1946
Oct. 15 & 16
Nov. 28.

BETWEEN:

PERCY JOHN SALTER.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ...RESPONDENT.

Revenue—Income Tax—Income—Income War Tax Act R.S.C. 1927, c. 97, secs. 2 (r), 3 (1), 3 (1) (e)—Admissibility of oral evidence to explain nature of transaction and real consideration for agreement as set forth in written document—Payment for surrender of contract not income—"Personal and living expenses"—Premiums on annuity contract to or for the benefit of the taxpayer or his wife or daughter are personal and living expenses and constitute income.

Appellant having been employed for a great many years by the Sun Publishing Company Limited resigned from his position of President and Director of the Company consequent to a written agreement entered into between them on July 3rd, 1942. The Company by the same agreement undertook to pay to the appellant the sum of $5,000 on the execution of the agreement and the sum of $10,000 in monthly payments of $1,000 each commencing on August 15, 1942. Respondent assessed appellant for income tax on these sums of $10,000 received in 1942 and $5,000 received in 1943. In 1942 and 1943 the Company paid certain premiums on an annuity contract entered into by it with a life insurance company for the benefit of the appellant and, in the event of survivorship, his wife and daughter. The Company also paid the additional income tax of appellant occasioned by the payment of such premiums. For these years there was added to the appellant's income by the respondent for taxation purposes the amounts paid by the Company in respect of the annuity premiums and the income tax in relation thereto.

From these assessments appellant appealed to this Court.

Held: That evidence to show the true nature of the transaction entered into between appellant and the Company and the real consideration for the agreement is admissible and appellant is not estopped by the terms of the written agreement from proving the real considerations as the agreement was *res inter alios* and there is no mutuality.

2. That the payments of $10,000 in 1942 and $5,000 in 1943 were paid entirely for the surrender of appellant's contract with the Company and such payments do not constitute income for the years in question.

3. That the premiums on the annuity contract were payable to or for the benefit of the taxpayer, or his wife or daughter, and were therefore "personal and living expenses" and the payment of such personal and living expenses by the Company constitutes part of the gain, benefit or advantage accruing to the appellant under its contract with the insurer; the annuity contract was entirely for the benefit of the appellant and to the extent of the premiums paid in each year such

premiums and the tax paid in reference thereto constitute part of the annual profit or gain of appellant within the meaning of s. 3 of the Act.

4. That the premiums so paid by the Company are taxable in the hands of the appellant as a gratuity indirectly received by the appellant from his employment with the Company.

APPEAL under the provisions of the Income War Tax Act.

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

C. K. Guild, K.C. and *K. L. Yule* for appellant.

C. L. MacAlpine, K.C. and *E. S. MacLatchy* for respondent.

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

Cameron J., now (November 28, 1946) delivered the following judgment:

This is an appeal in respect of income tax for the years 1942 and 1943. On December 27, 1945, Notice of Assessment for both years was sent to the appellant. On January 16, 1946, Notice of Appeal was given and on April 16, 1946, the respondent gave his decision affirming the assessments. Notice of Dissatisfaction was given on May 6, 1946, and on May 17, 1946, the Minister made his reply affirming the assessment as formerly levied. By order of this Court delivery of pleadings was directed on July 10, 1946. The case came before me for trial at Vancouver on October 15 and 16, 1946, and judgment was reserved.

The main problem in connection with these appeals relates to the sum of $15,000 paid to the appellant by the Sun Publishing Company Limited of Vancouver (hereinafter called "the Company") pursuant to an agreement in writing dated July 3, 1942, $10,000 of which was paid in 1942 and $5,000 in 1943. It is alleged by the respondent that the said sums of $10,000 and $5,000 constituted taxable income in the hands of the appellant for the respective years; and by the appellant that the said sums were not income within the Income War Tax Act but were sums paid to him by the Company in order to secure a release

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from the unexpired portion of the appellant's five year contract and were received as compensation for loss of office; that such contract was a capital asset and that therefore the payments represented capital rather than income and were therefore free of tax.

The appellant for twenty-eight years prior to 1942 had been in the employ of the Company in various capacities. Mr. R. J. Cromie, the proprietor and chief shareholder, died in 1936 and thereafter the appellant became the President and General Manager and was also a shareholder and director. On November 22, 1938, a contract was entered into by which the appellant's services as President and General Manager were retained for at least five years from that date. His salary at that time was $12,000 but was later raised to $15,000 and so continued until his resignation took effect on July 15, 1942.

Under circumstances which will later be referred to in greater detail, differences of opinion arose between Mr. Donald C. Cromie (the second son of the former publisher R. J. Cromie) and the appellant and a verbal arrangement was entered into between the appellant and the said Donald C. Cromie (who held a power of attorney from his mother who had a controlling share-interest in the Company) as to the retirement of the appellant and the compensation which he would receive. This matter came before the Board of Directors on July 2, 1942. The following is an extract from the minutes (Exhibit 7):

> Mr. Donald C. Cromie reported that he had made an arrangement with Mr. P. J. Salter on the occasion of his resigning from the presidency and directorship of the Company, the arrangement briefly being that Mr. Salter's resignation as Director and President which he tendered should be accepted by the Company as of the 15th of July next, and that the Company should pay to Mr. Salter the sum of $15,000 *in full settlement of all claims against the Company,* the said $15,000 to be paid $5,000 cash and the balance at $1,000 a month. MOVED by Donald C. Cromie, SECONDED by F. R. Anderson that the principle of the arrangement be adopted and that an agreement embodying the terms of the agreement and other clauses necessary for the protection of either party be prepared and submitted to the next meeting of Directors of the Company. CARRIED.

Pursuant to the said minutes above extracted, the solicitor of the Company, Mr. F. R. Anderson (who was also a director) prepared an agreement of which Exhibit 8 is a copy and which was submitted to the directors on July

3, 1942. Exhibit A is a copy of the minutes of that meeting and the following extract therefrom indicates the action taken by the directors in regard thereto:

An agreement having been prepared by the solicitor of the Company between P. J. Salter and the Company regarding settlement of claims between said P. J. Salter and the Company; MOVED by Donald C. Cromie, SECONDED by F. R. Anderson that the terms of the agreement be approved and adopted and that the same be executed under the seal of the Company in the presence of two directors who shall sign the same in witness of the affixing of the seal and that the Agreement be delivered to Mr. P. J. Salter as the act and deed of the Company. CARRIED.

Subsequently the agreement was completed and signed by the parties. (Exhibit 8 is a copy.) Excluding the description of the parties, it is as follows, the Company being the party of the first part and the appellant the party of the second part:

NOW THIS AGREEMENT WITNESSETH that in consideration of the premises and in consideration of the mutual covenants and agreements of the parties hereto hereinafter contained, IT IS AGREED by and between the parties hereto as follows:—

1. The Party of the Second Part has tendered to the Company his resignation as President and Director of the Company to take effect as on the 15th day of July, A.D. 1942, and the Company accepts such resignation to take effect as aforesaid;

2. The party of the Second Part AGREES with the Company to assist and advise the Company as it may require for a period of thirty (30) days from the said 15th day of July, A.D. 1942;

3. The Company will pay to the Party of the Second Part the sum of Fifteen Thousand ($15,000) Dollars payable as follows: Five Thousand ($5,000) Dollars on the execution of this Agreement and the balance at the rate of One Thousand ($1,000) Dollars per month beginning with the 15th day of August, A.D. 1942, and continuing on the 15th day of each and every month thereafter until the full sum of Fifteen Thousand ($15,000) Dollars have been paid and satisfied, and the Party of the Second Part agrees to accept such sum of Fifteen Thousand ($15,000) Dollars when paid in full settlement of all claims that he has or might have in respect of wages or salary up to the 15th day of August, A.D. 1942, the date when the Party of the Second Part finally severs his connection with the Company.

4. The Party of the Second Part will not, during a period of one (1) year from the date hereof and within the City of Vancouver, in the Province of British Columbia, accept employment with any newspaper which can or may compete with the newspaper published by the Company, and will not either directly or indirectly within the time or territory mentioned engage in any employment competitive with that of the Company.

5. Subject to the foregoing agreements between the parties hereto, the parties hereto and each of them doth and do hereby release the other and each of them, their and each of their heirs, executors, administrators, successors and assigns, and their and each of their estates and each

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of their effects from all sums of money debts, duties, contracts, agreements, covenants, bonds, actions, proceedings, claims and demands whatsoever which any one of them now hath or has against the other for or by reason or in respect of any act, matter, cause or thing whatsoever up to and including the day of the date of these presents, it being the intention of the parties that these presents shall constitute a complete settlement of all matters outstanding between them to date.

THIS AGREEMENT shall enure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, successors and assigns.

The success or failure of the appeal on the main point depends in large measure on whether the appellant could lead evidence which would in any way add to, vary, modify or contradict the terms of the written agreement.

Counsel for the appellant argued that this was not an action between the parties to a contract and that he was entitled to prove (1) that it did not represent the real agreement between the parties thereto and (2) what was the real agreement and real consideration. Counsel for the respondent argued that the Court could not go behind the agreement itself, that the appellant was estopped from denying the terms of the written contract; that the appellant could not plead his own fraud; that the contract itself was the best evidence, that secondary evidence should not be admitted, and that the contract could only be set aside in an action between the parties themselves on the ground of fraud or mutual mistake; and that, as the Company was not before this Court, rectification could not here be made.

I reserved my finding as to the admissibility of such evidence and shall now deal with it.

The general rule is set out in Halsbury, 2nd Edition, Vol. 13, Article 786 as follows: "extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements is inadmissible to add to, vary, modify or contradict a written instrument."

In Article 787 the author pointed out that there may, however, be cases where a written instrument is in question, which are not within the rule and where oral evidence is admissible.

The following are instances—to show the true consideration or the existence of consideration or of consideration in addition to that stated; to show the true nature of the transaction, or the true relationship of the parties.

Article 1149 in the 12th Edition of Taylor on Evidence p. 735 is as follows:

1149 (r). It may further be remarked that the rule is applied only in suits between the parties to the instrument, and their representatives, and they alone are to blame if the writing contains what was not intended, or omits what it should have contained. It cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties and, therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others.

In Phipson on Evidence, 8th Edition, exceptions to the rule are dealt with on page 566 under the heading "Private Documents where inter alios" and at p. 567 it is said:

Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to *contradict or vary* the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, *or a party and a stranger;* since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties (*R. V. Cheadle,* 3 B & Ad. 833); nor, in proceedings between a *party and a stranger,* will the *former* be estopped, since there would be no mutuality.

In the instant case it is necessary, in order to reach a proper conclusion as to appellant's assessability to tax, to know the nature of the transaction and what was the true consideration. Was the sum of $15,000 paid in settlement of wages or salary and therefore subject to tax? Or was it a capital sum paid to secure the release of a valuable contract and therefore free of tax? Or was it partly one and partly the other?

Basing my finding on the above, I have reached the conclusion that the evidence introduced by the appellant to indicate the true nature of the transaction and to show the real consideration was admissible. I also find that the appellant is not estopped by reason of the terms of the written agreement from proving the real consideration as the agreement was *res inter alios,* and there is therefore here no mutuality.

If I am in error in the above conclusion and extrinsic evidence could not be lead to contradict, or vary the written agreement, I am of the opinion that the Court is entitled to consider evidence of the surrounding circumstances so that it may know what the agreement is dealing with and understand it. Looking at the agreement itself it is to be observed that the expressed consideration is "the

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premises and the mutual covenants and agreements of the parties hereinafter contained". In paragraph No. 3 the Company agrees to pay the appellant $15,000 as therein set out "And the party of the Second Part agrees to accept such sum of $15,000 when paid in full settlement of all claims that he has or might have in respect of wages or salary up to the 15th day of August 1942, the date when the Party of the Second Part finally severs his connection with the Company." This clause, in my view, is capable of several interpretations. It may mean that the consideration of $15,000 is paid entirely for wages or salary; or it may also mean that any claim for wages or salary up to that date would, together with other claims, be extinguished upon payment of that sum. There is no recital that any sums are owing to the appellant by way of wages or salary and the words "might have" could indicate that there was no certainty that there was any such claim.

But paragraph No. 5 is a part of the agreement and forms part of the consideration. It is a general release clause and, among other things, each releases the other from debts, duties, contracts, covenants, proceedings, etc.

My view, therefore, is that in order to resolve the problem before me I should know what is the real meaning of the clauses just referred to; and that to ascertain what part of the consideration is attributable to wages and salary and what part to the release from duties, contracts, etc., I must know the surrounding circumstances, not to vary or contradict the document, but to explain and identify the terms therein used.

As authority for this view, reference may be made to Phipson on Evidence 8th Edition where at p. 601 ff. he deals with the subject of "Rules as to Extrinsic Evidence". At p. 602 under "Contracts" it is stated:

> And the extent, as well as the identity, of the subject matter may be similarly shown. Thus, although prior conversations, negotiations, conditions of sale, draft agreements, and the deleted clauses cannot be proved directly to enlarge or restrict a concluded contract, since they are presumed to be superseded thereby . . ., yet where the language of the contract is vague or general, the state of facts in the knowledge and contemplation of the parties at the time, and about which they were negotiating, may be proved by their conversations or correspondence, *as circumstantial* evidence, in order to apply the words and to show whether their narrower or wider meaning was intended. Thus, the

knowledge of the parties at the time has been received to determine the scope of a release . . . Again, where an agreemnt is ambiguous, the *object* of the parties is generally relevant to determine its scope.

Reference may be made to the recent case of *Carter* v. *Wadman* (1), which was cited by counsel for the respondent. Atkinson J., in his judgment said p. 256:

This is a question which has to be determined on the proper interpretation of this agreement. There have been several warnings in the House of Lords concerning the importance of giving due weight to the terms of the agreement. I refer to *Prendergast* v. *Cameron* (1940) A.C. 549, at page 143, where the then Lord Chancellor, Lord Caldecote, quoted some warnings of Lord Tomlin and others emphasizing the importance of giving effect to the proper legal interpretation of the documents, providing they are bona fide. That does not mean that the Court is not entitled to consider evidence of the surrounding circumstances, so that the judge can know what the agreement is dealing with and understand it. And it does not mean that one can admit evidence for the purpose of contradicting or varying the plain language of the agreement.

That was a tax case where the appellant was employed under a service agreement as residential manager of a licensed hotel. The contract was a valuable one, extended for seven years, and the employer was under an obligation with the appellant not to part with any of the assets of the business during the term of the contract. Subsequently the employer, having run into difficulties, desired to dispose of the business and by agreement with the appellant contracted to pay him £2,000 free of tax in full settlement of all past, present and future claims, and the appellant agreed to the sale of the premises. At the time of this agreement the original contract had many years to run. The question was as to how much of this payment of £2,000 was referable to the commission which the appellant was entitled to up to the time of the release, but which had not then been ascertained (although later determined); and how much was referable to the release from the unexpired term of the contract. The Court sent the matter back to the General Commissioners to apportion it along those lines. What the Court did there was to go behind the agreement itself, not to contradict or vary the plain language of the agreement, but to ascertain the surrounding circumstances so that it might know what the agreement was dealing with and understand it.

(1) (1946) T.R. 255.

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Having found that such evidence is admissible little more need be said as to the facts, inasmuch as counsel for the respondent quite properly and frankly admitted that if such evidence could be given, then on the evidence so tendered, he could not successfully oppose the appeal on this point. It is sufficient to set out the following which I find as facts.

The appellant had been in newspaper work most of his life and in 1942 was fifty-eight years of age. He had a valuable contract with a company in which he had long been employed. He had no thought of retiring from his employment until that year when Mr. D. C. Cromie, son of the former proprietor, entered the business. The latter held a power of attorney from his mother, who, by her shareholding, controlled the business, and Mr. Cromie was, therefore, in a position to forward his purpose to bring about a change in the management and take over for himself the chief positions. He disapproved of the policies of the appellant and his co-directors. I accept the evidence of the appellant that Mr. D. C. Cromie approached him to secure his resignation and that it was the latter who named the sum of $15,000 as the amount that would be paid to the appellant for a release from his contract which then had about 1½ years to run. It is clear also that at the time of the agreement (Exhibit 8) the Company owed nothing to the appellant by way of wages or salary. Reference to the minutes of July 2, 1942, shows that the sum of $15,000 was to be paid as a release of all claims of the appellant and as he had no possible claims, except under his unexpired contract, the full sum was referable to that alone. In order to effectuate his desire to get control of the management, it was necessary for Mr. D. C. Cromie to secure the resignation of the appellant and it is significant that several other directors of long standing resigned at or about the same time as the appellant.

I was greatly impressed by the evidence of the appellant. His memory as to events was clear and he gave his evidence in a frank and convincing manner. I accept his statement that, relying on what had been discussed with Mr. Don Cromie prior to the Directors' meeting of July 2, 1942, and what took place at that meeting, and on the reliance he placed in his co-director and Company solicitor Mr. Ander-

son, he paid little attention to the contents and wording of the agreement itself, being content to know that, upon his resignation, he would be paid $15,000 in the manner agreed upon.

And I find also that the appellant throughout acted in good faith. Prior to the execution of the agreement (Ex. 8) he had advised the Local Income Tax authorities as to his proposed settlement with the Company, namely, that the payment of $15,000 was for a release of the balance of his contract, and had been assured that in that event it would not be subject to tax. This was not a case where the claim as to the nature of the payment was first raised after the assessment was made; but when the appellant did find that he was assessed to income tax in respect of the payment, he then attended at the office of the Collector to reaffirm what he had previously told him and to indicate that the wording of the agreement was incorrect. To support his contention he took Mr. Anderson with him, and the latter verbally confirmed the appellant's view that the payments were not paid for past services by way of wages or salary. At the trial Mr. Anderson gave evidence to the same effect, stating that the wording of the agreement was probably unfortunate, in that while it would appear as though the payments were for past services, he did not consider his instructions were to that effect.

By Clause 2 of the written agreement of July 3, 1942, the appellant agreed to assist and advise the Company for a period of one month from July 15, 1942. He was not asked to perform any services of any kind after July 15, 1942. Clause 4 prohibited the appellant from employment with any competing newspaper in Vancouver for one year. Neither of these clauses was part of the original verbal understanding with Mr. Don Cromie, or were mentioned at the Directors' meeting of July 2, 1942, when the Directors adopted in principle the verbal arrangement made with Mr. Cromie. They were inserted by the Company solicitor without any specific direction from anyone, pursuant to the resolution of July 2, "that an agreement embodying the terms of the agreement and other clauses necessary for the protection of either party be prepared and submitted."

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While considerable discussion took place at the trial as to the effect of these two clauses, they do not, in my opinion, affect the issues in any way.

I find, therefore, that the payment of $10,000 made by the Company to the appellant in 1942, and a like payment of $5,000 made in 1943, were paid entirely for the surrender of the appellant's contract with the Company, and that such payments do not constitute taxable income for the years in question.

The appellant also appeals in respect to two items for which he was assessed in 1942 and one in 1943 none of which were shown in his own returns. They all arise in connection with one set of circumstances and may be dealt with briefly.

In 1938 when the appellant was President of the Company, the latter decided to provide annuities for some twenty-five employees (executives, departmental heads and employees who had served for over fifteen years). Arrangements were completed by the President with the Monarch Life Assurance Company, by the terms of which the Company would apply for individual policies for each such employee, the Company to pay all premiums while the employee remained with it. In the case of the appellant Retirement Annuity policy No. 2050 was issued on September 9, 1938, the annual premium being $2,295 payable in advance every twelve months during the lifetime of the annuitant prior to the due date of the first annuity payment. It provided for a payment of $100 per month to the appellant commencing on September 1, 1944, and to continue for his lifetime. It contained a ten year guarantee, the appellant's wife, if she survived him, to be the beneficiary of the balance of the guaranteed period, and if she did not so survive, then to his daughters. The policy year was to be computed as from September 1, 1938.

Clause 18 provided that in the event of the annuitant leaving the services of the Company prior to the due date of the first annuity payment, all benefits of the annuitant and beneficiary should terminate on the date that such service ended; but in that event the insurer would pay to the annuitant in one sum an amount equal to the sum of all premiums then paid, or the cash surrender value of the

policy, whichever should be the greater, less any indebtedness thereon; and such payment to the annuitant would discharge the insurer from all liability.

Following the termination of the appellant's services with the Company, the latter on August 4, 1942, assigned all its control and interest in the policy to the appellant; the appellant paid the last premium which fell due on September 1, 1942, and by application dated November 19, 1942, the appellant directed that upon his death any further benefits in the annuity should go to his wife, if living, and otherwise to his estate, and consented to the cancellation and deletion of clause 18. By provision 19 of the policy it is recited that the insurance contract having been entered into between the Company and the insurer, the annuitant should have the right to deal with the policy as provided by paragraphs 3, 4, 6 and 15, only with the written consent of the Company. These clauses related to guaranteed surrender options, alternative settlement options, policy loans and assignments.

In the Company's income tax return for 1938, made out in 1939, it showed the payment of such premiums, and it appeared to the income tax authorities that such payment would constitute additional taxable income in the hands of the annuitants. The Company, having planned to pay all the costs incidental to the pension scheme, agreed to pay any additional income tax of the annuitants occasioned by the payment of such premiums. The tax authorities computed the tax of the appellant on his own return which did not include the amount of the annuity premium for the year 1938. Then a further computation was made on the basis of further income in the amount of the annuity premium. The difference in the amount of the two tax computations for all such annuitants was then added together, the Company was advised as to such total sum, and then in 1939 it paid the total sum to the income tax authorities, thereby relieving the individual annuitants from all tax occasioned by payment of the premiums. Credit was then given to each individual annuitant taxpayer for the proper amount, under the heading "other payment applied on the assessment". But the income tax authorities

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then added to the income of the appellant, for the year in which the company paid such tax, an amount equal to such tax so paid.

This procedure was continued throughout the years in question. For the year 1942, there were added to the appellant's declared income, (1) the sum of $1,312, being that year's portion of the annuity premium, the appellant having left the employ of the Company in July, 1942, and (2) the sum of $2,114.58, being the amount paid by the Company to the income tax authorities in 1942, in respect of the appellant's income for the taxation year 1941, in relation to the annuity premium paid in 1941. It is to be noted that the item of $2,114.58 paid as tax in 1942 was in fact credited against the income tax of the appellant for the year 1941 as though he had paid it himself.

Similarly in 1943 there was added to the appellant's declared income for the year 1943 the sum of $977.36 being the amount paid by the Company to the income tax authorities in 1943 in respect of the appellant's income for the year 1942 and representing the tax paid on the annuity premium of $1,312 paid in 1942. Credit for the payment of $977.36 was given to the appellant in the assessment for 1942 under the heading "other payments applied on the assessment."

The question for determination therefore is as to whether these items of premiums and the tax relevant thereto constitute taxable income of the appellant? Counsel for the appellant argues that the liability to pay the premiums was that of the Company; that payment in any one year of that liability could not be considered as the income of the appellant; that he did not receive it directly or indirectly, although at some future date he might (as in fact, he did) receive benefit from it; and also that the tax paid by the Company was never received by the appellant either directly or indirectly and was not therefore taxable income.

With these arguments I cannot agree. I have reached the conclusion that both the amount of the premiums and the tax paid in reference thereto constitute taxable income within the provisions of section 3 of the Income War Tax Act, the relative portions of which are as follows:

Sec. 3. "Income"—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 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

(*e*) personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer or the payment of such constitutes part of the gain, benefit or advantage accruing to the taxpayer under any estate, trust, contract, arrangement or power of appointment, irrespective of when created.

By section 2. (*r*)

"Personal and living expenses."—"Personal and living expenses" shall include inter alia—

(ii) the expenses, premiums or other costs of any policy of insurance, annuity contract or other like contract if the proceeds of such policy or contract are payable to or for the benefit of the taxpayer or any person connected with him by blood relationship, marriage or adoption.

In the instant case the premiums on the annuity contract were payable to or for the benefit of the taxpayer, or his wife or daughters, and were therefore "personal and living expenses". In my opinion also the payment of such personal and living expenses by the Company constitutes part of the gain, benefit or advantage accruing to the appellant under its contract or arrangement made with the insurer (and in which the appellant was a party) to provide an annuity for the appellant. The annuity contract was entirely for the benefit of the appellant, for although in certain particulars the appellant did not have absolute control as to options, loans and assignments, I cannot recall any provisions in the policy under which the Company could at any time receive any benefits thereunder without, at least, the voluntary approval and direction of the appellant. And to the extent of the premiums paid in each year, such premiums constituted part of the annual profit or gain referred to in section 3.

I am also of the opinion that in addition to being taxable as personal and living expenses under section 3 (1) (*e*) the premiums so paid by the Company are taxable in the hands of the appellant as a gratuity indirectly received by the appellant from his employment with the Company. There

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was no obligation on the Company to provide any pensions for its employees, but, as a matter of grace, it decided to do so in the manner previously outlined and to pay any premiums which fell due while the employee remained in its service; and should the employee leave its service before the first annuity payment fell due, then the Company would pay no further premiums—but the employee would be entitled to receive the benefits mentioned in the policy. The whole scheme, therefore, related to his employment or office, and being gratuitous on the part of the Company and the premiums being paid to the insurer for the sole benefit of the appellant, the amount thereof was a gratuity indirectly received by him. From the very nature of the transaction, the payments of premiums on a policy (the sole benefits of which were for the appellant) were paid as additional compensation to the appellant and in consideration of his services from year to year.

Reference may be made to *In Re Gillespie Estate* (1) where MacDonald J. A. stated at p. 399:

> The situation was the same in effect as if the payments (insurance premiums) had been made direct to the insured and by him paid over to the insurance company.

On appeal (reported in (1943) 1 W.W.R. 26) the judgment of the Court was delivered by Ford, J. A. At p. 28 he stated:

> There can, I think, be no doubt that the payment by Gillespie Grain Company Limited of the premiums in each of the years in question was made for John Gillespie's benefit in consideration of the services as recited in Ex. 7, and the amounts thereof must be treated as if paid to him, and to be income received by him just as much as if he had been paid a salary as president and manager of the company. The fact that they were paid not to him but to the insurance company makes no difference. They were profit or gain indirectly received during each of the years in which the premiums were paid, and were income within the meaning of *The Income Tax Act*, 1932 ch. 5.

The Income Tax Act referred to in the above case was, of course, that of the Province of Alberta, 1932, chap. 5. In that Act the word "income" is given much the same meaning as in the Income War Tax Act.

Reference should also be made to the case of *Hartland* v. *Diggines* (2). In that case a shipping company voluntarily paid income tax over a series of years on the salaries of its employees, including their accountant. It was held that this payment was part of the accountant's profits and

(1) (1942) 3 W.W.R. 396. (2) (1926) A.C. 289.

emoluments as an officer of the Company for which he was assessable to income tax. Viscount Cave L. C. in giving judgment in the House of Lords said at p. 291:

My Lords, the Income Tax Act provides that the duty under Sch. e is to be payable "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of" the office held by the person to be charged; and by r. 4 in Sch. E "perquisites" are to be deemed to be "such profits of offices and employments as arise from fees or other emoluments". The question therefore is whether the additional £80.5s. comes within the description of "profits", "perquisites", or "emoluments" in that statute. If it does come within that description, it is plain that it is rightly added to the salary for the purpose of assessment. That appears from the case of *Samuel* v. *Inland Revenue Commissioners* (1918) 2 K.B. 553 relating to super tax, and the case of *North British Ry. Co.* v. *Scott* (1923) A.C. 37, and from other decisions.

But is it a profit, a perquisite, or an emolument? That the payment is voluntary makes no difference; that appears plainly from the case of *Blakiston* v. *Cooper* (1909 1 A.C. 104). But it is said—and this is the main argument used on behalf of the appellant—that the sum is not an emolument, because it was not paid to the appellant or at his request, although in fact it was paid regularly over a series of years. I do not agree with that argument. There was that continuity in payment to which reference was made in the case of *Blakiston* v. *Cooper*, and the effect of the payment was in practice and in fact to relieve the appellant year after year from his liability for the payment of the tax. It is true that the appellant did not receive cash in his hands, but he received money's worth year after year. This being so, I cannot resist the conclusion that the payment was in fact a part of his profits and emoluments as an officer of the company for which he has been properly assessed to tax.

While the above judgment has to do with the interpretation of a section in the English Act, it is of interest to note that there the voluntary payments of tax were determined to be profits and emoluments of an officer of the Company.

In any event, if the payment of income tax by the Company on the appellant's income was not part of his profits or gain it was in my opinion, a gratuity indirectly received by the appellant from his office or employment. The Company, being under no obligation to pay any part of the appellant's income tax, but having determined that the appellant should be under no greater tax burden by reason of the payment of the annuity premium, voluntarily paid that portion of the income tax of the appellant referable thereto. It was clearly an additional gratuity and in computing the appellant's income for the year in question the respondent was entitled to add the amount thereof to the assessable income of the appellant. The additional

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taxes occasioned thereby, have been paid by the Company and proper credits given to the appellant for such payments.

In the result therefore the appellant succeeds as to the sums of $10,000 and $5,000 added to his income for the years 1942 and 1943 respectively, and otherwise the appeals will be dismissed. The assessments are referred back to the respondent to re-assess the appellant for the years in question on the basis of my findings.

The question of costs presents some difficulty. While the appellant is successful on the main points of his appeal the difficulties in regard thereto arose through the fact that he was careless in executing an agreement which did not accurately or clearly set out the actual terms of the agreement. Had the agreement been properly drawn so as to indicate the true arrangement between the Company and the appellant, I think there would have been no difficulty on the part of the taxing authorities in reaching the same conclusion as I have as to the nature of the payments made by the Company to the appellant. To that extent the appellant is the author of his own difficulties. On the whole, therefore, I think justice will be done to the parties if costs are not allowed to either party.

Judgment accordingly.