1963

*May 28
June 13

LLOYD W. GARDINER in his capacity as Public Trustee for the Province of Alberta and as such the duly appointed Administrator of the Estate of Gordon Papp, Deceased ..... APPLICANT;

AND

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

MOTION FOR LEAVE TO APPEAL

Appeals—Leave to appeal—Pleadings—Amendment to reply, withdrawing admissions—Estate Tax Act, 1958 (Can.), c. 29, s. 24(3)—Income Tax Act, R.S.C. 1952, c. 148, s. 99(3).

A corporation, the shares of which were owned as to 90 per cent by a husband and as to the other 10 per cent by his wife, took out an insurance policy on the life of the husband, with the wife named as beneficiary. On the death of the insured in April 1960, the Minister took the position that the proceeds of the policy should be included in the estate for estate tax purposes. On appeal to the Exchequer Court, the notice of appeal alleged that the deceased, or alternatively, the corporation, had paid the premiums unitl October 1959, at which date the corporation had assigned the policy to the wife; that the assignment had been an absolute one, and that neither the deceased nor the corporation had any interest in the policy after the assignment. In his reply to the notice of appeal, the Minister admitted these allegations. Subsequently, the Minister was allowed by the Exchequer Court to amend his reply so as to admit only that the deceased, or alternatively, the corporation had paid the premiums until October 1959. The appellant applied to this Court for leave to appeal from that ruling, contending that the admission could not be withdrawn because the Minister had failed to prove that the facts which had been admitted were not true.

Held: The application should be dismissed.

The facts to which the admission related were entirely within the knowledge of the appellant and first came to the knowledge of the Minister at the time of examination for discovery. The admission was as to matters of mixed fact and law. It was open to the trial judge to take the view that the evidence showed that there was a triable issue as to the validity and absolute nature of the assignment which should be decided at a trial rather than on an interlocutory motion. There was no good reason to think that on appeal the ruling which the trial judge had made in the exercise of his discretion would be reversed.

Application before Cartwright J. in chambers for leave to appeal from an interlocutory judgment of Cameron J. Application dismissed.

D. Spitz, for the applicant.

*PRESENT: Cartwright J. in Chambers.

G. W. Ainslie, contra.

The following judgment was delivered by

CARTWRIGHT J.:—This is an application for leave to appeal from an interlocutory judgment of Cameron J. allowing the respondent to amend his reply, and awarding the costs of the motion to the appellant in any event.

The question which is in dispute between the parties is whether the sum of $50,000 the proceeds of a life insurance policy taken out by a company, Papp's Truck Service Limited, on the life of Gordon Papp, in which his wife Mae Papp was named as beneficiary, should be included in the estate of the said Gordon Papp in calculating the amount of estate tax payable in respect of his estate. Gordon Papp died on April 22, 1960; he was the owner of 90 per cent and Mae Papp was the owner of 10 per cent of the shares of Papp's Truck Service Limited.

Paragraph 5 of the appellant's notice of appeal to the Exchequer Court reads as follows:

> 5. The deceased, alternatively, the Company, paid the monthly premiums on the policy until October, A.D. 1959. In October, A.D. 1959 the policy was assigned by the said Company to Mae Papp. The policy was absolutely assigned and neither the deceased nor the company had any interest whatsoever in the policy after the assignment thereof. Further Mae Papp assumed the burden of paying all the further instalments on the policy.

Paragraph 3 of the respondent's reply as originally delivered read as follows:

> 3. He admits that the deceased, alternatively, the company, paid the monthly premiums on the policy of assurance until October, A.D. 1959; that in October, A.D. 1959 the said policy of assurance was assigned by the said company to Mae Ritter Papp; that the said policy of assurance was absolutely assigned and neither the deceased nor the company had any interest whatsoever in the said policy of assurance after the assignment thereof; but does not admit any further allegations of fact, if any, contained in paragraph 5.

By the order of Cameron J. the respondent was allowed to delete this paragraph and to substitute the following:

> 3. He admits that the deceased, alternatively, the company, paid the monthly premiums on the policy of assurance until October, A.D. 1959 but does not admit any other allegations of fact, if any, contained in paragraph 5.

Other amendments were also permitted but they are comparatively unimportant.

1963

GARDINER v. MINISTER OF NATIONAL REVENUE

Cartwright J.

Both counsel state that the answer to the question whether the policy was absolutely assigned to Mae Papp in October 1959, so that neither the deceased nor the company had any interest whatsoever in the policy thereafter, is relevant to the decision of the dispute between the parties.

On the hearing of the motion before Cameron J. oral testimony was given. The solicitor who had prepared the reply on behalf of the respondent was examined and cross-examined at some length.

On the evidence given it was open to Cameron J. to find that the admission was made through inadvertance but it is urged on behalf of the appellant that it was not proved that the facts admitted were not true. Reliance was placed on a number of authorities most of which are discussed in the judgment of the Court of Appeal for Ontario in *Canada Permanent Mortgage Corporation v. The City of Toronto*[1]. Hope J. A. who delivered the unanimous judgment of the Court said at p. 733:

> An admission may in certain circumstances and upon proper terms be withdrawn on leave of the Court. Nevertheless it is well established that facts admitted cannot be withdrawn unless it is proved by satisfactory evidence that the fact so admitted was not true.

It was not necessary for the decision of that case to state the rule of practice in such wide terms. It is clear, as appears from the reasons at p. 735, that neither by evidence nor argument had counsel for the City attempted to show that the admission was not in fact correct; and the fact admitted was one within the knowledge of the City.

In the case at bar the facts to which the admission related were entirely within the knowledge of the appellant and first came to the knowledge of the respondent at the time of the examination for discovery; the admissions are as to matters of mixed fact and law. In my opinion, it was open to Cameron J. to take the view that the evidence showed that there was a triable issue as to the validity and absolute nature of the assignment of the policy which should be decided at a trial rather than on an interlocutory motion. There does not appear to me to be good reason to think that the Court on appeal would reverse the

[1] [1951] O.R. 726, 4 D.L.R. 587.

ruling which the learned judge made in the exercise of his discretion.

The application for leave to appeal is dismissed. The costs of the motion will be costs to the respondent in the cause.

1963

GARDINER v. MINISTER OF NATIONAL REVENUE

Cartwright J.

Application dismissed.