in the commodity, such dealing is a trading adventure; (2) the "nature and quantity" of the commodity may be such as to make a transaction in it inherently commercial, and to exclude the possibility of its being merely the realization of a capital investment. In this case the respondent's conduct in buying and selling the lead at a profit through the same channels and in the same manner as conventional lead dealers satisfied the first test, and 1,500 tons of lead, requiring more than twenty freight cars to transport them, satisfied the second.

To be taxable the transaction itself need not be part of a going business or trade: isolation is not decisive. In a Scottish case Lord President Clyde said: "A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade."[6] That nothing has been done by the purchaser to make the article saleable before resale does not deprive its subsequent sale of a trading character. In *C.I.R. v. Fraser*,[7] a woodcutter bought a consignment of whisky which he later sold in three lots at a profit. He did not blend or advertise the whisky: it merely passed through his hands. Yet, the transfer was commercial and therefore taxable. Similarly lack of a business organization to market the article is not decisive. Again, dissimilarity of the activity from the trader's usual business is not crucial: a purchase and resale outside the taxpayer's usual line of business may well be taxable.

Since in the present case, the respondent's reasons "were business reasons of a trading nature,"[8] and the adventure a speculative one, lack of intention to make a profit, lack of processing of the product and the isolated nature of the transaction were not enough to deprive it of its trading character. The speculation was commercial and its profit taxable.

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(6) **The Balgownie Land Trust, Ltd. v. C.I.R., [1929] 14 T.C. 684, at p. 691.**
(7) **[1942] 24 T.C. 498.**
(8) **[1956] C.T.C. 189, at p. 215.**

INSURANCE — FORFEITURE — ELECTION TO DEFEND — NON-WAIVER AGREEMENT — JOINDER AS THIRD PARTY.

The plaintiff, an insurer, issued a policy indemnifying the defendant against liability arising by law while operating a motor vehicle. The defendant ran down one, Kane, while driving in the State of Washington, U.S.A. The defendant informed the plaintiff of the accident including the fact that he had been drinking before the accident. Kane commenced an action in Washington. The plaintiff obtained a non-waiver agreement from the defendant and undertook the defence of the Kane action. Then the plaintiff commenced an action in B.C. claiming a declaration that the defendant by drunkenness forfeited his rights under the policy. *Held*, for the defendant. *Federal Insurance Co. v. Matthews*, [1956] 3 D.L.R. (2d) 322 (B.C.).

The relevant terms of the B.C. Insurance Act are similar to those of the N.B. Act. However, since the action brought by Kane was in the U.S.A., the insurer could not invoke the sections of the B.C. Statute corresponding to s. 211(9) of the N. B. Act: under this section an insurer denying liability to the insured has the right to apply to be added as a third party in the injured person's action against the insured, and to contest the liability of the insured to the plaintiff.

This case was decided on the ground that to permit the insurer to defend the Kane action and deny liability under the policy would be to permit it to take a position in which its interest during the Kane action might be contrary to that of the insured. In effect, having elected to defend, the insurer was a fiduciary; as such its duty was to serve its principal single-mindedly.

However, the insurer obtained a non-waiver agreement from the insured and maintained that this preserved the right to repudiate liability while still continuing the defence. In interpreting this agreement, the Court held it was essential to consider the intention of the parties, and the insured's intention could not have been that contended for by the insurer. Cline J. said:

> In my view the non-waiver agreement was designed to prevent the defendant (Matthews) from successfully alleging that the plaintiff (insurer) had waived the breach during its investigations and up to the time when it reached its decisions to repudiate. To suggest that its operation continued after repudiation would place a construction upon the agreement which would be manifestly unfair to the defendant.[1]

In defending the Kane action, it would be the duty of the insurer in the insured's interest to proceed in good faith and argue that the insured was not intoxicated; while at the same time, it would be in the insurer's own interest in regard to the insured's potential claim against it under the policy to show he was drunk. This appeared to be the point on which the case turned. But one might argue that the insurer could have denied liability and defended the Kane action without any real clash of interests. The actions would be completely separate. The insurer could maintain the insured was sober, and that the cause of the accident was Kane's negligence. If Kane recovered judgment, this in itself would be some indication of forfeiture by the insured. Even if the insured was liable on negligence alone, the insurer would then be in no worse position to deny liability than when first informed of the accident.

If the Kane action had been brought in B.C., the insurer would not have faced the problem of election. By virtue of s. 183 of the B.C. Insurance Act, the insurer could have denied liability, and applied to be joined as a third party to contest the action. In N.B. today, where an action is brought against an insured for damages arising from operation of an automobile, the insurer, unless it denies liability, must defend the action.[2] If liability is denied, the insurer may be joined as a third party

(1) [1956] 3 D.L.R. (2d) 322, at p. 343.
(2) R.S.N.B. 1952, c. 113, s. 204.

and contest the liability of the insured to the same extent as if a defendant in the action.[3] But if no ground for denying liability is disclosed until after an appearance has been entered, or during the trial, how must the insurer proceed: deny liability immediately or, under the circumstances, continue the defense without prejudicing the right to deny liability?

In *England v. Dominion of Canada Gen. Ins. Co.*,[4] insurers, with knowledge of circumstances relieving them from liability, undertook and continued the defence of an action against the insured. In a subsequent action against them, they were held to have admitted liability under the policy and could not, therefore, repudiate liability. If the insurers intended to rely on such circumstances to relieve them from liability, it was their duty to abandon the defense as soon as these circumstances came to their knowledge. However, in *Stenhouse v. General Casualty Ins. Co.*,[5] after the insurer's counsel had addressed the jury, he learned for the first time that the insured had given a chattel mortgage of the insured car which, if given before the accident and during the currency of the policy, would have avoided the policy. Pending ascertainment of the date of the mortgage, counsel agreed to continue the defense. It was held that, in the dilemma in which counsel found himself, it was competent for him to make an arrangement whereby the trial could proceed to its conclusion preserving the rights of the insured and the insurer pending the insurer's decision. On learning the date of the mortgage and that it constituted a breach, the insurer did nothing further. It was held also that *England v. Dom. of Can. Ins. Co.*, was not authority for the proposition that to preserve its rights an insurer must completely withdraw from the trial as soon as it suspects a breach by the insured of a policy condition. In *Marshall v. Adamson*,[6] it was held that an insurer, in continuing defence after grounds for repudiation have arisen during the course of an action but pending investigation into the grounds for repudiation, does not waive the right to repudiate.

It seems, therefore, that until an insurer's suspicion of grounds for repudiation becomes knowledge, the insurer may continue the defense without prejudicing its right to repudiate.

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(3) Ibid., s. 211 (9).

(4) [1931] O.R. 264; [1931] 3 D.L.R. 489.

(5) [1934] 3 W.W.R. 564; [1935] 1 D.L.R. 193 (Alta C.A.).

(6) [1936] O.R. 394, rev'd [1937] O.R. 872, rev'd [1938] S.C.R. 482 (sub. nom, **Provident Assur. Co. v. Adamson**).