1949
Sept. 23
1950
July 7

BETWEEN:

MAY McDOUGALL ROSS, as Executrix of the last Will of ANNIE McDOUGALL, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R S C. 1927, c. 97, ss. 2(h), 3(1) (f), 5(1) (a), 33(1), 36(2), 77(1) (c), 77(2)—"Income"—"Royalty" —"Production"—Receipts either royalties—Words "production or use of any real or personal property" in s. 3(1) (f) of the Act include oil produced from land—Allowance made by Minister for exhaustion "just and fair"—Penalty added by Minister for failure to file estate income tax return within delay—"Person"—Appeal allowed in part.

Section 3(1) (*f*) of the Income Tax Act reads as follows: For the purposes of this Act "income" . . . shall include . . .

(*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

As executrix of the will of her late mother, Annie McDougall, who owned certain lands in the province of Alberta, appellant transferred all hydro carbons (oil and gas) except coal in said lands and the right to work the same to a company in consideration of a sum in cash and the execution of an incumbrance to secure to and for her benefit a further sum of $60,000 payable out of 10 per cent of oil produced from the land with the option, however, to the company to pay her the cash market value of such production The company made certain payments in the years 1944 and 1945 which appellant did not include in the estate returns for those years.

Respondent, considering these payments to be "income" within s 3(1) (*f*) of the Act, allowed a deduction of 25 per cent for exhaustion and assessed the balance to tax, adding a penalty of $500 to the assessment for the taxation year 1945 because the appellant was late in filing the return.

Held: That the payments received by appellant were like royalties, if not royalties themselves, and they come within that part of subsection (*f*) of the Act.

2. That the words "production or use of any real or personal property" in the same subsection, include the bringing forth or yielding up of hydro carbons from an oil well and that the payments so received fall also within that part of the subsection.

3. That appellant has not established that the allowance of 25 per cent for exhaustion made by the Minister is other than a "just and fair" one.

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4. That Parliament in enacting s. 77(2) of the Income War Tax Act intended to provide special and distinct penalties for the classes of persons described in ss. 36 to 38 of the Act and that they should not be liable under any other part of s. 77. The intention is so manifest that it cannot be overridden merely by the broad definition of "person" contained in the Act.

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APPEAL under the provisions of the Income War Tax Act.

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

S. J. Helman and *L. F. May* for appellant.

H. W. Riley, Jr., T. Z. Boles and *N. D. McDermid* for respondent.

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

CAMERON J. now (July 7, 1950) delivered the following judgment:

The appellant received from Royalite Company, Ltd. (hereinafter called Royalite), the sum of $183.90 in the year 1944, and $37,820.82 in the year 1945, under circumstances set out in the agreed statement of facts or admitted in the pleadings. The first question is whether these sums were "income" of the appellant within the meaning of the Income War Tax Act (R.S.C. 1927, ch. 97, as amended).

It appears that the appellant is the executrix of the will of her late mother, Annie McDougall, who on June 30, 1938, was the registered owner in fee simple of all mines and minerals, petroleum and gas and the right to work the same in, on or under certain lands in the province of Alberta as particularly described in para. 3 of the amended statement of claim. On that date Mrs. McDougall entered into an agreement under seal with Royalite (Ex. 2) whereby in consideration of the sum of $12,000 and the covenants of Royalite therein, she did "lease, grant, demise and let" to Royalite "all hydro carbons except coal which may be found in or upon the leased area", and also the right to explore and operate the same and remove the leased substances therefrom (The phrase "hydro carbons except coal" is apparently used to denote "oil and Gas").

That document is referred to as a lease and it provided that Royalite would be the tenant for six years, subject to the term being extended as therein provided.

By that agreement the lessor (Mrs. McDougall) was entitled monthly to receive at the point of production "as royalty and rental," one-tenth part of the leased substances produced; or, alternatively, Royalite had the option of paying her the value thereof in cash at the end of each month.

By para. 11 thereof the lessor gave Royalite an option to buy her entire estate and interest in "the lands and rights hereby leased, including the term of this lease and the reversion thereof," for:

(*a*) the sum of $40,000, credit being given thereon for the $12,000 paid as consideration for the lease, and the balance being payable in cash at the time of taking up the option; and

(*b*) $60,000 payable out of 10 per cent of the production of hydro carbons except coal, as therein provided.

By para. 12 it is provided that upon taking up the option and upon payment of $28,000, the lessor would give to Royalite a registrable transfer and that such transfer:

shall reserve to the Lessor a right to receive at the mouth of the well or wells drilled or to be drilled on the said lands 10 per cent of all hydro carbons other than coal produced, saved and marketed from the said lands until the Lessor shall have received such substances in quantities which valued at the current market price at the time and place of production amount in the aggregate to $60,000, whereupon the right of the Lessor to receive the said *royalty* shall cease and determine and all interest of the Lessor in the lands, rights and the production shall cease and determine. The Operator shall have the right in lieu of paying the said *royalty* in kind as by this paragraph provided to pay the lessor the value thereof at the current market price prevailing in Turner Valley field on the day of production thereof, such payment to be made not later than the last day of the month following production.

On April 25, 1939, Royalite exercised the option and paid the sum of $28,000 to Mrs. McDougall but nothing further seems to have been done up to the time of her death on June 13, 1939. The transaction was closed out in a manner somewhat different from that provided for in the original agreement of June 30, 1938. By a "surrender of lease" dated February 3, 1940 (a certified copy of which is attached to Ex. 5), Royalite surrendered to the appellant as executrix of the will of Mrs. McDougall, the lease dated June 30, 1938, and "the terms therein created". By transfer also dated February 3, 1940, the appellant, as executrix in

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consideration of $40,000, transferred to Royalite all hydro carbons except coal in the lands referred to and the right to work the same. That transfer contained no reservation of any rental or royalty to the transferor; but in the "affidavit of transferor," required for registration and sworn to on January 23, 1941, Mrs. Ross stated that the consideration passing between the parties was as follows:

> The sum of Forty Thousand Dollars ($40,000) paid by the Transferee to the transferor and the granting by the Transferee of an incumbrance of the nominal value of One Dollar ($1 00) to secure the Transferor the payment of a *royalty* to the extent of Sixty Thousand Dollars ($60,000) on production of hydro-carbons except coal obtained from the said lands.

Ex. 7 is an incumbrance dated June 4, 1940. In that document there is recited the lease of June 30, 1938, the option therein contained, the exercise of that option, the transfer (Ex. 6) and "Whereas in order to preserve the rights of the said May McDougall Ross, as executrix, in the said lands, the said Royalite Oil Co. Ltd. has agreed to execute this incumbrance.

By that incumbrance Royalite, being desirous of rendering the hydro carbons except coal available for the purpose of securing to and for the benefit of Mrs. Ross the said sum of $60,000, did thereby incumber the said hydro carbons for her benefit with the sum of $60,000. The terms of payment thereof appear to have been identical with those contained in the original option, namely, that as, if and when production was obtained to deliver to her 10 per cent of such production until at current market values thereof she should have received an amount of an aggregate value of $60,000; but with the option to Royalite instead of delivering the same, to pay her therefor in cash at the current market value thereof until she should have received from them the sum of $60,000.

The surrender of lease, transfer and incumbrance were all registered on September 18, 1941. Royalite drilled wells and upon oil being produced elected to pay Mrs. Ross the cash market value of 10 per cent of such production. She received the payments I have mentioned and the balance of $21,995.28 in the year 1946, but with the payments in that year I am not here concerned.

The appellant did not include these payments in the estate returns for 1944 or 1945. The respondent, however,

considering them to be "income" within section 3(1) (*f*) of the Act, allowed a deduction of 25 per cent thereof for exhaustion and assessed the balance to tax. Following an appeal the respondent, both in his decision and later reply, affirmed the assessments as levied.

Section 3(1) (*f*) is as follows:

> For the purposes of this Act, "income" . . . shall include . . .
> (*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

Subsection (*f*) was enacted in 1934 following the decision in *Spooner* v. *Minister of National Revenue* (1). The headnote in that case is:

> The respondent sold all her right, title and interest in land which she owned in freehold to a company in consideration of a sum in cash, shares in the company, and an agreement to deliver to her 10 per cent (described as a royalty of oil produced from the land, on which the company covenanted to carry out drilling and, if oil was found, pumping operations. The company struck oil and paid to the respondent in 1927 10 per cent of the gross proceeds of the oil produced, which she accepted in discharge of the royalty. The Supreme Court of Canada held that the sum so received was not an annual profit or gain within s. 3 of the Income War Tax Act, but a receipt of a capital nature, and that accordingly the respondent was not chargeable to tax in respect of it:—
>
> *Held,* that it was for the appellant Minister to displace the view of the Supreme Court as being manifestly wrong, and that he had failed to do so.

The Judgment of the Supreme Court (2) was affirmed. There, Newcombe, J., speaking for all the members of the Court, pointed out that while that which Mrs. Spooner received was described as a "royalty", the statute did not, in terms, charge either royalties or annuities as such. It will be observed that both of these words were incorporated in the new subsection (*f*).

The appellant, however, submits that her receipts were neither royalties nor like royalties, and further that they did not depend upon the *production* of any real or personal property and that consequently they are not caught by subsection (*f*). It is not disputed that such receipts were periodical or that they were payable "on account of the sale of any such property". It is of some interest to note that in the documents by which the final settlement was carried out—the transfer and the incumbrance—the word "royalty" was used by the appellant in her "Affidavit of

(1) (1933) A.C. 684. (2) (1931) S.C.R. 399.

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Transferor" to describe the payments to which she was entitled, and the word "production" was used in that affidavit and in the incumbrance to describe that which might be yielded up by the well and to a percentage of which the appellant was entitled. It is now sought to establish that these words as so used do not bear the same meaning as they do in subsection (*f*). I take it to be well settled that the name given to a transaction by the parties concerned does not *necessarily* decide the nature of the transaction (*I.R.C.* v. *Wesleyan Assurance Society* (1)).

"Royalty" is not defined in the Act. Mr. Helman, counsel for the appellant, submits that "royalty implies a transaction which has some reddendum, some retention, such as exists between the relationship of lessor and lessee, where there is a fixed royalty obtained, not for a partial time but for the lifetime of the property." I find no authority for the suggestion that a royalty must exist for the lifetime of the property out of which it is payable. He stresses the importance of the manner in which the sale was eventually carried out, first by cancellation of the original lease in which there has been a reservation of a royalty, and finally by the execution of an incumbrance given to secure the sum of $60,000 to the appellant as the balance of the purchase price (but payable, of course, out of production). It may be noted in passing that there is a recital in the incumbrance that it is executed by Royalite "in order to preserve the rights of May McDougall Ross (the appellant) in the said land". Her only rights in the property were the rights to the royalty provided for and reserved to Mrs. McDougall in the original lease and, as I have noted, the appellant in her "Affidavit of Transferor", refers to these rights as a royalty.

In the Shorter Oxford English Dictionary, Third Edition, "royalty" is defined in various ways. Excluding those which have reference to the Sovereign, these definitions include the following: "denoting chiefly rights over minerals"; "A payment made to the landowner by the lessee of a mine in return for the privilege of working it"; "A sum paid to the proprietor of a patented invention for

(1) (1948) 1 A.E.R. 555 at 557.

the use of it"; "A payment made to an author, editor, or composer for each copy of a book, piece of music, etc., sold by the publisher, or for the representation of a play."

Other definitions of the word as used in reference to oil, gas and minerals are found in Words and Phrases, Permanent Edition Vol. 37, at p. 811, including the following:

(*a*) As relates to mining, "royalty" is a share of the product or profits reserved by the owner for permitting another to use the property.

(*b*) "Royalty" in connection with gas and oil leases is a certain percentage of the oil after it is found or so much per gas well developed.

Again, in Webster's New International Dictionary, Second Edition, it is described as "a share of the product or profit (as of a mine, forest, etc.) reserved by the owner for permitting another to use the property".

Some of these definitions would appear to give some support to appellant's argument that a royalty can only be created where there is something reserved out of a demise or grant and payable to an owner. I have, however, been unable to find any decision which says that such is the case, and in one of the definitions which I have given above the meaning is given as a percentage of the oil or gas after it is found, without any reference to any reservation by an owner.

In *Mercer* v. *Attorney General for Ontario* (1), Henry J. at p. 66 said: "'Royalties' is of very general import and very comprehensive . . . 'Royalties' as to mines is well understood in England to be the sums paid to the Sovereign for the right to work the Royal mines of gold and silver; and to the owner of private lands for the right to work mines of the inferior metals coal, etc." Assuming, however, (but without deciding) and for the purposes of this case only, that to constitute a royalty there must have been some reservation of that royalty in the grant or demise, and assuming also that in this case there was not *in form* any such reservation (although I am of the opinion that in both form and substances there was such a reservation in the documents read as a whole), that does not conclude the matter. It is sufficient to bring the receipts into tax if they are "like" rents, royalties or annuities, provided of course, they fulfil the other requirements of the subsection.

(1) (1882) 5 S.C.R. 538.

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Royalties, in reference to mines or wells in all the definitions, are periodical payments either in kind or money which depend upon and vary in amount according to the production or use of the mine or well, and are payable for the right to explore for, bring into production and dispose of the oils or minerals yielded up. All these conditions exist in the present case. Another matter which *may* not exist is the reservation of rights at the time of the grant and the consequent payment to the appellant as owner of such reserved rights. But even assuming that to be the case it is not sufficient, in my opinion, to prevent the "receipts" here being like or similar to royalties, all other essential requirements being fulfilled. It may well be that the concluding words of the subsection "notwithstanding that the same are payable on account of the use *or sale* of such property" are sufficient in themselves to do away with any requirement that the receipts must be paid to an owner. At least the appellant was a former owner.

I find, therefore, that the receipts here were like royalties, if not royalties themselves, and therefore they come within the meaning of that part of the subsection.

Before leaving that matter, I must refer to certain other evidence which was put in following an order reopening the case to permit of its being tendered, counsel for the respondent having reserved his right to object to its admissibility or relevancy, but consenting to its being presented in the form of an affidavit by R. D. Mercer, Secretary-Treasurer of Royalite. After setting out particulars of the payments, Mr. Mercer stated:

> 3. In making up the income tax returns for Royalite Oil Company Limited the full consideration paid to the late Annie McDougall and her estate, including the said $60,000, was capitalized and no deductions were made relative to the said $60,000 from the Company's total taxable income.

It is submitted on behalf of the appellant that if there be any doubt as to the nature of the contract with Royalite, the Court is entitled to see what the parties intended by seeing what they did (*B. & M. Readers' Service Ltd.* v. *Anglo Canadian Publishers Ltd.* (1)) from the fact that Royalite made these payments to the appellant out of capital and made no claim for any deductions in respect thereof from its taxable income, it is argued that Royalite did not

(1) (1950) O.R. 159 at 164, C.A.

consider the payments in any sense a "royalty" but merely in reduction of the balance due on its purchase price, the same view of the matter as taken by Mrs. Ross in her appeal.

However relevant and useful the conduct of the parties might be in an action between themselves as indicative of what they intended by the terms of the contract, I do no think that the conduct of one of the parties who is not before the Court and on a matter (the payment of income tax by Royalite) which was no concern whatever to the appellant, can be considered relevant to the appellant's case or as helpful in determining the nature of the appellant's receipts. It is entirely a collateral matter with which I am not in any way concerned. The question which I have to determine is whether under the Income War Tax Act the appellant's receipts are taxable, and not the question as to whether Royalite was or was not entitled to any deduction from its income in respect of such payments. The question of Royalite's opinion as to its liability to tax cannot in any way affect the appellant's liability.

In my opinion, the affidavit is inadmissible as being irrelevant. But even if admitted it is not helpful to the appellant. Assuming that Royalite was right in considering that its payments to the appellant were capital expenditures, that fact by itself does not necessarily mean that in the appellant's hands such payments were capital receipts. In *Brodie* v. *I.R.C.* (1), Finlay, J. stated at p. 439:

> If the capital belonged to the person receiving the sums—if he or she was beneficially entitled not only to the income but to the capital—then I should think that, when the payments were made, they ought to be regarded, and would be regarded, as payments out of capital, but where there is a right to the income, but the capital belongs to somebody else, then, if payments out of capital are made and made in such a form that they come into the hands of the beneficiaries as income, because the source from which they came was—in the hands, not of the person receiving them, but in the hands of somebody else—capital.

The next point taken by the appellant is that even if her receipts were royalties or like royalties, they did not "depend upon the *production or use of* any real or personal property" and therefore did not come within subsection (*f*). It is not disputed that such receipts did depend upon the production of hydro carbons for if none were produced she

(1) 17 Reports of Tax Cases, 432.

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would receive nothing. But it is contended that such hydro carbons being part of the property itself, they were not the production *of* property, although they may have been production *from* property. Counsel for the appellant takes the view that "production of" means only the renewing produce of property such as might be obtained periodically from the working of a farm.

"Production" is not defined in the Act. It is a word in common use and having a variety of meanings, including "the action of producing" and "that which is produced". In vol. 7 of the New English Dictionary there are the following definitions:

(*a*) "The action of producing, bringing forth, making or causing";
(*b*) "That which is produced—a thing that results from any action, process or effort—a product."

And in the same volume, "To produce" is defined as:

(*c*) "To bring forth, bring into being or existence";
(*d*) And with relation to a country, region, mine, process, etc.: "To give forth, yield, furnish or supply."

In *Ottawa Electric Light Co.* v. *City of Ottawa* (1), "To produce" was given several meanings, including "to bring forth, to furnish, generate, yield, etc."

In *Hanfstaengl* v. *American Tobacco Company* (2), Rigby, L.J. at p. 355 said that " 'Produce' is a word which has not got any exact legal meaning but which requires to have an interpretation placed upon it in the statute in which it is used."

Now whatever be the meaning of "royalties" it is a word which is widely used in connection with payments made for the use or operation of mines and oil wells. The presence of that word in the subsection—and also of the word rentals, which is frequently used as an alternative to the word royalties—suggests most strongly that Parliament in enacting this subsection must have had in mind the operation of mines and oil wells, as well as other matters. It cannot be disputed that such phrases as "a gold producing mine" and "an oil producing well" are in everyday use as indicating that the mine or well yields or brings forth gold or oil. It is of some significance that in the original lease of June 30, 1938, in the "Affidavit of Transferor" and in the incumbrance, the parties thereto used the

(1) (1906) 12 O.L.R., 290 (C.A.) (2) (1895) L.Q.B.D. 347.

word "production" throughout in that sense. I am quite unable to uphold the contention of appellant's counsel that it means only that which is made or grown. I hold, therefore, that the words, "production or use of any real or personal property" include the bringing forth or yielding up of hydro carbons from an oil well and that, therefore, the receipts here in question fall within that part of subsection (*f*).

One further point is taken by the appellant on this matter. It is submitted that as payments to her were limited to the sum of $60,000; that by itself establishes that her receipts were part of the purchase price and therefore capital in her hands. That fact might have been of some importance prior to the enactment of subsection (*f*). But having found that the receipts were either royalties or like royalties, I am unable to find that they ceased to be such merely because they stopped when an agreed maximum amount had been paid.

In my opinion, for the reasons stated the sums so received by the appellant for each of the years in question fall within the ambit of subsection (*f*).

An appeal is also taken on the amount of exhaustion allowed to the appellant. The allowance was made under the provisions of section 5(1) (*a*), the relevant parts of which then read as follows:

> 5(1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:
>
> (*a*) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair . . .

In the agreed statement of facts it is admitted that when the Minister was making the depletion allowance he had before him evidence of the fact that the appellant had been paid in full the sum of $60,000 in the course of the years 1944, 1945 and 1946. The assessments for the two years in question are dated March 31, 1947.

Counsel for the appellant put his argument thus:

> I submit that here, where the Minister had a duty to find a reasonable amount, that he has not exercised that, because at the minute that he did that, this very source of income was shown to be exhausted in three years. Therefore, he was bound to exercise it on that basis and give us 33⅓ per cent depletion and not 25 per cent. In a word, he could not say "I am going to ignore every bit of evidence that is before me.

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I am going to do that. It is true the statute says I have to do it fairly and reasonably but I am going to be unfair and unreasonable in this case because I have fixed that amount and done it in other cases . . ."

If the source of the income is income from a well, which terminates in three years, then it terminates as soon as the $60,000 is paid. We cannot look at this as being income from the well. It is income that is payable from this alleged royalty which was exhausted in three years, and that being exhausted in three years and he knew that at the time he made the assessment, he is bound to have that before him and he says "I am going to assess this at 25 per cent." He cannot say "This is the same as any ordinary well." It is not a well, it is income that comes from a source and it is bound to be exhausted in three years. Because he knew it was exhausted in three years. That was before him, that the $60,000 has been paid. In a word, Your Lordship is looking at it from the productive end of it, and I am looking at it from the standpoint of the income received by the taxpayer in his hands. It was a source of revenue that exhausted in three years. That is the whole point there is about that.

Counsel cited no case which would support the proposition so advanced and I know of no principles laid down in the cases which would indicate that that is the manner in which the allowance must be awarded. In effect, it would mean that when the Minister at the time of the assessment had knowledge that the depletable asset out of which the taxpayer received his income had been completely exhausted, the allowance he must make would be based solely on the number of years taken up in completing the operation, and without any other consideration whatever. For example, one operator of a timber limit who was able to complete all his logging operations in one taxation year would be entitled to an exemption of all his income and would pay no tax. Another such operator who occupied three years in precisely the same process would be entitled to an allowance of only 33⅓ per cent of his income. If the allowance were to be made in this way, it would fail completely to take into consideration the cost or value of the capital asset being depleted, a factor which must always be taken into consideration in making any such allowance. In fixing the amount to be allowed for exhaustion, the Minister had a statutory discretion. In *Fraser* v. *M.N.R.* (1), the principles to be followed in exercising that discretion were stated to be as follows:

The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is very well settled that if the discretion has been exercised bona fide, uninfluenced

(1) (1949) A.C. 24.

by irrelevant consideration and not arbitrarily or illegally, no Court is entitled to interfere even if the Court, had the discretion been theirs, might have exercised it otherwise.

In the instant case the Minister allowed the appellant a deduction of 25 per cent. The only objection taken thereto is that it should have been more, namely, 33 per cent, and for the reason which I have above referred to. There is no evidence before me as to how the allowance of 25 per cent was arrived at, but I think it is common knowledge that under the Income War Tax Act it was the practice of the Minister to deal broadly with allowances for exhaustion and to allow fixed percentages of gross income to those whose income was derived from mining. I think that counsel for both parties assumed that that was the situation here and therefore no evidence was led on that point.

When the *Fraser* case was before the Supreme Court of Canada (1), Rand, J. pointed out the difficulties involved because of the uncertain factors involved in mining operations, and at p. 163 stated:

> It calls for judgment of experience; and considering the unknown factors in the complication of actual operations in the mining industry, and the different accounting methods or measures by which the object in view might be attained, any award made by the Minister "as just and fair" on that broad basis of fact would be unchallengeable.

And at p. 165 he stated:

> Even conceding an absolute right to an allowance, it is necessarily bound by the limitation of value spread evenly over the asset as a whole; and since the statute does not prescribe the basis, the Minister must be free in any case to adopt one reasonably designed to carry out the purpose intended. On this assumption, I take the word "May" to include a discretion in that choice; and that the basis of actual capital investment may be used by him in any case is, I think, beyond doubt. Ordinarily the increments of return would attach to every unit of asset and value, but here the whole has been recovered by relation to part only of the asset.

I am quite unable to find that in allowing the appellant a deduction of 25 per cent the Minister acted in any arbitrary or illegal manner or contrary to well established practice or on any unsound principle. The appellant has not established that the allowance is other than a "just and fair" one. The appeal on this point must therefore be dismissed.

(1) (1947) S.C.R. 157.

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The remaining question is that of the penalty of $500 added by the respondent to the assessment made on March 31, 1947, for the taxation year 1945, on the ground that the appellant was late in filing such return. It is dated June 21, 1946, and while the precise date of filing is not noted, it was on and after the latter date and was therefore beyond the last date fixed for filing, namely, February 28, 1946.

The dispute centers around the question as to which part of section 77 is here applicable. That section was as follows:

77(1). Every person who fails to deliver a return pursuant to section thirty-three or section thirty-five of this Act within the time limited therefor is liable to a penalty of

(*a*) five dollars, where the amount of tax that was unpaid when the return was required to be made is one hundred dollars or less;

(*b*) an amount equal to five per centum of the tax that was unpaid when the return was required to be made, where the amount of the tax unpaid at that time is more than one hundred dollars and less than ten thousand dollars; and

(*c*) five hundred dollars, where the amount of the tax that was unpaid when the return was required to be made is ten thousand dollars or more.

(2) Every person failing to deliver a return pursuant to the provisions of sections thirty-six to thirty-eight inclusive, within the time limited therefor, shall be liable to a penalty of ten dollars for each day of default: Provided, however, that such penalty shall not in any case exceed fifty dollars.

The appellant contends that if she were liable to any penalty it could only be under section 77(2) inasmuch as the return made by her was in the capacity of executrix of her mother's estate and was made under the requirements of section 36(2), which is as follows:

36(2). In the case of the estate of any deceased person, the return shall be made by the executor, administrator or heir of such deceased person.

Counsel for the respondent, while agreeing that the penalty could have been assessed under section 77(2), takes the position that the Minister also had authority to assess the penalty, as has been done, under section 77(1) (*c*). He points out that the last named subsection provides the penalty for late filing of a return required to be made pursuant to section 33(1), which is as follows:

33(1). *Every person liable to taxation under this Act* shall on or before the thirtieth day of April in each year, without notice or demand, deliver to the Minister a return in such form as the Minister may pre-

scribe of his total income during the last preceding year; provided, however, that the return in respect of the year 1942 shall be filed on or before the thirtieth day of June, 1943.

It is submitted that section 33(1) is general in its scope and applies to "every person liable to taxation under the Act" and that the appellant as executrix is within the definition of "person" contained in section 2(*h*).

Upon consideration of the Act as a whole I have come to the conclusion that the appellant's contention on this point must be upheld. Section 33(1) is a general section and I have no doubt is sufficiently comprehensive to require returns to be made by all "persons" (as defined in the Act) liable to taxation. Special provision, however, is made as to what persons shall make the returns in the case of (*a*) legal representatives, as in section 36; (*b*) trustees in bankruptcy and other fiduciaries, as in section 37; and (*c*) recipients of income for non-residents, as in section 38. These three subsections have special reference to those who are or may be liable in a representative capacity and not in a personal capacity. Then, under Part XI, separate and specific penalties are provided for various offences and in every case by reference to the particular section which sets out the duty of the taxpayer to make the return. Subsection 2 of section 77 has been in effect for many years. In 1927 it was applicable to sections 35 to 39, inclusive; in 1934 only to sections 36 to 39, inclusive; and in 1943 applicable to only sections 36 to 38.

I cannot doubt that Parliament in enacting section 77(2) intended to provide special and distinct penalties for the classes of persons described in sections 36 to 38 and that they should not be liable under any other part of section 77. The intention is so manifest—at least in my opinion—that it cannot be overridden merely by the broad definition of "person" contained in the Act.

In Craies on Statute Law, Fourth Edition, at p. 200 it is stated:

ACTS of Parliament sometimes contain general enactments relating to the whole subject-matter of the statute, and also specific and particular enactments relating to certain special matters; and if the general and specific enactments prove to be in any way repugnant to one another, the question will arise, Which is to control the other? In *Pretty* v. *Solly*, (1859) 26 Beav. 606, at p. 610, Romilly, M.R., stated as follows what he considered to be the rule of construction under such circumstances. "The

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general rules," said he, "which are applicable to particular and general enactments in statutes are very clear; the only difficulty is in their application. The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply". "For instance", said the same Judge in *De Winton* v. *Brecon*, (1859) 28 L.J. Ch. 604, "if there is an authority in an Act of Parliament to a corporation to sell a particular piece of land, and there is also a general clause in the Act to the effect that nothing in the Act contained shall authorize the corporation to sell any land at all, the general clause could not control the particular enactment, and the particular enactment would take effect, notwithstanding the prior exception was not clearly expressed in the general clause. If the Court finds a positive inconsistency and repugnancy, it may be difficult to deal with it, but, so far as it can, it must give effect to the whole of the Act of Parliament."

The appeal on this point will therefore be allowed. The matter of the penalty will be referred back to the Minister to fix the penalty under the provisions of section 77(2) and subject to the limitation therein provided.

One further matter must be referred to. The respondent had assessed the appellant executrix under section 11(2) of the Act on the basis that she received such payments for the benefit of unascertained persons, or persons with contingent interests, in *one* trust only. It is now admitted that the assessment should have been made on the basis of there being *two* separate trusts. The parties have agreed on the amended assessments to be made on that basis. The appeal on that point will therefore be allowed and the matter referred back to the respondent to adjust the assessment in accordance with the agreement reached.

While the appellant has not been successful on all points, she has had substantial success. She is entitled to be paid her costs after taxation.

Judgment accordingly.