAL REVENUE

Cameron J.

of Morris and Morris (the appellant's wife being then the sole partner in that firm) and in the affidavit made under the *Land Transfer Tax Act,* she swore that she was solicitor for the grantee.

As shown by the Registrar's Abstract of Title (Exhibit "A"), the appellant since that date has been the registered owner of the property. It is also shown by the evidence that at least since that date the appellant has been assessed as sole owner of the property and as such owner has on one or more occasions appealed the amount at which the property was assessed and applied for allowances due to vacancies. *Prima facie,* therefore, it would appear that on the facts which I have mentioned, the appellant as such owner is bound to include as part of his taxable income all the profits arising in each year from the rents of the property under ss. 3 and 4 of the *Income Tax Act* 1948 and the *Income Tax Act.*

It may be noted here that Jean Cairns Morris (in trust) executed a discharge (Exhibit "B") of the mortgage to the Toronto General Trusts Corporation which had been assigned to her, on June 11, 1945, and registered on June 29, 1945; and also that four mortgages later to be referred to in detail and given by the appellant as sole owner of the property (with his wife joining to bar dower) have all been discharged, so that the property now stands in the Registry Office in the name of the appellant as sole owner, subject to this, that Exhibit 7, a discharge of a mortgage for $14,000 given by the appellant to the Canada Permanent Mortgage Corporation and dated February 29, 1956, has not been registered by the appellant.

I turn now to a consideration of the issues in this appeal and the manner in which they have come to this Court. The appellant first filed income tax returns for the years 1950 to 1956 on October 14, 1958, doubtless because he was pressed to do so by the tax officials. In each of those returns he included as income only one-third of the net income from the rentals of the property as taxable in his hands; and on that basis, the returns, after allowing for exemptions and deductions, showed no taxable income. The first assessments based on these returns and dated October 28, 1958 show no tax payable for any of these years.

Subsequently, and following a lengthy investigation, the Minister in April, 1960 issued re-assessments for each year, and, on the assumption that the appellant was entitled to the whole of the net profits from the rentals of the property, the total taxes so assessed for the seven years aggregated $4,962.77, including some penalties for late filing and interest. Following objections by the appellant, the Minister by his Notifications dated January 3, 1961, agreed to amend the re-assessments by allowing further deductions in respect of the capital cost of certain parts of the property, the details of which are set out in the reply of the Minister to the appellant's Notice of Appeal to this Court. At the hearing before the Tax Appeal Board, an agreement was entered into by which a further annual deduction of $500 for expenses was allowed to the appellant. By its decision the Tax Appeal Board allowed the appeal in part only; referred the matter back to the Minister for re-assessment based on the adjustments necessary by reason of the allowances made in the Minister's Notifications and the further amount of $500 for expenses in each year as agreed by the parties, and in all other respects affirmed the said re-assessments. It is from that decision that the appellant now appeals to this Court.

At the commencement of the trial, the first question that arose was the effect of the agreement of March 15, 1961, now filed in this Court. It reads as follows:

Hamilton, Ontario,
15th March 1961

BETWEEN:

PHILIP REGINALD MORRIS

versus

THE MINISTER OF NATIONAL REVENUE

With regard to the income tax assessment appeals relevant to the years 1950, 1951, 1952, 1953, 1954, 1955 and 1956 we hereby agree to the expenses shown in the relevant forms T 7 W for all the above-mentioned years being increased each by the sum of $500, and with the result that the net rental income in each year be reduced as shown on the T 7 W by $500, or the sum of $3,500 in all.

It is understood and agreed that after providing for this adjustment the figures in the various assessments shall be deemed as correct and may form the basis for re-assessment accordingly.

These figures to be so arrived at are to be binding on us, irrespective of the determination of the legal questions involved.

1963

PHILIP REGINALD MORRIS
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

All subject of course to the further adjustments contained in the Notifications by the Minister dated Jan. 3rd, 1961.

Witnessed
(sgd.)
P. McCann,
Deputy Registrar.

(sgd.) F. J. Dubrule, Solicitor for
Minister of National Revenue.

Philip R. Morris.
J. C. Morris.

While it is true that the hearing of an appeal in this Court from a decision of the Tax Appeal Board is a trial *de novo,* I came to the conclusion and so ruled that this agreement in the circumstances disclosed was a final and complete settlement as to the total net profits from the property for each year binding upon the parties thereto and that the only matter remaining to be determined by the Tax Appeal Board was a matter of law, namely, was the appellant entitled to the whole of such profits or part thereof, or none at all? It was on that basis that the matter proceeded before the Board. No doubt it was a compromise settlement which both parties were content to accept rather than embark on a lengthy and involved investigation as to receipts and expenditures.

Because of the ruling so made, I need not consider further the question as to the quantum of the net annual profits from the property.

The onus is on the appellant to establish that there is error in fact or in law in the re-assessments as so modified (*Minister of National Revenue v. Johnston*[1]).

The appellant was not represented by counsel at the hearing, but conducted his own case and evidence was presented on his behalf by his wife, his son Alan Morris, his daughter Mrs. Alma Tefft, a practising solicitor, J. L. Coburn, local manager of the Canada Permanent Mortgage Corporation in Hamilton, and by the appellant himself. No witnesses were called on behalf of the respondent.

Many grounds of appeal are raised in the appellant's Notice of Appeal. Some of these grounds are untenable, such as the submission that the respondent had no right to make the re-assessments now in appeal. His main submissions are that for the years in question he was not the

[1] [1948] S.C.R. 486.

owner of the property, was not entitled to receive any profits from the rental of the property and, in fact, did not receive any; or that at most he was entitled to only one-third thereof, these amounts being so small annually as to result in no taxable income. For the Minister, it is submitted that the re-assessments were based on the assumption that the whole of the annual profits from the property were income in his hands and that the evidence shows that he was the owner and did receive the annual profits.

In order to understand the nature of the case put forward by the appellant, it is desirable at once to set out the terms of an indenture dated April 15, 1944 (Exhibit 1) between two parties, namely, William Morris of the First Part and Jean Cairns Morris (in trust) called the trustee of the Second Part. While the appellant is not named as a party to the agreement between his father and his wife, he did in fact sign it. It reads as follows:

THIS INDENTURE MADE IN TRIPLICATE THIS 15th DAY OF APRIL A.D. 1944.

B E T W E E N

William Morris of the City of Hamilton, in the County of Wentworth, Gentleman, hereinafter called the Party

OF THE FIRST PART

—and—

Jean Cairns Morris of the said City of Hamilton, Barrister-at-Law, hereinafter called the TRUSTEE

OF THE SECOND PART

WHEREAS the said William Morris, Esther G. Morris and Philip R. Morris made and executed a mortgage on the property known as 22, 24 and 26 John Street North, in the said City of Hamilton, to The Toronto General Trusts Corporation to secure $25,000 and interest, which mortgage is dated March 8th, 1926 and was registered March 28th, 1926 at 11.04 A.M. in the Registry Office for the Registry Division of the City of Hamilton as number 284532.

AND WHEREAS the said mortgage is now overdue and the party of the First Part desires to be relieved from the obligations of the covenant in the said mortgage.

AND WHEREAS the Toronto General Trusts Corporation has agreed to assign the said mortgage to the party of the Second Part as Trustee and the party of the Second Part has agreed to relieve the party of the First Part from the covenant in the said mortgage.

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the abandonment of any claim to interest upon the principal of the said mortgage, the party of the Second Part hereby declares that no claim shall be made to interest under the said mortgage and the covenant in the said mortgage contained shall stand barred and of no effect

1963

PHILIP REGINALD MORRIS
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

so far as the party of the First Part or his estate is concerned and the party of the Second Part covenants promises and agrees with the Party of the First Part that in the event of a sale of the said mortgage, the transfer or assignment thereof shall contain a provision that the purchaser or assignee shall have no recourse or rights or remedies on the said covenant or otherwise against the party of the First Part, William Morris.

AND the parties hereto agree that so long as the said mortgage is held by the TRUSTEE there shall be no interest payable or claimed upon the said mortgage but whatever principal can be paid thereon every three months after due provision for repairs, taxes, water rates and insurance and improvements to the property 22, 24 and 26 John St. N. Hamilton shall be paid to Isla Victoria Ford, Edna Marion Hulbig and Philip Reginald Morris in equal shares. PROVIDED that in the event of one of the said last mentioned three persons or any or all of them directing that the said payments shall be paid otherwise, the said payments shall, after deduction of fees be so made. PROVIDED FURTHER that in the event of the decease of the Trustee without appointment of a new Trustee, the said three persons or the survivor or survivors of them shall have power, if deemed necessary to appoint a new Trustee.

THE PARTY OF THE SECOND PART and WILLIAM MORRIS shall have the right, until the property is sold to occupy the premises they are at present occupying rent free, respectively, and until his decease or until sale of the said property Philip R. Morris shall manage it and shall render a statement to the TRUSTEE every three months remitting at the same time the balance payable to the Trustee. After his decease or should Philip R. Morris desire to retire from the management of the said property, it shall be managed by the TRUSTEE.

In the event of a sale or mortgage of property the proceeds shall be equally divided between the said Isla Victoria Ford, Edna Marion Hulbig and Philip Reginald Morris or such other persons as they shall individually in writing (filed with the TRUSTEE) direct or appoint.

IN WITNESS WHEREOF THE PARTIES HERETO HAVE HEREUNTO SET THEIR HANDS AND SEALS THE DAY AND YEAR FIRST ABOVE WRITTEN

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF
(sgd.) Alan Morris
(sgd.)
William Morris
J. C. Morris
Philip Morris

That indenture denoted on the cover as a "trust agreement" was never registered. It was prepared in the office of Morris and Morris, the only member of that legal firm at the time being the appellant's wife. It is to be noted that it is dated the day following the date on which the Toronto General Trusts Corporation mortgage was assigned to the appellant's wife in trust as above stated. The recitals in the trust agreement indicate that William Morris desired to be released from his covenants in the mortgage

and that the party of the Second Part had agreed to do so. I find it difficult to understand why this was done in view of the evidence that William Morris himself paid to the Toronto General Trusts Corporation the full amount they demanded at the time they executed the assignment to the appellant's wife. Mrs. Ford and Mrs. Hulbig, named in the trust agreement, are sisters of the appellant.

On the evidence of the appellant's wife, I find that William Morris made the arrangements with the Toronto General Trusts Corporation to have the mortgage assigned to her, and, as I have said, he supplied all the funds to pay off the Corporation. Undoubtedly, he then wished to keep the mortgage alive.

In construing the trust agreement, I must keep in mind the fact that Mrs. Ford and Mrs. Hulbig, the appellant's sisters, both of whom are still alive and who by the agreement were entitled to some benefits, are not before me in this case. Nothing that is said here, therefore, may be construed as determining their rights either as to an accounting by the trustee or the appellant, or as to any interest they may have in the property when sold or otherwise.

In my view the trust agreement, in so far as it relates to the present issue and to the events that have occurred, provided as follows:

(a) The appellant was appointed manager of the property until his retirement from that office with the duties incidental to that office of collecting the rents and after paying for repairs, taxes, water rates, insurance and improvements to the property to remit the balance payable to his wife, the trustee of the mortgage, so long as she held that mortgage.

(b) That the trustee of the mortgage, so long as she held the mortgage, was not entitled to any interest thereon, but that any payments she received as above from the manager were to be applied on the principal of the mortgage and after deduction of fees were to be divided equally between the appellant, Mrs. Ford and Mrs. Hulbig or as they might direct. If the appellant died or retired from the management of the property, the trustee was to become manager of the property.

1963

PHILIP REGINALD MORRIS v. MINISTER OF NATIONAL REVENUE

Cameron J.

The first submission of the appellant is that whatever interest he may have had in the property as one of the grantees in the joint tenancy created by the conveyance in 1924 from Business Realty Limited (Exhibit C) was purely nominal and that his rights therein were lost by the adverse possession of his mother and father for a period in excess of ten years, any title he may have had being therefore extinguished by the *Statute of Limitations* R.S.O. 1960, c. 214. and its predecessors.

It is in evidence that following the grant by Business Realty Limited the appellant at the request of his father acted as manager of the property, collecting the rents and providing for necessary out-goings until about 1931 when his father, being dissatisfied with the returns, decided to collect the rents himself. Accordingly, he moved from Toronto and from about 1931, with his wife occupied two apartments in the property. There is no evidence that either the father or mother ever asserted any claim to having become owner of the property by possession at any time during their lives. The only evidence is that the father did collect the rents and paid the necessary out-goings for a considerable time. On the contrary, it would appear from the recitals in the deed of William Morris to the appellant, dated May 1, 1945, that the father then considered that following the death of his wife in 1941, he and his son, the appellant, were the owners as joint tenants of the property. That deed was prepared in the office of Morris and Morris, presumably by the appellant's wife. There is no satisfactory evidence that the appellant's mother did anything by way of collecting rents or otherwise which would indicate that she with her husband acquired any interest in the property adverse to that of the appellant. She merely resided with her husband in the property.

The evidence does not warrant a finding that William Morris became the sole owner of the property and that the title of the appellant was lost by adverse possession. Even if that had been the case, it would not be of any assistance to the appellant in view of the fact that by the deed (Exhibit "F") of May 1, 1945, his father conveyed all his interest therein to the appellant. As will be seen later, the appellant considered himself to be thereafter the owner in fee simple of the property when executing

four mortgages thereon. I therefore reject the appellant's submission on this point.

The next submission of the appellant is that by adverse possession for over ten years, Jean Cairns Morris, his wife, personally has acquired sole ownership of the property. While she frankly disavowed any right to any personal interest in the property (except for a possible claim to monies which she may personally have paid on the mortgages or any expenses, but of which she had no record and did not attempt to prove) and alleged that whatever possession she may have had was at all times referable to the trust and for the benefit of the *cestuis que trustent* therein, the appellant maintained this point to the end, realizing, no doubt, that if it could be established, the property would then be owned by his wife and not only would he avoid any income tax in respect of the profits, but any rights his sisters might have had under the trust might be extinguished.

The facts are that the appellant's wife had possession of her office and other space in the building at least since the execution of the trust agreement and as provided therein she paid no rent. It is also shown that commencing in May, 1948 she collected rents, secured tenants and paid necessary out-goings for the property until at least 1956—the last year with which I am here concerned. During that time she paid nothing to Mrs. Ford or Mrs. Hulbig, but she did pay the net revenue to her husband personally. While she says at all times her "possession" was referable to the trust agreement, she neither accounted to Mrs. Hulbig or Mrs. Ford for the income received by her, nor paid them anything. I reject as entirely unsupported by the evidence the effort of the appellant to establish that his wife personally acquired a possessory title—a title she does not assert, but disavows. In any event, such possession as she may have had began only in 1948 and could not have ripened into a possessory title until 1958, two years later than the years with which I am concerned.

I must find, also, that she could not have acquired a possessory title as against the owner (the appellant) in her capacity as trustee since she acknowledged his right to the rents and profits every three months by the payments which I have mentioned and will refer to later.

1963

PHILIP REGINALD MORRIS v. MINISTER OF NATIONAL REVENUE

Cameron J.

Reference may be made, also, to the case of *Andre v. Valade*[1], a decision of the Court of Appeal of Ontario. There the husband, a mortgagor, and his wife, a mortgagee of property, were living together in harmony as man and wife—as they were and are in the present case—and it was held that in those circumstances the Statute of Limitations did not run against the mortgagee—wife. Further reference may be made to *Gordon v. Ottawa*[2], a decision of McRuer, C.J.H.C. See also Lewin on Trusts, 15th Ed., p. 809.

I am fully satisfied that from his whole course of conduct the appellant himself considered that he was at all relevant times the sole owner of the property and that his effort to establish a possessory title in favour of his wife and/or parents was but an after-thought, made with the purpose of avoiding income tax on profits which he received and for which he has accounted to no one.

In March, 1945 the appellant consulted Mr. J. L. Coburn, the Hamilton manager of the Canada Permanent Mortgage Corporation in regard to a loan of $15,000. He advised Mr. Coburn that he needed the money for the purpose of settling a family estate in which he and his sisters were interested, and that the sisters now wished to be paid their shares which he had agreed to do. A loan of only $10,000 was recommended and the appellant told Mr. Coburn that he had bonds and securities which he was arranging to sell or had sold, out of which he would pay the balance above $10,000 due to his sisters. I accept unreservedly the evidence of Mr. Coburn, supported as it is by his report to head office dated March 16, 1945 (Exhibit "C"). I also accept Mr. Coburn's evidence that nothing was said at that time as to any rights the sisters had in any trust referable to this property and regard as untrue the appellant's statement that he did so.

On July 1, 1945 the appellant, with his wife joining to bar dower, executed a mortgage to the Canada Permanent Mortgage Corporation for $10,000, registered on June 29, 1945 as No. 98027 N.S. (Exhibit 5). That mortgage, as well as all the other mortgages to which I shall refer, was made in pursuance of the *Short Forms of Mortgages Act*, and contained a recital that the mortgagor was seized in

[1] [1944] O.R. 257. [2] [1953] 4 D.L.R. 542.

fee simple of the lands described and a covenant that he was the owner in fee simple to the said lands and had the right to convey the said lands to the mortgagee. The proceeds of that mortgage were paid to the appellant, but nothing was then paid to his sisters. Instead, as shown by Exhibit "D", the appellant executed a mortgage to his sisters for $3,000 on July 2, 1945, and registered on July 10, 1945 as No. 98350 N.S. That mortgage was discharged as shown by Exhibit "E" dated December 12, 1946, and registered on December 17, 1946 as No. 116849 N.S. The appellant says that he paid his sisters at that time $2,300 only, and that since then he has paid them nothing further or accounted to them in any way for the profits from the property.

Immediately thereafter the appellant gave a further mortgage to the Canada Permanent Mortgage Corporation for $13,500 (Exhibit 6) dated and registered December 18, 1946, and the former mortgage for $10,000 was discharged. The difference between the amount due under the former mortgage and the new loan of $13,500 was paid to the appellant who says that it was used on improvements to the property arranged by him as were the proceeds of the first mortgage.

The appellant again gave a mortgage to the Canada Permanent Mortgage Corporation for $14,000 (Exhibit 7) on March 1, 1951, registered March 15, 1951 as No. 184060 N.S. Again the proceeds of that loan, less the amount due under the former mortgage, were paid to the appellant and used by him for improvements to the property. A discharge of the mortgage for $13,500 was registered on March 30, 1951.

The last mortgage to the Canada Permanent Mortgage Corporation was discharged as fully paid on February 29, 1956 (Exhibit 7) but the discharge has not been registered. The only explanation for the failure to register it is the statement of the appellant that he thought he might ask for an assignment in lieu of the discharge. Subject to the registration of that discharge there has been no encumbrance on the property since 1956.

While, as I have said, I am not now directly concerned with the quantum of the net annual profits derived from the property over the seven years in question, I think it

1963

PHILIP REGINALD MORRIS v. MINISTER OF NATIONAL REVENUE

Cameron J.

right to note that from March, 1951 to February 29, 1956, there was paid not only the interest on the Canada Permanent mortgage, but also $14,000 as principal. While it is alleged by the appellant's wife that she made the payments out of her general office account into which all the rents were paid and from which the disbursements for taxes etc. were paid, and it is possible that some of the payments may have been made from her own funds, I must also find that there is no proof that such mortgage payments were made other than from income of the property, no record having been kept by the appellant's wife as to any amount that may have been paid by her personally. In fact, her failure to keep any record of such payments from her own funds strongly suggests that she was liable to account to no one but her husband.

Now as I have said, the appellant's wife from May, 1948 to 1956 did collect rents and pay the necessary out-goings. In addition, it is shown that during that period she paid to her husband by cheque each three months $150 on account of the principal of an alleged second mortgage for $16,000, as well as interest at 4 per cent. per annum, less a rental of $25 per month, for the use of an apartment in the building occupied for considerable periods by her husband and herself. The sums so paid in that period aggregated $6,550 on account of principal as well as interest, and the payment made in May, 1956 indicates that the principal of the so-called second mortgage had been reduced to $9,450. Between the date of the execution of the deed to the appellant and 1948, the appellant as manager of the property collected the rents and paid the out-goings. He says that in 1948 he retired as manager and thereafter did only necessary work entrusted to him by his wife.

Both the appellant and his wife were repeatedly asked to explain the details of the so-called second mortgage, but neither was able to say expressly that there ever had been such a mortgage or who was mortgagee or who was mortgagor or why it was given. Certainly, it was not registered and no such document was produced. I have grave doubts that it ever existed. The only possible inference that I have been able to draw from the facts is that the appellant and his wife thought it advisable for purposes of the appellant to keep alive in theory the

Toronto General Trusts' mortgage which had been discharged in 1946; and that as the principal amount thereof when assigned to the appellant's wife was approximately $18,300 (of which $2,300 had been paid to the appellant's sisters), the balance of $16,000 was to be represented in some way by the so-called second mortgage of $16,000. Now, as all the payments made by the appellant's wife were made to the appellant personally and thereafter retained by him and as his wife as trustee made no payments of any kind to Mrs. Hulbig and Mrs. Ford, it is also reasonable to infer that both the appellant and his wife considered that the sisters had accepted the mortgage for $3,000 in payment of all their rights under the trust agreement and in the property and that later on they were content to accept $2,300 in settlement of their rights. That this is the reasonable inference from the evidence is further shown by the fact that since this mortgage was discharged, neither sister (one of whom had a lawyer as husband and the other a son who is a lawyer) has made any claim to any interest under the trust agreement or in the property to either the appellant or his wife. I do not find that they have no rights, but for the purpose of this case I do find that that is the only reasonable inference to be derived from the limited evidence before me. If the trust agreement was still entirely in effect and if the sisters were entitled to two-thirds of the principal of the $18,300 Toronto General Trusts Corporation mortgage (less the $2,300 paid on account), it would have been the duty of the appellant's wife as trustee to pay their share regularly as it came into her hands instead of paying it all to her husband. Mrs. Morris stated frankly, "I don't know that it was not his money", and that she did not know what he did with the money. Such payments have been renewed and the balance of principal on the so-called mortgage is now $5,000.

I do not attribute bad faith to the appellant's wife. She is now seventy-six years of age and admitted to some loss of memory and confusion as to the facts. I think, moreover, that she was possibly subject to pressure on the part of her more astute husband.

But I am quite unable to accept the evidence of the appellant when it is in conflict with either documentary evidence or with other oral evidence. His explanation of the

1963

PHILIP REGINALD MORRIS v. MINISTER OF NATIONAL REVENUE

Cameron J.

manner in which he has dealt with these receipts is quite incredible. That he did receive them in his personal capacity is not open to question. He has been collecting them since 1948 and has not paid one cent to his sisters or accounted to them in any way. At the conclusion of his evidence, he did say that he held them in trust under the trust agreement and that he still had them "on hand" although declined to state where or in what form they now are. He said, also, that his sisters were entitled to a share therein, but he had not paid it over as he did not want them to dissipate the money—namely, money which he now says belonged to them, each being presumably a woman of mature years. Finally, he said that his wife at some unspecified time had demanded that he return the money to her, but he had refused to do so. His wife, however, made no mention of such demand. Now he says that he is willing to turn over the shares to the sisters *if they demand it.*

Frankly, I do not believe his last-minute conversion to the theory that he held the money in trust and made for the first time fifteen years after he first began to receive the payments and under pressure of a demand for income tax thereon.

On the evidence which I have accepted in this case and drawing the inferences therefrom which I have set out above, I have come to the conclusion that

(a) at all relevant times the appellant was the owner of the property; and

(b) that the appellant's two sisters ceased to have any interest in the trust or in the property upon executing a discharge of the $3,000 mortgage, or at least until the property has been sold, an event which has not occurred; and

(c) that in collecting the rents of the property and paying the expenses of operation and the principal and interest on the Canada Permanent mortgages, the appellant's wife acted only as the agent of the owner, the appellant; and

(d) that after providing for payment of interest and principal of the said Canada Permanent mortgages out of income from the property (of which the principal amount would be taxable income of the appel-

lant), the balance was payable to and was paid to the appellant in his capacity as owner.

In any event, the appellant has completely failed to meet the onus cast upon him to establish that the assumptions on which the re-assessments were made upon him—namely, that he was entitled as owner to all the rents and profits—was erroneous.

For these reasons, the appeal from the decision of the Tax Appeal Board fails. Its decision affirming the re-assessments made upon the appellant for each year, subject to the allowances made in the Minister's Notifications and to those made by the agreement of the parties on March 15, 1961, will be affirmed and the matter remitted to the Minister to re-assess the appellant in accordance with these findings.

The respondent is also entitled to be paid his costs after taxation.

Judgment accordingly.