CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

WAIN-TOWN GAS & OIL COMPANY LIMITED, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

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Sept. 15
Nov. 18

Revenue—Income Tax—Excess Profits Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1) (f)—Franchise to supply natural gas—Sale of franchise only in consideration of payments, from the proceeds of sales of natural gas under the franchise, of certain percentages of gross sales of gas reckoned at consumers' prices less consumers' discounts—Payments so stipulated whether "income" within s. 3(1) (f) of the Act or instalments on the purchase price, i.e. capital—Appeal allowed.

Appellant had an exclusive franchise to supply natural gas to the Town of Vermilion, in Alberta, and its inhabitants but did not own gas wells, pipes or conduits. The term of the franchise was for ten years, appellant having the option of renewing it for a further period of ten years and a similar option, at the expiry of each succeeding ten-year period for which the franchise may be renewed. Appellant sold the franchise to another company, the latter agreeing to pay to the former by way of royalty, from the proceeds of sales of natural gas under the franchise, percentages of the actual gross sales of gas at consumers' prices less consumers' discounts, fixed at six and one quarter per cent during the first three years, at eight and one third per cent during the next seven years and at twelve and one half per cent thereafter during the currency of the agreement and of the franchise.

Respondent, considering the sums received by appellant to be "income" within s. 3(1) (*f*) of the Act, assessed them to tax. Contending that the franchise sold was capital, appellant appealed to this Court from the assessments.

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Held: That these payments do not constitute a profit, gain or gratuity and are not rents, royalties or annuities or other like periodical receipts within the meaning of paragraph (*f*) of subsection (1) of section 3 of the Income War Tax Act.

2. That the payments stipulated in the agreement and received by appellant are instalments on the purchase price, i.e. capital.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Angers at Edmonton.

Harold W. Riley, Jr., K.C. for appellant.

F. J. Cross for respondent.

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

ANGERS J. now (November 18, 1950) delivered the following judgment:

The question arising for determination is governed by paragraph (*f*) of subsection (1) of section 3 of the Income War Tax Act. The material part of section 3 reads thus:

3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including (*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;

The facts are simple and undisputed. They may be summarized briefly.

By an agreement dated September 19, 1938, Wain-Town Gas and Oil Company Limited got from the Town of Vermilion an exclusive franchise to supply natural gas to the town and its inhabitants. The term of the franchise was for ten years, as set forth in clause 2, the company

having the option of renewing it for a further period of ten years and a similar option, at the expiry of each succeeding ten-year period for which the franchise may be renewed. The clause contains a proviso which is not material herein.

Clause 16 stipulates that in view of the large expenditure incurred by the company the Town covenants and agrees that the franchise and all other rights, powers and privileges granted to the company are and shall be granted to it exclusively for a period of ten years, subject to renewal as set forth in clause 12, and that during the said period or renewal thereof the Town will not itself supply natural gas to any of its inhabitants or allow any other person, firm or corporation using the streets, lanes, highways, thoroughfares and other public places for the purpose of laying gas pipes along, through or under the same.

By an agreement dated December 8, 1939, Wain-Town Gas and Oil Company Limited sold the franchise aforesaid, absolutely with no reversion, to Franco Public Service Limited. The only thing sold under that agreement was the franchise; no gas wells, pipes or conduits were included in the assignment.

By the agreement exhibit 3, i.e. the assignment by appellant to Franco Public Service Limited, the value of the franchise was estimated on the basis of a percentage of the natural gas distributed by Franco Public Service Limited.

It was submitted on behalf of appellant that the franchise sold was capital. It is idle to say that the purpose of the Income War Tax Act is to tax income, not capital. If the respondent be correct in his assessment, the whole of appellant's capital sum will be taxed as income. I do not think that this is the intention of the Act.

Taxing Acts must be construed strictly and a taxpayer must not be found liable to tax unless the tax be imposed expressly and clearly: *re Micklethwait* (1); *Partington* v. *Attorney General* (2); *Cox* v. *Rabbits* (3); *Tennant* v. *Smith* (4); *Shaw* v. *Minister of National Revenue* (5);

(1) (1855) 11 Ex. 456.
(2) (1869) L.R. 4 H.L. 109, 122.
(3) (1878) 3 App. Cas., 473, 478.
(4) (1892) A.C. 154.
(5) (1938) C.T.C. 346, 348, 352.

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Foley v. *Fletcher et al* (1); *Moore and Company* v. *Inland Revenue* (2); *Robert Addie & Sons Collieries Limited* v. *Commissioners of Inland Revenue* (3); *British Insulated and Helsby Cables Limited and Atherton* (4); *Minister of National Revenue* v. *Spooner* (5); *Capital Trust Corporation Limited* v. *Minister of National Revenue* (6); *Vanden Bergs Limited* v. *Clark* (7); *Inland Revenue Commissioners* v. *Ramsay* (8); *Minister of National Revenue and Dominion Natural Gas Company Limited* (9); *O'Connor* v. *Minister of National Revenue* (10); *Mahaffy* v. *Minister of National Revenue* (11).

In re *Tennant* v. *Smith*, at p. 154, we find the following observations of Halsbury, L.C.:

> My Lords, to put this case very simply, the question depends upon what is Mr. Tennant's income. This is an Income Tax Act, and what is intended to be taxed is income. And when I say "what is intended to be taxed," I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said, in In re Micklethwait, 11 Ex. at p. 456, "It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words."

Reference may also be had beneficially to *Maxwell, Interpretation of Statutes*, 9th ed., 291; *Craies, Treatise on Statute Law*, 4th ed., 107; *Beal, Cardinal Rules of Interpretation*, 3rd ed., 492.

It was argued by appellant's counsel that the payments are not "royalties", as such payments presuppose to continue in the recipient of title to the property or an interest therein, such as exists in the relationship between lessor and lessee or between licensor and licensee. The appellant

(1) (1859) L.J., Exchequer Court, 100.
(2) (1914-15) S.C. 91.
(3) (1924) S C. 231.
(4) (1926) A.C. 205.
(5) (1933) A.C. 684.
(6) (1935) C.T.C. 258.
(7) (1935) A.C. 431, 440.
(8) (1936) 154 L.T.R. 141.
(9) (1941) S.C.R. 19.
(10) (1943) Ex. C.R. 168.
(11) (1945) C.T C. 408, 413.

is being paid by Franco Public Service Limited not for the use of appellant's property nor for the production from it, but for the absolute loss of such property, forever assigned to Franco Public Service Limited. It was urged by counsel that the payments do not depend upon the production or the use of the franchise, but on the production or use of natural gas obtained by Franco Public Service Limited, which gas is in no means the property of appellant.

I do not think that the payments stipulated in the agreement exhibit 3 are royalties, notwithstanding the words "by way of royalty" used erroneously in clause 4. These payments, in my opinion, are instalments on the purchase price. One must scrutinize the purpose of a clause in a deed in order to determine its meaning. A definite price was set once and for all, payable by yearly instalments calculated on the proceeds of gross sales of natural gas under the franchise reckoned at consumers' prices, less consumers' discounts, fixed at six and a quarter per cent during the first three years, at eight and one third per cent during the next seven years and at twelve and one half per cent thereafter during the currency of the agreement and franchise.

After carefully listening to the oral evidence and reading the transcript thereof, examining attentively the documents produced, perusing the verbal and written arguments of counsel and studying the doctrine and the precedents, I am satisfied that the payments made by Franco Public Service Limited to Wain-Town Gas and Oil Company Limited do not constitute a profit, gain or gratuity and are not rents, royalties or annuities or other like periodical receipts within the meaning of paragraph (*f*) of subsection (1) of section 3 of the Income War Tax Act, that they are not income but are instalments of the purchase price.

A brief review of the doctrine and decisions seems apposite.

In the case of *Secretary of State for India* v. *Scoble et al* (1) the following observations of Halsbury, Lord Chancellor, much to the point, are very interesting (p. 3):

. . . Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), I cannot

(1) (1903-04) 89 L.T.R. 1.

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doubt that in this contract—it cannot be denied that what was done and agreed to was in one sense under a contract, though undoubtedly it is not a case of the purchase of an annuity, but it is a case in which under powers reserved by a contract one of the parties agrees to buy from the other party that which is their property—I cannot doubt, I say, that what is called an "annuity" in the contract between the parties, and in the statute, was a mode of making the payment for that which, by the hypothesis on which I am speaking, had become a debt to be paid by the Government. If it was a debt to be paid by the Government it introduces this consideration: Was it the intention of the Income Tax Acts ever to tax capital as if it was income? I think that it cannot be doubted, both upon the language of the Act itself and upon the whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital, at all events as income.

In *re Foley* v. *Fletcher and Rose* (1) Pollock, C.B. expressed the following opinion (p. 778):

> Mr. Phipson contended that they were profits, because when the value of money and the effect of such a protracted period of payment are considered, we could not assume that the value of the plaintiff's moiety was more than some £23,000, and that the rest must be considered as profit, and that it was the fault of the plaintiff that she has so mixed up profits with capital that they cannot be distinguished; and that therefore the whole must be liable to income tax. But there is nothing on this record to shew that the property was not worth more than £99,000, nor is there anything to shew that the postponement of payment was not a mere indulgence on the part of the seller. But if we were at liberty to speculate on the matter, and could come to the conclusion that a part of the annual payments is the price of the convenience of getting the payment postponed, we could not say that the payments are within the Act because a part of them consists of profit. These instalments are payments of money due as capital: the Act has made no provision for such a case. It professes to charge profits only, and we cannot say that capital is liable to the income tax because found in company with profits. If payments such as those in the present case are subject to income tax, wherever any debt of any sort is to be repaid by annual payments, or by instalments at three or six months, it would be subject to income tax.

In re *Inland Revenue Commissioners* v. *Ramsay* (*ubi supra*) it was held by the Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.) that the question to be determined was whether, under the terms of the agreement in question, the consideration for the purchase of a dentist's practice was a sum of money, though payable in instalments, or an annuity; that the sum of $15,000 was made the purchase price from beginning to end and the fact that in the result the amount paid might be greater or less than the primary price did not alter the legal

(1) (1858) 3 H. & N. 769.

position; that therefore the instalments were not annuities, but merely the manner and form in which a lump sum was paid. At page 145, Lord Wright states:

> The question involved in the case is the question which has so often to be debated where property has been sold, namely, whether the consideration is a sum of money, though payable in instalments, or whether it is an annuity. It is, of course, quite clear that for a lump sum of money the right to receive periodical payments may be purchased, and in that case if the transaction constitutes the purchase of an annuity and each one of these payments is in the nature of income in the appropriate hands and in the appropriate manner, it is taxable as such, but if that is not the case and the instalments are not annuities in the proper sense of the term, but are merely the method and the manner and the form in which a lump sum is paid, then the position is different, and the sums in question are not to be deemed income but capital, and accordingly in the hands of the payer when he comes to make his returns for super tax cannot be deducted under the provisions of sect. 27 of the Income Tax Act of 1918.

The learned Lord then analyses certain judgments. I do not deem it expedient to sum up his comments, since I have annotated or will hereafter annotate them briefly.

In the case of *Minister of National Revenue* v. *Dominion Natural Gas Company Limited* (*ubi supra*) the report discloses that the respondent company supplied natural gas to inhabitants in parts of the City of Hamilton. Its right to do so was attacked in an action in which there were claimed a declaration that it was wrongfully maintaining its mains in the streets and wrongfully supplying gas to the inhabitants, an injunction against the continuance thereof, a mandatory order for removal of the mains, and damages. Respondent contested the action and was successful. Its legal expenses of the litigation amounted to $48,560.94, after crediting all sums recovered from the other party as taxed costs. The question in dispute was whether that sum, paid by respondent in 1934, should be allowed as a deduction in computing respondent's taxable income for that year. The Supreme Court, reversing the judgment of MacLean, J. ((1940) Ex. C.R. 9), held that the sum was not deductible. This judgment is evidently not applicable herein. There is however in the reasons for judgment of Duff, C.J. an *obiter dictum*, which, I may say with all due deference, does not seem to me pertinent; it is worded as follows (p. 24):

> Again, in my view, the expenditure is a capital expenditure. It satisfies, I think, the criterion laid down by Lord Cave in ***British Insulated***

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v. *Atherton*, 1926 A.C. 205 at 213. The expenditure was incurred "once and for all" and it was incurred for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit". The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language.

In re *The Hudson's Bay Company Limited* v. *Stevens* (*Surveyor of Taxes*) (1) the headnote, fairly comprehensive and exact, is in the following terms:

The Appellants are a Company established by Charter, who prior to 1869 were the owners of large territories in Rupert's Land, North America. In 1869 they surrendered to the Crown their territory and rights of government in exchange, *inter alia*, for a money payment and for a right to claim, within fifty years, a twentieth share in certain lands in the territory as from time to time the lands were settled. The lands granted to the Company in pursuance of this agreement were sold by the Company from time to time, and the proceeds applied partly in payment of dividends and partly in reduction of capital.

Held, that the proceeds of the sales of the lands so granted were not profits or gains derived by the Company from carrying on a trade of dealing in land, and were not assessable to income tax.

See also *William M. O'Connor* v. *The Minister of National Revenue* (2); *Samson* v. *Minister of National Revenue* (3); *Inland Revenue Commissioners* v. *Wesleyan Assurance Society* (4); *Wilder* v. *Minister of National Revenue* (5).

In the matter of *Jones* v. *Commissioners of Inland Revenue* (6) it appears from the report that the appellant had sold his interest in certain inventions and letters patent for a sum in cash and a percentage, called a "royalty", payable for ten years on the sale of all machines constructed under the patent. It was held by the Court of King's Bench that the sums received by the appellant in respect of the royalty were taxable income.

Rowlatt, J., after referring to the judgments in *Foley* v. *Fletcher* and *Secretary of State for India* v. *Scoble* (*ubi supra*), made the following statements (p. 715):

On the other hand, a man may sell his property nakedly for a share of the profits of the business. In that case the share of the profits of the business would be the price, but it would bear the character of income in the vendor's hands. *Chadwick* v. *Pearl Life Assurance Co.*, (1905) 2 K.B. 507, 514, was a case of that kind. In such a case the man bargains

(1) (1903-11) 5 R.T.C. 424.
(2) (1943) Ex. C.R. 168, 175 et seq.
(3) (1943) C.T.C. 47, 72.
(4) (1948) 1 All E.R. 555.
(5) (1949) Ex. C.R. 347.
(6) (1920) 1 K.B. 711.

to have, not a capital sum but an income secured to him, namely, an income corresponding to the rent which he had before. I think therefore that what I have to do is to see what the sum payable in this case really is. The ascertainment of an antecedent debt is not the only thing that governs, although in many cases it is a very valuable guide. In this case there is no difficulty in seeing what was intended. The property was sold for a certain sum, and in addition the vendor took an annual sum which was dependent upon the volume of business done; that is to say, he took something which rose or fell with the chances of the business. When a man does that he takes an income; it is in the nature of income, and on that ground I decide this case.

I may say respectfully that I cannot agree with this decision.

It was urged on behalf of respondent that the sums received by appellant from Franco Public Service Limited in compliance with clause 4 of the agreement exhibit 3 are periodical receipts, dependent upon the use of the franchise, that they are like royalties and are income of the appellant, notwithstanding that they are payable on account of the sale of the franchise to Franco Public Service Limited. Counsel pointed out that in virtue of clause 5 of the agreement all royalties must be deposited monthly to the credit of Wain-Town Gas and Oil Company Limited; this provision seems to me immaterial herein.

Respondent's contention that the receipts in question are dependent on the use of the franchise assigned by appellant to Franco Public Service Limited is unfounded. They are no more dependent on the franchise than on the use of Wain-Town Gas and Oil Company Limited's charter or on its certificate to carry on business. Such a use is not that contemplated by the Act; the use thereby considered is of something that of itself produces. In the present case the receipts may be dependent on the use of gas in the ground or in Franco Public Service Limited's transmission lines, but not on the use of the franchise, which is merely a means whereby Wain-Town Gas and Oil Company Limited is put in a position to gather receipts in much the same way as its charter does.

It was submitted by counsel for respondent that by clause 4 of the agreement exhibit 3 Franco Public Service Limited agreed to pay to the appellant, from the proceeds of all sales of natural gas under the franchise, certain percentages of the gross sales of gas reckoned at consumer's price, less consumer's discounts.

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To the question as to what is the franchise counsel referred to the observations of Stuart, J. in the case of *Northern Alberta Natural Gas Company* v. *Edmonton* (1), appearing on page 44 of the report:

> The very essence of a franchise is the right to use streets and highways. If the use of these were not required a company could act, as any other industrial concern does, entirely by private contract and as a private trader, and sell its commodity, e.g. gas, to the householders as it pleased. It is the unavoidable necessity of using the public streets to convey the commodity that forces such a company to secure the right to use them, and it is this right which in substance constitutes the "franchise".

Counsel further submitted that the "receipts" of appellant are "dependent" upon the use of the right to operate pipe-lines under the streets of the town to convey natural gas and that the quantum of the receipts is likewise dependent upon the extent to which this right is used. He specified that it is the extent of operation of the pipe-lines which determines the amount of gas which can be sold and hence the percentage of gross sales of gas which the appellant will receive. He intimated that it cannot be too strongly emphasized that the franchise is not merely the right to lay pipe-lines but the right to use them for the purpose of supplying natural gas to the town's inhabitants. This seems elementary.

It was contended for respondent that a franchise is real or personal property. In support of this contention counsel referred to the reasons for judgment of Harrison, J. in *New Brunswick Power Company* v. *Maritime Transit Company* (2). A brief extract from these reasons may be useful (p. 395):

> . . . The defendant argues that the right to operate street cars is a franchise, but he says a franchise is not property. It is, I think, quite proper to call the plaintiff's right to operate its street railway upon the streets and highways a franchise.

The learned judge then refers to a definition of a franchise by Blackstone and continues:

> In later years the term "franchise" has been used to include that body of rights or privileges conferred by a Legislature (with, of course, the assent of the King) upon corporations to enable them to supply the public with some commodity or service in general use such as gas, electricity or transportation.

(1) (1920) 1 W.W.R. 31.

(2) (1937) 4 D.L.R. 376.

Further on he adds (p. 396):

In Canada no private person can establish a public highway or a public ferry or railroad or charge tolls for the use of the same without authority from the Legislature direct or derived, and the power given to invade public rights by the establishment of these public utilities is generally referred to as a "franchise": see *Calgary* v. *Can. Western Natural Gas Co.* (1917) 40 D.L.R. 201.

A franchise to operate a street railway and to collect tolls for such service is a property right, an incorporeal hereditament, the interference with which is a private nuisance, and the party wronged may have the nuisance abated.

In answer to appellant's claim that a franchise is a "chose in action" and not property, counsel for respondent stated that it is established that a "chose in action" is personal property and in support of this statement he cited *Williams on Real Property,* 23rd ed., pp. 3 to 6, and *Halsbury's Laws of England,* 2nd ed., vol. 25, pp. 189 to 194. Counsel's contention in this regard seems to me well founded.

The next argument raised by counsel for respondent is that the receipts are like royalties. In his brief counsel for respondent gave several definitions of the word "royalty", gathered from Webster's New International Dictionary, 2nd ed., The Standard Dictionary of the English Language and from the decisions in *Perry* v. *Clergue* (1); *The King* v. *Trusts and Guarantee Co. Ltd.* (2); *Attorney-General for British Columbia* v. *The King* (3).

In Webster's dictionary we find the following definition of the word "royalty":

7. (*a*) a share of the product or profit (as of a mine, forest, etc.) reserved by the owner for permitting another to use the property.

(*b*) A duty or compensation paid to the owner of a patent or a copyright for the use of it or the right to act under it, usually at a certain rate for each article manufactured, used, sold, or the like;

In The Imperial Dictionary of the English Language we read this definition:

4. A tax paid to one who holds a patent protected by government for the use of the patent, generally at a certain rate for each article manufactured; a percentage paid to the owner of an article for its use.

The Standard Dictionary of the English Language gives this definition:

3. A share of proceeds paid to a proprietor by those who are allowed to develop or use property, or operate under some right belonging to

(1) (1903) 5 O.L.R. 357.
(2) (1916) 15 Ex. C.R. 403; (1916) 54 S.C.R. 107.
(3) (1922) 68 D.L.R. 106.

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him, as to the owner of mining lands for ore taken out, to the owner of a copyright for books published and sold, or to the owner of a patent for articles manufactured and disposed of thereunder.

The case of *Perry* v. *Clergue* (*supra*) in which it was held (*inter alia*) that the right to create and license a ferry, having been one of the *jura regalia* or royalties belonging to the Provinces at the Union, continued to belong to them after Confederation according to section 109 of the British North America Act, 1867, notwithstanding subsection 13 of section 91 giving the Dominion legislative power in relation to ferries, is, to my mind, irrelevant.

In the case of *The King* v. *Trusts and Guarantee Co.* (*supra*) the facts were briefly these: A resident of the Province of Alberta was, at the time of his death, the registered owner of a parcel of land in that province under a patent issued to him by the Department of the Interior of Canada. He died leaving no heirs or next of kin. Letters of administration to his property, real and personal, were granted to the defendant. The land was subsequently sold by the latter and the provincial government claimed the proceeds of the sale, except insofar as they were amenable to debts and administration expenses, as belonging to it under the Alberta Statute 5 Geo. V, chap. 5, section 1. Upon an information exhibited by the Attorney-General of Canada to have it determined that such proceeds belong to the Crown in right of Canada, it was held that the right of escheat to the lands in question, or if the principle of escheat did not apply and the lands were to be treated as *bona vacantia,* the right to them belonged to the Crown in right of the Dominion as *jura regalia.*

I must say that this judgment seems to me beside the point at issue.

The headnote in the case of *Attorney-General for British Columbia* v. *The King* (*supra*) is in the following terms:

> The rights of bona vacantia in regard to the assets of a defunct English corporation which previously had carried on business in British Columbia is vested in the Province under subsections 102 and 109 of the British North America Act, being comprised in the word "royalties" which at the time of the union were assigned to the Province.

I do not think that this judgment has any more bearing on the present case than the two previous ones.

Counsel for respondent drew the attention of the Court to the fact that no specific mention is made in the dictionaries regarding sums paid to the owner of a franchise. He specified that in the case of *Attorney-General* v. *British Museum* (1) Farwell, J. held that a franchise was a royal privilege or a branch of the King's prerogative subsisting in a subject by a grant from the King and he referred to the reasons for judgment of Harrison, J. in *New Brunswick Power Company* v. *Maritime Transit Company* (*ubi supra*).

Referring to the definition of the word "patent" in The Standard Dictionary of the English Language as "a grant of any privilege, franchise, etc., made by a sovereign authority", counsel suggested that there would seem to be equal basis for saying that a sum paid to the owner of a franchise for the use of it was a "royalty" as for saying that a sum paid to the owner of a patent or a copyright for the use of it is a "royalty". He concluded that the respondent's submission is that a sum paid to the proprietor of a franchise for the right to use it is a "royalty".

Counsel for respondent further submitted that, to come within the words of paragraph (*f*) of subsection 1 of section 3, it is not necessary that the "receipts" be in fact "royalties", if they are "like" royalties. The question of what constitutes receipts "like royalties" was considered by Mr. Justice Cameron in *May McDougall Ross* v. *Minister of National Revenue* (2). At page 176 the learned Judge expressed the following opinion:

> 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. 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.

(1) (1903) 2 Ch. 612.

(2) (1950) C.T.C. 169

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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.

The facts in that case are substantially different from those in the case at bar. There the appellant, who on June 30, 1938, owned certain lands in the Province of Alberta, transferred all hydro carbons, 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 her a further sum of $60,000 payable out of 10 per cent of oil produced from the lands, with the option to the company to pay her the cash market value of such production. The company made certain payments in 1944 and 1945 which appellant did not include in her estate returns for those years. The respondent, considering these payments to be "income", allowed a deduction of 25 per cent for exhaustion and assessed the balance to tax. These payments were taxable since they depended not only for their existence, but also for their quantum, on the ownership of minerals; they depended on "the use or production of" the property transferred.

Counsel contended that, while it is true that Mr. Justice Cameron "did not actually decide the point", he has intimated that "receipts" may be "like royalties", even though they are not paid to an owner. Counsel added that such is the respondent's submission. He acknowledged that, if real or personal property were sold, the receipts of the purchase price cannot be "rents" or "royalties" in their true meaning. He stated however that Parliament must be presumed to have recognized this inconsistency; hence the use of the words "other like periodical receipts."

The respondent's last claim is that the receipts are income notwithstanding that they are payable on account of the sale of the franchise to Franco Public Service Limited. In counsel's opinion it is apparent from the concluding words of paragraph (*f*) of subsection 1 of section 3 that Parliament intended to make it clear that certain "receipts" were to be treated as "income", even though they were the consideration for a sale of real or personal property. He relied on the case of *Spooner* v. *Minister of National Revenue* (*ubi supra*). The facts in

this case are simple. The respondent sold her right, title and interest in land which she held 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 carrying out drilling and, if oil was found, pumping operations. The company struck oil and paid to respondent in 1927 10 per cent of the gross proceeds of the oil produced, which she accepted in discharge of the royalty. At page 690 we find the following observations by Lord MacMillan, who delivered the judgment of the Judicial Committee of the Privy Council:

Into which category, then, does the present case fall? Their Lordships agree with Newcombe J. that "the case is not without its difficulties", as all cases must be which turn upon such fine distinctions, but they are not prepared to differ from the view of the transaction which that eminent judge took, and with which all his colleagues agreed—namely, that "the respondent has converted the land, which is capital, into money, shares and 10 per cent of the stipulated minerals which the company may win . . . there is no question of profit or gain, unless it be as to whether she has made an advantageous sale of her property." It was for the Minister to displace this view as being manifestly wrong. In their Lordships' opinion he had failed to do so.

In the judgment of the Supreme Court (1) Newcombe, J., speaking for the Court, expressed this opinion (p. 406):

. . . but the question here is, does a man take an income within the meaning of the Canadian Act when he sells his land in consideration of a part of the oil and gas to be extracted from it by the purchaser, if, as is stated in the present admissions, "the appellant was not and is not a dealer in or in the business of buying and selling oil lands or leases"; and, when there is no provision for taxing the property delivered by the purchaser to the appellant, either as annuity or royalty; neither of these words having been used in the statute to describe any right such as that which the vendor acquired under the agreement.

* * *

The case is not without its difficulties, but I am not satisfied that the Crown has made out its claim. And, "inasmuch as it is the duty of those who assert and not of those who deny, to establish the proposition sought to be established, I think the Crown must fail." *Secretary of State in Council of India* v. *Scoble,* (1903) A.C. 299.

Regarding the question of the receipts being "like royalties", counsel for appellant pointed out that the issue in *Jones* v. *Commissioners of Inland Revenue* (*supra*) centred around royalties dependent on the thing sold, i.e. the invention. He submitted that the true position in so far

(1) (1931) S.C.R. 399.

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as royalties payable on account of the user of a patent or a copyright is laid down in the decision of the Court of Appeal in *Withers* v. *Nethersole* (1), where Lord Greene, M.R. made the following observations (p. 715):

> One might perhaps have expected that where a piece of property, be it copyright or anything else, is turned to account in a way which leaves in the owner what we may call the reversion in the property so that upon the expiration of the rights conferred, whether they are to endure for a short or a long period, the property comes back to the owner intact, the sum paid as consideration for the grant of the rights, whether consisting of a lump sum or of periodical or royalty payments, should be regarded as of a revenue nature. We emphasize the word "intact"—*salva rei substantia*, to use the expression adopted by Lord Fleming in *Trustees of Earl Haig* v. *C. I.R.* (3) (22 Tax Cas. 725, at p. 735)—since, save in the special cases of wasting property, if the property is permanently diminished or injuriously affected, it means that the owner has to that extent realized part of the capital of his property as distinct from merely exploiting its income-producing character.

The decision of the Court of Appeal was affirmed by the House of Lords, (2).

In the case of *Perrin* v. *Dickson* (*Inspector of Taxes*) (3) the facts were briefly these. By a policy of assurance effected by the appellant with an Assurance Society to provide for his son's education, the Society, in consideration of six premiums of £90 each, paid annually between 1912 and 1917, agreed to pay him an annuity of £100 each year for seven years as from September 29, 1920. It was agreed that, if the son should die before the expiry of this period, the premiums were to be repaid to the parent or his representatives less any annual payments already made, but without interest. The parent also effected a similar policy to provide for his daughter's education, by which the Society agreed to pay him £50 a year during a period of five years. The parent duly received the annual payments for the seven years (1920 to 1926) and assessments were made on him for income tax on these sums as on an annuity for these years. It was held that the annual payments made by the Society did not constitute an annuity, but were intended to effect a repayment of the principal sum with interest, and therefore that income tax was only payable upon such part of them as consisted of interest. The judgment of Rowlatt, J. in the King's Bench

(1) (1946) 1 All E.R. 711.
(2) (1948) 1 All E.R. 400.
(3) (1929) 2 K.B. 85; (1930) 1 K.B. 107.

Division was affirmed by the Court of Appeal. In his reasons for judgment Lord Hanworth, M.R. expressed the following opinion (p. 119):

> The view that I have taken is to follow what I conceive to be the method directed in Scoble's case, (1903) 1 K.B. 494. Each case must be examined on its own data. I do not feel at all pressed with the observations that the effect of the decision will be to release all annuities for a fixed term of years from income tax. The immunity will be given only in proper cases in which an attempt is being made wrongly to tax capital under statutes which are intended to charge income and income only, for, as was said by Bramwell B. in *Foley* v. *Fletcher*, (3 H. & N. 783, cited by Scrutton L J. in Lord Howe's case, (1919) 2 K.B. 336, 353, it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it. The appeal is dismissed with costs.

Reference may also be made advantageously to *Halsbury's Laws of England*, 2nd edition, volume 17, p. 180, paragraph 378 (in fine), and the decisions therein quoted; *Beal's Cardinal Rules of Legal Interpretation*, 3rd ed., pp. 92, 267, 318; *Craies, Treatise on Statute Law*, 4th ed., p. 154; *Maxwell, The Interpretation of Statutes*, 9th ed., pp. 19, 291; *Shore* v. *Wilson* (1); *Burton* v. *Reevell et al* (2); *The Queen on the prosecution of J. F. Pemsel* v. *The Commissioners of Income Tax* (3).

Considering the nature and substance of the transaction involved it seems to me that the agreement exhibit 3 is a sale and not a deed creating annuities or royalties. For the above reasons I have reached the conclusion that the assessments in question and the decision of the Minister affirming the same are ill founded and must be set aside and that the appeal must be allowed.

The appellant will be entitled to its costs against the respondent.

Judgment accordingly.

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(1) (1842) 9 C. & F. 355, 565.
(2) (1847) 16 M. & W. 307, 309.
(3) (1889) 22 Q.B. 296, 306.