2000 ABCA 151
Alberta Court of Appeal

Gainers Inc. v. Pocklington Holdings Inc.

2000 CarswellAlta 508, 2000 ABCA 151, [2000] A.W.L.D. 518, [2000] A.J. No. 626, 220 W.A.C. 373, 255 A.R. 373, 81 Alta. L.R. (3d) 17, 97 A.C.W.S. (3d) 234

Gainers Inc., Plaintiff/Defendant by Counterclaim (Appellant) and Pocklington Financial Corporation, Pocklington Holdings Inc. and Pocklington Foods Inc., Defendants/Plaintiffs by Counterclaim (Respondents)

Côté, Fruman JJ.A., Rooke J. (ad hoc)

Heard: May 2, 2000
Judgment: June 1, 2000
Docket: Edmonton Appeal 9603-0216-AC

Proceedings: reversing in part (1995), 35 Alta. L.R. (3d) 348 (Alta. C.A.); reversing (1996), 37 Alta. L.R. (3d) 248 (Alta. Q.B.); additional reasons to (1995), 35 Alta. L.R. (3d) 348 (Alta. Q.B.)

Counsel: *N.J. Pollock, Q.C.*, and *D.J. Wilson*, for Appellant/Plaintiff.
No one for Defendants/Respondents.

Subject: Torts; Restitution; Contracts; Corporate and Commercial; Civil Practice and Procedure; Evidence

Headnote

Evidence --- Parol evidence rule — Nature of rule and exceptions
Plaintiff meat-packing company went through financial difficulties and strike — P owned all shares of plaintiff, and was its sole director — Government loaned plaintiff money, and loan eventually went into default, government then foreclosed on security and became effective owner of plaintiff — While P controlled plaintiff, it had numerous financial dealings and agreements with some of his other companies, and plaintiff had sued some of its former parent and related companies for unpaid debts and unjust enrichment — Trial judge found less debt owing than claimed, dismissed claims for unjust enrichment and allowed set-offs of countervailing debts, and in result, plaintiff only recovered fraction of what it sought — Plaintiff appealed — Appeal allowed — Trial judge admitted large amounts of parol evidence about understanding, intent, belief and knowledge of P and his lawyer at various steps in proceedings — Written contracts were long, elaborate and formal and both sides had legal advice — No evidence of ambiguity, equivocal references, absurdity, contradiction or lack of clarity in relevant parts of written agreements — Particularly, management services agreements governed many matters ruled upon by trial judge, and such agreements contained "entire agreement" clauses — Judge incorrectly amended such agreements by implication, conduct, and oral discussions — Incorrect use of parol evidence and misconception of fundamental company law principles underpinned almost all of trial judgment in action, whole approach was misconceived and judgment could not stand — Trial judgment in favour of plaintiff would stand, but new trial ordered to decide whether plaintiff's judgment would be larger.

Contracts --- Construction and interpretation — General principles
Plaintiff meat-packing company went through financial difficulties and strike — P owned all shares of plaintiff, and was its sole director — Government loaned plaintiff money, and loan eventually went into default, government then foreclosed on security and became effective owner of plaintiff — While P controlled plaintiff, it had numerous financial dealings and agreements with some of his other companies, and plaintiff had sued some of its former parent and related companies for unpaid debts and unjust enrichment — Trial judge found less debt owing than claimed, dismissed claims for unjust enrichment and allowed set-offs of countervailing debts, and in result, plaintiff only recovered fraction of what it sought —

Plaintiff appealed — Appeal allowed — Trial judge admitted large amounts of parol evidence about understanding, intent, belief and knowledge of P and his lawyer at various steps in proceedings — Written contracts were long, elaborate and formal and both sides had legal advice — No evidence of ambiguity, equivocal references, absurdity, contradiction or lack of clarity in relevant parts of written agreements — Particularly, management services agreements governed many matters ruled upon by trial judge, and such agreements contained "entire agreement" clauses — Judge incorrectly amended such agreements by implication, conduct, and oral discussions — Incorrect use of parol evidence and misconception of fundamental company law principles underpinned almost all of trial judgment in action, whole approach was misconceived and judgment could not stand — Trial judgment in favour of plaintiff would stand, but new trial ordered to decide whether plaintiff's judgment would be larger.

Corporations --- Books and returns — General
Plaintiff meat-packing company went through financial difficulties and strike — P owned all shares of plaintiff, and was its sole director — Government loaned plaintiff money, and loan eventually went into default, government then foreclosed on security and became effective owner of plaintiff — While P controlled plaintiff, it had numerous financial dealings and agreements with some of his other companies, and plaintiff had sued some of its former parent and related companies for unpaid debts and unjust enrichment — Trial judge found less debt owing than claimed, dismissed claims for unjust enrichment and allowed set-offs of countervailing debts, and in result, plaintiff only recovered fraction of what it sought — Plaintiff appealed — Appeal allowed — Trial judge admitted large amounts of parol evidence about understanding, intent, belief and knowledge of P and his lawyer at various steps in proceedings — Written contracts were long, elaborate and formal and both sides had legal advice — No evidence of ambiguity, equivocal references, absurdity, contradiction or lack of clarity in relevant parts of written agreements — Particularly, management services agreements governed many matters ruled upon by trial judge, and such agreements contained "entire agreement" clauses — Judge incorrectly amended such agreements by implication, conduct, and oral discussions — Incorrect use of parol evidence and misconception of fundamental company law principles underpinned almost all of trial judgment in action, whole approach was misconceived and judgment could not stand — Trial judgment in favour of plaintiff would stand, but new trial ordered to decide whether plaintiff's judgment would be larger.

Practice --- Costs — General considerations on taxation or assessment — Amount involved in transaction
Plaintiff meat-packing company went through financial difficulties and strike — P owned all shares of plaintiff, and was its sole director — Government loaned plaintiff money, and loan eventually went into default, government then foreclosed on security and became effective owner of plaintiff — While P controlled plaintiff, it had numerous financial dealings and agreements with some of his other companies, and plaintiff had sued some of its former parent and related companies for unpaid debts and unjust enrichment — Trial judge found less debt owing than claimed, dismissed claims for unjust enrichment and allowed set-offs of countervailing debts, and in result, plaintiff only recovered fraction of what it sought — Plaintiff appealed — Appeal allowed — Trial judgment in favour of plaintiff would stand, but new trial ordered to decide whether plaintiff's judgment would be larger — Costs of trial in Queen's Bench to be decided by new trial judge — Costs of appeal would go to successful plaintiff, and costs would be assessed at 1.2 times column 5 of new Sched. C, considering that substantial amount of money was at stake compared to low floor of column 5 — Alberta Rules of Court, Alta. Reg. 390/68, Sched. C, Tariff of Costs, column 5 [rep. & sub. Alta. Reg. 152/98].

Practice --- Costs — Particular items of costs — Disbursements — Miscellaneous disbursements
Plaintiff meat-packing company went through financial difficulties and strike — P owned all shares of plaintiff, and was its sole director — Government loaned plaintiff money, and loan eventually went into default, government then foreclosed on security and became effective owner of plaintiff — While P controlled plaintiff, it had numerous financial dealings and agreements with some of his other companies, and plaintiff had sued some of its former parent and related companies for unpaid debts and unjust enrichment — Trial judge found less debt owing than claimed, dismissed claims for unjust enrichment and allowed set-offs of countervailing debts, and in result, plaintiff only recovered fraction of what it sought — Trial judge made certain determinations with respect to costs of witness fees and expenses and disbursements — Plaintiff appealed — Appeal allowed — Trial judgment in favour of plaintiff would stand, but new trial ordered to decide whether plaintiff's judgment would be larger — Costs of trial in Queen's Bench to be decided by new trial judge.

Practice --- Costs — Particular items of costs — Witness fees and expenses — Expert witness — General
Plaintiff meat-packing company went through financial difficulties and strike — P owned all shares of plaintiff, and was its sole director — Government loaned plaintiff money, and loan eventually went into default, government then foreclosed on security and became effective owner of plaintiff — While P controlled plaintiff, it had numerous financial dealings and

agreements with some of his other companies, and plaintiff had sued some of its former parent and related companies for unpaid debts and unjust enrichment — Trial judge found less debt owing than claimed, dismissed claims for unjust enrichment and allowed set-offs of countervailing debts, and in result, plaintiff only recovered fraction of what it sought — Trial judge made certain determinations with respect to costs of witness fees and expenses and disbursements — Plaintiff appealed — Appeal allowed — Trial judgment in favour of plaintiff would stand, but new trial ordered to decide whether plaintiff's judgment would be larger — Costs of trial in Queen's Bench to be decided by new trial judge.

APPEAL by plaintiff from judgments reported at(1995), 35 Alta. L.R. (3d) 348, 179 A.R. 91 (Alta. Q.B.) and(1996), 37 Alta. L.R. (3d) 248, 180 A.R. 392 (Alta. Q.B.), respecting award obtained at trial and costs.

***Per curiam*:**

1 The basic issue here is when (if ever) parol evidence may be admitted, and used, to vary a formal written contract.

2 Gainers was a meat-packing company which used to be effectively controlled by Peter Pocklington. Beneficially, he owned all the shares and he was the sole director of Gainers. It encountered financial difficulties and went through a difficult strike. The provincial government loaned it money, in return for many kinds of security, under a master agreement and some ancillary documents. Later another lender demanded more security. The government consented to that happening, in return for some additional security to the government from other Pocklington companies, and a standstill agreement was signed. Ultimately the loan went into default, the government foreclosed, and became the effective owner of Gainers.

3 While Mr. Pocklington controlled Gainers, it had numerous financial dealings and agreements with some of his other companies. Gainers has sued several of its former parent and perhaps "related companies" for unpaid debts and for unjust enrichment. The appellant plaintiff accurately summarizes the claims as follows:

> In this action, Gainers Inc. sued its former parent corporations (Pocklington Foods Inc., Pocklington Holdings Inc. and Pocklington Financial Corporation) for:
>
> > (1) a sum owing to [Gainers Inc.] by the Defendants, as a group, as of the date upon which the Defendants ceased to hold any interest in [Gainers Inc.], for the inter-corporate account between [Gainers Inc.] and the parent group. The amount claimed was not disputed — however, a counter-claim and set-off was alleged by the Defendant corporations seeking payment of management fees;
> >
> > (2) a sum owing as a result of an insurance premium refund paid to the Defendants upon deletion of [Gainers Inc.] from the group insurance coverage. The premium had been paid by [Gainers Inc.];
> >
> > (3) a sum owing to [Gainers Inc.] as a result of it having paid various expenses which were for the benefit of the Defendants and not [Gainers Inc.]. (abbreviations omitted)

As noted, part of that liability was disputed, part not.

4 The trial judge found less debt owing than claimed, dismissed the claims for unjust enrichment, and allowed large set-offs of countervailing debts. In the result, Gainers only recovered a fraction of what it sought. The trial judgment is reported at(1995), 179 A.R. 91 (Alta. Q.B.). As the trial decision is reported, more details here are unnecessary. Gainers appeals.

5 The suit was tried along with a suit against Mr. Pocklington personally about inducing breach of contract respecting some land, which is the subject of another appeal and another appellate judgment.

6 This appeal deals with accounting issues only. The defendant respondents are now bankrupt, and the trustee in bankruptcy has not instructed anyone to oppose the appeal. It was argued in writing on behalf of the appellant Gainers, whose counsel filed a long factum. There was no argument for the respondents.

7 The trial judge admitted large amounts of parol evidence about the understanding, intent, belief, and knowledge, of Mr. Pocklington and his lawyer at various steps in the drama. The trial judge made heavy use of that evidence. Sometimes he found what must be implied terms in the contracts. Sometimes he found additional agreements created by conduct. At other times he used the evidence to redefine a number of the terms in the written contracts. At times he simply seems to have found terms inconsistent with those in the contract, or maybe implied contracts contrary to the written contracts. Sometimes it was not clear under which rubric one would put the terms which he found and enforced.

8 But there are problems with that. The written contracts were long, elaborate, and formal, as one would expect when large sums and complex corporate structures and security were involved. Patently both sides had legal advice, and the evidence confirms that fact. Even the contracts which were made among Pocklington's own companies, at a time when he controlled them, were formal and obviously drafted by lawyers.

9 We cannot find ambiguity, equivocal references, absurdity, contradiction, or significant lack of clarity, in the relevant parts of the written agreements. Even if there were ambiguity, we have considerable doubts whether that would open the door to so far-reaching use and effects of parol evidence as one finds in the trial reasons for judgment here. For example, clarifying ambiguity, or covering points not dealt with, is not same as flat contradiction of the express terms of the contract.

10 We will take some time to expand here on such topics, because attempts to admit this kind of perversion of parol evidence under the guise of "context" appear to be fairly common in Alberta at the moment. Wrongful admission of such evidence can swell trials on simple issues about written contracts to weeks of historical investigation. And oral evidence admitted for a very limited purpose sometimes ends by supplanting the words of the contract.

11 In this case the Management Services Agreements were very important, governing many of the matters which the trial judge ruled upon. Both of them contained the following clauses:

> 6.01 This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof and supercedes [sic] all prior negotiations, proposals and agreements, whether oral or written, with respect to the subject matter hereof.
>
> 6.06 No term or provision hereof may be amended except by an instrument in writing signed by the Parties to this Agreement.

12 The contract expressly says that the management fees were as agreed by the parties, subject to a minimum payment. For at least two relevant fiscal years, only the minimum was paid, with no evidence of any other agreement. After the foreclosure and after the government became the sole shareholder of Gainers, Mr. Pocklington unilaterally pronounced a retroactive increase in fees, which was never agreed to by the government. The retroactive adjustment was accepted by the trial judge, resulting in a substantial reduction in the amount awarded to Gainers at trial.

13 Though this supposed power of Mr. Pocklington to make debts shrink and swell retroactively was allegedly based upon past practice, close examination of the evidence shows that past practice had not been frequent or recent, it was always done for tax reasons, and it was never done after final financial statements were signed. The adjustments here were large, unprecedented, long after the relevant final financial statements, and without any tax benefit. Clearly they cannot stand.

14 It seems to us that much of what the trial judge did was to amend the Management Services Agreements by implication, conduct, oral discussions, or oral agreements. The quoted clauses alone would suffice to prevent that.

15 When the deal is complete in the written contracts, and not subject to an escrow, other evidence (parol evidence) is inadmissible to vary or contradict a clear written contract: *Chant v. Infinitum Growth Fund Inc.* (1986), 15 O.A.C. 393, 55 O.R. (2d) 366 (Ont. C.A.), 369-70; *J.I. Case Threshing Machine Co. v. Mitten* (1919), 59 S.C.R. 118, 49 D.L.R. 30 (S.C.C.). More classic cases are cited in 1 *Chitty on Contracts* para. 12-094 (28th ed. 1999).

16 Even earlier promises or representations, otherwise having legal effects, may be wiped out by suitable contractual clauses: *J.I. Case Threshing Co. v. Mitten*, *supra*. There is such a "whole contract" clause here. Such a clause may also bar side oral contracts: *Steeplejack Services (Canada) Ltd. v. Access Scaffold & Ladder Co.* (1989), 98 A.R. 311 (Alta. Master), 318. See further Chitty, *op. cit. supra*, at para. 12-102.

17 Similarly, the parties may validly contract, as they did here, that oral modifications of the contract will be ineffective, and that amendments must be written: *Société Generale (Canada) v. Gulf Canada Resources Ltd.*, [1995] 9 W.W.R. 453, 169 A.R. 317 (Alta. C.A.), 456 [W.W.R.].

18 The power to imply terms is to be used cautiously, and no implied term can be inconsistent with or contrary to the express terms of the contract: *Sullivan v. Newsome* (1987), 78 A.R. 297 (Alta. C.A.), 303-04; *Catre Industries Ltd. v. Alberta* (1989), 99 A.R. 321, 63 D.L.R. (4th) 74 (Alta. C.A.), 85.

19 Nor can the court find a collateral parol contract inconsistent with the express written contract: *Catre Ind. v. Alberta*, *supra*; *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, 66 W.W.R. 673 (S.C.C.). Collateral contracts are viewed suspiciously and must be proved strictly, along with clear intent to contract: *Hawrish* case, *supra*, at 678 (W.W.R.).

20 The intent of the parties is to be determined from the words which they put in their written contract; their subjective intent is irrelevant: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 127 (S.C.C.), 166 [S.C.R.]. Subjective intent cannot even be used to interpret the written words, if they are clear: *id.* at pp. 27-29 (D.L.R.).

21 The trial judge thought (para. 68, p. 118 A.R.) that he could bypass all those rules by using the so-called "armchair rule". That rule lets the court see what the authors of the contract knew when they wrote it, in order indirectly to assist in resolving any difficulties in what certain words of the contract refer to. For example, a contract may contain unclear references to other people, or to things. The background knowledge may help to decide who or what was referred to. The expression quoted comes from the law of wills, and suggests that often one cannot construe a contract without knowing the facts which the parties knew when they contracted (not later). The rule under discussion is rarely called "the armchair rule" in contracts law, but that expression explains more than such vague or misleading labels as "the factual matrix". See *Boyles v. Cook* (1880), 14 Ch. D. 53 (Eng. Ch. Div.), 56.

22 For example, the parties may contract about a piece of land, or an earlier contract, or an existing paper, in vague terms. One then needs to know what they knew, in order to identify the vague reference. See, for example, *Bank of New Zealand v. Simpson*, [1900] A.C. 182 (New South Wales P.C.), 187-88; *Charrington & Co. v. Wooder* (1913), [1914] A.C. 71 (U.K. H.L.), 82; *Indian Molybdenum Ltd. v. R.*, [1951] 3 D.L.R. 497 (S.C.C.), 502-03. A good explanation of this doctrine is found in *Reardon Smith Line v. Hansen-Tangen*, [1976] 1 W.L.R. 989, [1976] 3 All E.R. 570 (U.K. H.L.), 995-97 [W.L.R.]. The doctrine lets the court find what a reasonable person would have thought was the aim of the transaction, if that person knew the facts available to the parties.

23 However, the "armchair rule" does not allow the court to receive direct evidence of intent, still less allow such evidence to contradict the contract, or evade a "whole contract" or "no oral amendment" clause. To use it to create ambiguities is backwards. See the *Indian Molybdenum Ltd.* case, and authorities there cited; *Reardon Smith v. Hansen-Tangen*, *supra*; *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 46 A.R. 22, 148 D.L.R. (3d) 598 (Alta. C.A.), 29-30 [A.R.]. The evidence admitted here went far beyond anything permitted by the "armchair rule".

24 If hindsight, implication, unspoken thoughts, and unwritten statements could have so pivotal a role as they appear to have had here, then written contracts would become a mere trap for the credulous. Almost all commercial certainly would evaporate, and commercial litigation become a swearing contest. A suit on a commercial contract, no matter how carefully drafted, would become a long historical investigation of an insoluble mystery. Often who said what to whom by telephone 15 years ago is impossible to unravel. A formal written contract should not rise or fall with such mysteries.

25 The trial reasons appear to find that Mr. Pocklington, who most of the time was the sole director, used to run his companies autocratically and arbitrarily. The reasons say that he was their sole owner, his interests were their interests, and any retroactive allocations of money among them which he might choose to make were proper and effective. If that proposition were correct, a trial would not even be a swearing contest, but a soliloquy, for only Mr. Pocklington could testify

about unwritten agreements which he made with himself.

26 The spectacle becomes risible. Indeed, a number of fallacies in company law and logic lurk there. We are not aware of any authority which makes the interests of the sole shareholder identical to the interests of the company. If that were so, a shareholder could always plunder the company to the creditors' detriment, and plainly he cannot. Long before laws against oppressing the minority, directors were not allowed to appropriate company property to themselves, even if ratified by the shareholders: Wegenast, *The Law of Canadian Companies* 366, 370, 381 (1931). That is classic law, and the rise of further duties and disabilities should not cause us to forget this oldest and most basic rule of minority protection.

27 What is more, the basic facts are almost the opposite. The owner of the appellant Gainers was not Mr. Pocklington, but another company controlled by him. At all material times, all of these companies had very significant debt, and much of that was secured. Toward the end, it is doubtful that Mr. Pocklington had any real equity in any of these companies. On top of all that, for the last few years, the shares of the appellant Gainers were in effect mortgaged to the government, and held in escrow as part of that mortgage. The interests of a bank are not those of its teller.

28 Even where the directors are the only shareholders, they cannot treat the company's property as their own, or give it to another of their companies: *Rustop Ltd. v. White* (1979), 36 N.S.R. (2d) 207, 102 D.L.R. (3d) 403 (N.S. C.A.), 413. Members of a group of companies are distinct from each other and from their owners: *Walker v. Wimborne, infra*.

29 The interests of the company include the interests of future shareholders: *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), 185. And they include the interests of the company's creditors: *820099 v. Ballard*; *Walker v. Wimborne* (1976), 50 A.L.J.R. 446 (Australia H.C.), 449; 2 *Palmer's Company Law* §8.506. Indeed, if the company's capital is effectively gone, the company's interests largely become those of the creditors: *Gower's Prs. of Modern Co. Law.* 555 (5th ed. 1992); *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1, 54 C.P.R. (3d) 161 (Ont. Gen. Div.), 189 [B.L.R.].

30 It is apparent that an incorrect use of parol evidence and a misconception of fundamental company law principles underlie almost all of the trial judgment in this suit. The whole approach at trial was misconceived, and the judgment cannot stand.

31 There are a great many other grounds of appeal. Most or all, including the question of limitations, sound fairly persuasive. But it is not necessary to pursue them further, in view of the conclusion reached. There are few pure fact findings in the trial reasons, and those lead to no particular legal conclusion unless one applies a considerable body of law. The law applied here seems to us erroneous, for the reasons given above.

32 For an appeal court to try to wade through the record and make its own fact findings would be difficult. We might have considered some kind of a reference to a referee, or ordering assessment of certain amounts by a new trial judge. Even that would be difficult, and the facts here are unusual.

33 The trustee in bankruptcy has so far not contested this suit or this appeal. Counsel for the appellant Gainers tells us that it is not at all clear that there are enough assets in the respondent companies to yield anything to their secured creditors, let alone to unsecured creditors such as the appellant Gainers. He tells us that if we order a new trial, he is satisfied that the expense and difficulty of a new trial will never be incurred. Either there will be no assets, and no one will bother, or the trustee and the appellant Gainers will readily compromise the suit.

34 At first blush that sounds like a rudely pragmatic consideration, but reflection shows that it makes some sense. In the first place, bankruptcy is supposed to be run practically by business people. It is not supposed to be a postgraduate seminar in law. In the second place, for the most part this appeal is moot. Directing a reference on part of the case and producing a long detailed appellate retrial of the rest of the case, would result in little practical benefit to the parties. And in the third place, the successful appellant demonstrates various grounds of appeal (flaws in the trial judgment), some of which in law may entitle it to judgment, and others of which plainly entitle it to a new trial.

35 The trustee in bankruptcy does not appear, and obviously does not much care what remedy this court awards. Therefore, the wishes of the appellant as to remedy should carry significant weight. Were the court to decline a new trial and

instead direct judgment with some kind of partial reference or assessment, it would in effect ignore those proven grounds of appeal which in law lead to a new trial. For example, inadmissible evidence was admitted and given heavy weight. That entitles the appellant to demand a new trial; the appellant cannot be forced to accept fact findings flowing from that error.

36 We order a new trial. However, the trial judgment in favour of the appellant plaintiff should stand. It is for admitted debts. One of the debts' amounts was admitted also. To it, the respondent defendants merely set up a counterclaim, so the trial judgment is for the balance, i.e. for an amount much less than the admitted debt. There is no cross-appeal. The new trial will decide whether the judgment in favour of the appellant plaintiff should be any larger.

37 The appellant attacks the reasoning underlying the trial judge's costs award, but in view of the conclusion reached, it will simply fall with the rest of the trial award. The new trial judge will decide who recovers costs in Queen's Bench, and on what basis. By then our decision in the related appeal against Mr. Pocklington personally about inducing breach of contract respecting a piece of land should be available. That renders academic the question of set-off of costs. But we are surprised that someone would suggest setting off costs payable by a company against costs payable not to the company but to its shareholder. As noted above, the two are in no sense the same person.

38 The appellant had to appeal, did, and won completely. It must recover costs of the appeal in any event, payable upon taxation. Millions of dollars are at stake, and so one must compare those amounts with the much lower floor of column 5. We cannot assume what the result of the new trial will be, but it would be unfair to hold up taxing appellate costs until then. Weighing these conflicting elements in this unusual situation, the appropriate scale is 1.2 times column 5 of new Schedule C. Taxation should, however, await our decision in the related appeal about land.

Appeal allowed; new trial ordered.

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