JAMES E. WILDER ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1951

*May 8, 9
Dec. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Sale of assets, consideration for which was monthly payments during life of vendor—Whether "annuity" within meaning of s. 3(1) (b) of the Income War Tax Act, R.S.C. 1927, c. 97 and amendments.

The appellant sold his real estate business together with all its assets, the purchaser assuming all the liabilities of the vendor. One of the considerations for the sale was that the purchaser would pay the vendor an annuity during his lifetime of $1,000 per month.

The appellant was assessed for income tax for the years 1941, 1942 and 1943 on the full amount of the monthly payments of $1,000 each, on the ground that that amount was income within the meaning of s. 3(1) (*b*) of the *Income War Tax Act,* which provided that " 'income' means the annual net profit or gain or gratuity . . . and also the annual profit or gain from any other source including . . . *annuities or other annual payments* received under the provisions of any contract except as in this Act otherwise provided; . . ."

These assessments, on appeal, were maintained by the Minister of National Revenue and by the Exchequer Court of Canada.

Held, reversing the judgment appealed from (Rand and Kellock JJ. dissenting), that the monthly payments were not taxable income within the meaning of s. 3(1) (*b*) of the *Income War Tax Act,* R.S.C. 1927, c. 97 and amendments, as they were not an income receipt but instalments due on the purchase price of certain assets. The appellant had bought no annuity subject to income tax.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Fauteux JJ.

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APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), affirming the decision of the Minister of National Revenue.

Harold E. Walker K.C. and *Robert H. E. Walker K.C.* for the appellant. The payments in question, being payments on account of the purchase price constitute repayments of capital and are not "annuities or other annual payments" within s. 3(1) (*b*) of the *Act*. There is only one "source of income" involved namely the properties sold. There is only one item of "income" involved namely the revenue or net revenue from that "source of income". The payments constitute the purchase price for the "source of income" and not payments for the income. The payments do not become "annuities" taxable under s. 3(1) (*b*) merely because they are payable for the life of the vendor. The test is whether they constitute a return of capital or not. The cases of *Foley* v. *Fletcher* (2), *Dott* v. *Brown* (3) and *Income Tax Case No. 98* (4) are relied on.

The basic rule or principle of the *Income War Tax Act* is to tax income and not capital unless where to a limited extent as under s. 3(*g*) it is expressly declared that capital may be taxed. The certainty or uncertainty of the term is not a factor to be taken into account in the determination of what is and what is not taxable annuity.

If there is any doubt as to the liability to the tax, it should be resolved in favour of the taxpayer: *Tennant* v. *Smith* (5) and *O'Connor* v. *Minister of National Revenue* (6). The question of liability is most ambiguous in the case at bar. Annuities subject to tax are not defined. It has been held and is well established that not all annuities are subject to tax. There is not an inkling in s. 3(*b*) as to what annuities are to be taxed under that subsection. In every other section or subsection of the *Act* where annuities are mentioned it is clear from the context that only annuities purchased from the Dominion or Provincial Government or from Insurance companies and annuities created under wills, gifts, trusts or settlements are in contemplation. There is, therefore, some reasons for inferring that the above kinds of annuities were what was contemplated by the 1940 re-enactment of s. 3(*b*). Before

(1) [1949] Ex. C.R. 347.
(2) (1858) 28 L.J. (Ex.) 100.
(3) [1936] 1 All. E.R. 543.
(4) [1927] 3 S.A.T.C. 247.
(5) [1892] A.C. 150.
(6) [1943] Ex. C.R. 168.

1940, annuities mentioned in para. (*b*) referred expressly to insurance annuities. The 1940 amendment is said to have been enacted to "catch" payments such as those held not taxable in the case of *Shaw* v. *Minister of National Revenue* (1).

The payments should not be considered to be taxable annuities merely because they are referred to in the contract of sale as such: *O'Connor* v. *Minister of National Revenue supra, The Secretary of State in Council of India* v. *Scoble* (2) and *Perrin* v. *Dickson* (3).

It is felt that the payments come rather within the category of payments contemplated in s. 3(2) enacted in 1942 and which appears to have been specially enacted to "catch" the interest content of payments, particularly payments on account of the purchase price of property where no interest was stipulated. The enactment in 1942 of s. 3(2) implies recognition that this category of payments existed before and that they were not chargeable as annuities under s. 3(1) (*b*). If s. 3(1) (*b*) covers any annual payment then there would be no need for s. 3(2).

As to the disposal of the appeal if the Court comes to the conclusion that the assessments should have been made under s. 3(2), the cases of *Shaw* v. *Minister of National Revenue supra* and *Lumbers* v. *Minister of National Revenue* (4) should be followed on that point. The assessments are good or bad and therefore should be maintained or dismissed and not returned to the Minister. In any event, there would be no tax for the year 1941.

Subsidiarily, even if the payments were held to be annuities within the purview of s. 3(1) (*b*), then at the most only the income or interest content should be chargeable with income tax. This submission is based on the construction to be placed on s. 3 of the *Act* and its members, where it is shown plainly that it is not the gross income that is subject to the tax but only the net income. The net profit or gain to the appellant in the payments due him under the contract is not the total amount of such payments. (Vide *Samson* v. *Minister of National Revenue* (5), *Shaw* v. *Minister of National Revenue supra* and *O'Connor* v. *Minister of National Revenue supra*).

(1) [1939] S.C.R. 338.
(2) [1903] A.C. 299.
(3) [1929] 2 K.B. 85.
(4) [1944] S.C.R. 167.
(5) [1943] Ex. C.R. 17.

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It is further submitted that purchased annuities and annuities payable by gratuitous title under a gift, will or settlement are the only kind of annuities that are contemplated in the *Act*. There is nothing in the *Act* to justify the inclusion of any other annual payments as coming within the meaning of "annuities or other annual payments" mentioned in s. 3(1) (*b*).

The case of *Chadwick* v. *Pearl Life Insurance Co.* (1) was also cited.

Paul Dalmé and *E. S. MacLatchy* for the respondent. The argument that the payments are not an annuity but are in the nature of a return of capital is not novel and has been decided against appellant in the case of *Lumbers* v. *Minister of National Revenue* (2). The whole question is what is an "annuity": *Perrin* v. *Dickson* (3). The payments in the present case are the price of the sale but payable in an "annuity" as defined in s. 3(1) (*b*). The payments are also an "annuity" because of the uncertain term and because of the fact that there is no capital to be recovered to the appellant. They cease to be capital and become net profit: *Sothern-Smith* v. *Clancy* (4).

S. 3(2) of the *Act* was enacted to deal with annual payments not covered by s. 3(1) (*b*): such as an instalment payment on a capital sum.

The case of *Dott* v. *Brown* (5) is distinguishable. The South African case (6) cited by the appellant, is the opposite of the case at bar and has no bearing.

Harold E. Walker K.C. replied.

THE CHIEF JUSTICE:—On the 6th of February, 1932, James E. Wilder, the appellant, sold to Wilder Norris, Limited, properties consisting of land, buildings, real estate, securities, listed in fourteen schedules appended to an agreement of that date. In effect, Wilder was thus selling his real estate business with all its assets, and as part of the consideration of the sale the purchaser agreed to assume all liabilities of the vendor. One of the considerations for the sale was that the purchaser should "pay to the vendor as from the first day of December, 1931, an annuity during his lifetime of $1,000 per month".

(1) [1905] 2 K.B. 507.
(2) [1944] S.C.R. 167.
(3) [1930] 1 K.B. 107.
(4) [1941] 1 All. E.R. 111 at 117.
(5) [1936] 1 All. E.R. 543.
(6) [1927] 3 S.A.T.C. 247.

The appeal is concerned with income tax assessments for the years 1941, 1942 and 1943, in each of which the appellant was assessed for income tax on the full amount of the monthly payments of $1,000 each, aggregating $12,000 per annum. These assessments were the subject of appeals to the Minister of National Revenue and to the Exchequer Court of Canada (1). The assessments were maintained by both the Minister and the Court (1).

The decision of the Minister in affirming the assessments was that the amount of $1,000 per month received by the appellant was income within the meaning of paragraph (*b*) of section (3) of the *Act*, and that the said sum is not within the exemption provided by paragraph (*k*) of section (5) of the *Act*.

Section 3(*b*) of *The Income War Tax Act*, so far as it may be said to apply to the matter, reads thus:—

> 3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity . . . and also the annual profit or gain from any other source including
>
> (*b*) annuities or other annual payments received under the provisions of any contract except as in this Act otherwise provided; . . .

The reason given by the appellant for contesting the assessment is that the payments in question, being payments on account of the purchase price of the property sold by the appellant, constitute repayments of capital and are not annuities or other annual payments coming within the purview of section 3(1) (*b*). Subsidiarily the appellant claims that, if the payments in question come within the purview of that section, at the most only the income or interest content is subject to tax.

Before the Exchequer Court (1) the appellant also submitted that if the payments were held to be annuities under section 3(1) (*b*) they should be entitled to the exemptions provided under section 5(*k*). At Bar the appellant abandoned this latter contention, so that the present appeal stands to be decided exclusively on the proper construction of section 3(1) (*b*) and its application to the facts.

There can be no doubt that the sum of $1,000 per month payable to the appellant under the agreement of the 6th of February, 1932 (being the sale to Wilder Norris, Ltd.)

(1) [1949] Ex. C.R. 347.

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is part of the purchase price and in essence, therefore, capital payment. Of course, section 3(1) (*b*) must be understood and interpreted as being part of section 3. That section clearly defines income "for the purposes of this Act" as meaning "the annual net profit or gain". It may be wages, salary, or other fixed amount, or fees or emoluments, or profits from a trade or commercial or financial or other business or calling, as the case may be, whether derived from sources within Canada or elsewhere. It 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", after which there is subsection (*b*) as above quoted. It seems to me clear, therefore, that what the section aims at as being income is the annual profit or gain.

It is obvious that the annual payments stipulated in favour of the appellant in the present instance cannot be described as annual profit or gain, and that on the proper construction of section (3) (1) (*b*) an annuity or annual payment, received under the provisions of a contract, such as the present one, in order to be taxable must be an annual profit or gain. The whole economy of section (3)—and for that matter all of the *Income War Tax Act*—is that it taxes income and not capital. This view is further supported by subsection (2) of section (3) whereby if the Minister is of opinion that under any existing or future contract or arrangement for the payment of money, payments of principal money and interest are blended or payment is made pursuant to a plan which involves an allowance of interest, "whether or not there is any provision for payment of interest at a nominal rate or at all, the Minister shall have the power to determine what part of any such payment is interest and the part so determined to be interest shall be deemed to be income for the purposes of this Act". This was not done in the present case and the decision of the Minister is not based on that subsection.

In my view the true construction to be given to section (3) (1) (*b*) is that the annual profit or gain derived from the source of annuities or other annual payments is taxable

income, but that the annuity, or other annual payment, received under the provisions of a contract, if the Minister has not expressed the opinion that some interest was blended with principal money, is not taxable under section (3) (1) (*b*).

I have no doubt that Parliament could declare to be income an annuity or annual payment which represents capital money, but, in my opinion, Parliament has not done so.

As was said by Chief Justice Sir Lyman Duff in *Shaw* v. *Minister of National Revenue* (1):

> The legislature, it seems to me, is at pains to emphasize the distinction between income and the source of income. The income derived from the capital source is income for the purposes of the Act. The source is not income for the purposes of the Act.

I do not think the decision in *Lumbers* v. *Minister of National Revenue* (2), has the effect of departing from that reasoning.

The appeal should be allowed with costs both here and in the Exchequer Court.

The judgment of Taschereau and Fauteux, JJ. was delivered by:—

TASCHEREAU J.:—On the 6th of February, 1932, the appellant sold to Wilder Norris Limited certain assets for the following consideration:—

1. The assumption by the purchaser of all existing debts, liabilities, contracts and engagements of the appellant;

2. The sum of $10,000 in cash;

3. The sum of $1,000,000 in debentures of the purchaser;

4. $100,000 by the allotment to the appellant or his nominees of certain shares of the company;

5. The obligation by the purchaser to pay to the vendor as and from the first day of December, 1931, an *annuity* during his lifetime of $1,000 per month, and of $75 per month to Mrs. F. E. Puffer.

In the years 1941, 1942, 1943, the appellant was assessed for income tax on the full amount of the monthly payments of $1,000 each, aggregating $12,000 per annum. The assessments were the subject of appeals to the Minister

(1) [1939] S.C.R. 338 at 342. (2) [1944] S.C.R. 167.

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of National Revenue and to the Exchequer Court of Canada (1). They were maintained by both the Minister and the Exchequer Court, hence the present appeal to this Court.

It is the appellant's submission for contesting the assessments, that the payments in question, although referred to as "annuities" in the deed of sale, are payments on account of the purchase price, and are not *"annuities or other annual payments"*, coming within the purview of section 3(1) (*b*) of the *Income Tax Act.*

The *Act* defines as follows "taxable income":—

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

(*a*) the *income from but not the value of property acquired by gift, bequest, devise or descent;* and

(*b*) *annuities or other annual payments received under the provisions of any contract* except as in this Act otherwise provided;

The word "annuity", is not defined in the *Act,* but the reading of section 3(1) (*b*) with other sections of the same Act, would seem to indicate that the whole scheme of the law is undoubtedly to tax *profits or gains,* and not capital. When Parliament intended to tax capital, it has clearly said so. Section 3(1) (*g*) is for instance an example of such an intention. It reads as follows:—

3. (1)

(*g*) annuities or other annual payments received under the provisions of any will or trust, irrespective of the date on which such will or trust became effective, and notwithstanding that *the annuity or annual payments are* in whole or in part *paid out of capital funds* of the estate or trust and whether the same is received in periods longer or shorter than one year;

It would have been useless for Parliament to say that "annuities or other annual payments received under the provisions of a will, even if *paid out of capital funds",*

(1) [1949] Ex. C.R. 347.

were taxable, if all these payments were already considered as "income" by virtue of section 3(1) (*b*).

Furthermore, section 3(2) shows that "annual payments" which are "capital" are excluded from the field of taxation. It says:—

(2) Where under any existing or future contract or arrangement for the payment of money, the Minister is of opinion that

(*a*) *payments of principal money and interest are blended,* or

(*b*) payment is made pursuant to a plan which involves an allowance of interest;

whether or not there is any provision for payment of interest at a nominal rate or at all, the Minister shall have the power to *determine what part of any such payment is interest* and the part so determined to be *interest shall be deemed to be income* for the purposes of this Act.

If the respondent is right in his contention, we would have to come to the illogical conclusion that, when in an annual payment, capital and interest are blended, only that part of the payment which is interest may be taxable, and that a payment representing only capital, as in the present instance, would be taxable *in toto.*

The respondent relied on *Lumbers* v. *Minister of National Revenue* (1). In this case, Lumbers had entered into a contract with an insurance company which entitled him, after paying premiums for twenty years, to receive, at his option, either a lump sum, or monthly payments during his lifetime with the payments going thereafter to his wife, if surviving him, during her lifetime, and with a guaranteed period of payment for twenty years. During the payment of the premiums the contract constituted a policy of insurance, and upon Lumbers' death, the monthly sums would become payable to his wife, if then living, for her lifetime, with the same guarantee of twenty years. After paying the premiums for twenty years, Lumbers elected to receive the monthly payments, and it was held that these monthly payments were *"annuities"*, and therefore taxable.

I do not think that this decision is an authority for the determination of the present case. The "annuities" payable by an insurance company, in order to be exempt from taxation, must be derived from an annuity contract which was *"like" annuity contracts* issued by the Dominion or a Province. The contract in the *Lumbers* case was not a "like" contract as required. Furthermore, in view of section

(1) [1944] S.C.R. 167.

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3(1) (*b*) of the *Act*, it was held that the taxation of the *annuities* paid, was not objectionable on the ground that they were of the nature of a return of capital.

In the present case, we are not dealing with an annuity or an income bought with a sum of money, and of which the annuitant is the purchaser, but we are dealing with instalments due on the purchase price of certain assets. The appellant has bought no annuity subject to income tax.

I would allow the appeal with costs here and below.

RAND J. (dissenting):—This appeal raises the question of the distinction between "annuities or other annual payments received under the provisions of any contract except as in this *Act* otherwise provided" within s. 3(1) (*b*) of the *Income Tax Act*, and instalment payments of capital or of capital and income combined; and it is to be determined by ascertaining the real nature of the payment from the standpoint of the person receiving it.

Perhaps the most familiar use of the word "annuity" envisages the payment of one or more sums of money in return for which an obligation is undertaken to pay an annual or other periodic sum during the lifetime of the purchaser. In that case, the purchase money is properly looked upon as having disappeared, and the annual payments, notwithstanding that they are actually or theoretically built up of the capital and accumulated interest, as neither a return nor a conversion of the money advanced but as income. This idea of "disappearance" is significant in being notional, for as Lord Greene in *Sothern-Smith* v. *Clancy* (1), points out, the payment of money or the transfer of property as consideration for a series of payments "disappears" in every case so far as the person making it is concerned: but the notion of its disappearance is nevetheless relevant to the issue, because it determines the aspect in which the payments are viewed and because it is the manner in which people uniformly and habitually view them that gives rise to the conceptions which underlie the legislation.

That transaction, as a clear example of annuity, on the one hand, is to be contrasted with the sale of land for a price to be paid by equal portions, on the other. In this the

(1) 24 Tax Cas. 5.

vendor views the receipt of instalments, to use the language of Rowlatt J. in *Perrin* v. *Dickson* (1), as "liquidating a principal sum", the price, and that is so even though title has passed and all that remains is the obligation: there is the conception of a conversion of capital from land to money or the payment of a debt. These relatively simple transactions have become complicated by variations in the term and by the introduction of conditions and modifications of the obligation to the extent that they present questions of some difficulty in allocating them to the one or other classification.

The statute does not observe all the possible refinements to which logically that primary contrast could give rise. There is scarcely any form of the receipt of money paid in return for a consideration, which, if we look at its financial facts, could not fairly be argued to possess some increment of returned capital: and there are taxable items under the statute which undoubtedly do that. S. 3(1) (*b*) provides broadly that "annual payments" are to be deemed to be income except as the *Act* otherwise provides: but the *Act* is designed primarily to tax "income" and the exclusion of the receipt of capital generally is basic. Subject, then, to its clear specifications, we should, in the differentiation of annual payments, act upon the common acceptation of these words held in the business world.

In the facts before us, the payments of $1,000 a month for life are part of the consideration for the sale by the taxpayer of a large business to a company, but they relate to no specific portion of the price, and when received, they are not taken as discharging pro tanto any notional, much less, any measured amount of capital. Nor is the total amount to be paid certain; it may be small or large, depending on the uncertain life of the taxpayer.

The question has been elucidated by the recent decision of the Court of Appeal of England, in *Sothern-Smith, supra.* There a life assurance society, in consideration of a specified sum of money agreed to pay to the purchaser a fixed annuity during his life with the added provision that if during that time the payments did not aggregate the sum paid by him, they would continue to his sister until that sum had been reached: in other words, the contract was to

(1) 14 Tax Cas. 615.

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pay an annual sum for an ascertainable period of years or for the period of the life of the purchaser, whichever might prove to be the longer. It was argued that the purchase price continued to persist as a guaranteed return, and that the payments to the sister partook, consequently, of the nature of capital. This contention was rejected. In speaking of an annuity for a term of years and pointing the distinction between that and a life annuity, namely, that in the latter the sum of the payments which fall to be made may be less or greater than the amount paid by the annuitant while in the former it would be the same as that amount plus an addition for interest, Lord Greene, at page 7, observes:—

> I feel bound to regard the purchase of an annuity of the kind to which I have referred as the purchase of an income and the whole of the income so purchased as a profit or gain notwithstanding the way in which the payments are calculated. The sum paid for the annuity has ceased to have any existence and the fact that at the end of the annuity period the recipient will have received an amount equal at least to what he paid I feel bound to treat as irrelevant.

A fortiori, would that reasoning apply to the case of a life annuity as we have it here.

It is then contended that the definition of income in s. 3 makes it clear that when income is associated with capital in a payment only the former is intended to be brought under the charge. It is then assumed that necessarily some part of these annual payments are of a capital nature and to that extent are beyond the tax. The difficulty here is that there is no agreed capital element and we are not at liberty in any manner to capitalize the payments. Under the contract, cash, debentures, shares of stock and two annuities constituted the purchase price. That a person may bargain for a life annuity as part of the consideration for the sale of property, whether or not it is referable to a specific portion of the price, is, I think, unquestionable, and that, in my opinion, is what was done here.

It was argued that the case is governed by *Shaw* v. *The Minister of National Revenue* (1). But the language of s. 3(1) (*b*), as it then was, specifically excluded "payments made or credited to the insured on life insurance, endowment or annuity contracts upon the maturity of

(1) [1939] S.C.R. 338.

the term mentioned in the contract or upon the surrender of the contract." The payments there, under an insurance policy, were directly within that language. Since that decision, the section has been amended to its present form.

It is finally contended that the case falls within subsection (2) of section 3 which provides:—

> (2) Where under any existing or future contract or arrangement for the payment of money, the Minister is of opinion that
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> (*a*) payments of principal money and interest are blended, or
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> (*b*) payment is made pursuant to a plan which involves an allowance of interest;
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> whether or not there is any provision for payment of interest at a nominal rate or at all, the Minister shall have the power to determine what part of any such payment is interest and the part so determined to be interest shall be deemed to be income for the purposes of this Act.

The facts of the case as well as the reasoning on which *Sothern-Smith* is based, are, I think, a complete answer to this contention. There is nothing in the agreement on which the Minister could find that payments of principal and interest are blended or that there is any plan which involves an allowance of interest; the annuity is one of a number of items together making up a total price not expressed in a specific amount of money. It is not intended, certainly, that every annuity is to be dealt with under that subsection, but that would seem to me necessarily to follow if the present case were held to be within it.

I would, therefore, dismiss the appeal with costs.

KELLOCK J. (dissenting):—This appeal raises the question as to whether or not the "annuity" of $1,000 per month received by the appellant under the provisions of the agreement of sale of the 6th of February 1932 here in question, constitutes an annuity within the meaning of s. 3(1) (*b*) of the *Income War Tax Act* as it stood with respect to the taxation years 1941, 1942 and 1943.

The agreement provides for the sale by the appellant to Wilder Norris Limited of a substantial list of assets, the consideration being (1) the assumption by the purchaser of all existing debts, liabilities, contracts and engagements of the appellant; (2) the sum of $10,000 in cash; (3) the sum of $1,000,000 in debentures of the purchaser; (4) $100,000 by the allotment to the appellant or

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his nominees of certain shares of the company; and (5) the following:

(*b*) To pay to the Vendor as and from the first day of December 1931 an annuity during his lifetime of $1,000 per month;

(*c*) To pay to Mrs. F. E. Puffer, of the City of Montreal, as and from the first day of December 1931, an annuity during her lifetime of $75 per month;

Section 3 of the statute defines income, so far as material, as

> The annual profit or gain from any other source, including . . .
> (*b*) annuities or other annual payments received under the provisions of any contract . . .

In *Lumbers* v. *Minister of National Revenue* (1), Hudson J. refers to the difference between the present form of the paragraph and its form at the time judgment in *Shaw* v. *Minister of National Revenue* (2) was given. In his view, and he gave the judgment of the majority of the court, the annuities or other annual payments covered by the paragraph are themselves to be regarded as income, rather than sources from which income may be derived. The question remains, however, as to what is included within the word "annuities" as used in the statute.

It is past question that the statutory definition was not intended to include everything in the nature of "annual payments". For example, annual instalments of the purchase price on the sale of property could not be regarded as income without very plain words, and there are no such words. "Other annual payments" is, I think, to be read *ejusdem generis* with "annuities," and if so, the word "annuities" would appear to be used with respect to payments of an income nature. This view is confirmed upon consideration of paragraph (*g*) of the same subsection which provides that annuities or other annual payments received under the provisions of any estate or trust are taxable "notwithstanding that the annuities or annual payments are in whole or in part paid out of capital funds." If "annuities" simpliciter were taxable, the qualifying words in the paragraph would be unnecessary.

In *Lady Foley* v. *Fletcher* (3), the House of Lords interpreted the words "any annuity or other annual payment . . . by virtue of any contract" in s. 40 of 16 Vict.

(1) [1944] S.C.R. 167 at 172. (2) [1939] S.C.R. 338.
(3) 3 H. & N. 769.

c. 34 by reference to schedule D of that statute which used the following language: "and for and in respect of all interest of money, annuities and other annual profits or gains," and it was held that the section applied only where the annual payment was in the nature of a profit. In the course of his judgment, Baron Watson said at p. 784:

> But an annuity means where the income is purchased with a sum of money, and the capital is given and has ceased to exist, the principal having been converted into an annuity.

This definition has never been departed from in England.

It is perfectly clear upon the authorities that, merely because a payment is described as an annuity, the question as to whether it is to be regarded as capital or income is not thereby concluded. The question in every case is only to be determined upon a careful analysis of the particular contract. In such analysis, the assistance to be gained from the decided cases is thus expressed by Lord Green M.R., as he then was, in *Commissioners of Inland Revenue* v. *36/49 Holdings Limited (in Liquidation)* (1):

> In so far as, in the cases which have been decided, certain of those circumstances have been regarded as of importance, the authorities no doubt are of assistance, because they at any rate go as far as this: They say that elements such as those are elements which may legitimately be taken into consideration; but when you come down to an individual case, taking such guidance as you can on that basis from the authorities and any general expression of principle, the matter must be decided by reference to the circumstances of the particular case.

At p. 182 he had said:

> The true nature of the sum is not necessarily its nature in law, but its nature in business or in accountancy whichever way one like to put it, because from the legal point of view there may be no difference whatsoever as between the parties between a capital and an income sum. It may be totally irrelevant to the legal relationships into which they are proposing to enter.

I therefore turn to a consideration of the authorities.

In *Secretary of State* v. *Scoble* (2), the appellant, having the right, under the contract there in question, to purchase a railway for the value of all the shares of the company, had also the option, instead of paying the gross amount in one sum, of discharging his liability by the payment, for a certain number of years, of an "annuity", the annual payments being calculated with respect to the gross sum and interest at a specific rate. This option was exercised

(1) (1943) 25 Tax Cas. 173 at 185. (2) [1903] A.C. 299.

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and it was held that these annual payments were composed in part of capital and in part of interest, the interest content of each alone being taxable. As expressed by Lord Davey, the one important fact which determined the case was that for the purpose of ascertaining the amount of the so-called annuity, the gross sum payable by the appellant had to be ascertained.

The fact, however, that the purchase price may not, in any given case, be definitely fixed for all purposes by the terms of the contract, does not necessarily indicate that the annual payments are not to be regarded as capital payments. This is well illustrated by the decision in *Commissioners of Inland Revenue* v. *Ramsay* (1). In that case, the respondent agreed to purchase a dental practice for a "primary price" of £15,000. £5,000 was to be paid down, and for a period of ten years the purchaser, who was to carry on the practice, would pay the vendor annually a sum equal to 25 per cent of the net profits. Such payments were to constitute full payment of the balance, regardless of whether they should amount to more or less than £10,000. £5,000 of this balance was to be secured by a charge upon a policy of life insurance on the life of the purchaser, and it was also provided that if the purchaser should die before the expiration of the full period of ten years, the vendor should accept the proceeds of the policy and the annual payments up to that time, in full discharge of all liability under the contract. It was held by the Court of Appeal that the annual payments were capital and not subject to tax. In the course of his judgment, Lord Wright M.R. pointed out that the mere statement in the contract itself that the annual payments should be paid and received as capital sums paid in respect of the "purchase price" was not conclusive of anything. Whether or not they were capital sums had to be determined by a consideration of the substance of the transaction. He approved of the statement of principle laid down by Walton J. in *Chadwick* v. *Pearl Life Insurance Company* (2), as follows:

> It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments; in the other there is an agreement for good consideration not to

(1) 20 Tax Cas. 79.

(2) [1905] 2 K.B. 507 at 514.

pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum.

In *Ramsay's* case, the essence of the contract was that it contained a code which, if it operated during the whole ten years, would have the result that the remaining debt of £10,000 would be discharged by payment of a number of instalments which might amount to either more or less than that sum. Lord Wright said that he could not see why a creditor who has sold property "for a particular price" should not, in discharge of that price, agree to accept a fluctuating sum if there are sufficient reasons of convenience or other considerations which make it desirable to adopt that method of payment. In his Lordship's view, the purchase price of £15,000 was

> A figure which permeates the whole of the contract and upon which the whole contract depends.

He therefore thought that the payments in discharge of that sum were all capital payments.

Greene L.J., as he then was, points out that the argument for the respondent was based upon the view that the sum of £15,000 mentioned in the contract had no real existence at all, in the sense that the contract would be exactly the same if all reference to that sum had been omitted. Greene L.J. rejected that argument, being of the view that, upon the contract, the primary obligation was to pay that sum which would only be varied in the events mentioned in the contract.

It has also been held that, merely because the annuity or annual payments constitute part of the price or consideration of a contract does not stamp them as capital payments.

Rowlatt J., in *Jones* v. *Commissioners of Inland Revenue* (1), a case of a contract providing for the payment of a "royalty" on the sale of certain inventions, said at p. 714:

> It has been urged by Mr. Latter that the annual payment now in question being 10 per cent upon the sales of machines for ten years is part of the consideration which was paid for the transfer from the appellant of his property. So it is, but there is no law of nature or any invariable principle that because it can be said that a certain payment is consideration for the transfer of property it must be looked upon as price in the character of principal. In each case, regard must be had to

(1) [1920] 1 K.B. 711.

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what the sum is. A man may sell his property for a sum which is to be paid in instalments, and when that is the case the payments to him are not income; *Foley* v. *Fletcher*, 3 H. & N. 769. Or a man may sell his property for an annuity. In that case the Income Tax Act applies. Again, a man may sell his property for what looks like an annuity, but which can be seen to be not a transmutation of a principal sum into an annuity but is in fact a principal sum payment of which is being spread over a period and is being paid with interest calculated in a way familiar to actuaries—in such a case income tax is not payable on what is really capital: *Secretary of State for India* v. *Scoble* (1903) A.C. 299.

There are cases, again, which illustrate that in a particular contract, the consideration on the sale of property may consist in part of capital items and in part of income items, and it is necessary, as in other cases, to ascertain where the line is to be drawn.

In the *36/49 Holdings Limited* case, *ubi cit.*, Lord Greene said at p. 183:

> Now it is plain to my mind that where you have a purchase consideration built up in that way, the fact that some of the elements are of a capital nature does not the least bit point to the periodical payments being also of a capital nature. Then again there are cases in the books where the two elements in the purchase price have appeared, one of a capital nature and one of an income nature. The presence, therefore, of these elements of a capital nature here does not in any way assist me in the problem in which I am engaged.

In *East India Railway Company* v. *Secretary of State* (1), the contract was similar to that in question in *Scoble's* case except that it provided, as to one-fifth of the capital of the vendor company, that the Secretary of State might arrange with the company that these shareholders, called "deferred annuitants," should receive, for a period determinable by the Secretary, interest at 4 per cent per annum on their interest in the capital, and in addition one-fifth of the net profits of the railway, instead of the annual payment of capital and interest to be received by the remaining shareholders. The contract provided that on termination, the deferred annuitants should thenceforth receive the annual payments on the same basis as the other shareholders. It was held that no part of the deferred annuities represented repayment of capital, but that under the arrangement, part of the capital of the annuitants had been used to purchase the right to the interest and profits which they had received. With respect to these shareholders, the consideration was made up in part of

(1) (1924) 40 T.L.R. 231.

payments composed purely of an income nature, namely, interest and profits, and latterly of annual payments composed, as in *Scoble's* case, of both capital and interest.

In the case already referred to, *36/49 Holdings Limited*, the respondent company had sold certain shares belonging to it in another company for a consideration composed of various items including certain sums in respect of each machine which should be sold by the company whose shares formed the subject matter of the contract.

Noting that the payments in question were to be perpetual unless the right given by the contract to commute them were exercised, Lord Greene thought it very difficult to class a perpetual payment under the category of capital, and he added:

> The length of time during which a payment is to endure may be a very important factor in determining its character. It is obviously much easier to treat a payment which is only going to extend over two years as really a payment of purchase price by instalments, than it is to treat a payment which it is contemplated may continue in perpetuity.

He also observed that the sums payable under the subparagraph of the contract with which he was dealing were not tied in any way or related in any way to any special sum whatsoever.

In the case at bar, there is no gross sum mentioned or ascertainable, and the two annuities are not in any way related to any such amount. The annuities are periodic payments, indefinite in number. In my opinion, the present case is essentially of the same nature as the *East India Railway Company* case, where part of the appellant's capital was, on the sale of his assets, used to purchase an income of $1,000 per month, the capital itself ceasing to exist, being converted into an annuity. I do not think it could be suggested, as to the annuity payable to Mrs. Puffer, that the situation was any other than that part of the appellant's capital had been used to purchase an income for her, and there are no indicia, in my opinion, which can properly lead to a different view with respect to the annuity payable to the appellant himself.

The appellant relies upon the decision of the Court of Appeal in *Dott* v. *Brown* (1). The contract in that case provided for the settlement of a debt due from the respondent to the appellant of about £10,000, which had been the

(1) (1936) 154 L.T. 484.

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subject of proceedings in bankruptcy, a compromise having been arrived at which was made an order of the court. Under this compromise, the petitioner agreed to accept "in full satisfaction of his judgment debt" various considerations including items undoubtedly of a capital nature and also the particular item in question, namely, the covenant of the debtor to pay certain annual sums as long as the petitioner should live. In the view of Lord Roche, the stipulation of the petitioner that the plaintiff was "to accept in full satisfaction of his judgment debt" was language applicable to the acceptance of a sum short of the full sum rather than to any contemplated sum larger than the judgment debt being received. Lord Roche was of opinion that it would have been open to the defendant, if he had thought fit, to offer evidence on this point as well as other points as to the surrounding circumstances, to remove this natural inference from the document. No such evidence was offered, and for that reason the *prima facie* construction remained. This circumstance immediately places the case in the category of those to which I have referred in which, in the words of Lord Greene, the repayments were "tied in" to a capital sum. In the case at bar, this element is entirely lacking.

Further, the covenant in *Dott* v. *Brown* was contained in a single clause by which the debtor was "to pay £1,000 on the 31st of March, 1933, £1,000 on the 31st of March, 1934, and £250 on each succeeding 31st of March so long as the petitioner should live." Scott L.J., in coming to the conclusion that the annual payments of £250 were capital payments, was influenced by the fact that, in his view, the two annual payments of £1,000 were clearly capital, and it was to be assumed that the payments of £250, *being contained in the same clause,* were also capital payments in the absence of some reason to the contrary. That this conclusion was not based upon the view that because one finds included in the consideration in a contract, capital items, that fact is of assistance in arriving at the conclusion that other items are also capital, is borne out by the judgment of the learned Lord Justice himself in the *36/49 Holdings Limited* case, where he agreed with the judgment of the Master of the Rolls to which I have already referred on this point. The circumstance to which Scott L.J.

attached importance in *Brown's* case is not present in the case at bar which, for the reasons given, is, in my opinion, quite distinguishable from that case.

There was no objection taken on the part of the appellant upon the ground that the payments in the present case are monthly payments. That point is, in any event, concluded by the decisions in *In Re Cooper* (1) and *In Re Janes' Settlement* (2), both of which have been approved by the Court of Appeal in *Smith* v. *Smith* (3), and I would adopt the reasoning in these judgments.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Walker, Martineau, Chauvin, Walker and Allison.*

Solicitor for the respondent: *E. S. MacLatchy.*