in that context that the learned CHIEF JUSTICE expressed the doubt to which I have referred and it was in that context that he pointed out (at p. 163) that, although there was some merit in the contention that by allowing fresh evidence to be led the matter could "more cheaply" be disposed of than by means of the "new and lengthy trial" which would result if it were left to the plaintiff to start *de novo*, there were weighty considerations against granting the application.

If, in this case, the judgment of the Court *a quo* were left undisturbed the appellant, despite the circumstance that absolution was decreed, would be faced with considerable practical difficulties if it were of a mind to sue the respondent *de novo*, for what the Court *a quo* held was that even on full acceptance of Comley's evidence the appellant had no case on the merits. It must be recognised, however, that if this Court were to dismiss the appeal and allow the decree of absolution to stand, it would do so not on the ground upon which the trial Court decreed absolution but on the entirely different ground of insufficiency of evidence on the *quantum* of damages. This might well enable the appellant to sue the respondent *de novo*, and to that extent the case bears some similarity to *Colman* v. *Dunbar, supra*. But, apart from that, the differences between that case and the matter now before us are manifest. In *Colman's* case the trial Court, after closure of the defendant's case on all issues, correctly decreed absolution on the evidence before it; here, the trial Court wrongly ruled at the end of the appellant's (plaintiff's) case that there was no evidence to support the claim on the merits. Different considerations therefore arise concerning the equities and costs. For example, here, unlike *Colman* v. *Dunbar, supra* at p. 162, an appreciable saving of costs might ultimately be achieved by allowing the trial to continue in the Court *a quo* which, because of its erroneous termination of the trial at the end of appellant's case on the only ground advanced by respondent, has not yet heard all the evidence on the merits and has not at all considered the question of damages, which respondent failed to raise. In these circumstances, and especially in view of appellant's success on appeal on the important issue in respect of which, alone, the trial Court absolved respondent from the instance, it is equitable and proper to set aside the decree of absolution so that the trial might continue.

Mr. *Edeling*, for appellant, contended that if the order of absolution were set aside, the appellant should be awarded the costs of appeal. But I do not think that this is a case in which the application of the general rule that costs follow the result will accord with what is fair. The appellant has achieved substantial success in the sense that the trial Court's decision that the evidence could not support a finding that respondent was liable at all, is to be set aside; but because of the deficiency of appellant's evidence on the issue of damages, it has yet to apply for leave to lead further evidence in order to avoid a decree of absolution on a different ground. The requirements of justice will be met, I think, by making no order as to the costs of appeal. Mr. *Jennett* suggested that if we were not disposed to order appellant to pay the costs of appeal, we should order that costs of appeal be costs in the cause, on the authority of *Supreme Service Station (1969) (Pvt.) Ltd.* v. *Fox and Goodridge (Pvt.) Ltd.*, 1971 (4) S.A. 90 (R, A.D.) at p. 95. One of the essential differences between that case and the one now before us is, however, that in the case decided in Rhodesia the appellant succeeded on appeal on a point which it ought to have raised, but did not, at the trial

whereas in this case the appellant succeeds on appeal on the sole point raised by respondent at the trial. It is the respondent who ought to have raised, but did not, the question of damages in its application for absolution from the instance. Moreover, the respondent has persisted to the very end in his contention that absolution was rightly decreed on the question of liability. But for the fact that this Court raised the question of damages, the appeal would clearly have been allowed with costs, and the only reason why costs of appeal are withheld from the appellant is that its own case was deficient in another respect. In all these circumstances I do not consider that there is justification for making an order which would require the successful appellant to pay the costs of appeal if it should ultimately fail in its action.

The question of costs in the Court *a quo* will be for the decision of that Court in due course.

The appeal is allowed. The trial Court's order of absolution from the instance, including its order as to costs, is set aside and the case is referred back to the trial Court for further hearing. There will be no order as to the costs of appeal.

TROLLIP, J.A., RABIE, J.A., GALGUT, J.A., and DE VILLIERS, J.A., concurred.

Appellant's Attorneys: *W. J. Olckers & Son*, Grahamstown; *McIntyre & Van der Post*, Bloemfontein. Respondent's Attorneys: *Espin & Espin*, Grahamstown; *Webber & Newdigate*, Bloemfontein.

JOHN BELL & CO. (PTY.) LTD. v. SECRETARY FOR INLAND REVENUE.

(APPELLATE DIVISION.)

1976. *May* 24; *August* 19. WESSELS, J.A., TROLLIP, J.A., RABIE, J.A., MULLER, J.A., and GALGUT, J.A.

Revenue.—Income tax.—Income or capital accrual.—Determination of.—Company carrying on business of fruit merchants.—Company having amongst its objects the dealing in property.—Company, in disposing of fruit business, retaining building until time more advantageous for selling.—Profit made therefrom.—Not income but capital accrual within the meaning of the definition of "gross income" in sec. 1 of Act 58 of 1962.

The mere fact that a person deliberately delays the disposal of a capital asset because, upon his "reading" of the property market, "the hand of time" is needed in order to realise the asset to best advantage cannot result in a change in the character of the asset so as to alter it from a capital asset, held for the purpose of advantageous disposal, to stock-in-trade, held for the purpose of earning income in the course "of an operation of business in carrying out a scheme for profit-making".

Appellant was incorporated on 3 October 1916 primarily to acquire and take over "as a going concern" the business of fruit merchants, exporters, importers and distributors. The objects of the company empowered it "generally to purchase . . . or otherwise acquire any real property . . ." and to "sell . . . other

property for the time being of the company". On 5 March 1924 the appellant had acquired the freehold title of the premises, where it carried on business, at a cost of R15 981. It retained this capital asset until May 1957 when, as the property had become redundant for its business, it decided not to dispose of its capital asset "with such delay as might be necessary in order to carry out the transaction advantageously", but elected to "hold the asset, probably for years with the object of selling it at a high profit when the market for property in the area had risen sufficiently". In May 1967 it sold the property at a profit of R131 019. It had also engaged in two isolated transactions involving the purchase and sale of shares in property-owning companies. In assessments for normal tax and undistributed profit tax for the year of assessment ended 28 February 1969, raised by respondent upon appellant, it objected to the inclusion of this amount in its assessment as it contended that it was a receipt of a capital expenditure within the meaning of "gross income" in section 1 of Act 58 of 1962. An appeal having been dismissed, in a further appeal under section 86 of Act 58 of 1962,

Held, that appellant's decision in May 1957 to sell the property and to hold it for that purpose "probably for years and possibly for many years, with the object of selling it at a high profit when the market for property in the area had risen sufficiently", by itself did not so affect its character that the profit realised on the sale thereof did not constitute a receipt or an accrual "of a capital nature" within the meaning of the definition of "gross income" in section 1 of the Income Tax Act, 58 of 1962.

Held, further, that neither by themselves, nor taken in conjunction with the other facts, did the two isolated transactions involving the purchase and sale of shares in property-owning companies afford evidence on which it could reasonably be concluded that appellant had, in May 1967, in fact embarked upon a trade or profit-making business of dealing in land or shares in property owning companies.

Held, therefore, that the appeal should be allowed.

Appeal from a decision in the Transvaal Special Income Tax Court. The facts appear from the judgment of WESSELS, J.A.

R. S. Welsh, Q.C. (with him *J. D. Schwartz*), for the appellant: The question of law which arises for decision by this Court in this appeal is whether, on the facts found and stated by the Special Court, the accrual of R147 000 to the appellant during the year ended 28 February 1969, was "of a capital nature" within the meaning of the opening words of the definition of "gross income" in sec. 1. *Commissioner for Inland Revenue* v. *Stott*, 1928 A.D. at pp. 259-260; *Secretary for Inland Revenue* v. *Cadac Engineering Works (Pty.) Ltd.*, 1965 (2) S.A. at pp. 518-521; *Secretary for Inland Revenue* v. *Downing*, 1975 (4) S.A. at pp. 527 *in fin.*, 528. The judgment of COLMAN, J., was delivered before *Natal Estates Ltd.* v. *Secretary for Inland Revenue*, 1975 (4) S.A. 177, and *Berea West Estates (Pty.) Ltd.* v. *Secretary for Inland Revenue*, 1976 (2) S.A. 614, had been reported. From these judgments the following principles emerge: *(a)* a company which owns property is not "condemned to static holdings upon pain of taxation". *Natal Estates, supra* at p. 210D-E. *(b)* If, on the facts of a given case, the most than can be said is that the taxpayer was merely realising a capital asset to the best advantage, the proceeds are not part of his gross income. Merely realising is not trading: income tax is not leviable unless the taxpayer has embedded the process of realising into a trading for profit. *Natal Estates, supra* at pp. 198-199, 210 and 211; *Berea West, supra*. See also *(c) Commissioner for Inland Revenue* v. *Stott, supra* at p. 264. In a case such as the present case, where the taxpayer, having held land for many years as a capital asset, sold it for more than its historic cost, the Court has to enquire, "from the totality of the facts", whether "it can be said that the

owner had crossed the Rubicon and gone over to the business, or embarked upon a scheme, of selling such land for profit, *using the land as his stock-in-trade*". See *Natal Estates, supra* at pp. 202G-203A, 214A; *Berea West, supra*. This test is not satisfied by reason of the fact that the taxpayer delays selling when the market is unfavourable and retains the property for a long period (e.g. 20 years); or "tailors the selling to the exigencies of the market at any particular time"; or spends much money (e.g. R95 000) in developing the property. *Berea West, supra*. *McClelland* v. *Federal Commissioner of Taxation*, (1967) 10 A.I.T.R. at p. 459. The fact that the taxpayer may have embarked upon a business in selling some of its land does not mean that sales of other land must necessarily be treated for income tax purposes as forming part of the land-dealing business. Each sale must be considered on its own merits. *Natal Estates, supra* at p. 209; cf. *Tati*, (1974) 37 S.A.T.C. 68; *Secretary for Inland Revenue* v. *Trust Bank of Africa Ltd.*, 1975 (2) S.A. 652. The fact that there has been a change of shareholding in the taxpayer company and that the new shareholders intend to cause the company to sell its capital assets does not mean that the company is converted into a property dealer. *Natal Estates, supra* at pp. 210H-211A; cf. *Tati, supra* at pp. 76 *in fin.* to 77, and 79-80; (1955) 5 C.T.B.R. (N.S.) 825 (Australia), case 130. Where the taxpayer is a company having among its objects both dealing and holding, a profit made on the realisation of assets will not necessarily be income. *Natal Estates, supra* at p. 197F to end; *Berea West, supra*. It was submitted to the Special Court that a mere decision to sell a property held as a capital asset does not amount to a sufficient "change of intention", for income tax purposes, to alter the character of that property from capital into stock-in-trade. The Special Court did not find that the appellant had used the property as stock-in-trade. Nor did it find that the appellant had "gone over to the business" of selling the property for profit, using the property as its stock-in-trade. The effect of the judgment of COLMAN, J., is that the R147 000 which accrued to the appellant in 1968 formed part of the appellant's gross income, merely because the appellant had decided in 1957 that, when the property market had eventually risen sufficiently, it would sell the property at a high profit and that, in the meantime, it would continue to hold the property. This approach, so far from being "well established", is unsupported by authority; contrary to principle; and inconsistent with the three leading decisions of this Court on this subject. A taxpayer's decision to sell a capital asset and to defer the sale "probably for years, and possibly for many years", in the hope that the value of the capital asset will appreciate, and with the object of getting a higher price when the market has risen sufficiently, does not have the effect in law of converting the asset from capital into stock-in-trade, or of transforming the transaction from a realisation of capital into a business or a scheme of profit-making, with the result that the proceeds of the eventual sale form part of the taxpayer's gross income. Sec. 26 *(a)* of the Australian Act provides that "*the assessable income of a taxpayer shall include profit arising* from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or *from the carrying on or carrying out of any profit-making undertaking or scheme*". The case of *McClelland, infra*, is authority for the view that to hold a capital asset for a time until it becomes enhanced in value, and then to sell it, is still only to realise a capital asset and does not amount to "the carrying on or carrying out of any

profit-making undertaking or scheme": "a better price got by waiting is not a profit of an income character". *McClelland* v. *Federal Commissioner of Taxation*, (1967) 10 A.I.T.R. at p. 459. This decision was reversed (but not on this point) by a majority of the Full Court: *Federal Commissioner of Taxation* v. *McClelland*, (1969) 1 A.T.R. 31. The appellant did nothing to enhance the value of the property. It did not spend any money on the property. It did not improve or develop or subdivide the property. It did not advertise the property for sale or seek for purchasers. It could not have done so without the co-operation of the lessee. It had tied its hands by granting the long lease. The ultimate purchaser was a shareholder in the lessee company. It was he who made the offer to purchase. The appellant, in fact, did nothing except wait for the market to improve. To wait for something to turn up is not to cross the Rubicon; nor is it a scheme of profit-making. A person who buys a family home in an improving residential area, or a company which buys an office block in a developing business area, normally hopes that, when he or it eventually comes to sell the property, he or it will get more for the property than he or it originally paid for it. It does not, however, follow from this that the eventual resultant "profit" is taxable. *Commissioner of Taxes* v. *Levy*, 1952 (2) S.A. at p. 421C-D; *Collector of Income Tax (Swaziland)* v. *Mafuteni (Pty.) Ltd.*, 1956 H.C.T.L.R. at pp. 39-40 (Swaziland Court of Appeal); *Tati*, (1974) 37 S.A.T.C. at p. 79; *Racine, Demers and Nolin* v. *Minister of National Revenue*, (1965) 65 Dominion Tax Cases at p. 5103 (Canada); *Sherman* v. *Minister of National Revenue*, (1973) 73 Dominion Tax Cases at p. 5169 (Canada).

B. O'Donovan, S.C. (with him *P. J. van R. Henning*), for the respondent: The Court *a quo* correctly held that the amount of R131 019 constituted income and not the realisation of a capital asset. This amount is accordingly taxable in the hands of the appellant. The phrase "receipts or accruals of a capital nature" in the definition of "gross income" in sec. 1 (xi) of the Income Tax Act, 58 of 1962, as amended, is not defined and the Courts have not attempted any comprehensive definition. *Sub-Nigel Ltd.* v. *Commissioner for Inland Revenue*, 1948 (4) S.A. at p. 595. It has frequently been emphasised that the question whether an amount is capital or income must be decided on the facts of the particular case, e.g. *Commissioner for Inland Revenue* v. *African Oxygen Ltd.*, 1963 (1) S.A. at p. 688C-D; 691A-D; *Natal Estates Ltd.* v. *Secretary for Inland Revenue*, 1975 (4) S.A. at p. 202G-H. Nevertheless, tests which are of assistance in determining that question have been discussed and formulated in a number of cases. The effect of these decisions is not that the *indicia* suggested for consideration are in law the distinctive attributes of income or capital, but to indicate the relevant considerations from which a conclusion as to the nature of the amount may properly be drawn. *Secretary for Inland Revenue* v. *John Cullum Construction Co. (Pty.) Ltd.*, 1965 (4) S.A. at p. 705C-E. The general distinction drawn by INNES, C.J., in *Commissioner of Inland Revenue* v. *George Forest Timber Co.*, 1924 A.D. at p. 526, and by WATERMEYER, C.J., in *New State Areas Ltd.* v. *Commissioner of Inland Revenue*, 1946 A.D. at p. 627, between capital and revenue expenditure is well recognised, namely, that, generally speaking, money spent in creating or acquiring an income-producing concern, a source of profit or a capital asset, is capital expenditure, while the cost incidental to the performance of the income-producing operations, is revenue expenditure, e.g. *Secretary for*

Inland Revenue v. *Cadac Engineering Works (Pty.) Ltd.*, 1965 (2) S.A. at p. 521H. In *Nchanga Copper Mines Ltd.* v. *Commissioner of Taxes*, 1962 (1) S.A. at p. 388H, CLAYDEN, F.J., preferred to use the term "income earning structure" as being a word that sounds wider than plant and machinery. That term was adopted by this Court in later cases, e.g. *Secretary for Inland Revenue* v. *Cadac Engineering Works (Pty.) Ltd., supra* at p. 522B; *Secretary for Inland Revenue* v. *John Cullum Construction Co. (Pty.) Ltd., supra* at p. 703G. See also *Natal Estates Ltd.* v. *Secretary for Inland Revenue, supra* at p. 198B; *Commissioner of Taxes* v. *Booysens Estates Ltd.*, 1918 A.D. at p. 595. The findings of fact are in terms of sec. 86 (1) of the Income Tax Act unassailable on appeal. See *African Life Investment Corporation (Pty.) Ltd.* v. *Secretary for Inland Revenue*, 1969 (4) S.A. at p. 268G; *C.I.R.* v. *Strathmore Consolidated Investments Ltd.*, 1959 (1) S.A. at p. 475G; *Secretary for Inland Revenue* v. *Trust Bank of Africa Ltd.*, 1975 (2) S.A. at p. 666B-D. The respondent contends that the enquiry whether a taxpayer intends to use his asset as part of a scheme of profit-making is one of fact and that the enquiry (which will usually be decisive of the intention enquiry) whether the taxpayer has in fact embarked on a scheme of profit-making, is also one of fact. *Yates Investments (Pty.) Ltd.* v. *Commissioner for Inland Revenue*, 1956 (1) S.A. at p. 616D-E; *Strathmore Holdings (Pty.) Ltd.* v. *Commissioner for Inland Revenue*, 1959 (1) S.A. at p. 467D-H; *Commissioner for Inland Revenue* v. *Strathmore Exploration Ltd.*, 1956 (1) S.A. at p. 598D-E. The legal result of a change of intention is a change in the character of the asset and a change in the nature of the dealings with such asset. *Commissioner for Inland Revenue* v. *Richmond Estates (Pty.) Ltd.*, 1956 (1) S.A. at pp. 607B and 610C-E; *Commissioner for Inland Revenue* v. *Leydenberg Platinum Ltd.*, 1929 A.D. at p. 147; *Yates Investments (Pty.) Ltd.* v. *Commissioner for Inland Revenue, supra* at p. 616; *Commissioner for Inland Revenue* v. *Strathmore Consolidated Investments Ltd., supra* at pp. 478-9; *Tati Co. Ltd.* v. *Collector of Income Tax, Botswana*, (1975) 37 S.A.T.C. at pp. 76-7, 85. In *Natal Estates Ltd.* v. *Secretary for Inland Revenue, supra*, the main contention on behalf of the appellant was that "an original intention to regard land as a capital investment is decisive, for it can never change (save in special circumstances not here relevant); and that subsequent development and sales of such land, however businesslike, fall under the umbrella of realising a capital asset to the *best* advantage". An analysis of the totality of the facts indicates that the appellant "had crossed the Rubicon and gone over to business, or embarked upon a scheme, of selling such land for profit, using the land as his stock-in-trade". See *Natal Estates Ltd.* v. *Secretary for Inland Revenue, supra* at p. 203A. The fact that the property was held for a long period of time is a neutral fact and does not create an inference of investment. See *Reliance Land and Investment Co. (Pty.) Ltd.* v. *Commissioner for Inland Revenue*, 1946 W.L.D. at p. 181; *L.H.C. Corporation of S.A. (Pty.) Ltd.* v. *Commissioner for Inland Revenue*, 1950 (4) S.A. at p. 646G-H. What is in fact significant is that, within one year after the Sher brothers and Fine took over the control of the appellant, there was a change of intention. The fundamental business character of the appellant changed. In the history of the appellant the year 1957 constituted a clear demarcation line between the past and a new beginning. The original purpose for which the appellant was incorporated fell away and with it a large number of the clauses in the

memorandum. Share transactions involving property are for purposes of taxation essentially similar to direct property transactions. Silke on *South African Income Tax*, 8th ed., para. 65, p. 58. The activities of the appellant during the period between the change of intention and the actual realisation of the asset can and should be considered in determining taxability.Income Tax Case 737, 18 S.A.T.C. 210. The poor return from the lease suggests that the appellant was looking to appreciation and eventual profit on resale for its holding of a relatively non-productive asset. *Reliance Land Investment Co. (Pty.) Ltd.* v. *Commissioner for Inland Revenue*, *supra* at p. 178; *Commissioner for Inland Revenue* v. *Goodrick*, 12 S.A.T.C. at p. 305. The "intention" of a company is a legal fiction and is equivalent to the "state of mind or intention of the persons in effective control of the company". *Secretary for Inland Revenue* v. *Trust Bank of Africa Ltd.*, *supra* at p. 669F-G. Having regard to the fact that the appellant was controlled by experienced land dealers, *Commissioner for Inland Revenue* v. *Richmond Estates*, *supra* at p. 607A; *Yates Investments (Pty.) Ltd.* v. *Commissioner for Inland Revenue*, *supra* at p. 616H; and the totality of the facts, the reason for selling the property is not consistent with the activities of a company merely holding property for investment purposes. *Natal Estates Ltd.* v. *Secretary for Inland Revenue*, *supra* at p. 198E-H. The appellant, as appears from its activities, was an investment *dealing* company and not an investment holding company. *Secretary for Inland Revenue* v. *Trust Bank of Africa Ltd.*, *supra* at p. 667F-H; *African Life Investment Corporation (Pty.) Ltd.* v. *Secretary for Inland Revenue*, 1969 (4) S.A. at p. 268E-G. In terms of sec. 82 of the Income Tax Act the *onus* rested upon the appellant of proving that the proceeds of the sale of the property were of a capital nature.

Welsh, Q.C., in reply.

Cur. adv. vult.

Postea (August 19).

WESSELS, J.A.: This is an appeal, direct to this Court, on a case stated under sec. 86 of the Income Tax Act, 58 of 1962 (hereinafter referred to as the Act), against a decision of the Transvaal Special Court for hearing income tax appeals, constituted in terms of sec. 83 of the Act. In assessments for normal tax and undistributed profits tax for the year of assessment ended 28 February, 1969, raised by respondent upon appellant, there was included the sum of R131 019, being the profit received by appellant from the sale of immovable property in Johannesburg during the year of assessment in question. Appellant appealed to the Court *a quo* against the inclusion of the profit in the assessments: it contended that it was a receipt of a capital nature within the meaning of the definition of "gross income" in sec. 1 of the Act. The appeal was dismissed, hence the appeal to this Court.

The following is a summary of facts set out in the statement of case:

Appellant was incorporated on 3 October 1916. From its memorandum of association it appears that the company was established primarily for the purpose of acquiring and taking over "as a going concern" the businesses of fruit merchants, exporters, importers and distributors then being carried on in Johannesburg and Cape Town under the style or firm of John Bell and Company. Para. 2 of the objects clause reads as follows:

"To carry on the business of fruit merchants, exporters, importers, and distributors of fruit, farmers, fruit growers, merchants, general dealers, ware-housemen, charterers of ships or other vessels, auctioneers, packers, cold storage agents or proprietors, carriers and forwarding agents, in all their branches."

It is to be noted that there is no reference in para. 2 to the carrying on of "the business" of dealing in real estate. It was, however, empowered,

"generally to purchase . . . or otherwise acquire any real . . . property"

and to

". . . sell . . . turn to account or otherwise deal with or dispose of the . . . lands, buildings, and other property for the time being of the Company".

Until March 1956 the affairs of appellant were under the control of Mr. P. A. Litopoulos and his co-shareholders. Until then, appellant carried on the business of market agent (mainly in the field of selling flowers for farmers), assurance broker or agent and auctioneer in premises on stand 340, Johannesburg. Appellant had acquired the leasehold of the property on 28 March 1922, and on 5 March 1924 the freehold title thereof, at a cost of R15 981. The property was situated at 44 President Street West, Johannesburg.

Since 1946 Mr. I. Fine, a tailor, and Messers Philip, Joseph and Solomon Sher (hereinafter referred to as "the Sher Brothers") had been associated in the carrying on of a clothing manufacturing business. Early in 1956 Fine suggested to the Sher Brothers that a new business of importing cloth and selling it to tailors—especially Indian tailors, with whom Fine had extensive connections—should be established. Fine suggested, further, that this business could conveniently be carried on in the premises owned by appellant (i.e., in the building on stand 340), since it was situated in a predominantly Indian area where a number of Indian tailors carried on business. In April 1956, after negotiations between Philip Sher and Litopoulos had been successfully concluded, the Sher Brothers and Fine acquired the shares in appellant then held by Litopoulos and his co-shareholders. Thereafter the Sher Brothers and Fine were in effective control of appellant until September 1961, when the Sher Brothers acquired from Fine the shares he held in appellant. In the result, the Sher Brothers between them held all the shares in appellant.

The primary purpose of the Sher Brothers and Fine in acquiring the shareholding in appellant was to secure suitable premises for their new business, and not to cause appellant to sell the property at a profit. Philip Sher, however, with his understanding and experience of the property market, was conscious, at the time the Sher Brothers and Fine gained control of appellant, and at all material times thereafter, of a likelihood that at some future stage it would be possible to dispose of stand 340 at a price well in excess of its book value (assigned to it by its previous directors) of £50 000—i.e., R100 000.

Despite the acquisition of the shares in the appellant by the Sher Brothers and Fine, the property remained a capital asset held by appellant for use as such, and it was held for that purpose for about a year after the change of control. As from 1 April 1956 a portion of the property was used by appellant for the purpose of carrying on the business of importing and selling cloth to tailors. The remaining portion of the building was used by appellant for its business of selling flowers until May 1957, when it discontinued carrying on this business. During the same month, appellant's textile business was transferred to premises situated at 116 President Street

East, which was owned by Presco Investments (Pty.) Ltd. (Presco). About the same time the Sher Brothers had acquired control through other companies of 75 per cent of the issued shares of Presco and Fine had acquired the remaining 25 per cent thereof. In September 1961, when the Sher Brothers acquired Fine's shares in appellant they also acquired his shares in Presco. The details of these transactions are fully set out in the stated case but Presco company, the Sher Brothers and Fine were able to transfer appellant's textile business from the premises on stand 340 to the premises owned by the Presco company at 116 President Street East. In about September 1959 appellant disposed of its business to Fine's Textile Co. (Pty.) Ltd., a company which had been registered for the purpose of taking over appellant's textile business.

After discontinuing its business as a flower seller and transferring its textile business to the above-mentioned premises at 116 President Street East in May 1957, appellant's property was no longer required for the purposes which the Sher Brothers and Fine had in mind when they gained control of appellant. The area of the property was too small for development by itself. As from and after May 1957, appellant intended to retain the property for the purpose of selling it at a good profit when the market for property in the area (which was within about half a mile of the Johannesburg City Hall) had risen sufficiently.

As from 1 June 1957, appellant let the property to Starlite Cinema (Pty.) Ltd., for the purpose of carrying on therein the business of a cinema and tea kiosk for non-Whites. The property was let on a monthly basis up to the end of December 1957. On 20 December 1957 appellant entered into a notarial agreement with Starlite Cinema (Pty.) Ltd. for the lease of the property for a period of 11 years as from 1 January 1958 until 31 December 1968, with the option of a renewal for a further period of five years. The agreed rental for the first 11 years was R400 per month, and for the renewal period, R550 per month. The lessee, which was entitled but not obliged to do so, spent approximately R15 000 on building alterations and a similar amount on equipment. In terms of the lease, the lessee was not, on the termination thereof, entitled to any compensation in respect of any improvements effected by it. The rents provided for in the notarial lease were unattractive in relation to the value of the property from appellant's point of view.

In May 1967, but with effect from March 1968, appellant sold the property in question to Mr. L. G. Thomas, a shareholder in Starlite Cinema (Pty.) Ltd., for the sum of R147 000. The payment of R110 000 thereof was deferred for 10 years subject to the payment of interest. Philip Sher negotiated the sale, which yielded a profit of R131 019 to appellant. At no time did appellant offer the property for sale. The sale came about as a result of an offer to purchase the property made by Thomas to appellant. Appellant received an annual interest from the proceeds of the sale amounting to at least R14 700. The rental return received by appellant prior to the sale was approximately R3 700 per annum.

During the period from 1 April 1956 to 28 February 1969 appellant, mainly through the instrumentality of Philip Sher, received income in the form of commissions and fees in respect of services rendered by it, e.g., assisting in the raising of bonds, organising syndicates formed for the purposes of land development, etc. At no time, however, during its existence did appellant buy or sell any land apart from the property with which the

appeal before the Court *a quo* was concerned. In the year ended 28 February 1966 the appellant made a profit of R13 899 on the sale of shares in a property-owning company known as Fays Buildings (Pty.) Ltd. The latter company owned a piece of land in Hillbrow, Johannesburg, on which a block of flats was being erected. The appellant acquired a 25 per cent interest in that company early in 1963 and lent that company R18 911. On 1 October 1965, when the building of the block of flats was nearing completion, the appellant, together with all the other shareholders, disposed of their interests in that company. The appellant had acquired its shareholding in Fays Buildings (Pty.) Ltd. in 1963 from the Sher Brothers and the block of flats erected by that company was financed by a syndicate of which appellant and Rapp and Maister (Pty.) Ltd., building contractors, were members. Philip Sher was the founder of the syndicate.

The profit made by appellant on the sale of the shares of Fays Buildings (Pty.) Ltd. (R13 899) was transferred to investment realisation reserve. The Secretary included this profit in the income of appellant for the year of assessment ended 28 February 1966, against which inclusion the appellant lodged objection and appeal. Appellant, however, subsequently withdrew this appeal.

In the year ended 28 February 1967 appellant made a profit of R9 033 on the sale of shares in a property-owning company known as Keitrust (Pty.) Ltd. Appellant acquired 50 per cent of the equity of that company in 1963 and sold one-third thereof at the said profit. Appellant lent R25 000 to that company. The profit was transferred to investment realisation reserve. The profit was included in the income of appellant by the Secretary for the year of assessment ended 28 February 1967, and against that inclusion appellant also lodged objection and appeal. The appeal was, however, subsequently abandoned by appellant. Apart from these two instances, appellant did not at any time buy or sell shares in property-owning companies.

This concludes the summary of the facts (admitted or proved) set out in the statement of case. Where necessary further facts will be referred to hereunder.

In terms of sec. 82 of the Act, on appeal before the Court *a quo*, the burden of proof that the respondent's decision to include the amount of the profit (R131 019), realised on the sale of stand 340 by appellant, in the assessments in question was wrong, rested on appellant. In the circumstances of this case, the burden of proof would be discharged by appellant if it established by a preponderance of probabilities that the profit was a receipt or accrual of a capital nature and, therefore, not part of its gross income within the meaning of the definition of "gross income" in sec. 1 of the Act.

At the hearing of the appeal before the Court *a quo*, Philip Sher was called as a witness to testify on appellant's behalf. He conceded under cross-examination that he was at all material times the "architect" of appellant's activities. The Court *a quo* held that "during the years 1956 to 1967, inclusive, the mind of the appellant had been his mind".

His evidence regarding appellant's intention or purpose in engaging in business activities was, therefore, admissible where such intention or purpose were disputed issues of fact. The Court *a quo* adopted the correct approach. See *Secretary for Inland Revenue* v. *Trust Bank of Africa Ltd.*, 1975 (2) S.A. 652 (A.D.) at p. 669B-G. Though admissible, the weight to be given to such evidence must necessarily depend upon the circumstances,

which would include the Court's view of the credibility of the witness giving the evidence.

For reasons which need not be canvassed in this judgment, the Court *a quo* held that Philip Sher had been "evasive and uncandid" in many parts of his evidence. It was, however, held that "much of his testimony, because of the inherent probability" was acceptable.

The Court *a quo* accepted Sher's testimony in regard to the purpose for which he and his associates had bought shares in appellant in order to gain control thereof, i.e., to cause appellant to continue holding stand 340 as a capital asset and to use the premises for the purpose of carrying on business therein. In accepting this part of Sher's testimony, the Court *a quo* added the following:

"It is our view that Mr. Sher, with his understanding and experience of the property market, was probably conscious, at the time when he gained control of the appellant and at all times thereafter, of a likelihood that at some future stage it would be possible to dispose of stand 340 at a price well in excess of its book value (assigned to it by its previous directors) of £50 000. That is, however, not to say that, in our judgment, it was the dominant intention of Sher, or of the appellant at the time when the change of control took place, or shortly thereafter, to sell the property at a profit. We accept that at that stage the property remained a capital asset of the appellant's, held for use."

After reviewing the evidence of what took place after appellant had ceased carrying on business in the premises on stand 340, the following is stated in the judgment of the Court *a quo:*

"As I have indicated, we are of the view that the stand was acquired by the appellant for use, and not for resale, and that it was held for that purpose while trading was being carried on there up to, and for about a year after, the change of control. The main, if not the sole, question which remains for decision is whether or not, in 1957 or thereafter, there was a change of intention by the appellant which, either alone or in conjunction with something else, converted stand 340 into property held for resale, and thus rendered taxable the profit on the eventual resale. As the appellant was saddled with the *onus* of showing that the assessment was wrong, it was for it to negative such a change in the character of the asset as I have referred to."

The Court *a quo* proceeded to an analysis of Sher's evidence relevant to the question whether or not there was subsequent to May 1957 such a change of intention on the part of appellant. It concluded that Sher was "uncandid and evasive" in his evidence regarding the future of stand 340 "because for some reason, he did not wish to tell the Court what his state of mind had been at the relevant time".

Despite Sher's evidence, the Court *a quo* correctly regarded the proved facts bearing on appellant's intention at the relevant time in its endeavour to ascertain what that intention was. For the judgment of the Court *a quo* proceeds:

"It seems to us that the appellant, when it caused stand 340 to become redundant for the purposes of its business, must have had some intention with regard to the future of that stand."

It proceeded to examine four possible intentions. I need only refer to the fourth of the "possible" intentions, i.e.,

"*(d)* To retain the property for the purpose of selling it at a good profit when the market for property in the area (which was within about half a mile of the Johannesburg City Hall) had risen sufficiently."

After ruling out the first three possible intentions, the Court *a quo* held as follows:

"Purpose *(d)*, above, seems to us far more probable than any of the others, particularly if one bears in mind the fact that the Shers, who controlled the appellant,

were active and experienced people in the urban property market. Details of their acquisitions and dealings, which were placed before us, leave us with the conviction that appreciation in the value of stand 340 could not have been far from their minds in 1957.

Certainly the appellant did not discharge its *onus* of proving that the appellant did not have the intention, from and after May 1957, of holding stand 340 for resale at a profit. Indeed Mr. *Welsh*, who appeared for the appellant, conceded, at the end of his argument, that he had failed in that regard. There had been a change of intention in 1957, he said, and it had not been proved that thenceforth the appellant's sole or dominant intention had not been to resell stand 340 at a profit."

It was submitted on appellant's behalf in argument before the Court *a quo* that a finding that it was appellant's intention to retain the property for the purpose of selling it at a profit did not conclude the matter against it. Counsel's submission is summed up as follows in the judgment of the Court *a quo:*

"In his submission the profit in issue was, despite the change of intention, an accrual of a capital nature. He pointed out, correctly, that not every change of intention which leads to a sale will render the profits from that sale taxable. Whenever a taxpayer disposes of a capital asset, that disposal must be preceded by, and flow from, a change of intention. But profit which accrues from the sale of a capital asset, *simpliciter*, is not taxable, and that proposition remains true even if the realisation is deferred for such period as is reasonably necessary in order that the realisation may be effected advantageously."

As to this, the following is stated in the judgment:

"Our finding, however, is that the appellant decided to do, and in fact did, something different from that. Its decision, in our opinion, was not to dispose of its capital asset with such delay as might be necessary in order to carry out the transaction advantageously. Its election, in our view, was to hold the asset, probably for years and possibly for many years, with the object of selling it at a high profit when the market for property in the area had risen sufficiently. It may appear that the difference between those two courses of conduct is one of degree: certainly it will not always be possible to indicate clearly where the line between them falls to be drawn. But we are in no doubt as to the side of the line upon which the present case falls."

After considering *dicta* in a number of decided cases relating to the question whether or not a change of intention was by itself sufficient to affect the character of an asset held by a taxpayer, i.e., to convert it from a capital asset to stock-in-trade, the Court *a quo* concluded that, in the present case, the change of intention resulted, without more, in the alteration of the character of the property in question. It followed, so the Court *a quo* held, that, by reason of the appellant's change of intention in 1957, the profit realised some 10 years later on the sale of stand 340 was subject to tax. The judgment concludes on the following note:

"I would add this: If I am wrong in my view that the change of intention was sufficient in itself, the following features may well constitute the additional material which is required to render the profit taxable: The appellant, in the 1966 and 1967 tax years, effected sales of shares in property-owning companies on which it made profits."

The property-owning companies referred to are Fays Buildings (Pty.) Ltd. and Keitrust (Pty.) Ltd. The nature of the share transactions in question have already been set out earlier in this judgment. It was pointed out that the "directing mind" of appellant both at the time of the change of intention and at the time of the acquisition and sale of the shares was the mind of Philip Sher. The judgment concludes:

"If, therefore, anything in the nature of 'continuity' were required, in addition to the appellant's change of intention, that might well be found in the subsequent transactions which I have mentioned."

For the purposes of this appeal, the crucial finding of fact made by the

Court *a quo* is that, as from May 1957 onwards, appellant's intention or purpose in holding the asset in question was

"not to dispose of its capital asset with such delay as might be necessary in order to carry out the transaction advantageously"

but to hold it

"probably for years and possibly for many years, with the object of selling it at a high profit, when the market for property in the area had risen sufficiently".

This finding of fact in relation to appellant's intention or purpose, as well as other findings of fact (whether of primary fact or of factual inferences therefrom) made by the Court *a quo*, are, in terms of sec. 86 (1) of the Act, unassailable on appeal unless it can be shown that the factual conclusion reached by the Court *a quo* is one which could not reasonably have been reached. See, *Commissioner for Inland Revenue* v. *Strathmore Consolidated Investments Ltd.*, 1959 (1) S.A. 469 (A.D.) at p. 475G-H; *Secretary for Inland Revenue* v. *Trust Bank of Africa Ltd., supra* at p. 666B-D; *Berea West Estates (Pty.) Ltd.* v. *Secretary for Inland Revenue*, 1976 (2) S.A. 614 (A.D.) at p. 635A.

The question, whether or not the conclusion reached by the Court *a quo* is one which could reasonably have been reached, is one of law.

The first question which arises for determination by this Court is whether

"on the facts found and stated by the Special Court, the accrual of R147 000 to the appellant during the year ended 28 February 1969 was 'of a capital nature' within the meaning of the opening words of the definition of 'gross income' in sec. 1"

of the Act. (I quote from the heads of argument filed by counsel on appellant's behalf). It was not disputed by respondent's counsel that the question arising for determination was one of law. In so far as reference to decided cases may be necessary, see e.g., *Platt* v. *Commissioner for Inland Revenue*, 1922 A.D. 42 at pp. 49-50; *Commissioner for Inland Revenue* v. *Stott*, 1928 A.D. 252 (in which it was stated by WESSELS, J.A., at p. 259 that on this question *Platt's* case "is conclusive"), and *Secretary for Inland Revenue* v. *Cadac Engineering Works (Pty.) Ltd.*, 1965 (2) S.A. 511 (A.D.) at p. 521F-G.

The phrase "receipts or accruals of a capital nature" in the definition of "gross income" in sec. 1 of the Act is not defined and the Courts have not attempted to give it an all-embracing meaning which could act as "a touchstone in deciding all possible cases" where the question to be determined is whether any particular receipt or accrual is, or is not, "of a capital nature". See, *Sub-Nigel Ltd.* v. *Commissioner for Inland Revenue*, 1948 (4) S.A. 580 (A.D.) at p. 595. Nevertheless, in every case in which a Court has to determine, as a question of law, whether any receipt or accrual is, on the proved facts, one "of a capital nature" within the meaning of the definition of "gross income" in sec. 1 of the Act, the Court must of necessity be informed on the "meaning" of the phrase in question. In dealing with the question whether in particular circumstances a receipt or accrual is, or is not, of a capital nature, the Courts have over the years decided in a long line of cases what factors may legitimately be taken into account in determining the question. The principles thus established, afford a measure of guidance where the question has to be determined in any particular case. As to this, however, STEYN, C.J., in adopting remarks from the judgment in *Commissioner for Inland Revenue* v. *36/49 Holdings Ltd. (In Liquidation)*, 25 T.C. 173 at p. 185, said the following in *Commissioner for Inland Revenue* v. *African Oxygen Ltd.*, 1963 (1) S.A. 681 (A.D.) at p. 691A:

"In so far as cases in our Courts decide what factors are to be taken into account in dealing with such a question, or cases in other Courts applying similar provisions draw attention to features which may on good grounds be accepted as relevant, they are, of course, of assistance, but each case must be decided on its own facts and circumstances."

As to the proper approach of a Court which is required to deal with the question, HOLMES, J.A., stated the following in *Natal Estates Ltd.* v. *Secretary for Inland Revenue*, 1975 (4) S.A. 177 (A.D.) at pp. 202G-203A:

"In deciding whether a case is one of realising a capital asset or of carrying on a business or embarking upon a scheme of selling land for profit, one must think one's way through all of the particular facts of each case. Important considerations include, *inter alia*, the intention of the owner, both at the time of buying the land and when selling it (for his intention may have changed in the interim); the objects of the owner, if a company; the activities of the owner in relation to his land up to the time of deciding to sell it in whole or in part; the light which such activities throw on the owner's *ipse dixit* as to intention; where the owner subdivides the land, the planning, extent, duration, nature, degree, organisation and marketing operations of the enterprise; and the relationship of all this to the ordinary commercial concept of carrying on a business or embarking on a scheme for profit. Those considerations are not individually decisive and the list is not exhaustive. From the totality of the facts one enquires whether it can be said that the owner had crossed the Rubicon and gone over to the business, or embarked upon a scheme, of selling such land for profit, *using the land as his stock-in-trade*.

Finally, one does not lose sight of the incidence of the *onus* of proving non-liability, imposed by sec. 82 of the Act, on the person claiming such non-liability, in this case the appellant."

It is to be noted that in the last quoted passage, HOLMES, J.A., stated that the considerations detailed by him (one of which is the factor of intention) "are not individually decisive". In this connection, too, I would draw attention to the remarks in the minority judgment of SCHREINER, J.A., in *Commissioner for Inland Revenue* v. *Richmond Estates (Pty.) Ltd.*, 1956 (1) S.A. 602 (A.D.) at p. 610C-D:

"But, apart from the above considerations, it seems to me that the Special Court erred in treating the change of intention in 1948-49 as decisive of the question before it. One must not lose sight of the true nature of the enquiry in cases of this kind. There is no legislative provision that makes the intention of the taxpayer decisive of whether the receipt or accrual was of a capital nature or not. The decisions of this Court have recognised the importance of the intention with which property was acquired and have taken account of the possibility that a change of intention or policy may also affect the result. But they have not laid down that a change of policy or intention by itself effects a change in the character of the assets."

In *Stott's* case, *supra* at p. 264, WESSELS, J.A., stated:

"It is unnecessary to go so far as to say that the intention with which an article or land is bought is conclusive as to whether the proceeds derived from a sale are taxable or not. It is sufficient to say that *the intention is an important factor, and unless some other factor intervenes to show that when the article was sold it was sold in pursuance of a scheme of profit-making, it is conclusive in determining whether it is capital or gross income.*"

(My italics).

It is unnecessary for me to compile a catalogue of cases dealing with the relevance and importance of the intention factor in determining

"whether profit has resulted from the productive use of capital employed to earn it, or whether it has resulted from the realisation of capital at an enhanced value."

(See *Commissioner of Taxes* v. *Booysens Estates Ltd.*, 1918 A.D. 576 at p. 595). Most of the leading cases were considered by HOLMES, J.A., in the *Natal Estates* case, *supra* at pp. 198-202.

In passing, I would mention that, when it heard the appeal, the Court *a quo* did not have available the guidance afforded by the judgments of this Court in the *Natal Estates* and *Berea West Estates* cases.

I revert to the facts of this case. It is stated in the judgment of the Court *a quo* that

"appellant did not discharge its *onus* of proving that appellant did not have the intention, from and after May 1957, of holding stand 340 *for resale* at a profit".

I am not certain whether the words I have italicised were deliberately chosen in preference to the words "for sale". Normally, it would seem that the concept of "resale" relates more readily to the intention with which an article is acquired, i.e., it is bought for the purpose of resale. However, later on in the judgment it is stated that at the relevant time it became appellant's intention to hold the asset,

"probably for years and possibly for many years *with the object of selling it* at a high profit when the market for property in the area had risen sufficiently".

(My italics). It is to be inferred, in my opinion, from the judgment of the Court *a quo*, as was indeed submitted by appellant's counsel in argument before this Court, that if appellant's intention were to have been

"to dispose of its capital asset *with such delay as might be necessary in order to carry out the transaction advantageously*",

the profit realised would probably not have been taxable as part of appellant's gross income within the meaning of the Act. (My italics).

In *Stott's* case, *supra* at the end of the main paragraph on p. 263, WESSELS, J.A., stated:

"Every person who invests his surplus funds in land . . . is entitled to realise such asset to best advantage and to accommodate the asset to the exigencies of the market in which he is selling. The fact that he does so cannot alter what is an investment of capital into a trade or business for earning profits."

This principle was reaffirmed in the *Natal Estates* case, *supra* at p. 201A. In the *Berea West Estates* case, *supra*, HOLMES, J.A., at p. 633A-B, indicated that the process of realising a capital asset to best advantage may in certain circumstances need "the hand of time". The mere fact, therefore, that a person deliberately delays the disposal of a capital asset because, upon his "reading" of the property market, "the hand of time" is needed in order to realise the asset to best advantage cannot, in my opinion, result in a change in the character of the asset so as to alter it from a capital asset, held for the purpose of advantageous disposal, to stock-in-trade, held for the purpose of earning income in the course

"of an operation of business in carrying out a scheme for profit-making".

See the *Natal Estates* case, *supra* at p. 199A-B. At p. 198D of the report, HOLMES, J.A., referred with approval to a passage in the judgment in *Californian Copper Syndicate* v. *Inland Revenue, anno* 1904, 41 Sc. L.R. 691, which reads as follows:

"It is quite a well-settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price than he originally acquired it at, the enhanced price is not profit . . . assessable to 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 change of investment, but *an act done in what is truly the carrying on or carrying out of a business.*"

(The italics are those of HOLMES, J.A.).

It is to be noted that the principles referred to in the above-quoted passage were already recognised by this Court in the *Booysens Estates* case, *supra* at p. 595, where INNES, C.J., stated:

"The rule is plain enough; the difficulty lies in the application of it."

Notwithstanding the passage of time and the development of the law in our decided cases, the position remains substantially the same: the rule is still

plain, and the difficulty of applying it to the particular facts of a given case still remains.

Respondent's counsel argued that, if a taxpayer changes his intention by deciding to realise his capital asset, the resultant profit on its disposal is usually capital, provided it was achieved incidentally to or consistently with its disposal in the ordinary way as a capital asset; but if the taxpayer, having decided to realise it, deliberately pursues the objective of making a profit out of its disposal, the resultant profit might well constitute taxable income; hence in the present case, so the argument proceeded, the Court *a quo* was entitled to find, as it did, that appellant had pursued that profit objective by retaining and nursing the property for many years until the property market had risen sufficiently to produce a high profit for appellant.

The concluding part of that argument, however, runs counter to the *dicta* in *Stott's, Natal Estates'* and *Berea West Estates'* cases, referred to above, that the taxpayer is entitled to bide his time in order to dispose of his capital asset to best advantage. Moreover, my understanding of the cases that deal with the matter is that the mere change of intention to dispose of an asset hitherto held as capital does not *per se* subject the resultant profit to tax. Something more is required in order to metamorphose the character of the asset and so render its proceeds gross income. For example, the taxpayer must already be trading in the same or similar kinds of assets, or he then and there starts some trade or business or embarks on some scheme for selling such assets for profit, and, in either case, the asset in question is taken into or used as his stock-in-trade.

In order to ensure that an appeal on a question of law is not inadvertently converted into one on a question of fact, I briefly recapitulate what appears to me to be the more important facts found by the Court *a quo* to be relevant to its conclusion, which is now being challenged on appeal before this Court.

1. Appellant was incorporated in 1916 mainly for the purpose of dealing in fruit. Although, as appears from para. 2 of the objects clause of its memorandum of association, it was apparently not contemplated that it would "carry on (the) business" of dealing in land, its powers were so widely stated that it could do so.
2. For the purpose of securing suitable premises in which to carry on its business as a dealer in fruit, it acquired the freehold title to stand 340 in 1924. It is common cause that it was used as a capital asset by appellant until May 1957.
3. During 1956, when appellant was carrying on business as a flowerseller, a market agent, an auctioneer and an insurance agent or broker, it fell under the control of a new group of shareholders, and one of them (Philip Sher) became and throughout was the "architect" of appellant's activities, the mind of appellant had been his mind. The Sher Brothers were active (through their shareholding in and control of property-owning companies) and experienced in the urban property market.
4. Notwithstanding the change in control in 1956, appellant retained stand 340 as a capital asset until May 1957, when the premises were no longer required by appellant for the purposes of carrying on business therein. During the period from 1 April 1956 up to 28 February 1969 it carried on business from which it received an

income of over R750 000. It is to be noted that none of the business transactions during the period in question involved any sales of property. Appellant realised profits on the sale of shares in two property-owning companies, i.e., Fay's Buildings (Pty.) Ltd. (R13 899) and Keitrust (Pty.) Ltd. (R9 033).

5. Upon the property becoming redundant for the purposes of appellant's business, it decided not to dispose of its capital asset "with such delay as might be necessary in order to carry out the transaction advantageously", but elected to "hold the asset, probably for years and possibly for many years, with the object of selling it at a high profit when the market for property in the area had risen sufficiently". This intention remained operative throughout until the property was sold in May 1967 (but with effect from March 1968) at a profit of R131 019.

6. As from 1 June 1957 until the end of the year, the property was let to Starlite Cinema (Pty.) Ltd., on a monthly basis, and as from 1 January 1958 in terms of a lease which was to run for a period of 11 years with an option to renew it for a further period of five years.

Now, as appears from the facts, either admitted or found proved by the Court *a quo*, the property in question was initially acquired, and thereafter retained, as a capital asset, certainly until May 1957. The property having become redundant for any of the purposes of appellant's business which was being carried on at that particular time, it decided to sell it, and in that regard made the "election" referred to in para. 5 above. As to that, it is stated in the judgment of the Court *a quo:*

"It may appear that the difference between these two courses of conduct is one of degree: certainly it will not always be possible to indicate clearly where the line between them falls to be drawn. But we are in no doubt as to the side of the line upon which the present case falls."

The difference of degree between the two courses of conduct appears to relate to the contemplated period of delay in disposing of the property after the decision to sell it had been taken. However, as I see it, depending upon the exigencies of the property market, the adoption of the first course might well have resulted in the property having to be held "for years and possibly for many years" in order "to carry out the transaction advantageously". Again, depending on the exigencies of the property market, where the second course is adopted, an unexpected boom in the property market within a relatively short period after the decision to sell is taken may result in a sale of the property at that time which may well achieve the object aimed at, namely,

"of selling it at a high profit when the market for property in the area had risen sufficiently".

The submission of counsel for the appellant that the distinction is one without a difference may well be justified. Nevertheless, it appears from the judgment of the Court *a quo* that its decision, that there had been a change of intention on appellant's part which affected the character of the asset so as to change it from a capital asset (which was its character from 1922 until May 1957) to stock-in-trade, was largely, if not wholly, founded on the "distinction" between the two courses of conduct referred to.

Having regard to the effect of the relevant general principles discussed earlier in this judgment, I am of the opinion that the Court *a quo* erred in law in holding that appellant's decision in May 1957 to sell the property in

question and to hold it for that purpose "probably for years and possibly for many years, with the object of selling it at a high profit when the market for property in the area had risen sufficiently", by itself so affected its character that the profit realised on the sale thereof did not constitute a receipt or an accrual "of a capital nature" within the meaning of the definition of "gross income" in sec. 1 of the Act. The Court *a quo* did not specifically find, and, in my opinion, could not reasonably have done so on the facts of the present case, that what appellant decided in May 1957, apart from deciding to dispose of the property, was to embark upon a new trade or profit-making business of dealing in land, using the property in question (held up to then as a capital asset) as its stock-in-trade. I have not over-looked the two isolated transactions involving the purchase and sale of shares in property-owning companies. Neither by themselves, nor taken in conjunction with the other facts, do they afford evidence on which it could reasonably be concluded that appellant had in May 1957 in fact embarked upon a trade or profit-making business of dealing in land or shares in property-owning companies.

In the result, the appeal is allowed with costs, including those consequent upon the employment of two counsel; the judgment of the Court *a quo* is altered to one allowing the appeal and referring the matter back to the respondent to re-assess the appellant.

TROLLIP, J.A., RABIE, J.A., MULLER, J.A., and GALGUT, J.A., concurred.

Appellant's Attorneys: *Simler & Broido*, Johannesburg; *Lovius, Block, Meltz & Cowan*, Bloemfontein. Respondent's Attorneys: *Deputy State Attorney*, Johannesburg and Bloemfontein.

SHIELD INSURANCE CO. LTD. v. HALL.

(APPELLATE DIVISION.)

1976. *May* 20; *August* 17. WESSELS, J.A., GALGUT, J.A., DE VILLIERS, J.A., KOTZÉ, A.J.A., and VILJOEN, A.J.A.

Evidence.—Document.—Admissibility of.—Plan of an accident.—Scope of such admission under Rule of Court 36 (10).—Statements on plan only admissible if conditions of sec. 34 (1) of Act 25 of 1965 proved.—Only physical features on plan admissible under the Rule.—Negligence.—Action for damages.—Evidence.—Plan.—Policeman not available.—Only physical features on plan admissible under Rule of Court 36 (10) unless conditions of sec. 34 (1) of Act 25 of 1965 proved.—Head-on collision between plaintiff's vehicle and that insured by defendant after latter had emerged from a gap in a road on plaintiff's side of road.—Road under construction and both drivers aware that vehicles from both directions had to pass through it.—Trial Judge's finding that both drivers equally negligent upheld.—Assessment for loss of earning capacity reduced.—Costs.